ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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THE EXTERNAL DIMENSION OF THE EU IMMIGRATION AND ASYLUM POLICIES BEFORE THE COURT OF JUSTICE

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ABSTRACT: This *Article* analyses the case-law of the European Court of Justice (ECJ) relating to the external dimension of the EU immigration and asylum policies. Its aim is to search for the rationale behind the figures and types of actions brought before the Court in this field, as well as to infer from this case-law the inputs provided by Luxembourg to the design, development and implementation of EU external action on immigration and asylum. The role played by the ECJ in this external dimension will therefore be assessed, by verifying whether it can be ascribed to its usual role within the internal dimension of EU immigration and asylum policies or is rather closer to its case-law on EU external relations in general.

KEYWORDS: ECJ case law – external dimension – EU immigration and asylum policies – EU external relations law – EU-Turkey Statement – development cooperation.

I. INTRODUCTION

It is widely accepted that the case-law of the European Court of Justice (ECJ) has significantly contributed to the conformation of both EU external relations law and the EU area

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of freedom, security and justice (AFSJ).[1] However, the pronouncements of the Court regarding the external dimension of EU immigration and asylum policies, as a conjunction of these two sectors of EU law, seem to present a more limited impact. In this particular field, a reduced number of cases have reached the ECJ, which has been confronted in recent years with a variety of issues related, for instance, to the adequate decision-making procedures applicable to the externalisation of sea border controls;[2] the delimitation between readmission and development policies in EU external action;[3] the issuance of humanitarian visas by Member States,[4] or the use of international soft law tools for migration cooperation purposes.[5] To these scattered and diverse cases, we may add the much more solid and abundant jurisprudence of the Court regarding the interpretation of the migration-related provisions contained in association agreements and their impact on the status of third-country nationals' rights.[6]

The acquisition of complete jurisdiction over the AFSJ via the last reform of the Treaties, the rather recent proliferation of legal developments in this external dimension and some of their particularities might be among the reasons explaining the modest number of proceedings before the Court. From a substantive perspective, the content of some of these judgments might be disconcerting, as it seems to diverge from the traditional position of the ECJ within the AFSJ as an EU institution that tends to favor European integration and ensure human rights protection. At the same time however, these judgments

[1] See, among others, on EU external relations, M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges* (Hart Publishing 2014); M Cremona (ed.), *Structural Principles of EU External Relations Law* (Hart Publishing 2018); and regarding the AFSJ in general, K Lenaerts 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) ICLQ 255; V Hatzopoulos, 'With or Without you... Judging Politically in the Field of Area of Freedom, Security and Justice' (2008) ELR 44; H Labayle, 'Architecte ou Spectatrice? La Cour de Justice de l'Union dans l'Espace de Liberté, Sécurité et Justice' (2006) RTDEur 1.

[2] Case C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516.

[3] Case C-377/12 *Commission v Council (PCA with the Philippines)* ECLI:EU:C:2014:1903.

[4] Case C-638/16 *X and X v État belge* ECLI:EU:C:2017:173.

[5] Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T-193/16 *NG v European Council* ECLI:EU:T:2017:129; and case T-257/16 *NM v European Council* ECLI:EU:T:2017:130.

[6] Although their aim is to govern the privileged relationship of the Union and its Member States with a particular country "in all the fields covered by the Treaties" (case C-12/86 *Demirel* ECLI:EU:C:1987:400), association agreements can be considered, in my view, an instrument *lato sensu* of the external dimension of EU migration policy. As they usually contain clauses related to access to employment, residence and social security of nationals from the associated country, readmission clauses, as well as additional provisions regarding commitments on broader migration dialogues and cooperation, we can affirm the EU is conducting a part of its external action on migration through these global agreements. See, among others, S Peers, 'EU Migration Law and Association Agreements' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (Vubpress 2008) 53–87; K Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill/Nijhoff 2014); P García Andrade, *La acción exterior de la Unión Europea en materia migratoria: un problema de reparto de competencias* (Tirant lo Blanch 2015).

may also be a sign of the Court's reluctance to pronounce itself on political choices, keeping rather in line with its EU external relations case-law.

This *Article* will therefore attempt to analyse and categorise the judgments of the ECJ relating to the developments of the external dimension of the EU immigration and asylum policies, comprising, for this purpose, both external instruments of cooperation with third countries and internal instruments having an externalisation purpose. Through this exercise, I will firstly aim at searching for the rationale behind the figures and types of actions brought before the Court in this field (section II). I will secondly attempt to extract from the content of ECJ case-law the inputs provided by Luxembourg to the design, development, and implementation of the external dimension of EU immigration and asylum policies and thus to its constitutional framing (section III). Bearing in mind its mission of ensuring that, in the interpretation and application of the Treaties, the law is observed,[7] the role the ECJ plays in this external dimension will be assessed. This will be done by verifying whether it can be ascribed to its usual role within the internal dimension of these policies or is rather closer to its case-law on EU external relations in general (section IV).

II. Quantitative analysis and scope of judicial competence in the external dimension of EU immigration and asylum policies

After undertaking an empirical survey of ECJ case-law, the first observation to make is that only a very limited number of cases have reached the Court as regards to issues pertaining to the external dimension of EU immigration and asylum policies. Out of the 84 judgments delivered in the period 2018-2020 in relation to immigration and asylum policies, none of them concerned the EU external action or its instruments of externalisation,[8] with the sole exception of the appeal on the EU-Turkey Statement rejected by the Court of Justice.[9] Cases regarding migration-related provisions of association agreements are however not included in this calculation. Out of 13 cases on association agreements decided in the period 2018-2020, more than 50 per cent of them dealt with migration-related issues, such as family reunification and social security of migrant workers, and all the seven cases addressed the interpretation and implementation of the Association Agreement with Turkey.[10]

If we examine the types of legal actions with which the ECJ was confronted in these cases, most of them concerned annulment actions introduced under art. 263 TFEU,

[7] Art. 19 TEU.

