

## Shifting up and out: The foreign policy of European immigration control

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### Abstract

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# Shifting Up and Out: The Foreign Policy of European Immigration Control

SANDRA LAVENEX

*Traditionally a core aspect of state sovereignty, immigration control has first moved upwards to the intergovernmental sphere. It has then been brought closer to supranational governance, and is now gradually moving outwards towards the realm of EU foreign relations. This article interprets this move as the continuation of established patterns of transgovernmental cooperation in an altered geopolitical and institutional context. It explains internationalisation as a strategy of immigration ministers to increase their autonomy towards political, normative and institutional constraints on policy-making. Whereas these constraints were originally located at the national level, they are now increasingly perceived in communitarising immigration politics. The shift 'outwards' may thus be interpreted as a strategy to maximise the gains from Europeanisation while minimising the constraints resulting from deepening supranationalism. Yet this might in the long run also yield a widening of the external migration agenda, distracting it from the original focus on migration control.*

The Commission's Assessment of the Tampere Programme in June 2004 described the creation of an area of freedom, security and justice over the previous five years as 'one of the most outstanding expressions of the transition from an economic Europe to a political Europe at the service of its citizens'. The process of communitarisation of asylum and immigration policies, which was stipulated in the Treaty of Amsterdam, followed nearly ten years of transgovernmental cooperation among member states, first outside of the Treaty framework, and later under Maastricht's third pillar. It went along with the gradual strengthening of supranational procedures in these sensitive fields of domestic politics, and a widening of the substantive agenda – moving from the coordination of control to a deeper harmonisation of domestic policies. This evolution from transgovernmental coordination to supranational communitarisation has, however, not been uncontroversial, as protracted negotiations in the Council of Ministers and last-minute compromises on minimum standards show. Indeed, this difficult transition documents

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member governments' resistance to pooling authority in these core aspects of national sovereignty and identity. In strong contrast with these internal blockades, the external dimension of European asylum and immigration policies has rapidly developed into a key focus of cooperation. Taking into account the international dimension of the migration phenomenon, this cooperation seeks to engage countries of origin and transit in the control of migration flows. The result is a growing emphasis on extraterritorial control.

What explains this latest shift in European immigration policies, what are its main components, and how does this emerging foreign policy agenda relate to the internal harmonisation process? Highlighting the interplay between deepening communitarisation and widening cooperation, this account argues that the shift towards extraterritorial control is less a new phenomenon than the continuation of the transgovernmental logic of cooperation, and an escape from internal blockades. It reflects the continuity of a policy frame that emphasises the control, and, therewith, security aspect of migration. The conception of uncontrolled immigration as a societal and cultural threat and its linkage with other security issues such as organised crime, terrorism or Islamic fundamentalism blurs the distinction between internal and external security and necessarily shifts attention to the external sources of the phenomenon (Huysmans 2000; Bigo 2001; Pastore 2001). While during the 1990s the externalisation of control was strongly motivated by the fall of the 'Iron Curtain' to the East, today it is vulnerability to the EU's neighbours that propels attention beyond the territory of the Union.

The revived foreign policy agenda can thus be seen as the continuation of the established policy frame in an altered geopolitical context. Its dominance over other competing approaches, in particular what has been coined the comprehensive approach – and the contrast with reluctant harmonisation of internal policies – point at the existence of other sustaining factors. These are to be sought in the institutional configuration of cooperation and immigration ministers' efforts to preserve autonomy towards other influential actors. In this light, the search for policy solutions beyond the territory of the EU is motivated less by the search for innovative solutions than by the interest of justice and home affairs officials to increase their autonomy vis-à-vis other actors in the domestic and European policy arenas. With the hesitant but progressive realisation of supranational decision-making procedures, this concerns mainly their room for manoeuvre vis-à-vis other member states and strengthened supranational actors. Since they are not exposed to the same competitive electoral pressure as member states' governments, and have a broader mandate, supranational actors, in particular the Commission and Parliament, pursue a more comprehensive approach to migration management than the Justice and Home Affairs (JHA) Council. Whereas, internally, the move towards the Community Method of policy-making tends to intensify reluctance towards transfers of sovereignty, externally it creates an impetus for cooperation without compromising national asylum and immigration systems.

The following analysis thus interprets the externalisation of migration control as a double-edged continuation of the transgovernmental logic of cooperation: in substantive terms through the prioritisation of migration control over policy harmonisation or a comprehensive approach; and in institutional terms preserving transgovernmental forms of cooperation despite intensifying communitarisation. It first introduces the theoretical background to this interpretation which stresses the autonomy-seeking behaviour of transgovernmental networks. It then highlights the constants of extraterritorial control in early European migration and enlargement policies. It follows the analysis of their continuation in the 'new' foreign policy agenda and their interplay with reluctant communitarisation of domestic admission policies. The question whether this double-edged continuity of the transgovernmental logic of cooperation is likely to persist, finally, or whether the 'escape' to foreign policy cooperation is likely to be caught up by the broader context of Community external relations, is then addressed.

