CDDRL

WORKING PAPERS

The European Neighbourhood Policy: Legal and Institutional Issues

Marise Cremona

Center on Democracy, Development, and the Rule of Law
Stanford Institute for International Studies

Number 25
2 November 2004

This working paper was produced as part of CDDRL's ongoing programming on economic and political development in transitional states. The paper was originally presented at the Promoting Democracy and the Rule of Law: EU and U.S. Strategies and Instruments sponsored by CDDRL, October 4-5, 2004. The full program and additional working papers appear on CDDRL's website: http://cddrl.stanford.edu.

Center on Democracy, Development,
and the Rule of Law
Stanford Institute for International Studies
Stanford University
Encina Hall
Stanford, CA 94305
Phone: 650-724-7197
Fax: 650-724-2996
http://cddrl.stanford.edu/

About the Center on Democracy, Development and the Rule of Law (CDDRL)

CDDRL was founded by a generous grant from the Bill and Flora Hewlett Foundation in October in 2002 as part of the Stanford Institute for International Studies at Stanford University. The Center supports analytic studies, policy relevant research, training and outreach activities to assist developing countries in the design and implementation of policies to foster growth, democracy, and the rule of law.

About the Author

Marise Cremona is a Professor of European Commercial Law, Head of the European Commercial Law Unit and Deputy Director of the Centre for Commercial Law Studies at the Queen Mary, University of London. She has had many years' experience of teaching European Community law, specializing in the European Internal Market and the external relations of the EC, and is currently teaching a number of courses in this area as part of the University of London LLM degree program. She is also Director of two Diploma program offered by the Centre for Commercial Law Studies, in European Internal Market Law, and European External Market Law. She has a particular interest in the relationships between the EU and its near neighbors, particularly the countries of central and eastern Europe, but also including the emerging economies of the former Soviet Union, the EFTA States, and the Mediterranean States. Her major publications are in the field of EU external policy, including most recently: *"The European Union as an International Actor: Issues of Flexibility and Linkage"* (1998) 3 European Foreign Affairs Review 67-94; *"External Relations And External Competence: The Emergence Of An Integrated External Policy For The European Union"* in Craig and de Burca (eds) EU Law: An Evolutionary Perspective (Oxford University Press 1999); and *"External Economic Relations"* in D. O'Keeffe and P. Twomey (eds) Legal Issues of the Amsterdam Treaty (Hart Publishing, 1999).

Promoting Democracy and the Rule of Law: American and European Strategies and Instruments
Workshop October 4th and 5th 2004, Stanford University

The European Neighbourhood Policy: Legal and Institutional Issues

Marise Cremona
Paper outline September 2004 (draft only – not for citation)
Comments welcome to: M.Cremona@qmul.ac.uk

I. Introduction

The European Union launched its European Neighbourhood Policy (ENP) in March 2003. Following endorsement of its proposals by the Council and European Council in June 2003, the Commission produced a Strategy Paper in May 2004 and a number of Country Reports. The ENP is intended to cover Russia, the Western NIS (Ukraine, Moldova, Belarus), the Southern Caucasus (Armenia, Azerbaijan and Georgia) and the Southern Mediterranean (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia). The overall objective of the ENP is to counterbalance possible fears that the future borders of the Union will become a new dividing line in Europe, and to create a 'ring of friends' from Morocco to Russia and the Black Sea (COM(2003)104, p.4). The emphasis is thus on promoting stability both within and between the neighbouring States, and economic and social development leading to increased prosperity and increased security on the EU's borders. The mechanisms for achieving this objective may be summarised as the offer of an enhanced relationship with the EU based on the EEA model, that would be 'as close to the Union as can be without being a member' and the use of instruments derived from the pre-accession process, including Action Plans with agreed reform targets and a strong element of conditionality.

This paper will address some of the legal and institutional issues that arise in relation to the ENP, its genesis, rationale and policy context. These include the interaction between the ENP and other legal instruments governing EU relations with the neighbourhood states, the appropriateness of its methodology and structures, and the approach taken towards the membership aspirations of (some of) the states concerned. It will focus in particular (and with an emphasis on the Eastern European states) on the EU's emphasis on the rule of law, in the light of its overall objectives in relation to the ENP states, especially its security objectives. The rule of law occupies a central position in the EU's policy of conditionality, not only in the relatively recent ENP, but earlier in relation to the candidate states and the western Balkans (and development policy more generally). The paper will compare the rationale for rule of law conditionality towards these different regional groups. In particular it will assess the extent to which promotion of the rule of law within the ENP may be seen as one aspect of the Union's developing security policy towards and within the region. In the light of the conclusions drawn, it will be questioned to what extent rule of law promotion is really a "shared objective" between the EU and its partners.

II. The ENP: rationale and methodology

1. Rationales for the ENP

Enlargement

In a simple sense, the basis of the ENP can be found in the recent enlargement of the Union. In the initial years of the enlargement process the focus was on the candidate states themselves, on the establishment of the accession criteria (the Copenhagen criteria), developing a pre-accession strategy, decisions as to when and with whom to open negotiations. But in the second half of the 1990's attention begins to turn to the impact of enlargement on the EU's policies, external as well as internal, regional as well as global. In its 1997 paper, *Agenda 2000*, which accompanied its initial opinions on the applications for membership from the central and eastern European states, the Commission stresses the importance for the enlarged Union of its new neighbours and the need to ensure stability through cooperation in the wider Europe region.[1] Progress Reports and Strategy Papers in the following years mainly stress the benefits of enlargement for the new neighbours while remaining vague about the nature of any possible new relationship.[2] In 2002, following a joint initiative by the Commission and High Representative Javier Solana, the development of a proximity or neighbourhood policy moves onto the agenda of the Council. The Council recognises the need to take an initiative with respect to its new neighbours, expressing this in terms of opportunity: "EU enlargement will provide a good opportunity to enhance relations between the European Union and the countries concerned with the objective of creating stability and narrowing the prosperity gap at the new borders of the Union."[3] "Enlargement presents an important opportunity to take forward relations with the new neighbours of the EU which should be based on shared political and economic values."[4]

Security

By March 2003, the Commission policy paper on the ENP focuses on these key ideas of stability, prosperity, the Union's borders and shared values.[5] The underlying concern is no longer merely to assure the Union's neighbours that enlargement will benefit them economically but to build a relationship that will enhance the security of the Union itself. By 2003 the concern has grown that enlargement – or at least the idea of exclusion - may act as a divisive and destabilising factor. The security dimension of the ENP is brought out by Javier Solana in his paper on EU Security Strategy for the Thessaloniki European Council in June 2003:

---

[1] EC Commission 1997, Agenda 2000, For a Stronger and Wider Union, Part I The Policies of the Union, sect. IV The Union in the World, p.43.

[2] Commission Composite Paper on Progress towards accession by the candidate countries, 1999; Commission Composite Paper on Progress towards accession by the candidate countries, 8 November 2000, sect 1.5; Commission Strategy Paper, 13 November 2001, "Making a Success of Enlargement"; Commission Strategy Paper, 9 October 2002, "Towards the Enlarged Union".

[3] GAER Council conclusions on the new neighbours initiative, 30 September 2002.

[4] GAER Council conclusions on the new neighbours initiative, 18 November 2002.

[5] Commission Communication, Wider Europe –Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM (2003) 104, 11 March 2003.

> "It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe. The reunification of Europe and the integration of acceding states will increase our security but they also bring Europe closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations."[6]

The emphasis is thus placed on partnership, interdependence, avoiding the creation of new dividing lines, and shared values, a "common project". Thus, the firm endorsement of the ENP and the Commission's strategy paper of May 2004 given by the Council in June 2004:

> "The objective of the European Neighbourhood Policy (ENP) is to share the benefits of an enlarged EU with neighbouring countries in order to contribute to increased stability, security and prosperity of the European Union and its neighbours. The ENP offers the prospect of an increasingly close relationship, … involving a significant degree of economic integration and a deepening of political cooperation, with the aim of preventing the emergence of new dividing lines between the enlarged EU and its neighbours." … "the privileged relationship with neighbours covered by the ENP will be based on **joint ownership**. It will build on commitments to **common values**, including democracy, the rule of law, good governance and respect for human rights, and to the principles of market economy, free trade and sustainable development, as well as poverty reduction. Consistent commitments will also be sought on certain **essential concerns** of the EU's external action including the fight against terrorism, non-proliferation of weapons of mass destruction and efforts towards the peaceful resolution of regional conflicts as well as cooperation in justice and home affairs matters."[7]

The recognition that it is not possible to seal off instability behind ever tighter borders has compelled the Union to make a choice: whether to export stability and security to its near neighbours, or risk importing instability from them.[8]

Regionalism

The talk of partnership and solidarity[9] perhaps obscures a fundamental characteristic of the ENP: its regional character, and its emphasis on differentiation. Certainly since the 1980's and arguably before that, the EC and now the EU has structured its relationships along regional dimensions. The tendency operates beyond the borders of Europe[10] but has been particularly powerful there. In some cases, of course, the EU's approach follows a self-definition of a regional group or RIA (e.g. EU-Mercosur, or EU-ASEAN relations). But the EU has also developed its own regional approach towards, for example, the Western Balkans,[11] the "Western NIS",[12] or the Southern

---

[6] Solana, 'A Secure Europe in a Better World', S0138/03.

