



ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

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THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES: RECONCILING THE IRRECONCILABLE? AN INTRODUCTION TO THE *SPECIAL SECTION*

In recent years, the European Union (EU) has substantially intensified its activities directed at externalising the management of immigration, asylum and borders towards the territories of third countries. These actions aim at reducing the pressure on EU Member States located at the Union's external borders and, pursuant to official statements, preventing migrants, asylum seekers and refugees from risking their lives when embarking on journeys to reach European soil. This multi-faceted process of externalisation of migration control comes together with an increased securitisation of the aims and means, including even military ones; alongside the more intense involvement of EU Agencies with extended mandates and the constant informalisation of instruments of cooperation with third countries. The emergence and incessant development of this specific model of EU migration policy, which appears to be consolidated under the New Pact on Migration and Asylum,¹ is often realised at the expense of democratic scrutiny, judicial supervision, transparency and, most importantly, the protection of human rights, also entailing unprecedented challenges for the legitimacy of the EU in its international projection.

There is a common agreement between the Member States on the need to further enhance international cooperation with third countries of origin and transit in order to more effectively face current challenges in the area of migration. The European Council, in its Conclusions of 9-10 February 2023, has reiterated the longstanding call for an intensified EU engagement in the external dimension of migration “with the objective of strengthening [third countries] capacity for border management, preventing irregular flows, breaking the business model of smugglers, including through strategic information campaigns, and increasing returns”.² The Swedish Presidency of the Council of the EU

¹ The new Pact is composed of a Commission communication serving as the policy frame (Communication COM(2020)609 final from the Commission of 23 September 2023 on a New Pact on Migration and Asylum), and a number of legislative proposals aiming at reforming the EU *acquis* on borders, asylum and immigration.

² European Council Conclusions of 9 February 2023, para. 23.



has also called for “a true whole-of-government approach and sustained engagement, both from Member States and EU institutions and from EU agencies” to achieve results in this external dimension, “while making full use of all relevant policies, instruments and tools” in order to strengthen cooperation with partner countries.³ As a result of the limited progress in the political negotiations of the different legislative proposals included in the New Pact on Migration and Asylum, it seems that the EU and the Member States are once more seeking solutions externally to the challenges raised by the management of migration. Cooperation with third countries, an essential element of any coherent and effective migration policy, appears focused on advancing EU’s own interests and thus subordinated to the objectives of alleviating pressure on its external borders and reception capacities, preventing, as close as possible to the point of departure, irregular arrivals to Member States’ territories, ensuring effective returns and transferring the burden of protection responsibilities.

The aim of the present *Special Section* is to assess the implications of the externalisation of EU migration policies for the EU constitutional principles and values, and to take stock of the latest developments in different concrete policy areas. Particular attention is devoted to analyse compliance of externalisation practices with the requirements imposed by the EU constitutional framework, specifically with the principles and values that should guide Union’s external conduct in this area. As per the origins of this exercise, a joint webinar was organized in collaboration with the European Society of International Law Interest Group ‘The EU as a Global Actor’ and the European Papers Jean Monnet Network on 10 June 2021,⁴ under the coordination of Prof. Juan Santos Vara (University of Salamanca), Prof. Paula García Andrade (Universidad Pontificia Comillas - ICADE) and Dr. Tamás Molnár (EU Agency for Fundamental Rights and the Corvinus University of Budapest). The workshop was the beginning of a discussion and writing process that led to the publication of this *Special Section*. The latest round of revision took place in October 2023. We would like to sincerely thank the anonymous reviewers for the time devoted to thoroughly review the whole Section and the valuable comments made on the different contributions. The usual disclaimer applies.

The first two papers deal with the challenges arising from the externalization process to the rule of law, democracy and fundamental rights in the EU. One of the key experts in this area, Prof. Tineke Strik, sets the stage by reflecting on the way the Union values and principles are guiding the external dimension of EU’s asylum and migration policy. She argues that there are ample reasons to reverse the current policy trend to keep the external dimension of asylum and migration policy outside the scope of the EU Treaties and its safeguards for democracy, fundamental rights and other key EU principles. Strik contrasts the increasing pressure on rule of law compliance in Member States with the

³ Council of the European Union, “Asylum and migration: external and internal dimensions”, 27 February 2023, 6748/23.

