

European Integration and Immigration by Third-Country Nationals: The Obduracy of the National Border

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1. Introduction

For the early French Revolutionaries, the concept of the nation did not serve as a vehicle for territorial states' exclusionist practices. Neither did they conceive of national identity primarily as a criterion by which to distinguish between "us" and "them". For them, the concept of the nation gave expression to the radical idea of an inclusive political community based the concept of popular sovereignty, equality and unalienable rights. However, the territoriality of global political organisation led to a different role for nationalism on the global political stage than which could have been foreseen by the early Revolutionaries. Contemporary nationalism is defined by the very distinction between "us" and "them" and its original promise of individual rights and freedoms often seems to be in direct contradiction with everyday reality. I will argue below that the reason for this has to be sought at least partly in the process of territorialisation. Territorialisation, a process that links political authority to clearly delimited space, has led to the notion of sovereignty as an abstraction that links state, people, identity and territory in a way that is presented as natural and inextricable. National citizenship is thus seen as the primary political identity, while the adjective national has simultaneously acquired a pre-political aureole on account

*An earlier version of this paper was presented at Queens University, School of Politics, International Studies and Philosophy: *Beyond the Nation? Critical Reflections on Nations and Nationalism in Uncertain Times*, Belfast, 12-14 September 2007. I would like to thank the participants in the conference for helpful suggestions and valuable insights.

of stubborn myths of the shared blood and history of the “people” that underpin the concept of popular sovereignty. As a result, the territorially fixed population has become one of the foundations of the concept of sovereignty. Consequently, the modern state guards its territorial boundaries jealously and strictly, especially with regard to the movement of persons, because “when the rules for differentiating between the inside and the outside become blurred and ambiguous, the foundations of sovereignty become shaky.”¹

It is sometimes argued that the fundamental status of the territorial/nation state and its citizens in the global political system is changing. According to this view, sovereign states are increasingly limited in their use of territorial borders to maintain a strict divide between “inside” and “outside”; “us” and “them”. As a result, a post-Westphalian constellation is slowly developing of which allegedly post-national political entities such as the European Union offer the best example.² However, there are also scholars who have described an opposite trend over the last decades and who claim that globalisation has forced states to think of novel ways to protect traditional borders, both of territory and of community.³ In the specific European context, it has for example been argued that national states have shifted high politics as immigration policy making upwards to the EU in order to circumvent national policy constraints as have been formulated by domestic judiciaries.⁴ It has also been said that national “concerns to maintain and protect borders of work, welfare and citizenship” have shaped EU policy making

¹ R. Doty, ‘Sovereignty and the nation: constructing the boundaries of national identity’, in: *The social construction of state sovereignty*, T.J. Biersteker and C. Weber (eds.), Cambridge: Cambridge University Press; 1996; pp. 121-147, at 122.

² The EU has thus been called a “post-national entity” (J. Habermas, *The Postnational Constellation*, Cambridge: MIT Press; 2001; and D. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy*, The Hague: Kluwer Law International; 1997) and the “first truly post-modern international form” (J. Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, *International Organization* 47(1), 1993, pp. 137-174.)

³ Both positions do not necessarily exclude but may also complement each other, as is shown by the work of for example Saskia Sassen.

⁴ V. Guiraudon, ‘European integration and migration policy making: Vertical policy-making as venue shopping’, *Journal of Common Market Studies* 38(2), 2000, pp. 251-271.

in this area,⁵ and that instead of the emergence of a post-national approach that departs from the usual (national) discourse that portrays immigration first and foremost as implicating territorial sovereignty and a threat to the unity and identity of the body politic, “Member States’ own discourse on the securitization of migration and asylum policy” is simply copied at the EU level.⁶

Indeed, the argument that instead of ceding sovereignty, European States aim at enhancing national sovereign power by resorting to supranational law making in the area of immigration of third-country nationals is not a new one.⁷ This paper seeks to deepen the understanding of such a perspective on European integration in this specific policy area. In the first place, by addressing the relationship between immigration, territorial borders, and conceptions of sovereign power, it will shed much needed light on what the very sovereign power that individual Member States allegedly wish to preserve is about.

In the second place, this paper describes the implications of Member States’ inability to think beyond the national sovereign paradigm on the legal regime regulating immigration of third-country nationals within and into Europe. We will see that Member States’ desire to preserve the traditional function of the national territorial border *within* Europe – despite their formal commitment to establishing an area without internal frontiers – has led to ambiguity in the separation of powers between the EU and its Member States. Similarly, European integration with regard to policies concerning immigration *into* the EU show that the driving

⁵ A. Geddes, ‘Europe’s Border Relationships and International Migration Relations’, *Journal of Common Market Studies* 43(4), 2005, pp. 787-806.

⁶ T. Kostakopoulou, ‘The ‘Protective Union’: Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe’, *Journal of Common Market Studies*, 38(3), pp. 497-518, 2000, at 508.