### **Internationalisation and State Autonomy**

Conventionally, international cooperation is associated with a loss of state autonomy and transfers of sovereignty. Yet internationalisation may also fulfil the opposite role of strengthening the autonomy of national governments: 'It can strengthen the executive by establishing an additional political arena which is dominated by government representatives' (Wolf 1999: 336). Government representatives gain autonomy because their action at the intergovernmental level is shielded from the pluralistic domestic arena, where they compete with other actors on the 'right' interpretation of social problems and possible policy solutions. By acting jointly at the intergovernmental level, national executives gain an information advantage over their domestic counterparts and act in the capacity of gatekeeper. Usually gathering representatives from the same ministries, intergovernmental cooperation frameworks are often relatively homogeneous, and thus favour particular policy options over others. According to this logic, the purpose of international cooperation hence is not necessarily the search for functionally superior collective policy solutions, as conventional cooperation theory would predict. The 'escape to Europe' rather results from a 'new *raison d'Etat*' (Wolf 1999, 2000), which consists in the strengthening of particular governmental actors and their preferred policy agenda over other parts of the domestic constituency, including other sections of the public bureaucracies, but also parliament, political parties or courts. In this light, 'governments are not primarily problem-solvers but strategic actors with an *a priori* interest in themselves' (Wolf 1999: 334; Koenig-Archibugi 2004).

The autonomy-generating effects of internationalisation are especially strong for democratic states, and may be particularly important in fields that

are close to their liberal core, such as migration policies. As several authors have convincingly argued, the existence of heterogeneous (organised) interests in liberal democracies and the legal rights conferred to different classes of migrants impose strict limits on the scope for domestic policy reforms – and for the attempt to reject ‘unwanted immigrants’ (Joppke 1998; see also Freeman 1995; Guiraudon and Lahav 2000; Castles 2004). Recent analyses of European cooperation in asylum and immigration matters confirm the autonomy-seeking behaviour of JHA officials acting at the European level. Highlighting the interplay between domestic politics and the developing European agenda, it was shown that the shift ‘upwards’ towards transgovernmental cooperation was motivated less by the goal of a truly supranational immigration policy. Instead, it was followed by the desire of particular sections of national bureaucracies to circumvent domestic obstacles to political reforms which resulted from the constitutional foundations of humanitarian policy frames and their defence by political parties (Lavenex 2001a), the courts and fellow ministries (Guiraudon 2000). Guiraudon aptly coins this strategy as an instance of ‘venue-shopping’ through vertical policy-making.

In European studies and international relations, this logic of ‘two-level games’ (Putnam 1988) has hitherto only been applied to the vertical relationship between domestic politics and international or European cooperation (a similar line of reasoning is akin to liberal-intergovernmentalist theorising, see Moravcsik 1998). Yet the EU is not only ‘multilevel’, it is also ‘polycentric’ (Schmitter 2003). Its specific hybrid constituency as both supranational polity and intergovernmental organisation allows this logic to be extended to horizontal relations between the communitarised arena, where the supranational ‘Community method’ of policy-making prevails, and the inter- or transgovernmental one. Whereas the former is characterised by a strong role for supranational actors in initiating (Commission), deciding (co-decision through the Parliament) and adjudicating (the European Court of Justice) binding, supranational policies, the latter centralises the policy process in the hands of national executives and usually does not produce supranational European law (Wallace 2000; Lavenex 2001b). For national governments which apprehend being overruled after the introduction of qualified majority voting (QMV) in the Council, transgovernmental cooperation has the additional advantage of preserving unanimity. This analysis of the shift towards foreign policy cooperation will thus ask how far it reflects stronger elements of transgovernmentalism than the ‘internal’ modes of policy-making, and whether it allows government representatives, in this case JHA officials, to by-pass the policy agenda of competing European actors, in particular the Commission and Parliament. If this is the case, the newest shift ‘outwards’ towards foreign policy cooperation may be interpreted as a strategy to maximise the gains from Europeanisation while minimising the constraints resulting from deepening supranationalism in these matters.

### **Extraterritorial Control as a Constant in European Migration Policies**

The 'external dimension' of EU asylum and immigration policies was officially embraced only in 1999 at the Special European Council on Justice and Home Affairs in Tampere. The Presidency conclusions stated that these concerns should be 'integrated in the definition and implementation of other Union policies and activities', including external relations. Since then, 'partnership with countries of origin' and 'stronger external action' figure prominently in the work-plan of the JHA Council. Yet European cooperation in these matters has always had an external dimension. This is reflected in early initiatives by the European Commission and the Parliament and the very different external effects of transgovernmental measures. Although presented as a question of technical adaptation to the EU *acquis*, the politics of Eastern enlargement also constitute an early element of extraterritorial control.

#### *The Comprehensive Approach of Supranational Actors*

Well before acquiring formal competence in asylum and immigration matters, the European Parliament and the Commission argued in favour of a comprehensive approach tackling admission of migrants and asylum seekers as well as the root causes of involuntary migration. As early as 1987, a Resolution on the right of asylum noted the necessity to enhance economic and political cooperation with countries of origin in order to stabilise their economies and to guarantee the protection of human rights (European Parliament 1987: §§B–E). In its first Communication on Immigration of 1991, the Commission called for the integration of migration issues into the EU's external policy (Commission 1991). These ideas were developed further in its 1994 Communication. This emphasised the need to fight the root causes of migration through the integration of asylum and immigration policies into all external policies of the Union, including development, trade, human rights, humanitarian assistance and foreign and security policy. The document also suggested the introduction of an early warning system and an Immigration Observatory for that purpose (Commission 1994). In sum, these early initiatives reflected quite well the idea of a comprehensive approach in which 'all forms of migration (legal, illegal, refugee and asylum) would be taken into account, and the full course from motives to move through to ultimate 'solutions' (integration, return or for some refugees, resettlement) would be connected' (van Selm 2002: 144). Under Maastricht's 'third pillar', however, the Commission and Parliament lacked formal competence to shape the Council's agenda and these early proposals were not pursued further. Instead, the course of transgovernmental cooperation took another direction, focusing on control of flows rather than motives to move.