[7] GAER Council conclusions on European Neighbourhood Policy - 14 June 2004 (emphasis added).

[8] William Wallace, Looking After the Neighbourhood: Responsibilities for the EU-25, Notre Europe Policy Papers, N°4, July 2003, pp.18-19.

[9] Cremona, "EU Enlargement: Solidarity and Conditionality", forthcoming in *European Law Review*.

[10] For example, the change taking place within development policy, whereby the EU is moving from a pan-ACP agreement and structuring its new Economic Partnership Agreements around regional groupings such as the Central African states, West African States and the SADC group of Southern Africa.

[11] The western Balkans covers Albania, Bosnia-Herzegovina, Croatia, former Yugoslav Republic of Macedonia (FYROM) and Serbia & Montenegro; Commission Communication on Western Balkans and European Integration of 21 May 2003, COM (2003) 285.

[12] The Western NIS (WNIS) covers Ukraine, Moldova, Belarus.

Mediterranean states,[13] which may or may not reflect their own perception of their identity.

As far as the new neighbours are concerned, a crucial distinction, articulated by the Commission in 1999, has been made between three groups. First, those countries which are eligible for membership but do not at present want it (such as Switzerland and Norway). Second, those countries which may be seen as "potential candidates" (although this term was not used in 1999), which may desire membership but which do not yet meet the criteria and may not yet have made a formal application (this would include the countries of the western Balkans). Third, those countries which are already, or will become "near neighbours" of the enlarged Union, including Russia, Ukraine and the southern states especially those of the Maghreb (Algeria, Morocco, Tunisia). The evolution of policy since 2000 has reinforced these distinctions, with separate policies being developed for Russia, for the Western Balkans, and for the Western NIS. Although initial discussion of the neighbourhood policy in the Council during 2002-2003 and the Commission March 2003 policy paper had proposed a focus on Ukraine, Moldova and Belarus, together with the southern Mediterranean states, in May 2004 the Commission proposed to extend the ENP to the Southern Caucasus (Armenia, Azerbaijan and Georgia) in line with a recommendation of the European Parliament.[14] The ENP is thus an attempt to fuse together policy towards a number of regions hitherto separately treated (on this see further below), creating what the European Parliament has called, rather desperately, "a complex geopolitical area stretching from Russia to Morocco, which, for historical and cultural reasons and the fact of its geographical proximity, may be defined as a 'pan-European and Mediterranean region'".

Repeating the success story

A strong motivating factor behind the choice of methodology of the ENP is the desire to repeat the success story of the enlargement process itself.[15] Enlargement has been called the most successful act of foreign policy that the EU has ever made,[16] or perhaps more precisely, the promise of membership has been characterised as the Union's most successful foreign policy instrument.[17] The "success" with respect to

---

[13] The Southern Mediterranean covers those countries that participate in the Barcelona Process, apart from Turkey, viz. Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria and Tunisia. Libya has also been included by the Council although not yet a formal member of the Barcelona Process.

[14] Commission Communication of 12 May 2004, 'European Neighbourhood Policy: Strategy Paper' Com(2004)373 final; European Parliament Report on the Wider Europe, A5-0378/2003, at para 8; resolution of the European Parliament of 26 February 2004 on 'EU Policy towards the South Caucasus'.

[15] Cremona, "Enlargement: A Successful Instrument of EU Foreign Policy?" in Tridimas and Nebbia eds., *European Union Law for the Twenty-First Century*,
(proceedings of WG Hart Workshop 2003, Hart Publishing 2004).

[16] Wim Kok, *Enlarging the European Union: Achievements and Challenges*, Report to the European Commission, EUI, 19 March 2003.

[17] Commissioner Patten, 11 March 2003.

the new Member States, and especially the ten from central and eastern Europe, has been in precisely those areas now prioritised in the ENP: increased political stability and prosperity, and economic development built upon a transparent and stable legislative and regulatory framework.

The Union has also presented itself as a model for peaceful resolution of conflict between neighbours, between its original Members of course, but also in relations between new and candidate Member States (such as Hungary and Romania). The promotion of regional cooperation and the peaceful resolution of conflict is a central aspect of the ENP. The promotion of good neighbourly relations is one of the common values underpinning the proposed relationship (as it is in relations with the Western Balkans) and the peaceful settlement of disputes is said to be one of the "essential aspects of the EU's external action" on which commitments will be sought.[18]

The EU is clearly hoping to repeat the perceived success of the accession process by setting some of same targets and by using similar instruments and methodologies, including conditionality and differentiation, but without the goal of accession to provide the incentive. The ENP is based on the premise, or hope, that the promise of a high degree of economic and political integration will prove to be as potent an incentive as accession, a premise about which there are many doubts.

2. Methodological issues

A number of issues arise here, which we can summarise.

First, as we have seen, the Union's proposal is to harness the pre-accession processes including Plans, targets, conditionality and regular monitoring in order to achieve a high level of integration on the EEA model, strengthened cooperation on border management and common management of cross-border and regional issues. The Commission's Communication endorses a comment by Prodi, 'If a country has reached this level, it has come as close to the EU as it is possible to be without being a member.'[19] The question is whether the envisaged structures will work in the absence of membership as a target.

Second, the issue of added value. The ENP – including its Action Plans and the New Neighbourhood Instrument - is explicitly designed to enhance and reinforce existing policies and instruments, including the PCAs, TACIS, Common Strategies, the Barcelona Process, MEDA and existing Association Agreements. The Commission, in its May 2004 Strategy Paper, stressed its added value, arguing that Union policy would be thereby "enhanced" and more focused, offering (for some at least) a greater degree of integration than is envisaged in current instruments, an upgrade in the "scope and intensity" of political cooperation, the definition of priorities and

[18] Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, p.3.

[19] Prodi, "A Wider Europe – A Proximity Policy as the key to stability", speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

increased funding. But how much value will it really add (especially for Israel and the Mediterranean states)? The ENP is intended to remedy the absence of any real guiding policy towards the Western NIS, and the absence of any real progress in achieving the ambitious aims of the Barcelona Process. Effort will be needed to ensure that what is intended to be a unifying and reinforcing process does not instead merely add to the multiplicity of initiatives already in place.

Third, is the enhanced use of conditionality. Conditionality has been a hallmark of accession policy over the last decade, and also of policy towards the Western Balkans, and in both of these cases it has developed into a highly structured policy. Towards the Western NIS, conditionality has been present (in the "essential elements" clauses in the PCAs for example, as well as in the TACIS Regulation on financial and technical assistance) but used in a more sporadic and ad hoc way. The PCA with Belarus, for example, has not been ratified by the EU or its Member States, and TACIS assistance has been very limited, because of concerns about standards of democracy. It is noteworthy that the Commission has declared that assistance to Belarus under a revision of the TACIS programme would need to take account of the Council's 1997 Conclusions.[20] These Conclusions, of 29 April 1997, established a highly structured form of conditionality for the Western Balkans which is still applied as part of SAP conditionality.[21] There is a suggestion here that they might be applied more widely. They are characterised by the concept of linking different levels of conditionality to different aspects of relations with the EU (e.g. autonomous trade preferences, financial assistance, contractual relations), and in establishing a number of general conditions for all applicable countries together with country-specific conditions.