[8] From the total number of pronouncements delivered by the ECJ on immigration and asylum law since the 90s (around 190 approximately), only eight concern its external dimension *stricto sensu*.

[9] Joined cases C-208/17 P to C-210/17 P *NF and others v European Council* ECLI:EU:C:2018:705.

[10] See, *e.g.*, case C-70/18 *A, B, P* ECLI:EU:C:2019:823; case C-677/17 *Çoban* ECLI:EU:C:2019:408; case C-123/17 *Yön* ECLI:EU:C:2018:632.

against decisions to conclude international agreements on behalf of the EU[11] or arrangements,[12] decisions on the EU position to be defended within the organs set up by an international agreement,[13] or internal acts with externalisation effects.[14] As far as legal standing is concerned, applications were filed mainly by EU institutions, and also by Member States and private parties, albeit to a lesser extent.

A few judgments respond to preliminary references, usually when the cases relate to EU secondary legislation with extraterritorial or externalisation effects.[15] Preliminary rulings are of course the main legal proceeding through which the ECJ has had the opportunity to develop its much more solid jurisprudence regarding the interpretation of association agreements and their impact on the status of migrants' rights.[16] The fact that preliminary references on the migration provisions of association agreements are numerous in contrast to the limited number of preliminary questions regarding the specific instruments of the external dimension of EU migration policy might be explained by the scope of the Court's judicial competences on the AFSJ.

Initial procedural limitations were imposed on the ECJ's jurisdiction under former Title IV of the EC Treaty, as preliminary references on interpretation and validity could only be raised, according to former art. 68 EC Treaty, by courts or tribunals against whose decisions no judicial remedy was allowed, thus discarding references by lower instance courts.[17] Moreover, the request for urgent preliminary ruling procedures, created for the AFSJ in 2008,[18] was also restricted, quite paradoxically, to last instance courts.[19] The Lisbon Treaty

[11] E.g. *Commission v Council (PCA with the Philippines)* cit.

[12] On the EU-Turkey Statement, *NF v European Council* cit.; *NG v European Council* cit.; and *NM v European Council* cit.

[13] Case C-81/13 *United Kingdom v Council* ECLI:EU:C:2014:2449.

[14] On Council Decision 2010/252/EU supplementing the Schengen Borders Code as regards the surveillance of the sea external borders, *European Parliament v Council* cit.; on a Commission Decision approving a project on the security of borders of Philippines, case C-403/05 *European Parliament v Council (Philippines Border Management Project)* ECLI:EU:C:2007:624; on a Commission Decision confirming the refusal to grant access to documents regarding the Statement with Turkey of 18 March 2016, case T-852/16 *Access info Europe v Commission* ECLI:EU:T:2018:71.

[15] *E.g.* on Regulation 810/2009 establishing the Visa Code, *X and X* cit.; case C-403/16 *El Hassani* ECLI:EU:C:2017:960.

[16] S Peers, 'EU Migration Law and Association Agreements' cit. and K Eisele, *The External Dimension of the EU's Migration Policy* cit.

[17] Limitations on former Title VI TEU on police and judicial cooperation on criminal matters are not addressed in this paper.

[18] Decision 2008/79/EC of the Council of 20 December 2007 amending the Protocol on the Statute of the Court of Justice. From the first one decided in July 2008 (case C-195/08 PPU *Rinau* ECLI:EU:C:2008:406), 64 urgent procedures have been resolved by the ECJ up to now; only 14 of them related to borders, asylum and immigration.

[19] K Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' cit. 264; H Labayle and P De Bruycker, 'Impact de la jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' (2012) Étude Parlement Européen 72-74.

suppressed these limitations: as of 1 December 2009, "normalized" jurisdiction of the Court on the AFSJ, and more particularly on immigration and asylum policies, has applied. In addition, the AFSJ has also benefitted from other general improvements on judicial protection brought about by the Lisbon reform.[20]

Quite surprisingly, not a single infringement procedure against a Member State has reached the Court of Justice as far as this external dimension is concerned. Since 2004, out of 30 (closed) cases initiated within the immigration and asylum policies of the AFSJ under art. 258 TFEU, none of them relates to their external dimension.[21] The only exception would lie in the infringement procedure brought against the Netherlands on the charges required for obtaining or renewing residence permits by Turkish nationals, considered by the Court as an infringement of the Ankara Agreement, its Additional Protocol and Decision 1/80 of its Association Council.[22] It should be recalled that Member States must comply with the provisions of any international agreement concluded by the Union, as they, albeit not parties to these agreements under international law unless concluded in the mixed form, fulfil an obligation under EU law to respect and implement those agreements.[23] In addition to abiding by the commitments contained in international agreements concluded by the Union, Member States must respect the EU rules on the distribution of external competences. This includes, for instance, the obligation to refrain from negotiating a bilateral agreement at the national level when the Commission has received a mandate to negotiate an agreement with the same substantive scope at the supranational level.[24] Some infringements of the so-called "mandate theory" and the principle of sincere cooperation in negotiating readmission can be identified.[25] However, as far as this external dimension is concerned, we

[20] See V Hatzopoulos, 'Casual but Smart: The Court's New Clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty' (College of Europe Research Papers in Law 2-2008). We refer to the extension of the legal standing of private persons in the annulment action, by allowing to bring this procedure against regulatory acts which are of direct concern to them and do not entail implementing measures (art. 263(4) TFEU); the extension of the passive legitimation to acts from the European Council and EU Agencies (art. 263(1) TFEU); or the recognition of the right to an effective remedy in art. 47 of the EU Charter on Fundamental Rights.