⁷ See in addition to the literature cited above: G. Lahav, *Immigration and Politics in the New Europe*, Cambridge: Cambridge University Press; 2004 and G. Freeman, ‘The Decline of Sovereignty? Politics and Immigration Restrictions in Liberal States’, in: *Challenge to the Nation State: Immigration in Western Europe and the United States*, C. Joppke (ed.), Oxford: Oxford University Press; 1998. Rey Koslowski argues differently and sees the deepening and widening integration in migration policy-making as indicative of major future transfers of sovereignty.” R. Koslowski, ‘Personal security and state sovereignty in a uniting Europe’, in: *Controlling a New Migration World*, V. Guiraudon and C. Joppke (eds.), London and New York: Routledge; 2001, p. 99-116.

force behind integration in this area is provided by a wish to safeguard the intrinsically national link between territorial exclusion and the other. And although European integration in this area may thus be seen as a way in which individual Member States attempt to maintain the traditional role of territorial boundaries in protecting what is perceived as the identity of the body politic, obdurate conceptions of the relation between sovereignty and immigration in an integrating Europe have simultaneously necessitated the emergence of novel ways to regulate human mobility. The overall result of the self-evidence with which the link between the foreigner and territorial exclusion has been retained in Europe has made the movement rights of third-country nationals subject to a legal framework that is unnecessarily complicated and contradictory, and which, in important respects, fails to live up to the demands of the rule of law.

2. Territorial Sovereignty, the Nation-State and Exclusion

According to Andrew Geddes, territorial borders are “typically understood as the sites at which the sovereign authority of the state to exclude is exercised”.⁸ However, territorial borders are not only sites where the sovereign power to exclude comes most clearly (and often most brutally) to the fore. In addition, and perhaps more fundamentally, they have also played a central role in the development of modern sovereignty whose function it is to distinguish the inside from the outside. As such, they have determined the particular way in which this inside and outside have been constructed by establishing a seemingly self-evident relation between sovereignty and modern concepts of nation and identity. Indeed, territorialisation, the process by which political authority came to be linked to clearly demarcated territorial units, profoundly influenced the way in which the modern state conceives of identity and political community. An inquiry in the relationship between territorial borders, immigration and sovereignty is much needed in a political climate where the exclusion of “outsiders” is increasingly perceived as both natural and justified on account of the state’s territorial sovereignty.

⁸ Geddes (2005), *op.cit.*, p. 788.

Contemporary political discourse portrays the right to control the entry and stay of non-nationals as inherent in the state's sovereign claims over its territory. The link between immigration and notions of territorial sovereignty is most explicit in right-wing populist discourse – now common in all EU Member States – that adopts a rhetoric of “threat”, “crisis”, and “invasion” to address problems associated with immigration. But also more mainstream approaches by policy makers and judiciaries disclose a view that does not doubt the legality of the national state's claim to exclude non-nationals on account of its territorial sovereignty, albeit presently subject to some exceptions based on human rights obligations of the state. Such a view seems to be largely derived from the notion of the inviolability of territorial boundaries in classical international law, a discourse almost exclusively about the rights and duties of states towards each other and in which the interests of the individual as such did not feature.⁹ The preponderance of powerful claims by the state that are derived from its territorial sovereignty on the legal regime of immigration control is exacerbated by the current trend in which immigration is increasingly portrayed as a security issue.¹⁰ The contemporary discourse of societal security draws likewise from the vernacular of the “invading enemy”¹¹, traditionally reserved for war and other threats to the territorial integrity of the modern state in the past.

An approach to the right to regulate immigration that draws so directly from a legal discourse in which the sanctity of territorial boundaries is paramount could only come about as a result of a perception in which individuals' relationships to territory are static and in which each and everyone of them

⁹ The discourse that addresses immigration as engaging first and foremost territorial sovereignty to which the state has an absolute claim originates from the way in which international law addresses armed conflict between sovereign states and dates from the late 18th century. See for example the U.S Supreme Court in the *Chinese Exclusion Case*: “to preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us” (Chae Chan Ping v. United States (1889), p. 606).

¹⁰ See J. Huysmans, ‘The European Union and the Securitization of Migration’, *Journal of Common Market Studies*. 38(5), pp. 751-777, 2000.

¹¹ *Id.*, at 757.

belongs to a certain, clearly demarcated piece of the earth.¹² According to such a perception, migration poses a problem to both the territorial state *and* the global political system based on territoriality, which therefore needs to be prevented and contained by the use of violent dissuasive measures and in which there is little awareness of the manifold ways in which individuals relate to territory.¹³ However, it is important to keep in mind that extensive exercise of the right to regulate immigration by the state is a relatively recent phenomenon, and the allegedly classical perspective that the right to exclude aliens is an essential attribute of territorial sovereignty may well be a “late nineteenth century artefact”.¹⁴ Whence then the contemporary “need for territorial sedentarization”, for “fixed concentrations of populations”?¹⁵

In order to understand the intricate relation between territory, sovereignty and notions of identity, belonging, inside and outside, one needs to go back to the consolidation of exclusive territorial rule in Europe during the sixteenth and seventeenth century. It was around that time that the state began to be perceived as a unified force, with supreme and exclusive authority over the population within a certain territory.¹⁶ Monarchical struggles for power had led to the breakdown of the medieval Christian order and territorial boundaries had gradually been drawn. Territory started to play a bigger role in political life, but initially the feudal perception that relations of authority were of a personal character, remained. Formally, people belonged to the body politic (embodied by the King) by virtue of their being subjected to the sovereign, and not because they

¹² See Barry Hindess who argues that such an international police of populations is brought about by citizenship. B. Hindess, ‘Citizenship in the international management of populations’, *American Behavioral Scientist* 43(9), 2000, pp. 1486-1497 and B. Hindess, ‘Divide and Rule: The International Character of Modern Citizenship’, *European Journal of Social Theory* 1(1), pp. 57-70, 1998.