The ENP envisages Actions Plans for each country, setting priorities progress towards which will be regularly assessed in monitoring reports. These reports will serve as a basis for deciding whether to move towards further contractual links, for example the conclusion of a European Neighbourhood Agreement.[22] The enhanced use of conditionality in the ENP raises the same kinds of question as have been raised in relation to its use in the accession context: the moving target problem, the double

[20] Commission Staff Working Paper on reform of the TACIS programme, available on: http://europa.eu.int/comm/external_relations/consultations/cswp_tacis.htm

[21] See for example the reference to these Conclusions in the Commission's Third Annual Report on the SAP, COM(2004) 202/2 final, 30 March 2004, p.5. The Conclusions of 29 April 1997 are available on: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/028a0057.htm. For an example of the operation of conditionality towards the Western Balkans in practice, see the Declaration on the granting of autonomous trade preferences to FRY, annexed to these Conclusions. See Cremona, "Creating the New Europe: The Stability Pact for South-Eastern Europe in the Context of EU-SEE Relations" *Cambridge Yearbook of European Legal Studies Volume II 1999* (Hart Publishing 2000) 463.

[22] The new agreements are likely to be either association agreements concluded under what is now Article 310 EC Treaty, or based on Article I-56 of the Constitutional Treaty (which is, of course, not yet in force). This Article provides that "The Union shall develop a special relationship with neighbouring States, 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."

standards problem, the measurement and consistency problems, for example.[23] There is also the broader problem of the extent to which highly directive conditionality, by substituting EU policy objectives for domestic policy goals, has the effect of undermining the capacity for autonomous policy development.[24]

Fourth, is differentiation and the implications this has for the principle of joint ownership and the development of a real partnership. In spite of bringing together this widely disparate group of states under one policy, the Commission makes it clear that the process of agreeing the Action Plan and priorities for each country will depend on the circumstances of that country; hence the individual country reports that have been prepared. This is justified in part by reference to the principle of joint ownership:

> "Joint ownership of the process, based on the awareness of shared values and common interests, is essential. The EU does not seek to impose priorities or conditions on its partners. The Action Plans depend, for their success, on the clear recognition of mutual interests in addressing a set of priority issues. There can be no question of asking partners to accept a pre-determined set of priorities. These will be defined by common consent and will thus vary from country to country."[25]

The different starting points of the neighbouring states will entail different speeds and timetables, and although the Commission wishes to enhance the coherence of its policy, both Commission and Council are also committed to the differentiation that both the differing starting points and conditionality imply. The policy will be structured around "a differentiated framework, which responds to progress made by the partner countries in defined areas".[26] This carries the risk that existing differences between the neighbours in their relations with the EU will grow wider rather than narrower. But more importantly, differentiation in this sense cuts across the Union's stated aim of joint ownership. Not only is it natural to be sceptical about the real extent of common consent in defining standards and targets to be met. The relationship will remain one in which the actions of one are judged by the other. There is no doubt that the agenda is being set by the Union and focuses on Union priorities, including border security, regional stability and the rule of law. Economic integration (a "share in the internal market") is presented as an incentive rather than a shared objective. The implication is that the Neighbourhood countries will be the potential beneficiaries of this economic integration, as long as they demonstrate the economic and legal ability to take that step, and the readiness to share wider Union foreign policy objectives. The real mutuality of partnership is somehow missing.

---

[23] 'Report on Political Dimensions of the Accession Criteria', No 1 in a Series of Workshops 'Assessing the Accession Criteria' (European Research Institute, the University of Birmingham, 30 November 2002), available on:
http://www.eri.bham.ac.uk/Phare/reports/Workshop1report.pdf
For a discussion of conditionality in the accession context, see M.A. Vachudova, 'The Leverage of International Institutions on Democratizing States: the Eastern Europe and the European Union, *EUI Working Paper RSC* No. 2001/33, IUE, Florence.

[24] K. Wolczuk (RSC Working Paper).

[25] Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, p.8.

[26] Council Conclusions on Wider Europe – New Neighbourhood, 16 June 2003, para 5.

3. Uniting the neighbours?

The Commission's Communication of March 2003 argues that in spite of the differences between the different partners, mutual interests exist between all Neighbourhood partners, characterised by the Commission in terms of proximity (to the EU), prosperity and poverty. Although these mutual interests may exist, they are more obvious to the EU than to the neighbours. The differences lie not only in their geo-political situation and economic and political development, but also in the history of their relations with the EU. More importantly, the ENP ignores the fact that some of the neighbours are eligible for membership in terms of Article 49 TEU and some are not. It simply tries to disassociate itself from the question of membership: the ENP does not promise membership but it does not preclude it either, and "should be seen as separate from the question of possible EU accession".[27] Clearly, the EU did not want, just before the dramatic 2004 enlargement, to enter into the potentially highly divisive debate as to the future borders of the Union. However, although the language is neutral, the mere fact of putting these two groups together appears to be sending a signal to the eastern European neighbours, who are in what Wallace has called a "grey zone", neither definitively excluded from membership (like the non-European southern Mediterranean countries), nor "potential candidates", like the Western Balkan states. So the ENP, by bringing together the very disparate Mediterranean and Eastern European states, also has the effect of dividing Ukraine, Moldova and Belarus from the Western Balkans. The Commission's statement in its most recent Report on the SAP spells this out clearly:

> "The Commission has put forward a new framework for relations with its new eastern and southern neighbours which currently do not have the perspective of membership of the EU, the European Neighbourhood Policy. The European Neighbourhood Policy does not apply to the Western Balkan countries since they have a membership perspective."[28]

In discussing the European Neighbourhood policy, the Council and Commission both deflect the question of membership by referring to Article 49 of the Treaty on European Union. The implication is that the accession process, initiated by the prospective candidate state, will take its course according to Treaty-based procedural stages. This is to ignore the enormous political impact of categorising some – but not other - neighbouring countries as potential candidates. In addition, the "neutrality" of the ENP is put into question by statements by individual Commissioners emphasising that although further enlargement is not ruled out, the ENP is not designed to prepare the WNIS for membership:

> But let me make it clear once more that our Neighbourhood policy is distinct from enlargement. It neither prepares for enlargement, nor rules it out at some future point. For the time being the accession of these countries is not on our agenda.[29]

It must be said, though, that although not specifically designed to prepare the Neighbourhood countries for membership, fulfilment of the targets set in the Action

---

[27] COM(2003)104 at p.5; Council Conclusions on Wider Europe – New Neighbourhood, 16 June 2003, para 2.

[28] Commission's Third Annual Report on the SAP, COM(2004) 202/2 final, 30 March 2004, p.5.

[29] Commissioner Verheugen, 'The European Neighbourhood Policy', Prime Ministerial Conference of the Vilnius and Visegrad Democracies: "Towards a Wider Europe: the new agenda", Bratislava, 19 March 2004, SPEECH/04/141.

Plans is in practice likely to enhance the readiness of those countries to submit membership applications, should they eventually decide to do so.

Wallace also offers less highly charged justifications for bringing together the Eastern and Southern neighbours into one policy framework.[30] As he points out, they share many economic features, including *per capita* GDP levels,[31] dependence on access to EU markets and inward investment from the EU for economic development, issues of access to the EU labour market and sensitive border issues, the importance of EU financial and technical assistance – in short, the economic consequences of being neighbours of such a large and powerful market. He also argues that in terms of internal balance, bringing together the east and the south will avoid damaging tugs of war between Member States with different particular interests.

> "If the EU is to achieve a more consistent and coherent approach to the management of its new borders and the economic and political development of its neighbouring states, a global approach that places southern and eastern neighbours within the same framework is therefore desirable: to avoid contradictory demands from different member governments, and to make more evident the implications of decisions taken with respect to one neighbouring state for policy towards others."[32]

The arguments are thus based on coherence and a desire to avoid having to make too hasty a judgment on the potential for membership of these border countries. The risk is that, for Ukraine in particular, the signal has been read as negative and that makes achievement of the ENP's objectives in the region more difficult.

4. Priorities and resources

EU policy towards its new neighbours has been working its way slowly up the policy agenda. Current rhetoric puts it at a high level of priority for the enlarged Union, an issue of security policy as well as more general external policy, an issue which will affect the functioning of the EU itself (for example in its immigration and border policies). It is for obvious reasons an issue of importance to many of the new Member States. However, to make it work, it will require higher levels of resourcing and a real financial commitment from Member States at a time when the Commission's budgetary proposals are still contentious. The pressure on internal cohesion may well make it difficult to spend much more on cohesion policies towards the New Neighbours.

III. The Rule of Law in EU External Policy

1. Why promote the Rule of Law?[33]

---

[30] William Wallace, Looking After the Neighbourhood: Responsibilities for the EU-25, Notre Europe Policy Papers, N°4, July 2003, pp.8-10.

[31] In general less than 2000 euros per year.

[32] William Wallace, Looking After the Neighbourhood: Responsibilities for the EU-25, Notre Europe Policy Papers, N°4, July 2003, p.10.