*The Externalisation Approach of Transgovernmental Cooperation*

In contrast to a preventive comprehensive approach addressing the factors which lead people to leave their countries of origin, European policies focused on the repression of undesired inflows through externalisation (van der Klaauw 2002; van Selm 2002; Boswell 2003). This externalisation has also been referred to as ‘remote control’ (Zolberg 2003) and consists in shifting the locus of control further afield from the common territory. The main instruments here were the early coordination of visa policies in the Schengen group, the introduction of carrier liability, which was also already provided for in the 1990 Schengen Agreements, and, in the second half of the 1990s, the placing of national liaison officers from the home ministries at airports in countries of origin in order to check that documentation was thoroughly examined.

A second form of early externalisation was the mobilisation of third countries in the control of migration flows to Europe, mainly through the adoption of the ‘safe third country’ rule (Lavenex 1999). Already the first intergovernmental agreements, the 1990 Schengen Implementation Agreement and Dublin Convention, allowed for the application of this rule. The latter was reaffirmed in Art. 3(3) of the Council Regulation no. 343/2003 of 18 February 2003 which replaced the 1990 Dublin Convention. It allows the member states to deny examination of an asylum claim and to send back the applicant to a third country where he or she would have had the possibility to apply for asylum, provided that the state is party to basic international refugee treaties. The next step in the mobilisation of third countries into the emerging system of EU-wide cooperation was the conclusion of readmission agreements. The first such agreement was concluded in 1991 between the Schengen states and Poland. This contractual engagement of non-member states into immigration control was officially embraced in the Declaration of the Edinburgh European Council which recommended that member states ‘work for bilateral or multilateral agreements with countries of origin or transit to ensure that illegal immigrants can be returned to their home countries’ (European Council 1992: 23). Originally, the determination of a third country as safe and the concomitant conclusion of readmission agreements focused on countries neighbouring the Union, later, it was extended well beyond Europe (see below).

*Externalisation through EU Enlargement*

The demise of the Iron Curtain and the subsequent approximation of the Central and East European Countries (CEECs) to the EU were a major motor behind the developing migration policy agenda. Their geographic position on major transit routes for migrants and asylum seekers heading towards Western Europe has prompted member states early on to include them in their emerging system of migration control. As in other policy fields, the conditionality for membership has proved a powerful instrument of



foreign policy and in the promotion of strict immigration control standards beyond the territory of the member states. Enlargement politics, and in particular the decision to make adoption of the complete EU and Schengen *acquis* compulsory upon candidate countries were hence vehicles to expand the territory of immigration control beyond the circle of the member states (Lavenex 1999, 2001b; Wallace 2001; Byrne *et al.* 2002; Grabbe 2002; Jileva 2002).

Comparable dynamics are also at play with newer and remaining potential candidates for membership, Turkey and the countries from the former Yugoslavia (Kirisci 2002; Lavenex 2002). As with the CEEC, guarding the EU's borders may not always be in the immediate interest of these traditional countries of transit and immigration. The more these countries themselves start to face an immigration problem, the more they develop a genuine interest in strict policies, thus contributing further to the externalisation of immigration control.

To sum up, the 'external dimension' has always been present in EU asylum and immigration policies. In contrast to the comprehensive approach stipulated by the European Parliament and Commission, the focus of inter-governmental cooperation has been the more limited aspect of immigration control. The early involvement of so-called 'safe third countries' and later the candidates for EU membership in this cooperation has established the contours of a pan-European migration regime, in which the burden of migration control is shared with countries which were or are not (yet) members of the EU.

### **Asylum and Immigration as Community or Foreign Policy?**

The external widening of the EU migration regime was intricately tied to its internal deepening. The need to accompany migration control measures targeted at third countries with a more substantive transfer of asylum and human rights law was a major impetus for the elaboration of common minimum standards for asylum procedures and the refugee definition. The Amsterdam Treaty and the 1999 Tampere European Council paved the way for the stronger communitarisation of transgovernmental cooperation. Yet both documents already indicated the parallel pursuit of stronger external action. Another early step was the initiative of the Dutch Foreign Ministry of the same year for the creation of a High Level Working Group (HLWG) (van Selm 2002; Boswell 2003: 628–632). The HLWG was set up by the General Affairs Council in December 1998 to establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum seekers and migrants. The Tampere Presidency Conclusions put the aim of a partnership with countries of origin at the top of the policy agenda, stipulating a 'comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit'. The internal goals of establishing a common

European asylum system, and the fair treatment of third country nationals are listed in the second and third place. How have these goals materialised, and what is the relationship between the 'new' external policy agenda and internal communitarisation?