¹³ See F. Düvell, *Illegal immigration: What to do about it*. Working Paper. Working Group Migration-Mobility-Minorities-Membership, Florence, EUI/RSCAS. 2004, at. 9.

¹⁴ D. Martin, ‘Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy’, *International Migration Review* 23(3), 1989, pp. 547-578 at 547.

¹⁵ G. Procacci, ‘Social economy and the government of poverty’, in: *The Foucault Effect: Studies in Governmentality*, G. Burchell, C. Gordon and P. Miller (eds.), Chicago: University of Chicago Press; 1991, at 161.

¹⁶ R. Plender, *International Migration Law*, Leiden: Sijthof; 1972 at 10.

had a special relation with each other or with the territory in which they lived. Indeed, ideologies such as nationalism, alluding to a deeper (and allegedly more profound) relationship between people, territory and the body politic, were not yet conceivable. In practice, however, territorialisation had led to a situation in which the people over whom the sovereign ruled were defined by virtue of their location within certain borders.¹⁷ This situation became a structural aspect of political organisation after 1648, the year when the Peace of Westphalia, by establishing external sovereignty as a principle of international relations, ascribed to each territorial state the exclusive government of the population within its territory.¹⁸

Thus, territorialisation of political organisation had largely become a fact by the time that the predominant mode of legitimising political authority consisted in an appeal to the sovereignty of the *people*. Indeed, the very process of territorialisation made possible the emergence of a notion as abstract as popular sovereignty: its very abstraction one of the characteristics that distinguished popular sovereignty from earlier theories by which men had attempted to legitimise political authority. A new idea was needed to imagine the novel idea of the body politic governed by the people, just as a new political identity had to be devised to give expression to political equality. The nation became the all-compassing political entity that was the source of sovereignty and equality, and citizenship indicated membership in the political community called the nation.¹⁹

However, the insidious result of the fact that the notion of popular sovereignty came to be executed in a system of separate and independent political entities, demarcated by way of territorial borders, was that the enlightenment ideals on which the concept of the people was based quickly lost their universalistic connotations of a common humanity. Instead, they transformed into a particularistic conception of the nation constituted by the people whose bonds to each other were supposedly pre-political. The very survival of a political system

¹⁷ D. Philpott, 'Ideas and the evolution of sovereignty', in: *State Sovereignty: Change and Persistence in International Relations*, S.H. Hashmi (ed.), Pennsylvania: Pennsylvania State University Press; 1997, at 19.

¹⁸ Hindess (1998) *op. cit.*, p. 65.

¹⁹ See M.P. Fitzsimmons, 'The National Assembly and the Invention of Citizenship', in: *The French Revolution and the Meaning of Citizenship*, R. Waldinger, P. Dawson, and I. Woloch (eds.), Westport, London: Greenwood Press; 1993; pp. 29-41

in which loyalty was no longer required to the King, but to an anonymous and abstract multitude called the people would perhaps not have been possible without an appeal that went deeper than that intangible notion of the people who were only united because they were subject to common government within a certain territory.²⁰ The mobilising myth of nationalism, implying a pre-political identity of the territorially defined “people” was able to fill the gap that existed between the abstract notion of popular sovereignty and the actualities of a political system based on territoriality. That a universalistic ethic came thus to be construed in what had become by then the particularistic language of nation and national citizenship was caused by the fact that it was not within a universal empire but within the territorial state that enlightenment ideals were politically translated.

Accordingly, the interplay between territorialisation and liberal theory had led to the formation of exclusive political identities by the time that the Napoleonic wars had swept over Europe. Romanticism buttressed the perception according to which sovereignty, territory and the identity of the body politic were inextricably tied together so that their linkage had acquired a halo of necessity and naturalness by the end of the nineteenth century. People were defined by virtue of to which state they belonged and this period saw the introduction of racially, culturally and socially exclusive immigration laws. Territorial sovereignty was put forward as inherently entailing the power to exclude foreigners, characterised by extensive executive discretion with little or no room for the legislative or judiciary powers. During the course of the twentieth century we have witnessed an ever more progressive assertion of territorial sovereignty in the legal regime of immigration control. And although the modern human rights discourse has made some inroads in the state’s sovereign claims in this area, most clearly illustrated by the rights of long-term legal residents in liberal democracies,²¹ contemporary practices as immigration detention and deportation of those individuals that are

²⁰ See J. Habermas, ‘The European Nation-State: On the Past and Future of Sovereignty and Citizenship’, *Public Culture*, 10(10) 1998, pp. 397-416.

²¹ See C. Joppke, ‘Why Liberal States Accept Unwanted Immigration’, *World Politics*, 1998; 50(2):266-293; Y. Soysal, *Limits of Citizenship*, Chicago: University of Chicago Press; 1994; and S. Sassen, ‘The Repositioning of Citizenship’, in: *People out of Place: Globalization, Human Rights and the Citizenship Gap*, A. Brysk and G. Shafir, London and New York: Routledge; 2004.

labelled as “illegal” show that the right as such of the nation state to exclude foreigners is not questioned.