[33] Cremona, "Regional Integration and the Rule of Law: Some Issues and Options" in R. Devlin and A. Estevadeordal (eds) *Bridges for Development: Policies and Institutions for Trade and Integration* (Inter-American Development Bank and Brookings Institution, Washington DC 2003). For a helpful

The Rule of Law is one of the constitutive, foundational values of the European Union. It appears in Article 6(1) TEU, among the principles on which the Union is founded, and respect for which is demanded of all prospective Members.[34] It is included among the values of the Union in the Constitutional Treaty, which the Union's external policy is to uphold and promote.[35] It is not surprising, then, to find that the Rule of Law has played a prominent part in the Copenhagen criteria, the conditions against which candidate states are now judged. Although it is mentioned expressly in the first of the criteria (stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities) it is also highly relevant to the second (the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union) and third (the ability to take on the obligations of membership). Bound up as it is with the operation of legislature, executive and judiciary in a well-functioning state, it underpins a state's ability to function in the complex environment of the EU regulatory model. As we shall see, promotion of the Rule of Law is also an important part of EU external policy, being found in "essential elements" clauses of agreements, as an objective of financial and technical assistance, as a key element of conditionality and as part of the Union's developing conflict prevention and crisis management policies.

At its most basic the rule of law refers to a State where power is exercised according to, and accountable to, the law. The equivalent French expression *l'Etat de droit* or German *Rechtsstaat* emphasise the link between law and State (and State institutions) within a constitutional system of government. According to Dicey the rule of law embodies three concepts: "the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations."[36] A recent EU instrument reflects this approach:

> "the rule of law, which permits citizens to defend their rights and which implies a legislative and judicial power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system;"[37]

---

discussion of the difficulty in establishing a rationale for rule of law promotion, see Corothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowment for International Peace, Working Papers Rule of Law Series, No 34 January 2003.

[34] Article 49 TEU.

[35] Articles I-2, I-3(4) and III-193 Constitutional Treaty; the text is taken from the Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, 25 June 2004, CIG 86/04. See further Cremona, "Values in the EU Constitution: the External Dimension" in Millns and Aziz eds, *Values in the Constitution of Europe* (Ashgate/Dartmouth 2004).

[36] Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1885), cited by the Oxford University Press's *Dictionary of Law.*

[37] Council Common Position 98/350/CFSP on human rights, democratic principles the rule of law and good governance in Africa OJ 1998 L 158/1. The Common Position seeks to provide a benchmark for the coordination of EU, EC and Member State policy.

In this sense the rule of law is linked to the values of democratic government and human rights guarantees and indeed in EU policy "democracy and the rule of law" are often combined and not clearly differentiated. In its political dimension, the rule of law emphasises due process and equality before the law, but it is not limited to the judiciary and court system. It signifies the possession by a State of independent constitutional and judicial authorities, properly functioning public administration at local and central government level, a well-qualified, functioning and independent judiciary, an accountable law enforcement structure, an adequate, well-trained and disciplined police force and an independent media. In this sense the rule of law will underpin such goals as equality, executive accountability, good governance and anti-corruption measures.

But the EU also sees the rule of law as a prerequisite for economic and social development. The existence of a transparent and effective legislative and regulatory framework, as well as of the necessary institutions, is regarded as a prerequisite for both domestic and foreign investment. A functioning legal system means more than an independent judiciary; it implies a legal system which can play its part in formulating and working out the regulatory choices that are at the heart of modern economies. In this sense, the rule of law means not only that these regulatory choices are accountable to legal procedures, but also that legal institutions are a necessary part of the legal foundation for economic transition and development. In its Common Strategy on Russia, for example, the Union states that "the rule of law is a prerequisite for the development of a market economy".

Without effective legal norms, economic reforms will not be able to take root; the development of a substantive legal infrastructure is necessary for a modern market economy. However, the enactment of legislation in such areas as corporate law, accountancy, taxation and anti-trust will not of itself encourage investment (domestic or foreign) in the absence of such principles as the transparency and stability of laws and effective anti-corruption controls. The role played by the rule of law in encouraging foreign investment may be challenged: there is evidence that it is not a determining factor.[38] Nevertheless, the rule of law is still seen, by the EU and its Member States among others, as a pre-requisite for economic, social and political development, and as such has become a key element in EC technical and financial assistance and its development cooperation and association agreements.

> "Governance is a key component of policies and reforms for poverty reduction, democratisation and global security. This is why institutional capacity-building, particularly in the area of good governance and the rule of law is one of the six priority areas for EC development policy that is being addressed in the framework of EC programmes in developing countries."[39]

More recently, a further aspect of the rule of law has emerged in EU policy: its link to security and defence policy as the rule of law is deployed in both conflict prevention and crisis management instruments. This is, in a sense, to go back to the need for stability essential to a functioning state, but it is also to recognise the need for confidence in legislative, administrative and judicial structures particularly in societies where conflict is threatening or endemic.[40]

---

[38] Corothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowment for International Peace, Working Papers Rule of Law Series, No 34 January 2003.

[39] Commission Communication on Governance and development, COM(2003)615 final, para 3.

[40] Commission Communication on Governance and development, COM(2003)615 final, sect 2.4.

Each of these aspects of the rule of law is bound up with institutional development, most especially the institutions of central and local government but also the institutions of a functioning civil society.[41] They are also essentially concerned with procedure, and the specific legal virtues of certainty, predictability, stability, clarity and transparency, consistency and coherence. The rule of law is thus closely connected to the objective of good governance as a prerequisite for both political and economic development.

Thus, the rule of law is not just – or even mainly – a matter of constitutional law. It requires functioning institutions and independent agencies, and not only those that are directly related to government. The rule of law is not just about state institutions: the growth of a "rule of law culture" depends on the strengthening of civil society institutions, including the universities, media and professional organisations. This has implications for the planning and targeting of technical assistance programmes, not least because, as Corothers has pointed out, institutional change is difficult to achieve.[42]

2. The Rule of Law in regional and development policies

Regulations 975 and 976/99[43] provide a legal base for rule of law promotion initiatives within as well as outside the framework of regional programmes such as TACIS. The initiative was launched in 1994 and falls under the budget heading European Initiative for Democracy and Human Rights (EIDHR). The first of these two Regulations applies within the context of the EU's development policy,[44] the other to all other contexts (including eastern Europe).[45] Article 3(2) of each

---

[41] "The establishment of efficient, transparent public institutions is one of the prerequisites for confidence and wider adherence to democratic guidelines and the operation of the rule of law. It constitutes the necessary foundation for economic and social development." EU Common Strategy on Russia, 1999/414/CFSP, adopted 4 June 1999, para 1.

[42] Corothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowment for International Peace, Working Papers Rule of Law Series, No 34 January 2003, p.9.

[43] Council Regulation 975/1999/EC of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms OJ 1999 L120/1; Council Regulation 976/1999/EC of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries OJ 1999 L120/8.

[44] Under Article 177(2) EC, development cooperation policy is to "contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms". In the development context, see also Council Common Position 98/350/CFSP on human rights, democratic principles the rule of law and good governance in Africa OJ 1998 L 158/1.

[45] Under Article 181A EC, introduced by the Treaty of Nice, which provides for economic, financial and technical cooperation measures with third countries, "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and

Regulation defines the scope of EU operations in the field of democracy and rule of law widely, to include independence of the judiciary and separation of powers generally, a humane prison system, constitutional and legislative reform, promotion of good governance, particularly by supporting administrative accountability, the prevention and combating of corruption, and support for national efforts to separate civilian and military functions. Action includes capacity building support for NGOs and other civil society organisations, as well as election observation and assistance, public administration reform and training of judges and law enforcement agencies.[46] In addition to these two general Regulations establishing a legal basis for action, there are the specific regional financial assistance Regulations, such as TACIS,[47] MEDA[48] and CARDS.[49] This is not the place for a detailed analysis of measures adopted within these frameworks which impact on rule of law promotion. Instead, we will briefly look at the approach to the rule of law, as evidenced in EU statements, reports and actions.

