2 EU Migration Law: From Schengen to the Externalisation of Border Control – Quo Vadis?

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This chapter aims to highlight the main features of EU migration law. It starts with Schengen and the context of removing border control at EU's internal borders to facilitate the flow of people internally and then moves on to how the EU has strengthened, and sometimes struggles to strengthen, its external border with third countries. Hence, while the EU encourages internal migration, it seeks to tighten regulations at the external border. Finally, the chapter discusses where this may lead the EU in the future by examining current European case law.

2.1 Introduction

EU migration law has long been a controversial and debatable field of law. Why the EU initially lacked competence and still does not have exclusive competence plays an important role in evaluating EU migration law. The EU went from eliminating internal border controls to strengthening the external border through the Schengen acquis. However, the externalisation of border control brings up several potential human rights violations and raises the question of the positive obligation of states to protect human rights and strike a balance between the rights of migrants and the control of the external border. In the first part, this chapter provides a microcosm of the main EU migration law and policy. This is followed by how the EU went from removing control at its internal borders to strengthening and fortifying its external borders. However, this did not prove sufficient to stem a legal migration. So, the Member States sought to externalise border control, which brought about potential human rights violations. In the final part of this chapter, the discussion focuses on some examples of the case law of European courts in Strasbourg and Luxembourg and how they see the externalisation of border control.

2.2 EU Migration Law

Free movement of persons is one of the very foundations of the Treaty on the Functioning of the European Union (TFEU), which establishes the Internal Market through Article 45 TFEU. Free movement rights have been consolidated in the Citizens' Rights Directive.[1] Although the directive applies to EU nationals, it can be argued that the principles in the directive are gradually being widened to include third-country nationals. The relationship in EU migration law between Union citizens and third-country nationals is one of both convergence and divergence.[2] Convergence because the category of third-country nationals enjoying the same or similar rights as Union citizens is widening – a prime example being that of third-country national family members of Union citizens – although their treatment remains problematic. Divergence because in developing EU law on borders and admission, residence and status of third-country nationals, Member States have subjected the right of free movement of third-country nationals to barriers that the Court of Justice of the European Union (CJEU) has severely limited, and in many cases excluded, with regard to Union citizens. Guild identifies such barriers, for instance, in the lower threshold for their expulsion and in the additional requirements to access social security benefits.[3] The result is that the developing concept of EU citizenship is presumed to be based on discrimination between classes of citizens. For third-country nationals enjoying free movement rights, the dividing line between citizenship rights and discrimination against aliens remains rather blurred. This brings up the following questions: How to distinguish between free movement and immigration? Who are the citizens and the immigrants?

Third-country nationals are those who do not hold the nationality of a Member State. As clarified by the CJEU, the rights of workers, self-employed and service providers to have free movement are limited to the nationals of the Member States. The jurisprudence of the Court is more ambiguous about the rights of service recipients, such as tourists. In 1986, the Single European Act enlarged the scope of the right of free movement of service providers to include the ability to adopt measures for the free movement of third-country national service providers. This opportunity has not been taken up. Although the Commission proposed a directive to provide for this in 1999, it was withdrawn. The extension was reintroduced in the draft services directive in 2005

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States [2004] OJ L 158/77.

2 See Guild, E., 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons', in Baldacchi, A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 57.

3 Ibid., p. 59.

but was withdrawn in the face of heavy criticism by some Member States and social partners.[4]

EU nationals, however, have a right to exercise free movement rights, which entails a movement right for third-country nationals. In particular, EU businesses that provide services across EU borders are entitled to deploy personnel of any nationality for this purpose.[5] While it appears that Member States can require that the third-country national personnel have been admitted to a Member State, other obstacles, such as obligatory periods of previous employment with the enterprise before the deployment, are not permissible.[6]

Third-country nationals are entitled to rely on all EU free movement rights except those of persons. Thus, for example, they are not excluded from the personal scope of the free movement of goods or capital under agreements between their country of origin and the EU. Some third-country nationals enjoy rights attached to the free movement of persons, such as security of employment and residence, equal treatment in social security and education.[7] The most extensive of such rights accrue to the Turkish workers under the EC-Turkey Association Agreement and the Decisions of the Association Council, in particular Decision 1/80, which has been the subject of substantial jurisprudence from the CJEU.[8]

Following the *communautarisation* (introduction to the then Community pillar) of the immigration and asylum issues into Title IV of the EC Treaty by the Amsterdam Treaty in 1999, now Title V of the TFEU, several new legislative instruments were created dealing with legal migration. A five-year period ending 1 May 2004 required adopting measures under the new powers. Regarding legal migration, the following measures have been adopted:

a) Regulation 1030/2002 on residence permit[9]
b) Regulation 859/2003 on third-country national's social security[10]
c) Directive 2003/86 on family reunion[11]
d) Directive 2003/109 on long-term residents[12]