Nonetheless, although the legal claims to regulate immigration are justified with an appeal to the modern state’s territorial sovereignty, the importance that states attach to the territorial ideal is different from and goes far deeper than the mere wish to maintain independent sovereign units. Apart from exclusive and ultimate political authority within a certain demarcated territory,²² the territorial ideal entails the homogenisation of these territorial units: by invoking their sovereign power, states thus seek to protect what Catherine Dauvergne has called their “nation’s nationness”.²³

And for those who do not question the contemporary political discourse in which the link between territorial exclusion and the foreigner is presented as natural and to a certain extent even unavoidable, it is perhaps useful to be reminded of the fact that the ideology of nationalism has also generated other modes of territorial exclusion, that is to say, of those belying a different identity *within* the nation state.²⁴ The fact that practices such as the expulsion of religious minorities, population transfers based on ethnicity, and transportation of criminal citizens have become prohibited by modern human rights law, while the territorial exclusion of foreigners remains legitimate merely with an appeal to the territorial sovereignty of the nation state, reinforces the claim that the contemporary attitude towards immigration is decisively influenced by the classical legal discourse that

²² Which can indeed be had by a state that adheres to an open admissions policy.

²³ C. Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’, *The Modern Law Review* 67(4) 2000, pp. 588-615 at 595. See also John Crowley who distinguishes between immigrants and visitors and argues that “to immigrate [...] is to attain a certain kind of status with respect both to a *society* and to a *jurisdiction*, which are related to a territory but not exhaustively defined by it.” J. Crowley, ‘Locating Europe’ in: *In Search of Europe’s Borders*, K. Groenendijk, E. Guild en P. Minderhout (eds.), The Hague: Kluwer Law International; 2003, pp. 27-44, at 33.

²⁴ William Walters denaturalises the link between deportation and the foreigner by providing a historical and genealogical analysis of deportation. See W. Walters, ‘Deportation, Expulsion, and the International Police of Aliens’, *Citizenship Studies*. 6(3) 2002, pp. 256-292.

regards territorial borders as sacrosanct and that clings to the illusion of the territorially defined nation state as a closed container of society.²⁵

In such a discourse there is little room for articulation of the individual interests that are actually implicated in the dominant perception of territorial sovereignty. The fact that modern international law has delegitimised historical forms of territorial exclusion while it has simultaneously naturalised the link between such exclusion and foreign nationals serves to highlight the distinction that has been made within the concept of sovereignty by the modern rule of law: while it has increasingly offered ways in which to hold accountable the jurisdictional content of sovereign power whenever that is exercised over a well-defined group of people within a certain clearly demarcated territory, it has largely remained indifferent whenever the state presents the exercise of its power as based on sovereignty's territorial form.

3. Third-Country Nationals and European Integration: the Paradox of the “Abolished” Internal Border

The way in which the modern state appeals to its territorial sovereignty in order to exclude the foreigner may thus be one of the clearest examples of the “pervasive institutionalization of nationhood in the practice of states and our state system”.²⁶ How then does the European Union feature in a world where questions regarding the movement of people are for a very large part determined by the national quality of both persons and territory? Have the abolition of internal frontiers within Europe and the establishment of free movement rights changed notions of belonging, sovereignty, and territoriality so as to be able to say that Europe has moved beyond the organization of political space along the lines of national sovereignty? I will argue that policy making with regard to movement rights of third-country nationals into and within the EU shows that the Member

²⁵ See J. Agnew and S. Corbridge, *Mastering space. Hegemony, territory and international political economy*, London: Routledge; 1995 at 82-92 about perceptions of the nation state as a “container of society”.

²⁶ R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe*, Cambridge: Cambridge University Press; 1996, at 21.

States have not seized the opportunity provided by the process of European integration to reflect seriously on post-national conceptions of political community. This is so because, notwithstanding the fact that notions of inside and outside *within* Europe may have been shifting in important – and perhaps unprecedented – ways as a result of the establishment of the internal market and integration in more general terms, the legal regime regulating movement by third-country nationals across both external and internal borders remains for a large part moulded according to traditional conceptions of the link between national sovereignty and territorial exclusion of the individual who is defined as the other.

In section 3.1., I will address the free movement rights of third-country nationals in the ‘area without internal frontiers’ in order to show that the internal border is far from being abolished in Europe. In this section, specific attention will be paid to the *Chen* case because the UK government’s contentions in that case provide an excellent example of a Member State’s strategic – albeit disguised – use of the national sovereign paradigm as soon as it perceives an endangering of the link between territorial exclusion and the foreigner as a result of European integration. Furthermore, this Section will pay attention to the current confusion that surrounds the precise extent of the movement rights that third-country nationals may enjoy in their quality as family members of EU citizens. We will see that recent case law of the ECJ shows that the precise delimitation of competences between the EU and its Member States in this area is far from clear, resulting in unnecessarily complicated and contradictory case law by the ECJ.