In EU policy towards the Western Balkans, we can see a development which, as we shall see below, can also be found in the rule of law promotion within the ENP. The Council Conclusions of 29 April 1997 includes democracy, human rights and the rule of law among the general conditionality requirements imposed on the Western Balkans. The specific content of the rule of law emphasises administrative accountability, access to justice and equality before the law:

> "*Democratic principles*
> - Representative government, accountable executive;
> - Government and public authorities to act in a manner consistent with the constitution and the law;
> - Separation of powers (government, administration, judiciary);
> - Free and fair elections at reasonable intervals by secret ballot.
> *Human rights, rule of law*
> - Freedom of expression, including independent media;
> - Right of assembly and demonstration;
> - Right of association;

---

to the objective of respecting human rights and fundamental freedoms." See also Commission communication on the European Union's role in promoting human rights and democratisation in third countries, COM(2001)252 final, 8 May 2001.

[46] For a recent report, see Annual Report 2003 from the Commission to the Council and the European Parliament on the EC development policy and the implementation of external assistance in 2002, COM(2003)527 final, sect 6.2 on Eastern Europe and Central Asia..

[47] Regulation 99/2000 on the provision of assistance to the partner States in Eastern Europe and Central Asia (TACIS) 2000 – 2006, OJ 2000 L 12/1. On the rule of law within the TACIS programme, see further section IV below.

[48] Council Regulation 1488/96/EC on financial and technical measures to support the reform of economic and social structures in Mediterranean non-member countries and territories (MEDA) in the framework of the Euro-Med Partnership OJ 1996 L 189/1, amended by Reg. 2698/2000/EC OJ 2000 L 311/1.

[49] Council Regulation 2666/2000/EC on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia (CARDS: Community Assistance for Reconstruction, Democratisation and Stabilisation) OJ 2000 L 306/1. Among the purposes of assistance is "the creation of an institutional and legislative framework to underpin democracy, the rule of law …" (Art 2(2)). In addition, assistance is made conditional upon respect for rule of law (Preamble, para 7 and Art.5).

- Right to privacy, family, home and correspondence;
- Right to property;
- Effective means of redress against administrative decisions;
- Access to courts and right to fair trial;
- Equality before the law and equal protection by the law;
- Freedom from inhuman or degrading treatment and arbitrary arrest."

This aspect of the rule of law has certainly not disappeared from policy towards the region. The Stabilization and Association Agreements (SAAs) include the rule of law in the essential elements clause and this is supported by a provision (new to Association Agreements) providing for cooperation to strengthen institutions and rule of law including "the reinforcement of institutions at all levels in the areas of administration in general, and law enforcement and the machinery of justice in particular … the independence of the judiciary, the improvement of its effectiveness and the training of the legal professions."[50] In these instruments (unilateral and bilateral) then, the rule of law is seen as essentially concerned with administrative accountability in the broad sense, and the effectiveness and independence of the legal system and judiciary.

Alongside this more traditional approach, we can also see developing a particular association between the rule of law and anti-corruption measures, cross-border crime and border security issues. In its Third Annual Report on the SAP, for example, the Commission says that "The continuing prevalence of organised crime and corruption in the region delays political reform, holds back economic development and puts into question the rule of law."[51] More specifically, the Commission links the liberalisation of the visa regime to the rule of law and security issues:

> "The perspective of the liberalisation of the visa regime is a long-term issue and should be put in a broader context: any progress in this area is linked to the countries' ability to implement major reforms in areas such as strengthening the rule of law, combating organised crime, corruption and illegal migration, improving their border management and document security, and generally improving their administrative and implementation capacity."[52]

Strengthening the rule of law has become closely associated with combating corruption and organised crime and thereby linked to security issues more generally.

3. The Rule of Law in foreign and security policy

This link between the rule of law and security issues can be seen even more clearly in the context of the Union's developing security and defence policy (ESDP), and in particular measures adopted on conflict prevention and crisis management. The Commission has recently argued:

> "Effective management, transparency and accountability of the security system are necessary conditions for the creation of a security environment that upholds democratic principles and

[50] SAA with Croatia, Art.75. In addition, the European Partnership for Croatia includes, under the heading of democracy and the rule of law, strengthening the judicial system (an open, fair and transparent system for recruitment, enhanced professionalism and training, proper and full execution of court Rulings; improving court organisation, including IT, access to justice); improving the fight against corruption, and improving the functioning of the public administration (including improving accountability, openness and transparency).

[51] EC Commission, Third SAP Report of 30 March 2004, COM(2004) 202/2 final, p.6.

[52] EC Commission, Third SAP Report of 30 March 2004, COM(2004) 202/2 final, p.21.

> human rights. … Reform of core security actors such as the military, paramilitary, police as well as its civilian oversight structures, are of fundamental importance to create safe security environments and to keep the security sector permanently subject to the same governance norms as other parts of the public sector and military forces under the political control of a civilian authority. These institutions are part of a broader security picture and dependent on the existence of effective justice and law enforcement institutions. Security system reform must thus be linked to efforts undertaken to strengthen national and local rule of law."[53]

Support for democracy, the rule of law and civil society is seen as part of ongoing action on conflict prevention, using existing regional or bilateral assistance programmes, including TACIS, CARDS and MEDA as well as the European Initiative for Democracy and Human Rights (EIDHR) which has its own budget.[54] This relationship is presented as two-way: one the one hand, it is seen as important that security actors are themselves subject to the rule of law;[55] on the other hand, the strength of the rule of law is regarded as an important contributor to a stable and secure society. Rule of law indicators are thus included in the Commission's checklist for the root causes of conflict or early warning indicators (along with the legitimacy of the State, respect for FHR, civil society and media, dispute-solving mechanisms, social and regional inequalities and economic management). For example:

> "**Rule of Law:**
> **How strong is the judicial system?**
> Independence and effectiveness of the judiciary, equality of all citizens before the law,
> effective possibility to undertake legal action against state decisions, enforcement of legal decisions
> **Does unlawful state violence exist?**
> Participation of security forces in illegal activities (road blocks, extortion, others), effective prosecution of human rights abuses by security forces, existence of a minimal human rights framework for their operation, prison conditions
> **Does civilian power control security forces?**
> Influence of security forces over political decision-making, role of the Parliament in debating/checking their use, existence of open debate and media/academic scrutiny on the security sector
> **Does organised crime undermine the country's stability?**
> Control of a significant part of the country/economy by criminal networks (drugs, natural resources, human trafficking), existence of private armies or armed para-military groups acting with impunity,
> proper re-integration of former combatants into social life"

Strengthening the rule of law is also one of the four priority areas for civilian crisis management agreed by the European Council in June 2000 (along with police

---

[53] Commission Communication on Governance and development, COM(2003)615 final, paras 23-24.

[54] Commission Communication on Conflict Prevention, 11 April 2001, COM (2001) 211. See also the EU Programme for the Prevention of Violent Conflicts endorsed by the European Council at Göteborg, June 2001.

[55] For example, the OSCE Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-First Century, Section III, 'A Framework for Arms Control', includes among the stated objectives "to ensure democratic political control and guidance of military, paramilitary and security forces by constitutionally established authorities and the rule of law." DOC.S/1/96, 3 December 1996.

missions, civil administration and civil protection),[56] although "the size, composition and precise functions of each EU civilian crisis management 'package' deployment will vary according to the specific needs".[57] The target set is to have 200 EU experts in the rule of law available for missions, developing a common approach to training.[58] Operational activity has so far concentrated on police missions, including the EU Police Mission in Bosnia-Herzegovina (EUPM) and the EU Police Mission in fYROM (EUPOL PROXIMA) which started on 15 December 2003, following on from Operation Concordia. The Presidency Report on the ESDP prepared in December 2003, emphasises the need for an increase in operational capability in civilian crisis management, including capacity to conduct monitoring missions.[59] The Action Plan for Civilian Aspects of ESDP, adopted by the European Council in June 2004, envisages the development of closer links between civilian crisis management activities and the Justice and Home Affairs pillar, especially in policing, and also in action against organised crime.

Crisis management instruments include the Rapid Reaction Mechanism (RRM) based on Regulation 381/2001 adopted 26 February 2001,[60] which enables fast short-term interventions, backed up by the normal instruments such as TACIS for longer-term support. The RRM may be used where action would normally be possible under an existing Community instrument (these are listed in an Annex[61]) but for reasons of urgency, the normal procedures under those instruments cannot be followed. Actions are designed to be immediate and short-term (the implementation period does not normally exceed six months). The RRM is also an example of the cross-pillar nature of crisis management, which combines Community instruments such as the RRM, ESDP capabilities and Member State bilateral assistance. An example of the use of the RRM for a rule of law intervention is in the context of the action for Georgia in 2004.

The first ESDP mission specifically on the rule of law was agreed on 28 June 2004.[62] Called EUJUST THEMIS, it is directed at Georgia, for a one year period, and is

---

[56] European Council Conclusions, Feira, June 2000, Report on strengthening the ESDP, Annex I, Appendix 3.