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4 See Baldacchi, A. et al., *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 39.
5 Case C-43/93 *Vander Elst* [1994] I-3803.
6 Case C-445/003 *Commission v. Luxembourg* [2004] ECR I-10191.
7 Romero-Ortuno, R., 'Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?', *Journal of European Policy*, 11, pp. 245-272, 2004.
8 See Groenendijk, *ILPA European Update*, June 2005. p. 7-10.
9 [2002] OJ L 157/1.
10 [2003] OJ L 124/1.
11 [2003] OJ L 251/12.
12 [2004] OJ L 16/44.

The second five-year period is the subject of the Hague Programme adopted by the Council and the Commission, setting out the agenda of measures to be adopted. According to this agenda, there is significantly fewer new legislation than in the first five years of the Community, now Union, competence.[13]

Most significant for third-country nationals lawfully living in the EU are the two directives on long-term residency and third-country nationals and family reunification for third-country nationals. Firstly, Directive 2003/109/EC on long-term resident country nationals provides that third-country nationals who have resided lawfully in a Member State for five years (except for certain excluded classes such as refugees, and an exception for students who must complete ten years' residence in a Member State) have a right to move and engage in economic activities as workers, self-employed, service providers or recipients or students in any of the Member States.[14] They may also move for other purposes subject to an economic self-sufficiency requirement. This right derives from EU law, not national law, and must be transposed by January 2006. Thus, so long as the individual has completed the qualifying five years of lawful residence per the conditions, he or she has the right, notwithstanding what the national may state.

Further, the directive does not recognise any delay in the right. All third-country nationals who fulfil the requirements as of the transposition date are entitled to the right to free movement.[15] This directive will likely result in substantial new friction between the authorities of the Member States and third-country nationals who seek to rely on their rights.

The second important directive is that on family reunification. Directive 2003/86 creates a right of family reunification for third-country nationals in EU law. The next step is to look into the main elements to see how EU migration law works.

2.2.1 The Long-Term Residents & the Family Reunion Directives

The drafter of the directives had three aims in mind: (i) to create a new status for long-term resident third-country nationals, (ii) to determine the rights attached to that status in the first Member States (i.e. secure residence rights and equal treatment with nationals of the country of residence), and (iii) to grant freedom of movement within the EU

13 For a commentary on the new multi-annual programme see ILPA, *Response to the Hague Programme: EU Immigration and Asylum Law and Policy*, available at www.ilpa.org.uk.

14 See Carrera, S. & Migration, B. T., *Borders and Asylum: Trends and Vulnerabilities in EU Policy*. Brussels CEPS, 2005.

15 Ibid.

under certain conditions.[16] Third-country nationals holding the new status are no longer restricted to only residence in one host Member State. The Commission, in its proposal, conscientiously followed the guidance of the European Council in Tampere:

> The EU must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting these individual rights and obligations comparable to those of EU citizens.[17]

The Council asked the Commission to draft a set of uniform rights that are as close as possible to those enjoyed by citizens of the EU. This request is explicitly referred to in the second Preamble Recital to the directive. The Tampere Conclusions and the directive proposed by the Commission extend the old principle of EU free movement law (secure legal status and equal treatment to stimulate the integration of immigrants) to settled third-country nationals. While a full, comprehensive description of this directive is beyond the scope of this chapter, it makes sense to short survey some of the most underlying issues, including the acquisition and loss of status, the rights attached to the status in the first Member State and the right to move to other Member States.[18]

Articles 4 to 6 of the directive mention three mandatory conditions for the acquisition of status: five years of lawful residence in the Member State where the application is filed, stable and regular income for the family without recourse to social security and that the public policy and public security exception does not apply.[19] The other Member States are bound to recognise a decision by a first Member State unless that decision was manifestly wrong. Third-country nationals admitted for study or temporary purposes, such as seasonal workers, are excluded. A third-country national meets the status of a long-term resident if he or she satisfies the aforementioned conditions and has lodged an application that has been accepted.[20] Without application, they are not entitled to anything. The Member State has six months to evaluate the application and cannot add any additional requirements. The status is permanent. Expiry or loss of the document does not entitle loss of status.[21] It can only be lost on three grounds: fraudulent acquisition of the status, an expulsion decision on serious public order grounds or absence from the

16 Art. 1 of the directive.
17 Presidency Conclusions, Tampere European Council, 16-16 October 1999, para 18.
18 Lahav, G., 'Immigration and the State: The Devolution and Privatization of Immigration Control in the EU', *Journal of Ethnic and Migration Studies*, Vol. 24, No. 4, pp. 675-694, October 1998.
19 Art. 6 of the directive.
20 Art. 7 of the directive.
21 Arts. 8(1) and 9(6) of the directive.

territory of the EU for more than twelve consecutive months. However, Member States may decide that longer absences shall not entail withdrawal of the status.

