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THE EXTERNALISATION
OF MIGRATION CONTROL
IN THE EUROPEAN UNION:
FIRST STEPS TOWARDS
THE EXTERNAL DIMENSION
OF THE SPACE
OF FREEDOM, SECURITY
AND JUSTICE

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The creation of an area of freedom, security and justice is one of the most rapidly developing aspects of European integration. In this paper, we take a look at the foreign policies involved in this process — aside from the internal development of the European Union, they concern a significant number of third countries, including Russia. In our view, the efforts to manage the flow of migrants and asylum seekers constitute a viable part of the external dimension within the AFSJ policies. Much of this article is based on the theoretical postulates introduced by the scholars of the Paris School, a school within the discipline of security studies that conceptualized the connection between migration, terrorism, asylum, crime and ethnic clashes, and its role as a major threat facing the European Union. Externalization of this complex threat (that is, externalization in relation to the European Union) is thus seen as one of the key prerequisites to advancement of migration management activities beyond the EU (i. e. externalization of migration management). In this article, we analyze the role the EU plays at the international scene and categorize the actions it took to manage the influx of migrants and asylum seekers from the 1980s until the time when supranational administrative bodies were granted mandates in the spheres of Justice and Home Affairs (JHA) of the EU Member States. We conclude that it was as early as the 1990-s that the EU launched the policy which later allowed to transfer part of its security concerns to third countries.

Key words: immigration, political asylum, externalization of migration control, visa, safe third country, safe country of origin

The external dimension of an area of freedom, security and justice (ED of AFSJ) is a distinct set of measures within the wider framework of EU foreign policy that has emerged in response to a number of transnational threats. ED of AFSJ seeks to neutralize

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those threats by trying to make non-member states adopt certain portions of *acquis communautaire* (EU legislation), especially in the sphere of Justice and Home affairs.

ED of AFSJ was first introduced as a step to curb illegal migration. The latter is widely regarded as a threat for two reasons. Firstly, it has a negative influence on national identity — in some European countries the share of foreigners among the general population is already reaching quite significant numbers [1, p. 46]. Secondly, it is a central issue in the so-called ‘security continuum’ — a shared understanding of the complex of threats to the security of the EU. The ‘security continuum’, for example, makes a clear connection between illegal immigration, terrorism, asylum, crime rate and ethnic clashes. It also underlines the common, shared nature of these threats to the EU and their external character in relation to the Member States [2, p. 258—259].

It is the last postulate that has played the key role in adoption of a set of foreign policy measures aimed at managing the flow of immigrants and refugees. Traditionally, these measures are collectively referred to as ‘externalization’, or ‘remote control’ (police à distance), and involve two main strategies. First is shifting migration and (potential) refugee management from the external borders of the Member States to ‘undesirable’ people’s countries of origin. Second is involvement of third countries in EU migration management through making them responsible for readmission and processing asylum applications filed by the people who had illegally crossed the external borders of the EU via their territory [3, p. 334; 4, p. 22—37].

It is important to underline that externalization of migration management had started before supranational actors gained their JHA mandates (as introduced by the Amsterdam Treaty of 1997) and before ED of AFSJ provisions were formulated in Tampere (Finland) in October 1999. In fact, the whole process would not have been possible without the actions taken by the same legislative bodies that were involved in the development of the Schengen Agreement in the 1990s and without the proposals put forward by the *Ad Hoc* Working Group on Immigration set up in October 1986 to create an action plan for fighting “constant abuse of the right to seek political asylum” [5, p. 416].

For the most part, externalization measures are directly related to the Schengen Agreement that came into force on March 26, 1995. This document, as we well know, introduces a number of requirements that foreign nationals must meet in order to enter the area “without internal border control”. Among these requirements, is obtaining a single visa that gives one the right to freely move within the Schengen zone during the period of up to 90 days [6, p. 21—23].

Creation of harmonized visa policies of Schengen countries (a common list of third countries whose nationals require visa) became the key political instrument of control over illegal immigration.¹ Bigo et al. provide statistics of how the numbers on the list grew over the years: in 1985 there were only 70 third countries, in 1990, when the Agreement was signed, there were 110,

¹ Before that, every Member State had its own list of such countries, which did not have to be coordinated with the rest of the EU.

and by 1995, when the Agreement finally came into force for the seven original Schengen states (Belgium, Luxembourg, Spain, Italy, the Netherlands, Portugal and France), the list already included 126 countries [2, p. 132; 7, p. 40].