After that, in section 3.2., I will focus on the common immigration policy and the crossing of external borders. Instead of analysing the bulk of legislation that has been enacted under Title IV of the EC Treaty, I will investigate if and how EU law and policy-making in this area has changed traditional understandings of territoriality, sovereignty and exclusion. And although we will see that certain changes have indeed occurred, I will argue that these changes have mostly been triggered by Member States’ wishes to strengthen the kind of sovereign power that they deem necessary for protecting precisely that what is defined by the internal border.

3.1. Free Movement of Third-Country Nationals in an Area without Internal Frontiers

The Treaty of Rome of 1957 enlisted as one of the objectives of the Community, the abolition, as between Member States, of obstacles to the freedom of movement of goods, persons, services and capital, which objective was closely linked with the establishment of the common market.²⁷ The Single European Act of 1987 set the deadline of achieving what had by then been renamed the internal market, as an area without internal frontiers in which the free movement of goods, persons, services and capital was to be ensured by 1992. The definition of the internal market in what is now Article 14 EC Treaty thus consists of two elements, both of which touch directly upon the rights of movement of third-country nationals. The first element, the absence of internal frontiers – denoting the absence of all frontier controls on all persons, be they citizens of the Union or nationals of third countries²⁸ - is related to “flanking measures with respect to external border controls, asylum and immigration”²⁹, for the adoption of which Community competence was created by the Treaty of Amsterdam, as we will see in the Section below. The second element consists of the realisation of free movement of persons. In contrast to the abolition of frontier controls, which does not distinguish nationals of EU Member States from third-country nationals, Community law concerning free movement rights sets these two categories clearly apart, and third-country nationals only benefit from freedom of movement in a way that could be described as indirect and partial.

While EU citizens benefit from extensive freedom of movement rights between the Member States, the Treaty provisions on freedom of movement are not applicable to third-country nationals as such. It is important to note that other fields of EC law are much more inclusive of third-country nationals, such as the rules on free movement of capital or transfer of undertakings, consumer law and transport policy, and rules regarding working conditions and social security

²⁷ Article 3(c) EEC Treaty.

²⁸ Article 62 EC Treaty.

²⁹ Article 61 EC Treaty.

schemes.³⁰ It should also be underlined that the exclusion of third country nationals from the scope of free movement rights is not apparent from the way in which these rights are formulated in primary community law. Article 39 EC Treaty uses the term “workers” without reference to the nationality of these workers. Nevertheless, right from the beginning, the nationality limitation was applied by the Member States, which was approved of by the Court of Justice.³¹ The assertion of exclusionary powers per se is no longer deemed necessary, nor legitimate, with regard to EU citizens, but national states wished to keep their discretionary powers with regard to entry and sojourn of third-country nationals largely in their own hands.

Council Directive 2003/109/EC³² on the status of third-country nationals who are long-term residents has somewhat rectified this situation, but substantive differences between EU citizens and third-country nationals remain. Most significant in this respect is that Member States retain the final power of deciding on whom to confer long-term resident status through the possibility of requiring integration requirements in accordance with *national* laws.³³ As a result, instead of a European status that is beyond the national, long-term resident status is ultimately a status that can be made contingent on the national state’s notion of its “nationness”. It is worth mentioning that this situation is reinforced by the Reform Treaty, seeing that it explicitly excludes any harmonisation of laws concerning integration of third-country nationals.³⁴ In addition, Directive 2003/109 gives host Member States the possibility of restricting free movement rights of those who are in possession of long-term resident status on the grounds of economic

³⁰ S. Boelaert-Suominen, ‘Non-EU nationals and Council Directive 2003/109/EC on the status of Third Country Nationals who are long-term residents: Five paces forward and possibly three paces back’, *Common Market Law Review* 42(3) 2005, pp. 1011-1052, at 1014.

³¹ Case 238/83, *Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade*, 5 July 1984.

³² O.J. 2004, L 16/44.

³³ Article 5(2) of Council Directive 2003/109/EC.

³⁴ Article 69b paragraph 4.

considerations,³⁵ whereas economic ends are explicitly excluded from the public policy exceptions to the freedom of movement and residence of EU citizens.³⁶

‘Supranational’ policies of abolishment of internal borders thus seem to be acceptable to the Member States only if the national state is able to maintain and control its linkage of population and territory, if not in a formal sense, than at least in reality. In this respect, it should be underlined that in the past the Commission has been in favour of extending free movement rights for third-country nationals, motivated with the very argument that freedom of movement for economic activities was not as widely used by the nationals of Member States as would be desirable for internal market purposes. The still vivid image of national sovereignty as ultimate territorial control in order to protect their “nation’s nationness” is affirmed by the (temporary) reservations that many Member States have made with regard to the free movement rights of the new EU citizens in Central and Eastern Europe.³⁷

The *Chen* Case provides an excellent example of Member States’ strategic use of the concept of national sovereignty when it comes to the free movement rights of third-country nationals.³⁸ Legislation pertaining to nationality has been held firmly within their sovereign prerogatives,³⁹ while the issue of free

³⁵ Article 14(3) of Council Directive 2003/109/EC.

³⁶ See Article 27 of Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

³⁷ The Accession treaties contain provisions that make it possible to make transitional arrangements with regard to the free movement rights for the new EU citizens. For five years following the accession of new Member States, access to the labour markets of current Member States may depend on national measures and policies, as well as bilateral agreements they may have with the new Member States. After five years, the possibility exists for a current Member State to ask the Commission for authorisation to continue to apply national measures for a further two years, but only if it is experiencing serious disturbances on its labour market. See “Free Movement After Enlargement” at <http://europa.eu>.