The directive grants two rights in the country of residence: a secure residence right and equal treatment. Expulsion is possible only if the person "constitutes an actual and sufficiently serious threat to public policy or public security."[22] The article also stipulates substantial guarantees (judicial remedies and legal aid) in the event of an expulsion decision. In Article 11, the directive grants long-term residents equal treatment with nationals in various fields: employment, education and access to social services, among others.

Chapter III of the directive (Arts. 14-23) introduces an important innovation in EU law: the right of a long-term resident to move to and reside in another Member State for employment, study and other purposes.[23] Previously, this right had been granted only to third-country family members accompanying a Union citizen who had exercised his or her right to freedom of movement. The directive extends this right to all third-country nationals holding long-term residence status. The right to reside in a second Member State depends on conditions similar to those for acquiring the new status in the first Member State: an application, sufficient income, health insurance and the absence of public order grounds. There is a special refusal where the person constitutes a threat to public health.[24] The second Member State may (not must) introduce two barriers: a labour market test in case of migration for employment and, in certain cases, a further condition related to integration. Once admitted into the second Member State, the third-country national is immediately entitled to equal treatment as guaranteed by the directive in the first Member State. During the first six years in the second Member State, the long-term residence status in the first Member State remains valid. After five years, the long-term resident may apply for a long-term residence status in the second Member State, and once this is acquired, the status obtained in the first Member State is lost. Under the Family Reunion Directive, which will be discussed next, family members have the right to follow the person who has acquired the new long-term resident status.

What can be concluded from the aforementioned Directive 2003/109/EC has been compared with the consolidated Directive 2004/38/EC dealing with Union citizens. Since the European Council in Tampere instructed the institutions to establish

22 Art. 12(1) of the directive.

23 See Groenendijk, K. 'The Long-Term Residents Directive', in Baldacchi A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 438.

24 See Art. 18 of the directive. Diseases contracted during 5 years of lawful residence in the first Member State are no ground for refusal of the long-term residence status. This provision is absent from Chapter 2 of the directive.

a new status 'comparable' or 'as near as possible' to that of Union citizens, this approach is understandable, as Groenendijk argues.[25] However, it also tends to result in understanding the significance of changes produced by Directive 2003/109/EC in comparison with the situation before the directive was supposed to be implemented, that is, in January 2006, when the national law of the Member States fully determined the rights of long-term resident third-country nationals. Most provisions in the Long-Term Residents Directive can have a direct effect. They provide a clear definition of the limited number of conditions that Member States will have to check when dealing with applications for the status of a residence permit in the second Member State. The directive also ensures equal treatment between residents with such a status and Union citizens. However, although third-country nationals with such status have many more rights than before, the difference between them and Union citizens remains.

There are clear differences between the rights granted to long-term residents in this directive and the rights of Union citizens and their family members under Directive 2004/38/EC., For example there are differences such as family reunification, first access to employment and integration conditions. Integration conditions, for instance, are completely absent in the Union citizens directive. In addition, one should not disregard the differences in the wording of some of the provisions on similar issues in both directives. Concerning the public order provisions, it is not yet clear whether the Court will disregard (minor) differences in wording or, on the contrary, attach great weight to the differences. The CJEU in *Gattoussi* indicated that it continues bringing unity and coherence to union law.[26] What Member States had in mind during the negotiations in the Council, when they decided to use slightly different wording, is often far less clear. Those provisions have to be interpreted by the national courts and by the CJEU in the light of the aims and instructions of the Tampere Council, referred to in the second Preamble Recital to the directive. That Recital reiterates that the aim was to adopt a 'set of uniform rights which are as near as possible to those enjoyed by citizens of the EU'. Thus, giving a different meaning to similar provisions has to be justified so that it cannot be taken for granted.