[21] We must however relativise this data, as the unwillingness of the Commission to start infringement procedures appears to be a general feature of EU external relations as a whole. According to information provided in Curia, only 36 infringement procedures have reached the ECJ on external relations issues from the start of the integration process.

[22] Case C-92/07 *Commission v Netherlands* ECLI:EU:C:2010:228.

[23] Art. 216(2) TFEU. See P Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 301.

[24] For an examination on how Member States have respected the rules on distribution of external competences on the different dimensions of migration, see P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* cit.

[25] After the Commission received from the Council a mandate to negotiate an EURA with Russia in September 2000, Austria (2005), Greece (2004) and Italy (2006) signed bilateral readmission agreements or police cooperation agreements linked to readmission with the same country. Bilateral readmission agreements were put into force with Albania by Germany (2003) and the United Kingdom (2005), while the Commission had received its negotiating mandate in November 2002, the EURA having been signed in April

can only give account of the Commission's attempt to initiate an infringement procedure against Germany for negotiating an "Authorised Destination Status" (ADS) agreement with China at the bilateral level, in violation of the exclusive external competence of the EU on short-term visas.[26]

Together, of course, with the restricted legal standing of individuals under the annulment procedure in general EU law, other reasons also account for the limited number of cases that reach the Court concerning the external dimension of EU migration policy. For example, additional limitations apply to the judicial competence of the ECJ, especially as far as the operational aspects of this external dimension are concerned. At this point, we may think of the Court's capacity to monitor the conformity with human rights of Common Security and Defence Policy (CSDP) missions with a migration purpose, instruments that, because of their evident extraterritorial scope, might be included into the EU external action on migration *lato sensu*.[27] *A priori*, the Court lacks, according to art. 24 TEU and art. 275 TFEU, jurisdiction with respect to Treaty provisions on the Common Foregin and Security Policy (CFSP) and acts adopted pursuant thereto. The exception allowing the Court to review the legality of restrictive measures adopted by the Council against natural or legal persons is not applicable, while the ground of judicial competence aimed at monitoring respect of the mutual non-affectation clause of art. 40 TEU would not allow for the protection of individual rights.[28] However, it is true that art. 40 TEU provides precisely for the legal foundation to verify whether these missions, which, in my opinion, pursue AFSJ-migration objectives, are adequately founded on the TEU legal bases of the CSDP or whether we are instead faced with a problem of horizontal delimitation of competences.[29] In my view, the limited jurisdiction of the ECJ over this intergovernmental policy constitutes indeed an additional reason why these missions should rather be founded on the TFEU legal basis on migration. As such, had the operations been undertaken by the European Border and Coast Guard Agency (EBCG or Frontex Agency), they would have been subject to the review of legality of the ECJ under art. 263 TFEU as "acts of bodies,

2005. See P García Andrade, 'The Duty of Cooperation in the External Dimension of the EU Migration Policy' in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff 2019) 299.

[26] B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2012) 92.

[27] See, as examples, Council Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya); or Council Decision 2015/778/CFSP on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

[28] S Johansen, 'Human Rights Accountability of CSDP Missions on Migration' (8 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[29] See P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Elgar 2018) 296; P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157, 182-185.

offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". Obtaining judicial redress against the Agency's actions, including its extraterritorial operations, is legally possible,[30] and EU substantive safeguards can be considered to apply also extraterritorially.[31] Nevertheless, when border cooperation takes places in the territory of third countries, the distribution of powers, functions and responsibilities in the operations between not only Frontex and Member States' staff but also with third countries' agents appears even much more difficult to clarify.[32] In general terms, procedural difficulties related to the legal standing of individual applicants[33] or the production of legal effects of Frontex's acts vis-à-vis third parties, as well as transparency limitations also complicate the filing of legal actions by individuals against Frontex actions or omissions.[34] This therefore hinders the judicial supervision of the increasingly significant operational aspects of the external dimension of EU migration policy.

Finally, it is also important to note that the proliferation of developments of EU external action in the fields of migration and asylum has occurred quite recently. Although the political importance of the external dimension of immigration and asylum policies can be traced back to the early 90s, the first agreement specifically addressing migration – thus excluding association agreements with migration-related clauses - was only concluded in

[30] See art. 98 of the Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard (EBCG Regulation) in connection to art. 263(5) TFEU.

[31] Art. 71(3) EBCG Regulation: "The Agency and Member States shall comply with Union law, including norms and standards which form part of the Union acquis, *including where cooperation with third countries takes place on the territory of those third countries*", emphasis added.

[32] See J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* (Tirant lo Blanch 2020) 115-134; J Rijpma, 'The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?' (2016) Study for the LIBE Committee European Parliament 23-24; M Fink, 'Frontex: Human Rights Responsibility and Access to Justice' (30 April 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu. Note also that status agreements concluded by the EU with third countries simply state that "[e]ach Party shall use an existing mechanism to deal with allegations of a breach of fundamental rights committed by its staff in the exercise of their official functions in the course of an action performed under this Agreement" (Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia). The members of a team, both from the Agency and Member States' staff, enjoy immunity from the jurisdiction of the third country but this shall not exempt them from the jurisdictions of the respective home Member States.