[57] Action Plan for Civilian Aspects of ESDP, adopted by the European Council 17-18 June 2004, p.3.

[58] A training policy was approved by the Council on 17 November 2003. See "Training Civilian Experts for International Peace Missions – EC Project on Training for Civilian Aspects of Crisis Management", EC 2003. The training falls under the EIDHR budget head. Rule of law training includes the administration of justice, training of judges, prosecutors and lawyers, and monitoring of the legal system.

[59] ESDP Presidency Report, 9 December 2003, 15814/03. See also Action Plan for Civilian Aspects of ESDP, adopted by the European Council 17-18 June 2004.

[60] Regulation 381/2001/EC OJ 2001 L 57/5. For a description of the range of instruments available, including the RRM and Regulations 975 and 976/99 (discussed above) see EC Commission, "Civilian Instruments for EU Crisis Management", April 2003.

[61] They include the PHARE, MEDA, TACIS and CARDS Regulations, as well as Regulations 975 and 976/1999.

[62] Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS, OJ 2004 L 228/21.

designed to focus on the criminal justice system. Its aim is to "assist in the development of a horizontal governmental strategy guiding the reform process for all relevant stakeholders within the criminal justice sector, including the establishment of a mechanism for coordination and priority setting for criminal justice reform."[63] Specific reference is made to judicial reform, anti-corruption and the development of a new Criminal Procedure Code. Experts will be seconded to key ministries and agencies including the National Security Council and the Ministry of Justice. Although, as an ESDP measure, this action falls under the direction of the Council, the Joint Action recognises the link with EC instruments: "The Council notes the intention of the Commission to direct its action towards achieving the objectives of this Joint Action, where appropriate, by relevant Community instruments."[64] And in fact, on 2 July 2004, the Commission decided to make 4.65 million euro available under the RRM to support the rule of law and democratic processes in Georgia.[65] According to the Press Release, the funds will be allocated to policy and institutional reform in four areas: (i) penitentiary and probation service reform; (ii) organisational reform of the Ministry of Justice as well as other public institutions; (iii) parliamentary and electoral reform; (iv) confidence building among population groups affected by conflict, to include technical support to the administration of the State Minister for Conflict Resolution. The initiative is designed to complement the ESDP mission EUJUST THEMIS, and it is likely that following the RRM initiative longer-term support will continue via the TACIS programme.

Reinforcing the rule of law is developing into a central component of the EU's security policy, playing a part especially in both conflict prevention and civilian crisis management. In this, the EU will use not only CFSP/ESDP instruments, such as the Joint Action on the rule of law mission for Georgia, but also EC instruments such as the RRM and TACIS. Seeing security as a rule of law objective – and the rule of law as a security objective – has meant an increasing emphasis on particular aspects of the rule of law, including anti-corruption, measures to combat organised crime, effective policing and the relationship between the security forces and political institutions. No longer is the rule of law seen as having purely domestic connotations. This development needs to be kept in mind when considering the rule of law as an aspect of the ENP.

IV. The Rule of Law in the ENP

It could be said, in fact, that the rule of law is not just an aspect of the ENP, but is its foundation or basis. In Article III-193(1) the Constitutional Treaty requires the Union to "seek to develop relations and build partnerships with third countries and international, regional or global organisations which share [its] values."[66] This idea is

---

[63] Council Joint Action 2004/523/CFSP, Art.2(1).

[64] Council Joint Action 2004/523/CFSP, Art 11(1).

[65] IP/04/846 - Brussels, 2 July 2004.

[66] For further discussion of the role of values in EU external policy generally, see Cremona, "Values in the EU Constitution: the External Dimension" in Millns and Aziz eds, *Values in the Constitution of Europe* (Ashgate/Dartmouth 2004).

given specific expression in the provision for a neighbourhood policy in Article I-56 which envisages the development of "a special relationship with neighbouring States, 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". The values of the Union are currently defined in Article 6 TEU to include liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These are said to be common to the Member States, the Union is "founded" on them, respect for them is a condition of membership and a serious breach of them attracts sanctions. The Constitutional Treaty lists the Union's common values in Article I-2 and extends them to include respect for human dignity, liberty, equality and rights of minorities in addition to democracy, the rule of law and respect for human rights. These values are stated to be common to the Member States in a society of pluralism, tolerance, justice, solidarity, non-discrimination and equality between women and men. They are to be upheld and promoted by the Union "in its relations with the wider world" (Article I-3(4), setting out the Union's objectives), and are thus directly linked to external policy.

The ENP, it is claimed by the EU, and as foreshadowed in the neighbourhood policy treaty provision, is to be based on these *shared values*, "including democracy, the rule of law, good governance and respect for human rights, and to the principles of market economy, free trade and sustainable development, as well as poverty reduction."[67] The language of shared values, while very much in evidence in the recent documents on the ENP, is not an innovation in EU policy towards these regions. As a recent OECD declaration states:

> "Our approach is one of cooperative security based on democracy, respect for human rights, fundamental freedoms and the rule of law, market economy and social justice. It excludes any quest for domination. It implies mutual confidence and the peaceful settlement of disputes."[68]

Here again, we find the idea of security based on values including the rule of law. The Common Strategies adopted by the European Council in relation to Russia, Ukraine and the Mediterranean in the late 1990's make explicit references to a strategic partnership based on shared values and common interests,[69] and "foundations of shared values enshrined in the common heritage of European civilisation".[70] In the case of the Mediterranean, the promotion of "core values" embraced by the EU and its

---

[67] GAER Council conclusions on European Neighbourhood Policy - 14 June 2004. The idea of shared values has been included in the ENP from the beginning; the European Council at Copenhagen in December 2002, for example, said that the "new dynamic" created by enlargement "presents an important opportunity to take forward relations with neighbouring countries based on *shared political and economic values*." (emphasis added)

[68] OSCE Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-First Century, DOC.S/1/96, 3 December 1996, para 3.

[69] Common Strategy of the EU on Ukraine, adopted by the European Council at Helsinki, 11 December 1999, at para 1.

[70] Common Strategy of the EU on Russia, adopted by the European Council at Cologne, 4 June 1999, Part I.

Member States is made a key goal of Union policy towards the region.[71] What of the rule of law in these Common Strategies?

The two "clear strategic goals" of the Common Strategy on Russia are "a stable, open and pluralistic democracy in Russia, governed by the rule of law and underpinning a prosperous market economy" and "maintaining European stability, promoting global security". Of the principle objectives, consolidation of democracy, the rule of law and public institutions (including executive, judicial, legal institutions and the police) is the first on the list. As we have seen, the rule of law is also given prominence in context of developing a functioning market economy. Under the head of areas of action, the rule of law features, with actions including institutional reform at all levels of administration, developing the capacity of an independent judiciary, and accountable law enforcement structures. Mechanisms include contact between judicial administrations and law enforcement agencies, training for civil servants and assistance with developing a "transparent and stable legislative and regulatory framework". Enhancing the rule of law is also relevant to the "fight against organised crime, money laundering and illicit traffic in human beings and drugs and judicial cooperation" (under the head of "common challenges on the European continent"), and objectives here include ratification of key conventions on judicial cooperation.

The first and second "strategic goals" of the Common Strategy on Ukraine are "to contribute to the emergence of a stable, open and pluralistic democracy in Ukraine, governed by the rule of law and underpinning a stable functioning market economy", and "the maintenance of stability and security in Europe and the wider world". Principal objectives include support for democratic and economic transition, which includes a rule of law dimension. As with the Common Strategy on Russia, the EU emphasises the importance of the rule of law for economic transition:

> "A properly functioning independent judiciary, a professional police force, the development of a meritocratic, well-trained public administration at national, regional and local levels are all key elements in the effective implementation of government decisions. The EU encourages Ukraine's efforts to develop the efficiency, transparency and democratic character of its public institutions, including the development of free media. These are prerequisites for economic and social development and contribute to the building of a modern civil society."

Specific initiatives include the promotion of good governance, an effective and transparent legal system, and democratic local self government, regular dialogue between ombudsman institutions, the development of a free media. Mention is also made of cooperation in conflict prevention and crisis management.

Both the existing Partnership and Cooperation Agreements with the Western NIS and the Euro-Mediterranean Association Agreements contain in their Preambles a reference to "the common values that they share".[72] These are not defined explicitly, but the "essential elements" clause in the PCAs indicates their scope, and here there is an interesting difference between the PCAs with Russia, Ukraine and Moldova (the

[71] Common Strategy of the EU on the Mediterranean Region, adopted by the European Council at Feira 19-20 June 2000, at para 7; the core values include "human rights, democracy, good governance, transparency and the rule of law".