This directive has to be accompanied by Council Directive 2003/86/EC on the right of family reunification.[27] The purpose of the Family Reunion Directive is to determine the conditions for third-country nationals who are lawful residents of a Member State to exercise the right to family reunification. Family reunification is defined as 'the entry into and residing lawfully in that Member State to preserve the family unit, whether the

25 See Groenendijk, 'The Long-Term Residents Directive', p. 439.
26 Case C-97/05 *Gattoussi*.
27 [2003] OJ L251/12.

family relationship arose before or after the resident's entry'.[28] To this end, the directive defines who can apply for family reunification (Art. 3); which family members benefit from the right to a family on the grounds for refusing an application, including the right to mount a legal challenge (Arts. 16-18); the procedure for applying for family reunification (Art. 5) and the rights enjoyed by family members admitted under the directive (Arts. 14-15). The provisions in the directive set out the minimum standard. This follows from paragraphs (4) and (5) of Article 3, establishing that the directive is without prejudice to more favourable provisions of international law and does not affect more favourable provisions in national law. Member States are, thus, free to provide higher protection in their national legislation if they so desire.[29]

To establish the personal scope of the Family Reunification Directive, it is necessary to know who can apply for family reunification, who (in terms of the directive) is described as the sponsor and on behalf of whom family members can apply. Although the Commission's initial proposal used the terminology 'applicant for family reunification', in the directive the term 'the sponsor' has been chosen to refer to the person seeking permission to be reunited with or be accompanied by his or her family members. A sponsor is defined in Article 2(c) of the directive as a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him or her.[30] To be eligible for family reunification, a sponsor has to have a residence permit issued for a period of validity of one year or more and have reasonable prospects of obtaining a permanent right of residence.[31]

Even though the concepts 'reasonable prospect' and 'permanent residence' are the keys to the right to family reunification, the directive remains silent regarding their meaning. Neither is found in the initial nor the revised 2000 proposal. From the Commentary in the amended 2002 proposal, it follows that these requirements reflect 'the idea that the right to family reunification would not be open to persons staying only temporarily without the possibility of renewal'. The exclusion applies to au pairs and exchange and placement students. As there was no discussion on these conditions in either the Council or the European Parliament, there are no further clauses regarding how 'permanent' and 'reasonable' are to be interpreted.[32] A preliminary reference may be needed to clarify this issue.[33]

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28 Art. 2(d) of Directive 2003/86/EC.

29 See Case C-540/03 *European Parliament v. Council*.

30 See Oosterom-Staples, H., 'The Family Reunification Directive', in Baldacchi A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 456.

31 See Council document 6912/03, 28 February 2003, at 5.

32 See Oosterom-Staples, 'The Family Reunification Directive', p. 457.

33 Groendijk, K., 'Legal Conceps of Integration in EU Migration Law', *European Jounral of Migration*, Vol. 6, 2004, pp. 111-126, at 118.

Union citizens' family members are excluded from this directive, as the Citizens' Free Movement Directive, Directive 2004/38/EC, would be applicable in their case. Also, some other third-country nationals are excluded from the scope of this directive. Accordingly, the directive does not apply to a person:

- applying for recognition of refugee status whose application has not yet given rise to a final decision,
- authorised to reside in a Member State based on temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status[34] or
- authorised to reside in a Member State based on a subsidiary form of protection under international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

The first two groups listed were excluded from the personal scope of the directive from the outset. However, third-country nationals residing in a Member State based on subsidiary protection were initially not included in the list of persons not benefiting from the Family Reunification Directive. One may question whether it was really necessary to exclude applicants for refugee status, temporary protection and subsidiary protection from the personal scope of the directive. It can be argued that they are already excluded because they cannot provide evidence that they have 'reasonable prospects of a permanent residence status', as Article 3(1) requires for qualification as a sponsor. The explicit exclusion, admittedly, leaves no room for doubt.[35] Family members who can apply for family reunification under the terms of the Family Reunification Directive are those listed in Article 4 of the directive. This provision distinguishes between family members whom Member States must admit if the conditions in the directive are satisfied, such as the case for a nuclear family, and family members a Member State may include in the personal scope of the directive.

One thing that the directive on family reunification does not do is make national law on family reunification superfluous. First, there are EU citizens who have not experienced the right to free movement and, therefore, do not benefit from EU law when seeking permission to be united with third-country family members. Oosterom-Staples argues that it is a missed opportunity that Member States objected to the Commission's proposal to give EU citizens who have not exercised free movement rights the same

34 Council Directive 2001/55/EC of 20 July 2001 on the minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ 212/12.

35 See Oosterom-Staples, 'The Family Reunification Directive', p. 461.

right to family reunification as their fellow citizens who do not benefit from EU law.[36] To extend the terms of Directive 2004/38/EC to all EU citizens would have put an end to reverse discrimination in this field, which has resulted in what is now referred to as 'abuse of EU law' by nationals of Member States seeking permission for their third-country national family members to enter and reside with them in their home country.[37] Besides EU citizens who have not exercised free movement rights, national law still determines the right to family reunification of children over 15 in those Member States where derogation found in Article 4(6) of the directive applies and where the Member States choose to provide for more favourable provisions, as permitted by Article 3(5) of the directive.