[33] In May 2021, the first action for failure to act against Frontex was brought before the ECJ by several human rights organisations on behalf of two asylum seekers because of the Agency's failure to respect its human rights obligations during push-back activities in the Aegean Sea and its failure to suspend or terminate those operations (case T-282/21 *SS and ST v Frontex* pending). It is to be seen whether the Court accepts the applicants' legal standing for this action.

[34] See S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-Making Procedures' (TARN Working Paper 3-2020) 6-7. Also D Fernández Rojo, 'The Introduction of an Individual Complaint Mechanism Within Frontex: Two Steps Forward, One Step Back' (2016) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 225; S Carrera, L Den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability Versus Autonomy?' (2013) EJML.

2004.[35] Moreover, EU external action in the field of migration has substantially expanded and consolidated for more than a decade, through the conclusion of readmission agreements, visa facilitation and visa waiver agreements, the adoption of mobility partnerships, common agendas on migration and mobility and an important number of other *ad hoc* informal instruments of cooperation. However, in contrast, EU developments aimed at fostering cooperation with third countries on asylum matters remain scarce,[36] and are currently limited to reinforcing the protection capacities of third countries through "regional protection and development programmes" and to efforts on resettlement. This evolution in time has not however affected the ECtHR in the same way, as the difference in numbers and scope between its case-law and that of the ECJ in the field of migration and asylum is extremely noticeable to the detriment of the latter.[37]

III. Substantive inputs from the Court of Justice's case-law on the external dimension of EU immigration and asylum policies

Having assessed the ECJ case-law from a procedural perspective, focusing on quantitative aspects and on the scope of the judicial competence of the Court, this section will attempt to analyze the content of the Court's decisions in order to extract the inputs provided by Luxembourg to the design, development and implementation of the external dimension of EU immigration and asylum policies and thus to its constitutional framing.

Several threads can be identified in the ECJ case-law related to this external dimension. Perhaps one of the most prominent is the line of cases in which the ECJ has refused to adjudicate on the substance by declaring a lack of competence. Through the well-known orders delivered in *NF*, *NG* and *NM v European Council* (the EU-Turkey Statement cases),[38] the General Court (GC) declared the inadmissibility of the annulment actions filed by several asylum-seekers on the ground that the act in question, the EU-Turkey Statement of 18 March 2016,[39] was to be attributed to the Member States and not to the EU. It was therefore not a reviewable act under art. 263 TFEU. These orders and that of

[35] Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004]. With the exception of the EU-Turkey Statement, no legal action related to an instrument exclusively devoted to migration cooperation between the EU and a third country (*e.g.* readmission agreements, visas agreements...) has been brought before the Court.

[36] See, for an overview of external developments on migration and asylum, P García Andrade and I Martín, *EU Cooperation with Third Countries in the Field of Migration* (2015) Study for the LIBE Committee European Parliament.

[37] See H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' cit. 6.

[38] *NF v European Council*, *NG v European Council* and *NM v European Council* cit.

[39] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

the Court of Justice, which declared the appeal manifestly unfounded on formal reasons,[40] prevented the ECJ from ruling on the nature of this cooperation instrument, from verifying its compliance with the rule of law and institutional balance in conducting the EU's external action, as well as from monitoring the compatibility of the Statement with EU asylum and human rights law. Equally, in *X and X*, the Court replied to the preliminary reference from the Belgian *Conseil du Contentieux des Étrangers* that an application for a visa, with limited territorial validity, on humanitarian grounds submitted to the diplomatic mission of a Member State, did not fall within the scope of EU law – in this case the EU Visa Code – but solely within that of national law.[41] In doing so, the Court avoided an assessment of whether human rights obligations imposed a requirement on Member States to issue this kind of visa.

Both cases are considered, by Goldner Lang, examples of "judicial passivism", as the Court consciously chose not to decide on the substantial issues at stake by declaring a lack of jurisdiction.[42] By declaring its lack of competence, these cases may also reflect a different image of the ECJ when compared to its traditional role of ensuring the protection of individual rights which it has played in other fields of EU law.[43] Spijkerboer argues that had the Court addressed the compatibility of the EU-Turkey Statement with international and European asylum and refugee law, the Court would have been faced with two unattractive alternatives: either declaring unconformity with human rights, thus an "explosive political situation" for the Court, or interpreting refugee law standards in a narrow manner, which would be harmful for refugee protection and would undermine the Court's expansive interpretative approach, even leading to an erosion of other fields of law.[44] Nevertheless, in

[40] *NF and others v European Council* cit.

[41] *X and X v État belge* cit. paras 43-45.

[42] I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in T Cárpeta and others (eds), *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing forthcoming). In Spijkerboer's view, these judgments even reflect a bifurcation of law, through which the externalization of migration law is kept outside the scope of EU law: T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) Journal of Refugee Studies 216, 220.

[43] For the ECJ's contribution to the protection of fundamental rights in the AFSJ, see K Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' cit. For a view on the inadequate protection provided by the ECJ in the concrete fields of immigration and asylum in comparison to the contribution by the ECtHR, see H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en Matière d'asile et d'immigration' cit. Nonetheless, on the international significance of its case-law regarding the interpretation of the Geneva Convention on the Status of Refugees, see E Drywood, 'Who's In and Who's Out? The Court's Emerging Case Law on The Definition of a Refugee' (2014) CMLRev 1093.