⁴ Project Reference: 610707-EPP-1-2019-1-ES-EPPJMO-NETWORK.

failure to respect the institutional balance and fundamental rights protection in the EU decision-making on external cooperation on migration. According to Strik, the current externalisation measures put practically all objectives of the EU external policy as enshrined in art. 21 TEU at risk. This paper is followed by a contribution discussing the informalisation of EU readmission policy. Eleonora Frasca and Emanuela Roman argue that informality has always coexisted with formalisation efforts at the EU level, but the most recent wave of informalisation of EU readmission policy emerged as a consequence of the search for increased effectiveness in EU return policy. In exploring the legal nature of informal agreements, their contribution focuses on the interplay between informal agreements and conditionality and the use of informal agreements to return or push back asylum seekers. Frasca and Roman submit that the EU seeks to provide a legally-sound legitimacy to the externalisation of protection responsibilities by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum into informal migration agreements and arrangements.

A second set of papers addresses the externalisation of migration controls from the perspectives of the specific means used by the EU and its Member States, such as recourse to other external policies or the increasing involvement of EU agencies in these processes, as well as the legal consequences of externalisation in terms of EU actors' international responsibility when cooperation with third countries entails fundamental rights violations. First, Prof. Paula García Andrade analyses the implications of resorting to the means and instruments of the Common Foreign and Security Policy (CFSP) and the Common Security and Defense Policy (CSDP) to attain migration objectives. The aim of her contribution is to review the legal implications of the recourse to the CFSP instead of the Area of Freedom, Security and Justice (AFSJ) instruments for migration purposes addressing and comparing the competence question, as well as the institutional consequences in terms of decision-making and judicial protection in both policies. She then focuses on the Court of Justice of the EU (CJEU) doctrine on the choice of the appropriate legal basis and its "centre of gravity test" in order to clarify how its criteria apply to the linkages between CFSP and migration policy. García Andrade considers that accepting the instrumental dimension of the CFSP means that migration and internal security concerns appear to be preponderant over CFSP objectives and thus the "centre of gravity test" would solve the conflict in favour of the TFEU and the AFSJ integrated policies.

The question of how the European Border and Coast Guard Agency, Frontex contributes to the current process of externalisation of EU migration policies is central in the contribution by Prof. Juan Santos Vara. He argues that the deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the applicable legal regime and the delimitation of responsibilities between the different actors involved in these extraterritorial operations. Santos Vara considers that the allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that clarifying the role of Frontex in any wrongdoing that will happen in

the context of operations implemented in the territory of third countries will not be an easy task. In these extraterritorial scenarios, it will be difficult to sustain in the future that the responsibility as regards infringements of fundamental rights lies exclusively with third states. According to Santos Vara, it should be further explored how to develop adequate mechanisms and safeguards for ensuring the protection of fundamental rights in the case of operations implemented in the territory of third countries.

Finally, Tamás Molnár focuses his contribution on the EU Member States' responsibility under international law for human rights breaches when cooperating with third countries on migration. His piece is set against the backdrop that practically speaking it is still the Member States that most of the time implement EU law extraterritorially. He analyses selected extraterritorial, cooperative border management scenarios, which are in the "grey zone" in terms of State responsibility under international law from the perspective of various human rights violations. He argues that more legal clarity is needed in this regard, especially when EU Member States "aid or assist" third countries in their efforts to manage migration flows. Molnár submits that it is still debated whether related conduct entails State responsibility in such situations, which involve activities carried out under the umbrella of international cooperation, but with the aim of preventing migrants from reaching the EU. Nevertheless, he posits that complicity of EU Member States – notably in the form of "aiding or assisting" – on the basis of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)⁵ can be established under certain circumstances.

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⁵ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (2001) UN Doc A/RES/56/83 (12 December 2001) as the UN General Assembly took note of the articles.

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