Having analysed the two main directives involving EU immigration law, one can conclude that Directive 2003/108/EC may give fewer rights to long-term residents than many observers interested in encouraging the integration of immigrants settled in the EU had hoped for after Tampere. The directive may even have a counterproductive effect in some Member States, as seen by the introduction of integration tests as a new barrier to the secure status in Austria, France and the Netherlands.[38] Different, competing, contradictory perspectives on the relationship between the law and integration are visible in the political debate between Member States and EU migration law. The two perspectives can be summarised as follows. The first perspective maintains that secure legal status will enhance the immigrant's integration into the host society. A long-term residence status will enhance the immigrant's integration into the host society. A strong residence status and equal treatment are instruments for integration. According to the second perspective, a permanent residence status should be remunerated for complete integration. Naturalisation is considered to be the crown of a completed integration. In the first perspective, the concept of integration is used inclusively or instrumentally, while the second perspective exemplifies the exclusive or selective use of the concept of integration.[39]

The first perspective has a long tradition in EU law. Regulation 15 of 1961, Regulation 1612/68/EEC, the Council Decisions of the Tampere European Council, Directive 2004/38/EC on the free movement of Union citizens and the Common Basic Principles of integration policy adopted by the JHA Council in November 2004 are all clear expressions of the first perspective. Directive 2003/109/EC now extends comparable rights to all third-country nationals with long residence in a Member State, irrespective

36 Ibid., p. 487.
37 See on this issue Cases C-459/99 *MRAX* [2002] ECR I-6591; C-109/01 *Akrich* [2003] ECR I-9607; & C-135/03 *Commission v. Spain* [2005] ECR I-2911.
38 See Groenendijk, 'The Long-Term Residents Directive', p. 448.
39 Ibid., p. 449.

of nationality. The directive sends an important symbolic message to immigrants and most of the population, namely, that all would be entitled to stay and have equal treatment with co-citizens. This makes the directive a central element of any EU policy on integrating immigrants. How the Member States implement the Long-term Residents Directive and the Family Reunion Directive in their national law will indicate how serious the Member States are in pursuing the integration of immigrants into their societies. It makes clear whether integration is a serious policy aim or whether it is primarily a code word for the selection and exclusion of immigrants from their societies.[40]

As regards the Family Reunion Directive, it can be argued that it is meant to be geared towards preserving family unity. When drawing up the initial proposal, the Commission envisaged equal treatment with EU citizens and, therefore, chose to extend the generous provisions of existing EU law regarding family reunification for family members of EU citizens to third-country nationals.[41] The Commission also took great pains to ensure compliance with international obligations regarding family life. Harmonisation was seen as a means to ensure that the right to family reunification would not depend on the Member State of residence and have the additional bonus that forum shopping by third-country nationals seeking the Member State with the most lenient rules on family reunification would cease. However, the inclusion of discretionary powers, the watering down of the public policy exception and the open-ended provisions on judicial protection, which have found their way into the final text, indicate that the directive now primarily serves to preserve Member States' interests.

Although the watered-down text does prevent further deterioration of the right to family reunification in the national law of the Member States, it does cry out for serious reconsideration, which is, fortunately, provided by Article 19 of the directive. Member States can take seriously the commitment to ensure equal treatment to third-country nationals and, as a consequence, revise the text accordingly by taking Directive 2004/38/EC as a starting point as well as ensuring that the national transposing legislation is to be centred around the same concepts in line with the CJEU trend explained earlier on.

2.3 The Borders of Schengen and Its Function

Border control is a state's best way to manifest its sovereignty. A state's de facto control over a territory is one of the essential ingredients for functioning. It would be able to

40 Ibid., p. 450.
41 See Oosterom-Staples, 'The Family Reunification Directive', p. 487.

control the flow of people from and into the territory it controls. Migration sees people crossing a border, so the control of migration is one of the most important aspects of state sovereignty. Before providing for EU nationals, the Internal Market and later the Common Market described EU citizens' right to leave their home state and settle in a host Member State if they satisfy several conditions. The free movement of people or labour is one of the pillars of the Internal Market; therefore, it cannot be described legally as migration. The Member States are establishing a club, the EU, whose objective is the Internal Market, which necessitates the free movement of labour, which contributes towards economic growth within the club. The members of the club are even described as EU citizens, EU citizenship being a subservient right to national citizenship but it shows that persons who are members of the club are not considered as outsiders. So, they are not migrants. Barring the exceptions by law, EU citizens have an automatic right to cross the border.