[72] See for example Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine OJ 1999 L49, 19/02/1998 p.3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, and the Republic of Tunisia OJ 1998 L97, 30/03/1998 p.2.

Western NIS) on the one hand, and those with the Southern Caucasus on the other. The PCAs with the Western NIS all include a prominent reference to the rule of law in the Preamble:

> "CONVINCED of the paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multiparty system with free and democratic elections and economic liberalization aimed at setting up a market economy,"

However, the rule of law is not explicitly included among the "essential elements" in Article 2,[73] nor (unlike democracy, human rights and minority rights) is it mentioned in Article 6 on political dialogue. In fact, it does not explicitly appear again in the agreements. The PCAs with the Southern Caucasus, in contrast, in addition to the mention of the rule of law in the Preamble (again, it is not among the "essential elements"), include among the areas of cooperation:

> "… all questions relevant to the establishment or reinforcement of democratic institutions, including those required in order to strengthen the rule of law, and the protection of human rights and fundamental freedoms according to international law and OSCE principles. This cooperation shall take the form of technical assistance programmes intended to assist, inter alia, in the drafting of relevant legislation and regulations; the implementation of such legislation; the functioning of the judiciary; the role of the State in questions of justice; and the operation of the electoral system…."[74]

The Georgia mission on support for the rule of law already mentioned therefore directly implements this provision.

The TACIS Regulation – which applies to all the eastern European ENP states - puts the rule of law right at the heart of the programme. It is "A programme to promote the transition to a market economy and to reinforce democracy and the rule of law in the partner States".[75] "The programme shall take into account the differing needs and priorities of the principal regions covered by the Regulation and in particular the need to promote democracy and the rule of law.[76] In Annex II, development of the rule of law is included under the heading "support for legal, institutional and administrative reform". The Commission reports that TACIS provides policy advice in areas such as state budget reform, regional finance reform, public procurement reform, regulations for preventing conflicts of interest in the civil service, public access to information, legal status of civil servants and training and human resource management in the civil service.[77] The Regulation also introduces an element of conditionality: in case of a breach of an essential element or a serious violation of PCA obligations the Council may decide upon appropriate measures concerning assistance to a partner State.[78] In preparation for a new TACIS Regulation, the Commission has assessed its achievements and problems, and concludes, inter alia, that since 1999 there has been

[73] In this the PCAs are similar to the Europe Agreements; in contrast, the rule of law is included as an essential element in the SAAs with Croatia and FYROM and in the Cotonou Convention.

[74] PCA with Georgia, Art 71. The PCAs with Armenia and Azerbaijan contain similar provisions. There is also a provision on cooperation with respect to prevention of illegal activities including corruption (PCA with Georgia, Art 72).

[75] Regulation 99/2000/EC, Article 1.

[76] Regulation 99/2000/EC, Article 2(2).

[77] Commission Communication on Governance and development, COM(2003)615 final, para 90.

[78] Regulation 99/2000/EC, Article 16.

little real progress in democracy and human rights; instead there is increased divergence between the countries of the region, increased conflict and tension, and endemic corruption. A future TACIS programme will emphasise implementation of the PCAs and ENP Action Plans. The Commission also highlights the growing importance of justice and home affairs (JHA) issues in EU policy towards the region.[79] The rule of law is behind a number of priority areas, including conflict prevention, democratization, strengthening civil society organizations, security, JHA, and administrative reform.

This rather gloomy view is echoed in the Commission's Communication on Good Governance in 2003, in which the Commission highlights weak governance in the region and "widespread corruption within the state administration due to lack of transparency, unaccountability and low salaries."[80] As well as its own programmes, via TACIS and the EIDHR, the EU supports other initiatives, such as the OECD Anti-Corruption Network for Transition Economies. Six NIS (Armenia, Azerbaijan, Georgia, Russia, Tajikistan and Ukraine), for example, have recently adopted a regional plan to fight corruption. The plan commits these countries to specific actions to increase integrity and transparency in public services, promote corporate responsibility and accountability, and allow active public participation in making reforms.[81]

It is not surprising, then, to find the rule of law at the heart of the ENP, and in particular a focus on the links between the rule of law, economic development and security.

In its March 2003 paper, the Commission stresses the link between the rule of law and social and economic development:

> "Democracy, pluralism, respect for human rights, civil liberties, the rule of law and core labour standards are all essential prerequisites for political stability, as well as for peaceful and sustained social and economic development."
> "A political, regulatory and trading framework, which enhances economic stability and institutionalises the rule of law, will increase our neighbours' attractiveness to investors and reduce their vulnerability to external shocks."[82]

Thus, the rule of law is not only of declaratory value, as one of the shared values underpinning the ENP. It is also one of the EU's objectives and is likely to feature in the Action Plans that are currently being drafted. The Country Reports prepared by the Commission feature a section on "Democracy and the Rule of Law". The report on Ukraine, for example, refers to the issue of the allocation of executive authority between president and prime minister and the role of parliament being "a source of

---

[79] JHA covers border issues such as migration, as well as cooperation in police and criminal justice matters, including cross-border and organised crime. Commission Staff Working Paper on reform of TACIS programme, available on:
http://europa.eu.int/comm/external_relations/consultations/cswp_tacis.htm

[80] Commission Communication on Governance and development, COM(2003)615 final, para 90.

[81] Commission Communication on Governance and development, COM(2003)615 final, para 90.

[82] Commission Communication, Wider Europe –Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM (2003) 104, 11 March 2003, pp.7 and 9.

political tension", and also to concerns over the "low level of procedural transparency and public support" for constitutional reform. It also refers to reforms undertaken in 2001 and 2002 to increase the independence and efficiency of the judiciary; however, it concludes that "in practice, the judiciary has reportedly not yet achieved a major increase in efficiency and remains vulnerable to political and administrative interference from the executive branch, and to corruption."[83] A number of anti-corruption initiatives are recorded, including ratification of the Council of Europe Civil Law Convention on Corruption and Criminal Law Convention on Corruption of 1999, a Presidential Decree of February 2003 and the OECD regional Anti-Corruption Action Plan signed in September 2003. However "the Transparency International Corruption Perceptions Index 2003 ranks Ukraine in place 106 with a score of 2.3 (out of 10). The perceived level of corruption is reported to act as a deterrent for foreign investors and a restraining factor on economic development." The ENP Action Plan is likely to see targets established in these areas, including joining the Council of Europe Group of States against corruption (GRECO). An Action Plan on Justice and Home Affairs was agreed with Ukraine in December 2001, defining the areas for co-operation, including readmission and migration, border management, money laundering, corruption and trafficking in human beings and drugs. The ENP Action Plan will draw on these already agreed priorities in this field.
[note: it is hoped that the final version of this paper will be able to refer to the detail of published Action Plans]

The linkages being drawn here carry a certain logic. But there are problems with the EU's approach which undermine the idea of a partnership with shared objectives. First is the problem (already mentioned) with conditionality as a central mechanism of this policy. The Commission's Strategy Paper of May 2004 makes clear the link between progress in relations with the EU and progress in implementing agreed targets, including commitment to the rule of law:

> "**Commitment to shared values**
> The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. … The European Neighbourhood policy seeks to promote commitment to shared values. The extent to which neighbouring countries implement commitments in practice varies and there is considerable scope for improvement. Effective implementation of such commitments is an essential element in the EU's relations with partners. The level of the EU's ambition in developing links with each partner through the ENP will take into account the extent to which common values are effectively shared. The Action Plans will contain a number of priorities intended to strengthen commitment to these values. These include strengthening democracy and the rule of law, the reform of the judiciary and the fight against corruption and organised crime; … "[84]

I have quoted this passage at length, including its heading, because it illustrates the attempt of the EU both to proclaim the shared values on which the ENP is to be based, and to stipulate that any further progress in relations must be met by commitments to improve performance in implementing these values. It is difficult to manage such a rhetorical combination, which depends, in fact, on a recognition by the neighbourhood

[83] Commission Staff Working Paper, European Neighbourhood Policy, Country Report, Ukraine, 12 May 2004, SEC(2004) 566, p.7.

[84] Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, pp.12-13.

states that their levels of performance do indeed leave considerable scope for improvement and a willingness to submit to the EU's judgement as to how to demonstrate commitment to the proclaimed shared values. What is appropriate for a relationship based on candidacy does not translate easily into a relationship ostensibly based on partnership.