What is obvious is that ‘harmonization’ really meant increasing, rather than decreasing, the number of countries on the list. The visa requirements spread to the citizens of North African states wishing to travel to Spain or Italy; the former also had to back out of the visa-free scheme with certain countries of Latin America (namely, the Dominican Republic, Columbia, Peru and Ecuador), and the latter cancelled a similar agreement with Yugoslavia. On the other hand, on the insistence of Germany, the nationals of Hungary, Poland and the Czech Republic were granted visa-free entrance, while Bulgaria and Romania were kept on the ‘black list’ [8, p. 57; 2, p. 132—133].

The scholars of the Paris School of security studies believe that a visa is something more than a sticker in one’s passport, a mere technicality obstructing the free movement of persons. According to them, visa is a crucially important tool to keep ‘undesired persons’ in check, and the list of countries whose nationals require such visa is, in fact, a list of unannounced enemies that the European Union is trying to protect itself from [9, p. 85].

While undeniably important, the harmonized list of third countries is just the first step in managing the flow of migration. The second step tackles the problem at a more individual level. If we assume that the very presence of a country on the ‘black list’ is an open display of mistrust, then granting a visa to a national of such country signifies making ‘an exception from exception’ — the restoration of trust to this one person, who is singled out of the whole ‘suspicious’ population of this nation. It is the diplomatic service and consular offices of the EU Member States who must identify ‘undesired’ third country nationals and come up with legal grounds to deny them access (i. e. visa) to the territory of the Union.

The role of the consular service has greatly increased with the introduction of the common visa and harmonization of some working procedures through the Common Consular Instructions. The migration control functions have been seriously reorganized. The main migration control point used to be the port of entry to a Schengen Member State, and the control itself was mostly performed by the customs and border patrol officers. After the Schengen Agreement came into force, the function of these agencies has been limited to document checking and identifying blatant cases of abuse of migration law, yet they no longer make admission decisions. In other words, the external borders of the EU rarely serve as admission points for the Schengen zone. It is especially true with regards to the nationals of blacklisted countries, because ‘border control’ in its traditional sense still exists for the nationals of ‘white list’ countries [10, p. 6—8].

As the consulates and embassies are taking on the task of weeding out suspicious visa applications, they actively refer to the data that is circulated and shared between the Member States. It can be information about ‘popular’ ways of arranging illegal migration in this or that country, lists of names of nationals with ‘good’ or ‘bad’ visa histories, and, in some cases, even elaborated profiles of potential ‘undesirable’ immigrants described in terms of gender, age, ethnicity, reli-

gious affiliation, country of origin, place of residence, income level, and so on [11, p. 106—108].

The process of externalization of control over the flow of immigrants and (potential) asylum-seekers was completed when the Schengen Agreement came into force. According to Article 26 of the Agreement, the carriers from the third countries (that are perceived to be the source of ‘non-qualified aliens’) become responsible for verifying that the carried travelers are in possession of the valid travel documents, which are required by the host Member State for entry into the Schengen territory at the air, land or sea border.

Practice shows that quite a few governments overinterpret this provision. Thus, the domestic laws that have been introduced in compliance with the agreement, often task the carriers not only with verification of the presence of the necessary travel documents, but also with checking their validity — the carriers must now make sure the documents are not fake or expired, and that the data provided in them is correct. What we are seeing here is a governmental function of migration control handed over to the carriers [12, p. 54—58]. The carriers (especially the airlines) had to adapt, too. The introduction of the Schengen Convention increased their in-service training costs (since the staff had to be trained how to identify illegal aliens) and led to the rising number of fines the carriers had to pay if they failed to comply with the new provisions. Moreover, the carriers, at least in the beginning, were forced to work more closely with the EU authorities. Some airlines had no other choice but to hire former or even still serving customs and border control officers as experts who could help identify fake travel documents at check in points and while boarding the plane in some of the ‘hottest spots’ [12, p. 64—65].

The externalization of migration control also included tasking the third countries relevant to unauthorized migration to the EU with readmission. The Declaration on Principles of Governing External Aspects of Migration Policy adopted as a result of the EU Council meeting in Edinburgh in December 1992 established readmission as one of the principle instruments of managing illegal migration from countries of Central and Eastern Europe. The implementation of this instrument required harmonization of readmission agreements with the Member States. The *Ad Hoc* Working Group on Immigration came up with the ‘specimen bilateral readmission agreement’ that was approved by the EU Council in 1994. A year later, the same Council approved a set of guiding principles to be followed in case of ‘standard’ and ‘simplified’ readmission (including the specimens of forms to be filled by relevant authorities, instructions on how to determine nationality and fact of illegal entry to the EU, etc.) [13, p. 20—24; 14, p. 25—33].