[44] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 224.

refusing to adjudicate on substantive grounds,[45] the Court decreases the legitimacy of externalisation instruments, as legitimacy also comes with judicial supervision and human rights law.[46]

The refusal of the Court to decide on the substance of the case in *X and X*, by excluding humanitarian visa applications from the scope of EU law, also led, as a consequence, to the non-applicability of the EU Charter of Fundamental Rights.[47] However, it could be argued, as Goldner Lang does, that the Court cannot be accused of refraining from discussing the object and purpose of the claimants' applications.[48] Leboeuf also considers that, although the Court has not dealt with human rights concerns in *X and X*, it has neither dismissed them.[49] It is true that a few months later, in *El Hassani*, a preliminary ruling on the right to bring an appeal against the decision of the consulate authorities of a Member State refusing a short-term visa,[50] the Court reaffirmed that the Charter is applicable when Member States apply, even with a broad discretion and in an extraterritorial setting, the provisions of the Visa Code.[51]

Another line of case-law shows the Court's favorable attitude towards the use of development cooperation instruments for control-oriented objectives of the external dimension of the EU immigration policy, exacerbating, in my view, what constitutes a problem of horizontal division of competences. In the *Philippines Border Management Project* case and the *Partnership and Cooperation Agreement with the Philippines* case, the Court of Justice indeed interpreted the objectives of development cooperation policy so broadly as to integrate security and migration concerns therein, in opposition to the explicit aims of primary law for this EU external policy. Firstly, in the *Philippines Border Management Project* case, the Court accepted, in line with the European Consensus on Development, that security-related projects in third countries – as the one on border security management approved by the

[45] Another option for the Court would have been to declare the annulment action inadmissible for lack of legal standing of the applicants, by relying on the *Plaumann* doctrine: it would have been very difficult indeed to argue on the direct and individual affectation of the applicants by the Statement. However, a possible follow-up would have been a preliminary reference under art. 267 TFEU by a Greek judge: see T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 225. Consequently, refusing admissibility based on the nature of the act was the surest way to impede also a preliminary ruling request and thus ensure the Court's non-pronouncement on the substance of the case (I am grateful to Andrea Ott for pointing to this idea: see her analysis in A Ott, 'EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multilayered Relationship?' (2017) CLEER Papers 29).

[46] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 233.

[47] *X and X* cit. para. 45.

[48] I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' cit.

[49] L Lebouef, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration. Un défaut de constitutionnalisation?' (2019) RTDEur 55, 63.

[50] *El Hassani* cit.

[51] *Ibid*. para. 33. See L Lebouef, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration' cit. 63.

Commission decision at stake – directly contribute to their development,[52] in contrast to the view of AG Kokott, for whom an indirect link to development was deemed insufficient in that case.[53] Later, in the *PCA Philippines* case, the Court handled again a broad notion of development, encapsulating the two traditional paradigms of the migration-development synergies ("more development to less migration", as well as "better managed migration for more development").[54] However, these paradigms do not include the use of development assistance for strengthening capacities of migration control, and even less for the implementation of readmission or border management cooperation commitments. Acting in such a manner would result in a distortion of the objectives assigned to the legal basis of the development cooperation policy in the Treaties.[55] An issue of uncertainty regarding the objectives of EU external policies can certainly be observed in art. 21 TEU, since this provision does not lead to a clear correspondence between objectives and policies.[56] However, it could be argued that development cooperation is precisely an exception in this regard, as the legal basis of this policy clearly states that eradication of poverty constitutes its primary aim.[57]

Both the *EU-Turkey Statement* cases and the *PCA with the Philippines* case might also share a worrisome feature of this ECJ case-law, as these two pronouncements imply a certain departure – or its misapplication in practice – from consolidated jurisprudence of the ECJ. On the one hand, the argumentation followed in the orders of the GC in the *EU-Turkey Statement* cases would run counter to the reasoning underpinning the *ERTA* judgement, by which the Court required to first determine who was competent to conclude the ERTA agreement, and thus the legal effects of the measure in question, in order to then decide on the admissibility of the annulment action.[58] The fact that Member States' proceedings dealt with the negotiations of the ERTA agreement, which fell into an EC exclusive competence,[59] implied that those proceedings had legal effects on the relations between the

[52] *Parliament v Commission (Philippines Border Management Project)* cit. para. 57: "there can be no sustainable development and eradication of poverty without peace and security".

[53] Case C-403/05 *Parliament v Commission* (*Philippines Border Management Project*) ECLI:EU:C:2007:290, Opinion of AG Kokott, paras 93 and 98.

[54] *Commission v Council (PCA with the Philippines)* cit. paras 43 and 49.

[55] We have analysed this issue in P García Andrade, 'EU External Competences in the Field of Migration' cit. 178-182. Broberg and Holdgaard show their criticism towards how the Court relies once again on the joint statement on the "European Consensus" for development and the Development Cooperation Instrument Regulation, instead of interpreting EU primary law, more particularly the terms in art. 208 TFEU which confers upon the development cooperation policy the primary objective of eradicating poverty: MP Broberg and R Holdgaard, 'Demarcating the Union's Development Cooperation Policy After Lisbon: Commission v. Council (Philippines PCFA)' (2015) CMLRev 547, 564-566.

[56] M Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* cit. 15-32.

[57] See art. 208(1) and (2) TFEU.

[58] Case C-22/70 *Commission v Council* (*ERTA*) ECLI:EU:C:1971:32 paras 3-5.

[59] *Ibid*. paras 30-32.