*Reluctant Communitarisation . . .*

The review of progress made under the so-called Tampere programme shows a mixed picture. To be sure, immigration and asylum policy coordination has remained high on the political agenda. The bulk of common measures have focused on combating illegal immigration and abusive asylum claims (Guild 2005). Yet an impressive number of measures have been adopted which together are sometimes presented as the nucleus of a common EU asylum system. Community instruments stipulate minimum standards on reception conditions, procedures and the conditions for qualification as a refugee or beneficiary of subsidiary protection as well as an agreement on how to decide which EU member state should be responsible for determining an asylum application. A closer look at actual decision-making processes in the Council, however, shows that many of the issues agreed in recent years were effectively already addressed in the framework of the work programme to the Maastricht Treaty of 1991 (Lavenex 2001a: 117–119). Furthermore, agreement on central aspects of policy harmonisation, such as the Directive on family reunification, or those on refugee status and status determination procedures was only achieved after protracted negotiations in the Council, forcing the Commission to re-issue proposals several times. In the field of asylum, these delays have been repeatedly criticised, since these two directives are central to the equitable application system of responsibility allocation first, since 1997, under the Dublin Convention, and now under Regulation 343/2003. The Directive on refugee status has been discussed eight times in the JHA Council since its proposal in 2001. The deadline for its adoption was postponed three times before a compromise could be found, under considerable pressure, just a few days before the end of the transition period – which coincided with accession of ten new members on 29 April 2004. Notwithstanding similar time pressure, final agreement on the second central Directive on Asylum Procedures was only found in December 2005.

Apart from harmonisation, the question of burden sharing has been a major point of contention in European cooperation (Thielemann 2003). The newest proposals on burden-sharing, which envisage establishing an EU-wide resettlement system, show how far internal agreement has become conditional on the mobilisation of third countries. In its recent Communication on 'Improving Access to Durable Solutions' the Commission explicitly links this goal to the enhancement of 'the protection capacity' of third countries in the region of origin in the sense of a global burden sharing (Commission 2004a: §8). While being justified by its possible leverage in improving participation of third countries in the management of refugee

flows, such an EU-wide resettlement scheme will function on the basis of voluntary participation only and work with targets instead of legally binding quotas (Commission 2004a: §§26, 28).

Whereas cooperation in asylum matters thus displays a complex interplay between transgovernmental cooperation, reluctant integration and the increasing mobilisation of third countries, in the field of legal immigration, member states have been even more critical of Europeanisation. Discussions on a Commission proposal for a directive on migration for employment or self-employment tabled in July 2001 were first suspended for more than a year. Opposition to the idea of common rules forced the Commission to take two steps back. In January 2005, it reformulated some of these ideas in the form of a non-binding green paper which, rather than proposing legislation, should set in place a general discussion.

It comes therefore as no surprise that the Commission, in its review of the realisation of the Tampere agenda, concludes that while ‘the successes that have been achieved are considerable’, the ‘original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus’ (Commission 2004c: 5). The institutional constraints alluded to concern mainly the requirement of unanimity for decisions in the Council. While this requirement has fallen with agreement on the two asylum directives (apart from legal economic immigration), the second obstacle may well persist in spite of facilitated decision-taking through QMV. This lack of political consensus concerns not only the shape of common measures, but also the degree of communitarisation in these sensitive policy fields (Guild 2005).

*... Versus Dynamic Extraterritorialisation*

Compared with the tedious decision-making processes in areas of internal policy harmonisation on the admission of third country nationals, the evolution of cooperation on immigration control, and, in particular, the greater involvement of sending and transit countries, has been formidable (Lavenex and Uçaver 2002, 2004). A look at the bi-annual scoreboards on the realisation of the Tampere programme shows that whereas the internal harmonisation agenda remained stable, the external dimension was extended each year to include new measures and countries. This expansion is also visible in the so-called ‘multi-presidency programmes’ on JHA external relations which the Council has been adopting since 2001.

The engagement of third countries in the control of migration flows to Europe has obvious advantages for the EU member states. If successful, it reduces the burden of control at their immediate borders and increases the chances of curtailing unwanted inflows before they reach the common territory. Apart from increasing the number of states participating in the exercise of control, this strategy of extraterritorialisation is especially attractive to liberal democratic states. As was indicated above, the reason has to be sought in the legal and pluralistic constituency of liberal democracies.

This means that once an (irregular) immigrant reaches the territory of their jurisdiction, his or her removal faces significant juridical and societal constraints. As several authors have convincingly argued, the existence of heterogeneous (organised) interests in European societies and the legal rights conferred to different classes of migrants, guarded by the independent judiciary, constrain attempts to reject 'unwanted immigrants' (Joppke 1998; see also Freeman 1995; Guiraudon and Lahav 2000; Castles 2004).

With progressing communitarisation of asylum and immigration policies, some of these liberal-democratic constraints are now replicated at the European level. True, JHA remains an area dominated by elements of intensive transgovernmentalism, and proves relatively resistant to full communitarisation (Lavenex and Wallace 2005). Yet the Community method has been strengthened over time, and not only introduces more actors into the process of policy-making, but also spurs a reorientation of the substantive agenda. As pointed out above, the main points of contention concern the narrower focus of justice and home affairs officials on control versus the broader and more liberal comprehensive agenda promoted by the Commission and, more consequentially, the Parliament. The difficult decision-making process on legal immigration or asylum just mentioned illustrates the tension between the harmonisation impetus of European actors and the reluctance of member states to bind themselves to supranational law – and the jurisdiction of the European Court of Justice (ECJ). While the introduction of QMV will facilitate decision-taking, a general lack of political will as well as the fear of being overruled is likely to prevent domestically sensitive issues being put on the European agenda. Co-decision with the European Parliament is likely to form another constraint on policy-making, if the opinions in the Parliament remain as critical towards those in the Council as they have been to date.<sup>1</sup> Furthermore, since the Treaty of Amsterdam, measures take the form of formal EC law, thus opening cooperation for judicial scrutiny by the ECJ. This will be strengthened once the European Charter of Fundamental Rights is transformed into a legally binding instrument – as foreseen by the now stalled Constitutional Treaty. Much in contrast with the restrictive agenda of JHA Ministers, the Charter is the first international treaty to include, in Art. 18, a right to asylum.