³⁸ ECJ, Case C-200/02, *Chen Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.

³⁹ See the Declaration on nationality of a Member State attached to the final Act of the Treaty on European Union, OJ C 191 29/07/92: “*The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the*

movement rights for EU citizens is within the competence of the EC. As EU citizenship is only conferred on those who are nationals of one of the Member States, individual member states retain the power to decide who can benefit from free movement rights. It has been remarked that their interest in preserving their prerogative over recognition of citizenship status is indicative of their will to retain crucial elements of sovereign statehood.⁴⁰ However, the reverse side of that coin is that they have to respect other Member States' decisions in this area equally.

The *Chen* case showed that such an approach to EU citizenship is not always in the interest of an individual Member State wishing to preserve its ultimate powers to exclude. Catherine Chen was born in Belfast, whereupon she acquired Irish nationality.⁴¹ Her Chinese mother went to England with her (without having to cross any international border), where she held a temporary residence permit as her husband was engaged in business between England and China. The ECJ decided that as an EU citizen, Catherine Chen had the right to reside in any Member State, under the usual conditions laid down in secondary legislation. As her right of residence would be illusory without her mother to take care of her, her mother acquired such a right of residence as well. The judgment by the ECJ is no more than the result of a consistent application of established principles of EC law on the legal status of EU citizens.

And indeed, much more than in the outcome of the proceedings, the significance of this case for the topic under consideration here lies in the arguments that were presented by the UK government in the proceedings. In the first place, the UK raised an objection of inadmissibility: as the appellants had never exercised the freedom of movement granted to them by the Treaty – seeing that they never left the United Kingdom to go to another Member State – there would be no foreign elements of such a kind as to render Community law

question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.”

⁴⁰ See A. Dashwood, 'States in the European Union', *European Law Review*, 23, 1998, pp. 201-216 at 203; and E. Kveinen, 'Citizenship on a Post-Westphalian Community: Beyond External Exclusion?', *Citizenship Studies*. 2002; 6(1):21-35 at 31.

⁴¹ When certain conditions are fulfilled, anyone born within the territory of the island of Ireland, even outside the political boundaries of Ireland (Éire), acquires Irish nationality.

applicable to their situation.⁴² Following the Advocate General, the Court rejected this contention, as according to settled Community case-law, “the fact of possessing the nationality of a Member State other than the one in which a person resides is sufficient to render Community law applicable, even where the person relying on those provisions has never crossed the frontiers of the Member State in which he lives.”⁴³ The Advocate General added that the only instance in which Community law would not be applicable to their situation would be in the case that Catherine Chen would not possess Irish nationality; however:

“as regards Community law, the Court has held in its judgments in *Micheletti* and *Kaur* that ‘[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality’, and that therefore ‘it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty’.⁴⁴

Related to the objection of inadmissibility was the contention by the UK that the appellants were not entitled to rely on Community law because Mrs Chen’s move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constituted an attempt improperly to exploit the provisions of Community law, and as such to “illegally to circumvent national [immigration] legislation”.⁴⁵ The Court recognised that Mrs Chen intention was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom. Nevertheless, the argument of ‘abuse of rights’ was rejected by the Court because:

“it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that

⁴² See Opinion of Advocate General Tizzano in Case C- 200/02, delivered on 18 May 2004, par. 28.

⁴³ *Id.* par. 32 (In reaching this conclusion, the Court and the Advocate General referred to Case C-148/02, *Garcia Avello* [2003] ECR I-11613, par. 13 and 27).

⁴⁴ *Id.* par. 38.

⁴⁵ Judgment of the Court in Case C-200/02, *op. cit.* par. 34.

nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty [...] that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country”.⁴⁶

It is difficult to imagine any other case in which a Member State would voluntarily ask the ECJ to usurp the power of the Member States to decide which of their nationals can benefit from EU citizenship status, therewith relinquishing the sovereign prerogative over recognition of citizenship and opening the way for a citizenship status that is not necessarily linked to nationality. It is equally easy to understand why the UK did precisely that in the *Chen* case: suddenly the direct link between Irish nationality law and citizenship of the EU affected its powers to exclude third-country nationals with possibly far-reaching consequences. In this case, the UK seems to have wanted crucial importance accorded to the fact that it is *immigration* legislation that is allegedly circumvented and not any other area of the law – in which its line of reasoning would certainly have been much more difficult to imagine, because, as the Advocate General observes, the relationship between Community law and the laws of the Member States is always such that the non-application of a national provision as a result of reliance on a right conferred by Community law is merely the normal consequence of the principle of supremacy of EC law.⁴⁷

The decision in *Chen* is to be distinguished from the situation in which third-country nationals derive free movement rights as family members of EU citizens. From early onwards, EC law has been interpreted so as to confer on EU citizens that make use of their freedoms under the EC Treaty, the right to be joined by their family members, regardless of whether these family members are nationals of the Member States or of a third country.⁴⁸ The right to family

⁴⁶ *Id.* par. 39-40.

⁴⁷ Opinion of Advocate General Tizzano, *op. cit.*, par. 112.