Community and its Member States and on the inter-institutional relationships. More particularly, the Court focused on the content of the act and not on the intention of the authors. It highlighted how the ERTA proceedings, when settling the negotiating position aimed at adapting the agreement to Community law, could not have simply been the expression of a voluntary coordination among Member States, but it rather was a course of action binding or having effects on both the Institutions and Member States.[60] Competence analysis was therefore crucial for the annulment action to be admissible,[61] an argumentation from which the GC preferred to deviate as shown by its omission to address the competence question.[62] On the other hand, as regards the *PCA with Philippines* case, the Court upheld its famous *Portugal v Council* case-law on the use of the development cooperation legal basis for agreements covering a wide range of sectoral commitments provided that these are not so substantial that they constitute objectives distinct from those of development cooperation.[63] However, in the concrete case, the Court, after recognizing that the readmission clause of the PCA contained "specific obligations" distinct from development ones in the sense of its previous case-law,[64] indicated that this clause did not prescribe the specific way in which it would be implemented, as a fully-fledged readmission agreement would generally do.[65] Therefore, the Court surprisingly concluded that readmission commitments do not pursue different objectives from those of development cooperation, accepting an overly broad notion of development in contrast to its explicit aims in EU primary law.[66]

It can also be observed that ECJ case-law concerning the external dimension of EU migration and asylum policies appears to respond to a different logic than the one underpinning its jurisprudence on the interpretation and application of migration-related provisions of association agreements concluded by the EU with third countries. In this line of cases, the Court, when interpreting the scope of rights and obligations of nationals from associated countries as regards residence permits, equal treatment clauses on

[60] *Ibid*. paras 52-55.

[61] It is true that, in the EU-Turkey Statement cases, the GC would nevertheless encounter the obstacle of the lack of legal standing of the applicants, but the fact remains that it chose to ground its refusal to adjudicate on a contested argumentation related to the nature of the act.

[62] See also T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 225, as well as E Cannizzaro, 'Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council' (European Forum Insight of 15 March 2017) European Papers www.europeanpapers.eu 251-257. We have analysed the competence consequences of the refusal to accept the Union's authorship of the EU-Turkey Statement in P García Andrade, 'EU External Competences in the Field of Migration' cit. 194-196.

[63] Case C-268/94 *Portuguese Republic v Council* ECLI:EU:C:1996:461.

[64] *Commission v Council (PCA with the Philippines)* cit. para. 57.

[65] *Ibid*. paras 58-59.

[66] The Court would have been confusing, in my view, the scope of obligations in the agreement and their self-executing character. Only the first element is relevant for this aspect of the doctrine on the correct choice of the legal basis.

working conditions, or social security coordination, has usually ensured, with certain nuances, the protection of individual rights of migrants and their families.[67] This means that paradoxically the ECJ seems to be exercising a more protective role over certain aspects of legal migration, the less developed dimension of EU migration cooperation with partner countries, while leaving more political discretion to EU institutions and Member States in its control-oriented aspects.

IV. What is the Court of Justice's role in this external dimension?

After having highlighted some of the substantive inputs of this case-law, we should inquire into the possible explanations for these inputs, and whether the attitude and position adopted by the ECJ regarding the external dimension of the EU migration and asylum policies is aligned to, or rather differs from, the role played by the Court within the internal dimension of these policies or its role in EU external relations law more generally.

The above analysis allows us to preliminarily conclude that, although it has been an extremely relevant actor both in the EU system of external relations and in the AFSJ in general, the Court nonetheless plays a quite limited or modest role in the junction of these two sectors of EU law as far as the fields of immigration and asylum are concerned. However, it is important to note, as Cremona argues, that in general external action, the Court influences the content of the policy to a lesser extent than it does with regard to internal policies, and is rather more inclined to operate on the institutional architecture and the applicable legal limits to EU external action.[68] This non-interventionist approach to the policy choices made by EU institutions in external relations is even accompanied by a strong deference towards EU political institutions to retain their policy discretion.[69]

On migration matters, this can be observed in the external dimension but could even be a defining feature of the whole policy, since in recent years the ECJ also appears to follow this non-interventionist approach with respect to policy choices in its internal dimension. As Thym notes, it was predicted that the Court would replicate in migration matters the dynamism of internal market law, thereby promoting the rights of migrants and refugees just as it did regarding the legal status of EU citizens.[70] Although the Court has advanced very important developments in the fields of migration and asylum and has framed to a

[67] See K Eisele, *The External Dimension of the EU's Migration Policy* cit.; S Peers, 'EU Migration Law and Association Agreements' cit.; S Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 417-427.

[68] M Cremona, 'A Reticent Court?' cit. 15 and 25. See also M Cremona, 'Structural Principles and their Role in EU External Relations Law' in M Cremona (ed.), *Structural Principles of EU External Relations Law* (Hart Publishing 2018) 5.

[69] *Ibid.*

[70] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) ELR 139, 140.

certain extent the Member States' margin of discretion when applying EU legislation,[71] Thym argues that the current trend leans towards treading carefully by deferring to the position of EU institutions or by granting discretion to Member States.[72] Indeed, the ECJ might be reluctant to interfere in ongoing political or legislative debates, as well as in fields in which there is uncertainty or disagreement on the political direction of the policy. Spijkerboer appears to agree on this view as regards specifically the external dimension of the policy, in which the ECJ position "is motivated by a wish not to interfere with a crucial policy field"; a justification that could be convincing, in his view, if the policy was succeeding.[73]

This attitude of the Court of non-interference in policy choices could explain its position in the *PCA Philippines* case, relying so closely on the political choices made in secondary legislation and political documents – unfortunately against the Treaties –; and probably in *X and X* too, in which an eventual decision requiring Member States to issue humanitarian visas on the basis of the Visa Code would have amounted to a political decision corresponding to the role of political institutions of the EU and not to the Court.[74]

In other examples of EU external relations case-law since ERTA, the Court has also been "showing itself aware of the political realities of international negotiations",[75] a reason that might justify the refusal to annul a Council decision of conclusion in a given case or explain the preservation of the effects of an annulled decision until the adoption of the replacing measure. The Court usually shows this attitude towards agreements whose content would not vary greatly in case the act of conclusion were annulled, that is, when annulment grounds concern the powers of the institutions and not other substantive violations of the Treaties.[76] Consequently, if the aim of preserving the outcome of international negotiations or ensuring the effectiveness of the instrument might explain the Court's attitude, I do not think however this motive might justify its position in the *EU-Turkey Statement* cases, as the refusal to admit the annulment action precisely avoids an examination of the substantive conformity of the Statement with EU asylum law and human rights obligations.