A second issue relates to the question of objectives. In the accession process, the rule of law was seen by both sides as a necessary component of a modern democracy and market economy that was ready to become a member of the EU. The EU and the accession states shared an objective and agreed (more or less) on the means to achieve that objective. With the ENP the position is different. Although the importance of the rule of law for economic and social development is still emphasised, it is notable that the focus has turned to the creation of conditions for a stable political environment, the prevention of internal and external conflict and cross-border security for the EU. Promotion of the rule of law is seen as an important part of that strategy. This orientation towards security appears to be largely an EU objective. The EU is attempting to export stability in order to avoid importing instability and insecurity. Instead of a truly-shared objective we seem to have the incentive of economic integration and a closer relationship with the EU being offered in order to achieve EU security objectives. And the closer relationship with the EU will involve alignment to EU policies on sensitive issues such as corruption, immigration and border issues, organised crime, terrorism and conflict prevention. This shift of the EU objective is important for a number of reasons. In the first place, the point has already been made that the relationship between the rule of law and economic development is uncertain. Delivery of the latter - a key objective of the ENP states - is therefore by no means a certain result of espousing rule of law targets which are designed to achieve EU security objectives.

The EU is concerned with the potential for breakdown in the rule of law and in law and order and stability within its eastern neighbours, not just as an uninvolved observer or aid donor, but as a neighbour whose members are likely to be directly affected by the fall-out from civil insecurity. The Union makes it clear that its objective is to bind the ENP states, through shared values, into the Union's security policies, including conflict prevention and crisis management. This is a question both of participation in Union ESDP initiatives and of Union action to reinforce security and stability in the ENP states themselves.

> "Shared values, strong democratic institutions and a common understanding of the need to institutionalise respect for human rights will open the way for closer and more open dialogue on the Union's Common Foreign and Security Policy (CFSP) and the development of the European Security and Defence Policy (ESDP). A shared neighbourhood implies burden-sharing and joint responsibility for addressing the threats to stability created by conflict and insecurity."[85]

These two aspects of ENP policy (participation and reinforcement) imply increased importance for the rule of law: if the ENP states are to participate in Union security-oriented policies, including those to combat organised crime and conflict prevention, reinforcement of the rule of law within those states entails building respect for the rule

[85] COM (2003) 104, p.12.

of law into the Union's own security policies.[86] The Union's mandate, according to the Constitutional Treaty, is not only to promote its values in the wider world, but also to uphold them.[87] If the concept of shared values is to mean anything, the Union must ensure that the rule of law is not only something to be strengthened in the neighbouring states, but is also a principle underlying its own internal and external policies.

[86] "… the Wider Europe - Neighbourhood Policy should include common efforts in the field of illegal migration, the fight against terrorism, illegal trade, concern for international legal order, combating corruption and a policy on conflict prevention and settlement; in all these fields, the EU's principles concerning the rule of law must be guaranteed." European Parliament Report on 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (COM(2003) 104), 5 November 2003, A5-0378/2003, para 22.

[87] Article I-3(4) Constitutional Treaty.

Bibliography:

Judy Batt, Dov Lynch, Antonio Missiroli, Martin Ortega, Dimitrios Triantaphyllou, Partners and Neighbours: A CFSP for a Wider Europe, EU Institute for Security Studies, Paris, Chaillot Papers No 64, September 2003.

Thomas Corothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowment for International Peace, Working Papers Rule of Law Series, No 34 January 2003.

Cremona, "Creating the New Europe: The Stability Pact for South-Eastern Europe in the Context of EU-SEE Relations" *Cambridge Yearbook of European Legal Studies Volume II 1999* (Hart Publishing 2000) 463.

Cremona, "Regional Integration and the Rule of Law: Some Issues and Options" in R. Devlin and A. Estevadeordal (eds) *Bridges for Development: Policies and Institutions for Trade and Integration* (Inter-American Development Bank and Brookings Institution, Washington DC 2003).

Cremona, "Values in the EU Constitution: the External Dimension" in Millns and Aziz eds, *Values in the Constitution of Europe* (Ashgate/Dartmouth 2004).

Cremona, "Enlargement: A Successful Instrument of EU Foreign Policy?" in Tridimas and Nebbia eds., *European Union Law for the Twenty-First Century,* (proceedings of WG Hart Workshop 2003, Hart Publishing 2004).

Cremona, "EU Enlargement: Solidarity and Conditionality", forthcoming in *European Law Review*..

EC Commission 1997, Agenda 2000, For a Stronger and Wider Union, Part I The Policies of the Union, sect. IV The Union in the World.

EC Commission 1997, Agenda 2000, For a Stronger and Wider Union, Part II The Challenge of Enlargement, sect. I Assessment on the Basis of the Accession Criteria.

EC Commission Communication on Conflict Prevention, COM (2001) 211, 11 April 2001.

EC Commission Communication on the European Union's role in promoting human rights and democratisation in third countries, COM(2001)252 final, 8 May 2001.

EC Commission Communication, Wider Europe –Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM (2003) 104, 11 March 2003.

EC Commission Communication on Western Balkans and European Integration, COM (2003) 285, 21 May 2003.

EC Commission Annual Report 2003 to the Council and the European Parliament on EC development policy and the implementation of external assistance in 2002, COM(2003)527 final

EC Commission Communication on Governance and development, COM(2003)615 final.

EC Commission's Third Annual Report on the SAP, COM(2004) 202/2 final, 30 March 2004.

EC Commission Communication, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004.

Commission Staff Working Paper, European Neighbourhood Policy, Country Report, Ukraine, 12 May 2004, SEC(2004) 566

European Parliament Report on the Wider Europe, A5-0378/2003.

EU Common Strategy on Russia, adopted by the European Council at Cologne, 4 June 1999

EU Common Strategy on Ukraine, adopted by the European Council at Helsinki, 11 December 1999

EU Common Strategy on the Mediterranean Region, adopted by the European Council at Feira, 19-20 June 2000

EU Council Regulation 1488/96/EC on financial and technical measures to support the reform of economic and social structures in Mediterranean non-member countries and territories (MEDA) in the framework of the Euro-Med Partnership OJ 1996 L 189/1, amended by Reg. 2698/2000/EC OJ 2000 L 311/1

EU Council Common Position 98/350/CFSP on human rights, democratic principles the rule of law and good governance in Africa OJ 1998 L 158/1.

EU Council Regulation 975/1999/EC of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms OJ 1999 L120/1.

EU Council Regulation 976/1999/EC of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries OJ 1999 L120/8.

EU Council Regulation 99/2000 on the provision of assistance to the partner States in Eastern Europe and Central Asia (TACIS) 2000 – 2006, OJ 2000 L 12/1.

EU Council Regulation 2666/2000/EC on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia (CARDS: Community Assistance for Reconstruction, Democratisation and Stabilisation) OJ 2000 L 306/1.

EU Council Regulation 381/2001/EC on a Rapid Reaction Mechanism OJ 2001 L 57/5.

EU Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS, OJ 2004 L 228/21.

Wim Kok, *Enlarging the European Union: Achievements and Challenges*, Report to the European Commission, EUI, 19 March 2003.

OSCE Lisbon Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-First Century, DOC.S/1/96, 3 December 1996.

R. Prodi, "A Wider Europe – A Proximity Policy as the key to stability", speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

C. Radaelli, 'Whither Europeanization? Concept stretching and substantive change', *European Integration Online Paper*s, 2000, Vol.4, No.8 (July).

'Report on Political Dimensions of the Accession Criteria', No 1 in a Series of Workshops 'Assessing the Accession Criteria' (European Research Institute, the University of Birmingham, 30 November 2002), available on: http://www.eri.bham.ac.uk/Phare/reports/Workshop1report.pdf

J. Solana, 'A Secure Europe in a Better World', S0138/03.

Vachudova, M. A. (2001) 'The Leverage of International Institutions on Democratizing States: the Eastern Europe and the European Union, *EUI Working Paper RSC* No. 2001/33, IUE, Florence.

Commissioner Verheugen, 'The European Neighbourhood Policy', Prime Ministerial Conference of the Vilnius and Visegrad Democracies: "Towards a Wider Europe: the new agenda", Bratislava, 19 March 2004, SPEECH/04/141.

William Wallace, Looking After the Neighbourhood: Responsibilities for the EU-25, Notre Europe Policy Papers, N°4, July 2003.

K. Wolczuk (RSC Working Paper) full citation needed.