⁴⁸ ECJ, Case C-370/90, *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department*, 7 July 1992; Case C60/00, *Carpenter v. Secretary of State for the Home Department*, 11 July 2002; and Case C-459/99, *Mouvement contre le racisme, l'antisémitisme, et la xénophobie ASBL (MRAX) v. Belgian State*, 25 July 2002.

reunification has also been laid down in secondary legislation.⁴⁹ However, at present it is unclear if and under which conditions a Member State may refuse admission of third-country national relatives of EU citizens if they did not enjoy prior legal residence in another Member State, an uncertainty which seems to have originated in the Court's decision in *Akrich*, which ruling is very difficult to reconcile with earlier rulings in *Carpenter* and *MRAX*.⁵⁰ Eleanor Spaventa writes that decisions by the ECJ in this field seem to have been derived rather from a "case-by-case assessment that is very much based on the facts which gave to the reference" than from a consistent and hermeneutic approach to EC law.⁵¹ The legal vagueness surrounding this issue, and the refusal of the ECJ to squarely address it in *Jia*,⁵² exemplify that in the absence of a common regime regarding free movement rights of third-country nationals within the EU, the crossing of internal borders cannot be seen in isolation from the delimitation of competences between the European Union and its Member States with regard to external border crossings and first-admittance decisions. In this sense, competence skirmishes do not only concern the relation between the Community and its Member States, but they can also lead to considerable confusion as regards the legal framework that

⁴⁹ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004, on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 74/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, [2004], O.J. L 158/77.

⁵⁰ See for more discussion on this: A. Tekofsky, *The Power to Control v the Right to Enter: Admission of third country national relatives in the case law of the European Court of Justice*, Challenge Working Paper 192, July 2007, in which the following case law is discussed: Case C-370/90, *The Queen and Immigration Appeal Tribunal v. Surinder Singh*, 7 July 1992; Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, 11 July 2002; Case C-459/99 *MRAX v. État Belge*, 25 July 2002; Case C-109/01, *Secretary of State for the Home Department v. Akrich*, 23 September 2003; Case C-157/03, *Commission v. Spain*, 14 April 2005; and Case C-1/05, *Jia v. Migrationverket*, 9 January 2007.

⁵¹ E. Spaventa, Case C-109/01, "Secretary of State for the home Department v H. Akrich, judgement of the Full Court of 23 September 2003, [2003] ECR I-9607", *Common Market Law Review* 42: 225-239, 2005, at. 238.

⁵² Neither does Advocate General Mengozzi in his conclusion of 5 July 2007 in Case C-291/05 (*Minister voor Vreemdelingenzaken en Immigratie v. Eind*) take away the uncertainty surrounding this fundamental question.

addresses the rights of third-country nationals in terms of EC law. This is because, as will be dealt with below, EC competence with regard to external border crossings is only created within the limited context of Title IV of the EC Treaty, which in turn has been characterised as an “institutional ghetto” within that Treaty.⁵³

Internal border crossings and the national quality of persons thus remain firmly linked in the EU. For the EU to be “post-national”, it would arguably have to deconstruct more radically the link between nationality and entitlement to internal free movement. As it is now, for non-nationals of the Member States, internal borders are not disappearing at all: national sovereignty is still a factor of crucial importance when they want to move from the territory of one Member State to another. This is not to say that the creation of the single market has not made a difference for them too, caused by the fact that the physical border is free of control. But instead of according them more freedom, the absence of these controls combined with Member States’ insistence on their exclusionary powers vis-à-vis third-country nationals, has led to a situation in which, quoting Malcolm Anderson and Didier Bigo, “controls are still there, but now over the whole of the territory, although perhaps not applied to everyone, but certainly to persons categorised as dangerous and especially as “unwelcome migrants with dark skins.”⁵⁴

⁵³ E. Guild and S. Peers, ‘Out of the Ghetto? The Personal Scope of EU Law’, in: *EU Immigration and Asylum Law*, S. Peers and N. Rogers (eds.), Martinus Nijhoff: Leiden and Boston; 2006, pp. 81-141.

⁵⁴ M. Anderson and D. Bigo, ‘What are EU frontiers for and what do they mean?’ in: *In Search of Europe’s Borders*, K. Groenendijk, E. Guild, and P. Minderhoud (eds.), The Hague: Kluwer Law International; 2002; pp. 7-26, at 18. See also R. Bauböck, *Multilevel citizenship and territorial borders in the EU polity*, Vienna: Österreichische Akademie der Wissenschaften; 2003 at 7; and D. Bigo, and E. Guild, ‘Policing at a Distance: Schengen Visa Policies’, in: *Controlling Frontiers: Free Movement Into and Within Europe*, D. Bigo and E. Guild (eds.), Aldershot: Ashgate; 2005; pp. 233-263 at 238.

3.2. The Common Immigration Policy and the Borders of the EU and its Member States

Before the Treaty of Amsterdam, which made immigration and asylum policy a matter of EC competence, co-operation on these matters had for a long time been purely intergovernmental. This was largely due to Member States' reluctance to communitarize an area that was so clearly labelled, both by them and their national constituencies, as constituting the core of national sovereignty. Nonetheless, from the 1980's onwards, a certain degree of "Europeanization" of migration policies – although not part of the integration process in a formal sense⁵⁵ – had taken place in the form of various forms of trans-national cooperation by individual Member States.