The Member States of the club decided to go beyond the bare minimum of freedom of movement for EU citizens. In 1985, purely outside the EU framework, the then West Germany, France and the Benelux decided to go further. It signed an agreement in Schengen that abolished control between its internal borders and fortified its external ones. Hence, physical controls were no longer required at the internal border. The area of the agreement resembles one unified country for travel. The removal of internal border control is compensated for by strengthening external border control. The Schengen area necessitates mutual recognition and harmonisation of certain legislation, including a common visa policy. Persons crossing from third countries into the common travel area are regulated by the migration legislation discussed in the previous section of this chapter. The Schengen Agreement became the Schengen Convention in 1990, and it was transformed from an instrument of international law outside the treaty framework into the treaty framework, that is, EC law through the Amsterdam amendments and, eventually, EU law through the Lisbon amendments.

The Amsterdam Treaty amendments explicitly recognised the link between the goal of building an area of freedom, security and justice (AFSJ) and adopting measures relating to external border control, asylum and migration. Migration policy shifted to the then first pillar until it was abolished by the Lisbon amendments of December 2009. The treaty, as amended, mentions appropriate measures with respect to border control, asylum and immigration as a correlate of the establishment of an AFSJ, conferring upon the EC the exclusive right of initiative on border checks, asylum and immigration. In addition, it recognised the full legislative powers of the European Parliament and the jurisdiction of the CJEU. The ordinary legislative procedure (formerly co-decision) is established through Article 77(2) TFEU for measures within this area. Furthermore, in Article 78(3) TFEU, the treaty provides for 'solidarity measures' with Member States when they are confronted with an exceptional flow of migrants upon a decision of

the Council and consultation of the European Parliament, and proclaims solidarity and 'burden sharing' between Member States as a general principle in issues of border checks, asylum and immigration.

Despite this, the communitaristion of the AFSJ policies with the Lisbon amendments did not produce a true supranational governance of border management. The role of intergovernmental institutions remains important. The role of the European Council in setting the agenda is still very much there, while the Council of the European Union (formerly the Council of Ministers) works on consensus. The informal meetings of JHA counsellors play a paramount role in consensus building. Suppose supranationalism does not occur at the decision-making or operational levels. In that case, Member States remain the actors in charge of border management regarding individual cases and the actual border management. Bodies at the European level, such as the Intergovernmental Standing Committee on Internal Security (Art. 71 TFEU), have a coordinating role rather than the mandate to direct the work of national security agencies. The role of the EU has rather been one of capacity building, whereby it creates new European actors and assigns power to them, either in parallel or sometimes in competition with the national authorities. This is the case with FRONTEX, EASO (the European Asylum Office), the European Border and Coast Guard and the development of border management technologies such as the Schengen Information System. To sum up, despite the development of supranational elements, the EU border regime remains differentiated and fragmented, combining intergovermentalism and suprnationalism, and has not evolved in a federal-like form.

Schengen expanded not only in becoming EU law but also in the territory. At the time of writing, in January 2024, even Bulgaria and Romania will become members as far as non-land borders are concerned and full membership will materialise very soon. However, within this context, from a supposedly secured external border, one can observe that the EU seeks cooperation and association with third countries to help it manage the external border, mainly for migration purposes. This brings about the notion of the externalisation of border controls.

Confalonieri[42] argues that there is fuzziness in the EU biopolitical border, which does not coincide with the EU territorial border. Secondly, the distinction between the EU's domestic and foreign policies is blurring. Thirdly, the externalisation of border controls has exasperated the tension between effectiveness in border management and compliance with the EU human rights regime. The EU has faced criticism for

42 Confalonieri, M.A., 'The Borders of Schengen and Their Functions', in Calabro A.R (ed.), *Borders, Migration and Globalisation*, Routledge, London, 2022. P. 114

keeping undesired migrants at its periphery over respect for human rights by third countries have been formulated by NGOs and international organisations. Finally, the externalisation of migration control raises problems of democratic accountability since EU citizens are insulated from border-related violence used in their name by non-EU countries' authorities. The predominance of the security paradigm is a persistent feature of the EU's migration policy. Since the EU's migration policy's inception, migration has been approached as a 'security threat'. This framing of migration has marginalised competitive frames focusing on human rights or the economic function of migrant labour. The association of migration with other security threats implies the redefinition of Europe's external threat. After communism, immigration is perceived to be a destabilising factor of potentially destructive proportions.