Against this background, by offering new room for manoeuvre for transgovernmental actors, external policy coordination opens the possibility of making progress without compromising sensitive domestic policies – or, as an official in the Council Secretariat put it, 'it is easier to agree on things that concern a third country than one's own'.<sup>2</sup>

### **The Widening Geography of Extraterritorial Control**

In addition to the instruments of remote control and enlargement politics highlighted above, foreign policy cooperation in the JHA area today focuses

on five groups of measures, which are spurred by intergovernmental cooperation and gradually permeate into integrated EU external relations.

As will be argued, this magnifying foreign policy agenda resumes with the transgovernmental logic of cooperation in two ways: it resumes with the traditional focus on immigration control and increases the autonomy of JHA officials vis-à-vis supranational actors and procedures. Theoretically speaking, these developments can be interpreted as a form of horizontal venue-shopping. The increase in the external dimension of the intergovernmental institutional set-up offers justice and home affairs officials a means to pursue their policy frame focused on control, while minimising the growing normative and institutional constraints on internal policy-making under the influence of communitarisation. As will be shown, Community instruments are only used selectively when they are seen to be useful in increasing leverage over the third countries in question. This might change, however, if the institutional set-up of this cooperation is widened to reflect a wider political agenda of external relations and to include a greater variety of actors both at the level of the member states and EU institutions. As will be argued in the last section of this account, the new European Neighbourhood Policy might engender such a comprehensive change.

#### *Activities Outside the EU Framework*

While the Union is only starting to implement targeted programmes in the area of external migration control, such cooperation is much more developed outside its official framework at the intergovernmental level (see also Thouez and Channac in this volume). Probably the most influential multilateral initiative promoting cooperation with regard to border security and the fight against illegal immigration to the East is the so-called Budapest Group. Launched on a German initiative in 1993, this group has evolved into a pan-European cooperation framework. The interior ministries of 40 countries as well as different international organisations participate in this forum.<sup>3</sup> After enlargement, the focus of the Budapest group has shifted eastwards towards migration control problems in the 'new neighbours' of the EU. A special working group was set up for Russia, Ukraine, and Moldova, and the inclusion of all CIS countries was decided (Budapest Group 2004).

To the south, the most important multilateral project is the so-called '5 + 5 Dialogue' for the western Mediterranean which takes place between Algeria, France, Italy, Libya, Malta, Mauritania, Morocco, Portugal, Spain and Tunisia and under the aegis of the International Organisation for Migration (IOM). Launched in 2001, this dialogue focuses on the fight against irregular migration and trafficking in human beings, but is more comprehensive than the work of the Budapest Group in so far as it also deals with questions of immigrant integration and co-development. This broader agenda, as well as the greater importance of bilateral initiatives between individual member states and North African countries are due to

long-standing relations across the Mediterranean, including migration flows. This differs from Eastern Europe which, for the period of European unification until 1989, entertained very limited contacts with EU members. This difference is also visible at the level of bilateral cooperation across the Mediterranean. Spain and Morocco started in February 2004 to conduct joint naval patrols in the Mediterranean aimed at intercepting boat migrants; and Morocco has agreed to readmit non-national sub-Saharan boat migrants under its readmission treaty with Spain. Similar activities are conducted between Italy and Tunisia and, more recently, Libya. In summer 2004, an agreement was concluded with Libya which includes, apart from modern border control equipment, also joint patrols, and the establishment of reception centres to intercept would-be immigrants and asylum seekers prior to the (perilous) crossing of the sea. The fact that Libya is neither party to the UN Geneva Convention nor has any asylum procedures in place has done little to discourage this cooperation. Conversely, the case of Morocco shows that the country's ratification of the Convention and its 1967 Protocol are no guarantee against inhuman return practices.

With an estimated two million would-be immigrants waiting for their passage to Europe in Libya, Libya's foreign minister, Muhammad Abdel-Rahman Shalgham, pointed out that 'If for you Italians illegal immigration is a problem, for us it's much more – it's an invasion' (quoted in *The Guardian*, 12 August 2004). In response, Libya has begun to police its southern borders with Chad, Niger and Sudan, with the aim of ultimately pushing the immigration frontline further south into Africa.

#### *Joint Border Patrols*

Attempts to gain the support of neighbouring countries in the joint control of the Mediterranean Sea and the new eastern borders have also proliferated at the multilateral level in the EU, where they have become coordinated in the Action Plans on illegal immigration, external borders and return policy. At the end of 2003, the Council adopted a programme of measures to combat illegal immigration across the maritime borders of the member states. Most of these measures have been defined as being of an operational nature, thereby bypassing the formal legislative procedure. These measures aim at rendering the checks in member states and third countries from which illegal migration flows originate or transit more effective and include operations in territorial waters and on the high seas. In this intergovernmental form of cooperation, implementation falls under the responsibility of the member states. They will be assisted by two centres for the coordination of the maritime borders which were created in 2004 under Italian Presidency, one in Pireaus, the other in Madrid. Through the European Agency for the Management of Operational Cooperation at the External Borders, implemented in 2005, the sea border centres become specialised branches of the Agency; this latter will also be in charge of facilitating operational

cooperation with third countries. Neither supranational nor purely inter-governmental, this agency will function as a network of seconded national experts, but financed by the Community budget. A first EU-wide 'Border Management Control' programme has already been launched with Morocco. This aims at improving the border management and combating illegal migration by the Moroccan authorities (Commission 2003b).