It is true that, in the external relations sphere, the Court has, instead of influencing policy content, played a much more relevant and "activist" role in defining the scope and nature of EU external competences, in specifying the legal effects of international obligations and more generally the status of international law within the EU legal order, as well as in setting the contours of the institutional balance in conducting external affairs. More

[71] See for case-law developments the analysis in H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' cit.

[72] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 140.

[73] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 227.

[74] See I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' cit. and T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 227.

[75] M Cremona, 'A Reticent Court?' cit. 26.

[76] See, for instance, case C-660/13 *Council v Commission* (*Swiss MoU case*) ECLI:EU:C:2016:616 para. 51.

particularly, the ECJ has had a tremendous influence in shaping the definition and peculiarities of EU external competences in most of the policy fields of the EU external action. However, in opposition to judicial cooperation in civil matters as another component of the AFSJ,[77] not a single pronouncement has been issued up to now by the Court as regards EU external competences on migration and asylum, even if the contours of their existence and mostly their nature in the different fields of migration policy are far from being straight-forward.[78]

Its traditional inclination to operate within the institutional architecture of EU external relations law cannot explain the ECJ's position in the *EU-Turkey Statement* cases either, since, as argued above, the ECJ departed here from the sound legal argumentation previously developed in its ERTA judgment, and opted for denying EU intervention instead of clearly setting limits for the European Council to step into the making of external action.[79] The protection of the principle of institutional balance has therefore not been ensured.[80]

It is also important to note, in my view, that a "passive Court" in the sense given by Goldner Lang might just be a reflection of other institutions' passivism. We could firstly think of the European Parliament, which has not shown an intensive willingness to bring certain legal and/or political developments of this external dimension before the ECJ. Its attitude towards the procedure for the adoption of the *EU-Turkey Statement* and the absence of any legal action brought before the Court is certainly in contrast with previous cases. In case C-355/10 *European Parliament v Council*, the Court of Justice decided to annul Council Decision 2010/252 supplementing the Schengen Borders Code as regards the surveillance of sea external borders within operational cooperation coordinated by Fron-

[77] See, e.g., Opinion 1/03 *New Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ECLI:EU:C:2006:81; case C-533/08 *TNT Express Nederland BV* ECLI:EU:C:2010:243; or opinion 1/13 *Convention on the civil aspects of international child abduction* ECLI:EU:C:2014:2303.

[78] In the absence of explicit external competences, the ECJ doctrine of implied powers filled the silence of the Treaties, which continue to be of paramount significance in this area after the Lisbon Treaty only recognized an EU explicit external competence on readmission, in art. 79(3) TFEU. The codification in the Treaties of the ECJ doctrine of implied external competences, as well as of ERTA exclusivity have added confusion to an already complex jurisprudence. We have examined the existence and nature of EU external competences on migration in P García Andrade, 'EU External Competences in the Field of Migration' cit. and P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* cit.

[79] Not only the European Council cannot participate in the procedure to conclude international agreements by the EU according to art. 218 TFEU, but this institution is neither allowed to adopt non-legally binding agreements with third countries as art. 16 TEU entrusts to the Council the decision-making power in EU external relations.

[80] Even if the applicants in the EU-Turkey Statement cases lacked legal standing under the *Plaumann* doctrine, the fact that the refusal to admit the annulment action was however based on the nature of the act and therefore impeded future preliminary references shows, in my view, the ECJ's lack of will to protect this principle.

tex, as it had been adopted on the basis of implementing powers instead of as a legislative act.[81] The Court agreed with the European Parliament that rules on sea border surveillance required the adoption of political choices – such as the enforcement powers conferred on border guards and their impact on the fundamental rights of persons – which constitute essential elements of the basic legislation, the Schengen Borders Code (SBC) whose adoption must involve the EU legislature.[82] The European Parliament's concern over the democratic legitimacy of the rules on sea border surveillance clearly differs from its passivism towards the increasing trend to resort to non-legally binding instruments of cooperation whose informal nature – *a priori* – prevents this EU institution from being involved in the development of this external dimension.[83] The European Commission would also be responsible for the limited cases heard by the ECJ on the external dimension of EU migration policy, as it has shown, as argued above, an evident lack of will to bring Member States before the Court under infringement procedures.

A further argument raised by academic scholarship to explain the ECJ's position regarding the EU external action on migration interestingly points to the unease of the Court regarding the deficiencies of the constitutional framework of this external dimension.[84] It is true that EU primary law provisions governing EU external action are still ambiguous, particularly those codifying the ECJ doctrine on implied external competences (arts 216(1) and art. 3(2) TFEU) to which recourse has to be made when it comes to most of the dimensions of migration. A certain degree of uncertainty also characterizes EU external representation, which has given rise to continuous tensions among both EU institutions and Member States in the field of migration.[85] Further clarifications are still needed regarding the legal conceptualization of international soft law instruments, the inter-institutional distribution of powers applicable to their adoption, as well as the judicial scrutiny of these instruments in spite of their lack of binding effects.[86] It can also be argued that the constitutional framework on

[81] Case C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516.