The security paradigm dominates migration policy, and the common metaphor of 'Fortress Europe' does not capture its complexity. It contrasts with policies of openness to achieve economic desirability. Sometimes, the concept of a 'gated community' is used to accept only the wanted migrants. This is illustrated by the blue card (Directive 2009/50/EC) and the scientific Visa Directive (2005/71/EC). The relationship between humanitarian and securitised borders is complex. It relates to the fundamental control of humanitarian migrants' lives, which are put at risk because of the closing of channels for legal and migration. The next section shows that courts monitor, sanction and influence policies. Far from being taken for granted, the security approach starts as an object of institutional, political and moral disputes.

From the aforementioned, one can observe that some EU policies have shifted towards the externalisation of the border. The matter has become even more politicised. Intergovernmentalism proved dramatically ineffective during the refugee crisis with the de facto collapse of the Dublin system and the failure of burden-sharing capital due to the lack of humanitarian channels for refugees and the absence of a common migration policy. This led to evermore risky roots, producing permanent humanitarian emergencies at the borders. The externalisation of border control in third countries implies an acceptable shortcoming in compliance with international humanitarian norms; furthermore, it risks undermining the role of the EU as a normative power within the international context and in its relationship with neighbouring countries.

2.4 Externalisation of the EU Migration Policy

To control the ever increasing number of migrants at the borders, many Member States, including Italy, have put into practice methods of repression and deterrence to stem arrivals. This practice may consist of criminalisation of irregular migrants, separation of family members, poor reception conditions, reduction of procedural safeguards to

prolong the process to determine the status and expurgated returns where possible. This also includes fences, walls and, above all, the externalisation of border control.[43] One can argue that the externalisation of migration border controls is no longer a novelty but a widespread practice at the European level. This happens even though the EU has implemented various strategies to strengthen and control the external border.

One of the core concerns of externalisation is that they risk creating legal black holes, as one could learn from Australian and US border control practices.[44] Externalisation can lead to infringements of migrants' rights, in particular the prohibition of torture and inhuman treatment, the principle of non-refoulment, the right to leave the country, the rights to the Betty right to seek asylum, the rights of vulnerable people such as children and the rights of effective remedies.[45] These risks are particularly likely due to the most recent evolution of this practice in Europe, caused by the proliferation of arrangements with unsafe countries such as Libya. These arrangements could potentially breach the human rights legislation shared in the next subsection. The European courts in Strasbourg and Luxembourg play an important role in balancing the externalisation of EU borders and human rights principles.

2.4.1 The European Convention on Human Rights and the European Court's Views on Externalisation

The European Court of Human Rights (ECtHR) has been trying to apply the theory of positive obligations to hold Member States responsible for human rights violations connected to acts committed by the state. According to the doctrine of positive obligations, Member States are under a due diligence obligation to do all they can to prevent human rights violations by other parties, both private and state actors. A positive obligation of prevention may also be a viable function alternative, sometimes making it easier to establish the accomplice's and state's responsibility. For example, one can refer to the International Court of Justice (ICJ)[46] Bosnian genocide case as a strong precedent regarding the possibility of overlapping functions of the two categories. In this case, the ICJ found that the Federal Republic of Yugoslavia failed to comply with its obligation to prevent genocide. The Court stated the following:

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43 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of 26 February 2018, doc. A/HRC/37/50, available at https://www.ohchr.org/Documents/Issues/tortureA_HRC_37_50_EN.pdf (accessed 30 December 2023).

44 Kneebone, S., 'The Pacific Plan: The Provision of Effective Protection', *International Journal of Refugee Law*, Vol. 18, No. 3-4, 2006, p. 696.

45 Frelick et al., 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal on the Migration and Human Security*, Vol. 4, No. 4, 2016, p. 190.

46 Para. 40.

> The first, which varies greatly from one state to another, is clearly the capacity to influence effectively the action of persons likely to commit or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of political links, as well as links of other kinds, between the authorities of that state and the main actors in the events.

The ECtHR also examines the possible overlap between the two notions, especially in case law on extraordinary renditions. In *El Marsi v. North Macedonia*,[47] the Court states that it must assess whether the treatment suffered by the applicant at Skopje airport at the hands of the special CIA rendition is computable to the respondent state seeming to assume complicity in the act of torture by agents of a foreign state sufficient to attribute the conduct of those agents to the competent state. Paragraph 211 of the judgement of the Court explicitly references active facilitation and the theory of positive obligations. It states that the respondent state must be considered directly responsible for violating the applicant's rights under this head since its agents actively facilitated the treatment and then faced taking any measures that might have been necessary in the circumstances of the case to prevent it from a caring. In another case, in 2016, *Nasr & Ghali v. Italy* (App 44883/09), in examining the allegation of violation of Article 3 of the European Convention on Human Rights (ECHR), the Court appears to be less ambiguous in identifying a possibility of the breach of a positive obligation of protection under the Convention.