### *Readmission Agreements*

Apart from cooperation on border control, a focus of external migration policies has been cooperation on the removal of irregular migrants and rejected asylum seekers. In this area, the strategic use of Community resources has been most outspoken.

As pointed out above, such readmission agreements are not a fully new development since a first comparable agreement was already concluded in 1991 between the Schengen states and Poland. The agreements stipulate that the contracting parties have to take back their own nationals who have entered or stayed illegally in the other country as well as nationals of non-contracting parties or stateless persons who have illegally entered or stayed on their territory, subject to certain conditions. What changed with 'Amsterdam' is that the conclusion of formal readmission agreements outside broader association and cooperation agreements falls under Community competence (Monar 2004). Such EU-wide readmission agreements, which also cover readmission of non-nationals, have so-far been concluded with Hong Kong (2002), Macao (2003) and Sri Lanka (2003). An agreement with Albania is pending formal conclusion, and seven are currently under negotiation: with Algeria, China, Morocco, Pakistan, Russia, Turkey and Ukraine.<sup>4</sup>

A problem with the conclusion of readmission agreements is that as these 'are solely in the interest of the Community, their successful conclusion depends very much on the "leverage" at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return . . .' (Commission 2002: 23). Indeed, the difficulties in motivating countries such as Russia, Ukraine or Morocco to sign such agreements show very well the limits of an unbalanced, EU-centred approach. To respond to this challenge, the Commission has first created a new budget line (B7-667) to support 'Cooperation with third countries in the area of migration'. In 2004, this was replaced by a multi-annual financial framework for the years 2004–2008 with a total amount of €250 million (the so-called Aeneas Programme). Apart from the general goal to support third countries' efforts to improve the management of migratory flows, the Regulation stresses in particular stimulation of third countries' readiness to conclude readmission agreements, and assistance in coping with the consequences of such agreements.

The second measure to gain leverage towards third countries has been 'increasing complementarity with other Community policies in order to help achieving the Community's objectives in the field of return and readmission'

(Commission 2002: 24). This was basically achieved by linking association and cooperation agreements with migration control policies as decided in the Conclusions of the Seville European Council of June 2002. Although a Spanish–British initiative to make development aid conditional on third countries cooperating on migration control was rejected, the final conclusions did confirm a certain conditionality. Firstly, it was agreed that each future EU association or cooperation agreement should include a clause on ‘joint management of migration flows and compulsory readmission in the event of illegal immigration’. The handling of readmission clauses changed in so far as there is now an obligation to negotiate a supplementary treaty with the entire Community, not just individual member states. In addition, the EU policy is now that such clauses are mandatory: it will no longer sign any association or cooperation agreement unless the other side agrees to the standard obligations. The Seville Conclusions also decided that inadequate cooperation by a third state could hamper further development of relations with the EU, following a systematic assessment of relations with that country. And, finally, if a non-EU state has demonstrated ‘an unjustified lack of cooperation in joint management of migration flows’, according to the Council following a unanimous vote, then the Council, after ‘full use of existing Community mechanisms’, could take ‘measures or positions’ as part of the EU’s foreign policy or other policies, ‘while honouring the Union’s contractual commitments and not jeopardising development cooperation objectives’ (European Council 2002).

Whereas mobilisation of the Community budget and of the broader web of EU external relations has proved instrumental in furthering readmission policy, JHA ministers have expressed reticence about the idea of adopting a legislative text on return policy that fixes common norms, as proposed by the Commission. The European Parliament too has had a limited influence on this agenda. In its Report on the Hong Kong readmission agreement, it criticised the fact that it had not had an opportunity to deliver its opinion prior to the initialisation of the agreement. As with earlier transgovernmental cooperation, the procedure for concluding readmission agreements with third countries provides only for consultation of the European Parliament (Art. 300(3) TEC). Therefore, Jörg Monar concludes that there is now ‘a certain asymmetry between the European Parliament’s powers on internal and external measures in this domain’ (Monar 2004: 404); with co-decision only applying internally.

#### *From Remote Control to Remote Protection?*

The policy instruments discussed so far lead to an externalisation of the locus of immigration control, however, the conduct of asylum procedures and the grant of asylum remain tied to the territory of the member states. This might change with the newest proposals which foresee the processing of requests for protection outside the common territory in the region of origin



of asylum seekers. Italy's recent agreement with Libya on the establishment of a reception centre for would-be asylum seekers and irregular immigrants before they reach the Union's territory is the (preliminary) last stage in this strategy of externalisation. Other influential governments have issued similar proposals, starting with the Strategy Paper under Austrian Presidency in 1998 (Boswell 2003: 627–628) and continuing with the proposals of British Prime Minister Blair in 2003, were taken up again by German Minister of Interior Schily one year later.