Furthermore, in 1996 the Council proposed a specimen readmission clause to be inserted in so-called “mixed agreements” (any agreement between the EU, or any of its Member States and a third country — association, partnership, stabilization agreements, etc.). Unlike the documents adopted in the beginning of the 1990s, the new legislation put more responsibility on the EU partners. Thus, the 1996 specimen included the so-called ‘enabling clause’, or Article Y, which requested the third country to negotiate, at a later stage, bilateral agreements with the Member States regarding

non-nationals. In this case, the Member States could ask for and negotiate further obligations regarding non-nationals who passed through the contracting party on the way to an EU Member State [15, p. 368; 16].

Apart from involving third countries in the readmission procedures, the EU externalized migration control by making third countries responsible for assessing asylum claims, and introducing the concept of ‘safe third country’ (*pays tiers sûr*). According to the new rule, an asylum claim will be rejected if the claimant has failed to seek asylum in the third (often — transit) country which is known to be granting asylums [17].

The EU formalized this rule in a number of documents of different judicial force. The most important of those is the Dublin Convention of 1990, determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities. Prepared by the *Ad Hoc* Working Group on Immigration and signed 4 days prior to the Schengen Convention, the Dublin document introduces (in Article 3.5) the right of any Member State to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention of 1951 as amended by the New York Protocol of 1967 [18, p. 4]. Article 29.2 of the Schengen Convention contains a similar rule, although it postulates the need for more compliance with the international obligation of the contracting parties.

Then, in 1992, the EU Council, during the gathering of migration ministers from the Member States, adopted the so-called London Resolutions. While non-binding judicially, the Resolutions had a very strong impact, since it provided with detailed procedures for application of the concept of host third country. The Resolutions also provided with a list of requirements and criteria for establishing the safety of a country as a host third country:

1) in those third countries, the life or freedom of the asylum applicant must not be threatened;

2) the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country;

3) it must be the case that the asylum applicant has failed to use the opportunity to seek protection from the host third country before approaching the Member State;

4) the asylum applicant must be afforded effective protection in the host third country against *refoulement* [19]. It is interesting to note, that the criteria lack such important elements as the presence of a stronger connection of an applicant with a host third country other than a simple transit through its territory. The Resolution also fails to address the issue of whether the host third country is ready to accept an asylum seeker — from this point of view, the safe third country principle can be viewed as a one-sided norm benefiting the EU. In practice, the second concern (i.e. readiness to accept asylum seekers) is usually solved through drawing up bilateral readmission agreements, although exactly how they apply to asylum seekers is often not really spelled out [20, p. 79].

Another externalization instrument was the introduction of the ‘safe country of origin’ rule (*pays d’origine sûr*). A country would be determined ‘safe’ if it didn’t prosecute its nationals on the grounds of race, religion, nationality, social status or political affiliation. If the claimant’s country of ori-

gin was deemed safe, they would be unconditionally rejected an asylum and returned home.

This rule was also established by the London Resolutions of 1992. The first resolution concerned countries in which there was generally no serious risk of persecution. This document both introduced the definition of the 'safe country of origin' and the criteria of inclusion of a country to the 'safe' list. When determining the safety of the country of origin, Member States were to consider the following:

1) previous numbers of refugees and recognition rates for asylum applicants from the country in question who have come to the Member States in recent years;

2) observance of human rights (formal obligations undertaken by a country in adhering to international human rights instruments and how in practice it meets those obligations; the readiness of a country to cooperate with human rights NGOs);

3) development of democratic institutions (elections, political pluralism, freedom of expression and thought, and the availability of legal avenues of protection and redress);

4) stability of the above-mentioned elements and the possibility of dramatic changes in the future [21].

The second London resolution allowed Member States to either reject asylum claims from the nationals of safe third countries as 'unfounded' or run them through simplified procedures [22]. In practice it often meant that the asylum seekers were refused the rights to free legal assistance and were denied the possibility to communicate with the NGOs that protect the rights of the refugees. In some cases simplified procedures translated into decisions made on the basis of document review only without interviewing the claimant. If the authorized body declined an asylum claim, this would often be the final decision, without a chance to appeal [23].

To sum up, externalization of migration management has led to the shift in conceptual understanding of 'the border' for third countries nationals. They encounter full-scale border check well before they actually reach the physical external borders of the EU — while submitting their visa application, during the check-in at the airport (and sometimes even during boarding the plane), and, finally, when they arrive to a Member State port of entry. Also, even if the rules regarding 'safe third country' and 'safe country of origin' are sometimes interpreted and acted upon differently in different Member States, a number of third countries found themselves involved in the process of migration control in the interests, on behalf of, and on the conditions specified by Brussels.

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