Traditionally, state jurisdiction for human rights obligations was assumed to be limited to austerity. As international human rights law evolved, it is now accepted that the state jurisdiction for human rights purposes can act on two persons outside its territorial limits whenever the state exercises effective control over them, over the territory and where they are located. In *Issa v. Turkey* (App no. 31821/96), the Court said that Article 1 of the ECHR cannot be interpreted to allow a state party to perpetrate violations of the Convention on the territory of another state that it cannot perpetrate on its territory. A consistent implementation of this principle needs a functional approach to extraterritorial jurisdiction, although there may be some inconsistent interpretation in some cases, for example, in *Bankoviv v. Belgium* (App no. 52207/99). Still, each case should be examined on its own merits.

Because the concept of jurisdiction is effective control sets a high threshold, there is the risk that it may feign in some cases of externalised contours where the state does not enjoy the control but only some influence. However, in some judgements, the Court

47 Application no. 39630/09.

adopts an ocean of jurisdiction concerning two positive obligations. One may refer to the case of *Ilasco and Others v. Moldova and Russia* (App no. 48787/99) concerning Moldova's and Russia's jurisdiction. With respect to Moldova, the Court stated as follows:

> However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicant's right guaranteed by the Convention.[48]

From these snapshots of ECtHR case law, one can conclude that states' positive obligations are not exempt from the externalisation of border control.

2.4.2 The CJEU's Views on Externalisation

Regarding the externalisation of EU borders, the Luxembourg court has taken a somewhat cautious position. One can refer to the case of *X and X* as an example.[49] The case concerned a Syrian family who had come to Beirut to apply for a territorial limited Schengen visa at the Belgian Embassy because of humanitarian considerations to reach Belgium and request international protection. The CJEU ruling on a preliminary reference decided that, in substance under the Visa Code, Member States have to issue a territorial limited Schengen visa where there are substantial grounds to believe that the refusal to issue the document will have the direct consequences of exposing persons to torture or inhuman or degrading treatment. In its judgement, the Court, although it acknowledged that the applicants in the main proceedings were facing the risk of being subjected to inhuman and degrading treatment, did not pronounce itself on the merits. It stated that the application was outside the scope of the Visa Code. This is because, in the Court's view, even if formally grounded in Article 25 of the Visa Code, the application, in reality, was submitted to apply for a final evaluation in Belgium immediately upon arrival in that Member State and, therefore, to be granted a residence permit with the creator validity not limited to 90 days. Consequently, the Court inferred that the provisions of the Charter, in particular Articles 4 and 18, refer to the Belgian Court's question and do not apply. An application for international protection, which means staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of the Court and that EU law currently stands solely within the scope of national law.

48 Para. 331.
49 Case C-638/16 PPU.

One may argue that this interpretation protects Dublin Regulation 604/2013. Advocate General Mengozzy, at the beginning of his opinion in this case, argued that the Member States must not escape the responsibilities that follow from EU law when borders are closing and walls are being built. In the first case, the Belgian Courts are concerned about the consequences of a different interpretation of Article 25 of the Visa Code because this would entertain legal access irrespective of the rules established under the Dublin system. Thus, from the aforementioned, while the legal position is not very clear, one can see that the CJEU somewhat has a distance in striking down the externalisation of border control completely. One might argue that it could be regretful that a more courageous approach of Luxembourg might have offered a concrete possibility to a friend the supremacy of Human Rights with regard to the externalisation of border control, giving the extraterritorial applicability of the European Charter of fundamental rights of the European Union.

2.5 Conclusion

Migration has long been a very controversial subject in Europe, especially after the fall of the Iron Curtain. While the EU does not have full competence to deal with the matter, it is often seen as facilitating illegal migration. As discussed in the first part of this chapter, the EU has a considerable volume of legislation dealing with migration. While facilitating the flow of people within itself, the EU strengthens its external border, but this is not enough to control illegal migration. Several Member States have resorted to policies that involve the externalisation of border control in those countries. This has inadvertently brought up human rights issues, which will continue to be tackled by the European courts of Strasbourg and Luxembourg. It is of paramount importance to find a possible remedy to situations in which the jurisdictional threshold of effective control is difficult to reach and to find a way to hold outsourcing states responsible when they operate under the motto 'out of sight, out of mind'. The latter tends to make refugees and migrants, as well as the violation of their rights, invisible. The positive obligation of states to protect human rights remains, and one awaits how, in the long term, the European courts will continue to balance Member States' international human rights obligations and the need to externalise border control. The issue of the externalisation of border control is far from closed, and one looks for words for both judicial and legislative development in this regard.

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