The idea of reception centres contrasts with the older notion of safe havens protected by the international community which were established within regions of conflict and for a limited period of time, as applied for instance during the wars in the former Yugoslavia. It is now planned to externalise the formal asylum procedure itself by creating so-called reception centres in which asylum seekers would effectively be detained while their claims are assessed. This strategy has been applied before by the US vis-à-vis Haitian asylum-seekers on Guantánamo Bay and in Australia's 'Pacific solution' with off-shore processing centres on adjacent islands such as Nauru or Papua New Guinea.

The British, Italian and German advances have not remained unheard. The reaction of the UNHCR shows well the external effects of developments in the EU on global international organisations which are not only curtailed in their sphere of competence, but are also dependent on these states for funding and support (van der Klaauw 2002). A few days after the British proposal, the UNHCR tabled a 'three-pronged' approach which includes, inter alia, the idea of closed processing centres, albeit on EU territory, which was also the model originally favoured by the Commission (Commission 2004a). Notwithstanding these compromise offers, the majority of governments (with the exception of France and Sweden) opted for the offshore model. Already in September 2005, the Commission proposed the creation of first regional protection programmes – one in an adjacent eastern European country, and one in the Great Lakes region. The UNHCR too has relaxed its initial opposition to extraterritorial reception centres, and will cooperate with the EU in their implementation. After determination of an asylum claim in such a centre, one of three 'Durable Solutions' shall apply: repatriation to the home country (where there is no longer need for protection), local integration of refugees 'into the community of a host country' and, in cases where neither of these two options are possible, resettlement to a third state, i.e. the EU (Commission 2005a: §1).

The notion of off-shore reception centres represents a preliminary to the last step in the externalisation approach of transgovernmental cooperation. Their realisation constitutes a fundamental departure from the traditional system of refugee protection based on the individual responsibility of each asylum country. It is in a certain respect the logical extension of the system of migration control and responsibility allocation beyond the circle of 'safe third countries' through the creation of extraterritorial enclaves under

international or European rule. This legal vision of an extraterritorial 'transit' space also challenges one of the fundamental principles of the modern state which is the unity of territory and jurisdiction, or, put differently 'the institutionalization of public authority within mutually exclusive jurisdictional domains' (Ruggie 1993: 143). Persons seeking to enter the Union would be held in a 'vision of the exceptional', outside the ordinary mechanisms of judicial control and away from public scrutiny both in the potential country of asylum and in the first host country on whose territory the reception centre has been built (Noll 2003). This separation of the state that pays for, and is accountable for, an asylum claim from the state that provides the territory on which the claim is processed may be compared with the contracting-out of a fundamental human rights commitment of liberal democracies. The physical admission of asylum seekers is contracted out to less liberal and democratic third countries where the economic, social and political costs of granting refuge are seen to be relatively lower (Betts 2003).

### **The European Neighbourhood Policy: Still the Transgovernmental Logic?**

The temptation to externalise the difficulties encountered with unwanted immigrants is obvious, and may lead to a profound change in the meaning and exercise of liberal commitments towards foreigners in Europe. Yet two developments may yield a reconsideration of this approach. The first is that unilateral restrictionism to the debit of third countries alone does not work. The difficulties encountered with the conclusion of readmission agreements are a clear sign of this problem. There are also limits to how long liberal democracies can turn a blind eye on the severe human rights violations that have occurred in the context of returns in countries such as Morocco or Libya. The second and partly related source of reorientation lies in the broader reconfiguration of the EU's approach towards its close neighbours and more generally its external relations.

After enlargement, the challenge is no longer only that of guarding the southern and the new, roughly 3,860 km-long border to the east; it is also the need to avoid the creation of 'sharp edges' to the neighbouring countries (Reflection Group 1999; Grabbe 2000). The 'European Neighbourhood Policy (ENP)' towards the eastern and southern neighbours addresses this challenge and opens the perspective for the furthest possible association below the threshold of membership. At the same time, it expects cooperation by the neighbouring countries in addressing common security challenges (Lavenex 2004, 2005).

With the 'old' neighbours to the south, migration control has occupied a central position from the outset. In its Communication accompanying the launch of the Barcelona process, the Commission stated that 'if migration pressures are not adequately managed through a careful cooperation with the countries concerned, it is easy to predict the risk of friction to the detriment of international relations and the immigrant population itself'

(Commission 1994: 6). Although strong divergences of interests long obstructed concrete results (Pastore 2002: 111), the ENP is dedicated to a more partnership-oriented approach that might promote the identification of common concerns.

With the eastern neighbours, JHA cooperation has been steadily gaining importance and detailed Action Plans have been adopted with Russia on combating organised crime and Ukraine on JHA, including trafficking in persons and illegal migration. The growing priority of these matters in relations with the Eastern neighbours is also visible in the financial instrument for the region, the Tacis programme. In addition, specialised sub-committees have been established under the Partnership and Cooperation Agreements that will allow JHA cooperation on a continuous basis.