[82] *Ibid*. paras 64-65 and 76-78.

[83] On the necessary involvement of the European Parliament, see T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case' (European Forum Insight of 10 October 2016) European Papers www.europeanpapers.eu 1225; and our analysis in P García Andrade, 'The Role of the European Parliament in The Adoption of Non-legally Binding Agreements With Third Countries' in J Santos Vara and S Sánchez Rodríguez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 115.

[84] L Leboeuf, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration' cit. 61. Leboeuf argues that, in *X and X* the Court did not want to move away from the territorial logic of the system, while in the Statement orders it took an attitude of withdrawal regarding the problem.

[85] M Gatti, 'Too Much Unity in The European Union's External Migration Policy?' (20 July 2018) EU Immigration and Asylum Law and Policy Blog eumigrationlawblog.eu.

[86] See RA Wessel, 'Normative Transformations in EU External Relations: the Phenomenon of "Soft" International Agreements' (2021) West European Politics 77; A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation and Challenges' (2020) YEL; A Ott, 'The "Contamination" of EU Law By Informalization? International Arrangements in EU Migration Law' (29 September 2020) Verfassungsblog

migration and asylum does not provide the same certainty and precision as its internal market counterpart,[87] and that the EU Charter, when ensuring individual rights to third-country nationals, provides a lesser degree of protection than to Union citizens.[88] In my view however, these eventual limitations and current uncertainties of the EU constitutional framework of EU external action on migration are to be overcome by the Court through the recourse to structural principles of EU external relations law.[89] The principles of conferral, sincere cooperation, institutional balance, unity in external representation, solidarity,[90] transparency and the rule of law can certainly help the Court in filling the gaps and limitations mentioned above, as it has traditionally done in EU external relations law in general. Although the Court does not intervene on substantive policy choices of this external dimension, it has a lot to say on its constitutional governance, which would allow the Union to construct a coherent external action on migration and asylum compatible with the values on which the EU is founded and that shall be promoted, upheld, and respected in its relations with the rest of the world.

V. Concluding remarks

From its initial developments in practice in the early 2000s, the external dimension of EU immigration and asylum policies has only modestly reached the ECJ from a quantitative perspective. One of the prominent reasons behind the low number of cases heard by the Court on this external dimension might relate to the limitations to its judicial competences in this area; initially applicable to the preliminary reference procedure and now still perceivable regarding the operational aspects of this external dimension partially implemented through CFSP missions and EBCG Agency's operations, especially complicating the filing of legal actions by individuals. The passivism of other EU institutions in bringing matters before the Court, as demonstrated, for instance, in the timid attitude of the

verfassungsblog.de; as well as J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* cit. 19-46.

[87] A strong contrast between freedom-enhancing prescriptions underlying the internal market and the vague description of diverse objectives on migration, asylum and border controls can be identified: D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 142.

[88] See, among others, F Ippolito, 'Migration and Asylum Cases Before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) EJML; S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill/Nijhoff 2012) 437.

[89] For the conceptualization and implications of these principles, see M Cremona (ed.), *Structural Principles in EU External Relations Law* cit.; see also M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* cit.

[90] Note that this structural principle (art. 3(5) and 21 TEU) has been additionally concretised in art. 80 TFEU as regards the asylum policy. On the external scope of this principle, see V Moreno Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) Maastricht Journal of European and Comparative Law 740.

European Parliament in this role or the unwillingness of the Commission to initiate infringement procedures against non-compliant Member States, as well as the quite recent proliferation in time of legal developments of EU external action in these fields, may also explain their limited impact in the Luxembourg case-law.

In substantive terms, the analysis of the Court's case-law on the external dimension of immigration and asylum policies does not really provide a more comforting assessment. There are cases in which the Court refuses to adjudicate on the substance because of a controversial lack of jurisdiction, or in which a certain departure from its own previous case-law can be identified. The wish not to interfere in sensitive policy options, providing ample political discretion to EU institutions and Member States or blessing a security-oriented approach to migration, even accepting a deviation of EU development policy from its objectives in primary law, are some of the features of ECJ case-law on the external aspects of migration policies. The reflected image will most likely not correspond to the one we usually have of the ECJ, a key supranational institution whose contribution to the conformation and development of the EU integration process and its legal order has been crucial, particularly as far as EU external relations and the AFSJ are concerned.

However, a more nuanced look at these traits of the Court's case-law analyzed above, in comparison to the usual role the ECJ plays within the internal dimension of migration policies, on the one hand, and on EU external relations in general, on the other, might relativize its exceptionality. In particular, the "passivist" attitude of the Court and its hands-off position regarding policy contents and objectives, may inscribe into the reasonable non-interventionist approach on policy choices which is typical of the ECJ case-law on external relations, but also a recent defining feature of its role in migration policy as a whole. At the same time however, the Court has not printed into the external dimension of migration and asylum policies its traditional external relations contribution, focused on framing the EU external action through the definition of competences, or the delimitation of the contours of institutional balance, and through other structural principles of EU external relations law of enormous political significance for a still uncertain constitutional architecture. This is, in my view, what the Court should provide to an external action on migration in which the current trends towards informalization, agencification or re-securitization are entailing serious challenges to those principles and values that must guide the international action of the Union, and which is therefore clearly in need of strong judicial supervision. After the controversial pronouncements the Court has issued regarding this external dimension of the EU migration and asylum policies, the timing seems perfect to make use, in Thym's words, of that "constitutional imagination" that its case-law is currently lacking.[91]

[91] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 153.