With the ENP, cooperation in migration control has been embedded in a much broader integration strategy which mobilises a wider and more diverse set of actors, issues and interests than the foreign policy activities of transgovernmental cooperation. This might not only diversify the goals promoted on the EU side, but should also give the neighbouring countries a greater say in JHA cooperation. First indications of such a reorientation are the Commission's proposal to introduce facilitated visas for Russian citizens or the idea of linking readmission agreements with new opportunities for legal migration. However, although it is too early to judge its implementation, the current set-up of this cooperation still has a number of commonalities with the processes analysed above. It bears strong resemblance to the strategy deployed in the politics of eastern enlargement which was based on conditionality and policy transfer (see above). As expressed in the Commission Communication on Wider Europe, the EU expects these countries to line up with its own structures, that is 'demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*' (Commission 2003a: 10). The fact that it is the Commission which will put forward the action plans is likely to sustain its more comprehensive approach. Immigration ministers, however, retain significant control over the decision-making and monitoring process. This is because the ENP builds on the institutional framework of the association and cooperation agreements, in particular their respective councils which are composed of representatives of the member states and associated countries. These will have to approve the action plans, and will also be responsible for monitoring their realisation. As the recent developments regarding reception centres show, ministers of immigration not only succeed in placing their ambitions in the context of the ENP, but also shape the Commission's agenda and, increasingly, the UNHCR's.

The ENP can thus be seen as a laboratory in which the control agenda of JHA ministers competes with the more comprehensive approach of the Commission, other ministries and/or parliaments. It can provide a testing ground for an enhanced linkage of migration with development goals. Its inclusionary mandate could open the way for a more supportive approach

towards migration, including the optimisation of remittance flows, the mobilisation of diasporas as actors of home country development, and facilitating circular migration (Commission 2005b). Yet it may also be asked whether the ENP would not, if successful, yield a further replication of externalisation, perhaps improving the situation of ENP migrants, but, at the same time, shifting the boundary of migration control further away from the Union's territory.

### **Conclusion: 'Escape' to Foreign Policy?**

In seeking to explain the 'new' external agenda in European migration policies, this analysis argued that the shift towards extraterritorial control is less a new phenomenon than the continuation of the transgovernmental logic of cooperation. In substantive terms, it reflects justice and home affairs officials' emphasis on control, and, therewith, the security aspect of migration. In institutional terms, it was interpreted as the latter's effort to maximise their autonomy towards political, normative and institutional constraints. What has changed is that whereas originally these constraints were identified in the pluralistic and humanitarian constituency of liberal democracies, the communitarisation of JHA and, more broadly, the constitutionalisation of the EU increasingly replicates them at the European level. External action is thus a way to make progress in spite of internal blockades, and an attempt to circumvent new actors entering the field. It could be shown that foreign policy cooperation has indeed opened new room for manoeuvre for transgovernmental actors which favoured their control-oriented externalisation agenda over the more comprehensive approach of the Commission or European Parliament. EU-level action has been backed instrumentally where it bears a strategic advantage over intergovernmental and/or purely bilateral external relations. Even where this cooperation takes place in the institutional framework of EU external relations, supranational actors have fewer powers than they do in the now communitarised 'internal' asylum and immigration policies. At the same time, the scope for sovereignty transfers to the European level remains limited.

The coming years will show whether this foreign policy really constitutes an 'escape' road for national executives resisting a communitarisation of their domain. On the one hand, it becomes ever clearer that 'a person cannot be expelled from one territory without being expelled into another, cannot be denied entry into one territory without having to remain in another' (Brubaker 1992: 26). On the other hand, the EU has hitherto proved to be particularly resistant to long-term instrumentalisation by national actors. With a stronger mobilisation of Commission directorates and national ministries other than those concerned with internal security, the external migration agenda might in the long run be caught up by the wider, more diverse context of EU external relations – and thereby internalise some of the externalities it produces.

## Notes

1. The potentially influential role of the European Parliament in future legislation under co-decision is hinted at in its action before the European Court of Justice against the Council's Directive on Family Reunification and its very critical report on the Asylum Procedures Directive of 2005.
2. Interview with a representative from the Council Secretariat, DG H, Brussels on 4 March 2004.
3. Participants are representatives of Albania, Australia (observer), Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Latvia, Moldova, Netherlands, Norway, Poland, Portugal, Rumania, Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, Ukraine, Yugoslavia, European Commission, United Nations High Commissioner for Refugees (UNHCR), International Organisation for Migration (IOM), Stability Pact Support Unit, Inter-governmental Consultations (IGC) and the International Centre for Migration Policy Development (ICMPD) which acts as Secretariat.
4. To date, there exist six different levels of agreements. In mid-2003, these were the following: (1) unilateral statement by EC on readmission (Vietnam); (2) agreement to dialogue or cooperation on readmission only (Tunisia, Israel, Russia, Ukraine, Moldova, Kazakhstan, Kyrgyzstan, Belarus); (3) declaration on readmission of own nationals (Morocco – also with binding obligation to enter into dialogue – Yemen, Laos, Cambodia, Pakistan); (4) declaration on readmission of own nationals and negotiation of further treaties concerning third-country nationals (Jordan – also with binding obligation to enter into dialogue); (5) treaty obligation to readmit own nationals and negotiate further treaties concerning third-country nationals (Egypt, Lebanon, Algeria, Armenia, Georgia, Azerbaijan, Uzbekistan, Croatia, Former Yugoslav Republic of Macedonia, African, Caribbean and Pacific (ACP) states (including South Africa), Chile); and (6) application of internal EC rules (Norway, Iceland; planned with Switzerland, Liechtenstein). See Peers 2003. In addition, standard readmission clauses were introduced in the Political Dialogue and Cooperation Agreements with the group of Central American Countries comprising Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama and with the Andean Community (Bolivia, Columbia, Ecuador, Peru and Venezuela) which were signed on 15 December 2003.

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