Some authors make a link between the beginnings of European co-operation and a developing awareness of legal constraints domestically. Immigration control authorities found that they had more freedom of action if they operated at the European level, where decision-making was largely free of judicial checks and public scrutiny.⁵⁶ Even when at Maastricht, co-operation was institutionalised in the third pillar, the situation in which primacy laid with national executives remained largely intact: apart from the absence of domestic constitutional constraints, there was little scope for action by the Commission, European Parliament or the ECJ.⁵⁷ Thus, in this early phase Europeanization provided Member States with an opportunity to reassert national sovereignty with regard to control over international movement by turning to the traditional

⁵⁵ Huysmans, *op. cit.*, at 755.

⁵⁶ See A. Geddes, 'International Migration and State Sovereignty in an Integrating Europe', *International Migration*, 39(6) 2001, pp. 21-40, at 28; C. Boswell, 'The external dimension of EU immigration and asylum policy', *International Affairs*, 79(3) 2003, pp. 619-638, at 623; and V. Guiraudon, 'The constitution of a European immigration policy domain: a political sociology approach', *Journal of European Policy*, 10(2) 2003.

⁵⁷ Boswell, *op. cit.* at 623.

administrative culture of immigration decision-making where the rule of law is severely curtailed.⁵⁸

When Member States' concern over immigration had risen sufficiently high and dissatisfaction with the intergovernmental approach of the Third Pillar emerged, at Amsterdam the Treaty on the European Union was changed in such a manner that immigration and asylum were moved from the third pillar to the first.⁵⁹ Increasing immigration pressure on the European Union countries made the Member States realise that purely intergovernmental strategies would no longer be sufficient to "protect" their national states. Moreover, the absence of internal border controls as discussed above made a common stance on immigration from third countries seem logically required. The complex manner in which the common immigration and asylum policy is shaped, with rules from many overlapping sources, opt-in and opt-out provisions for certain Member States and forms of policy making which depart from the traditional EC legislative process such as the open method of co-ordination is a reflection of Member States' ambiguous feelings regarding loss of exclusive competences in this area. Another such example is contained in the special provision for preliminary rulings under Title IV that deviates from the normal procedure for preliminary rulings. According to Article 68 EC only national courts of last instance can refer questions for preliminary rulings to the European Court of Justice.⁶⁰ Furthermore, cooperation between Member States still also takes place outside the formal structure of the EU, such as multilateral cooperation between several Member States in combating illegal immigration under the Prüm

⁵⁸ V. Guiraudon and G. Lahav, 'A Reappraisal of the State Sovereignty Debate, the Case of Migration Control', *Comparative Political Studies*, 33(2) 2000, pp. 163-195. at 178; Geddes (2001), *op. cit.*, at 36; and Geddes (2005,) *op. cit.*, at 788.

⁵⁹ A. Duff, *The Treaty of Amsterdam*, London: Federal Trust; 1997 at 8, 9, 20; and Huysmans, *op. cit.*, (2000), at 756.

⁶⁰ The Council did not adapt this provision after the transition of the transitional period that expired on 1 May 2004 as required by Article 67(2) EC. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities, Adaptation of the provisions of Title IV of the EC Treaty relating to the jurisdiction of the Court of justice with a view to ensuring more effective judicial protection (COM 2006 (346) final, 28 June 2006).

Convention.⁶¹ The explicit intention of such cooperation is the transferral of the rules the participating states have agreed upon to the level of the EU. Even though such intergovernmental cooperation may be motivated by a genuine wish of some Member States to achieve closer integration, the inevitable result is that checks on the executive power are largely absent: the European Parliament for example has no say on the proceedings and outcomes within these multilateral frameworks.

The measures and policies which have been taken so far as a result of the “shift upwards” - denoting the transferring of migration decision making from the national to the Community level⁶² - exemplify that strong emphasis is laid on traditional control of the territorial border.⁶³ In spite of the comprehensive approach to be taken to migration as was proclaimed indispensable at Tampere,⁶⁴ legislation and other instruments such as on harmonising existing practices on expulsions,⁶⁵ mutual recognition of expulsion decisions,⁶⁶ voluntary repatriation,⁶⁷ the organisation of joint flights for expulsion,⁶⁸ and controlling illegal immigration in a more general sense,⁶⁹ all point to all point to Member States’

⁶¹ Convention on the stepping up of cross border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration, signed at Prüm on 27 May 2005 (Schengen III). Participating states are Belgium, France, Spain, Luxembourg, Austria, the Netherlands, Germany and Italy.

⁶² Guiraudon and Lahav, *op. cit.*, at 176-177.

⁶³ Id.

⁶⁴ EU Presidency Conclusions Tampere European Council, 15 and 16 October 2001.

⁶⁵ Various Recommendations, see for example OJ C 5, 10 January 1996 and OJ C 274, 19 September 1996.

⁶⁶ Council Directive 2001/40/EC, OJ L 149, 2 June 2001

⁶⁷ Council Decision 97/340/JHA of 26 May 1997, OJ L 147, 5 June 1997.

⁶⁸ Council Decision of 29 April 2004, OJ L261, 6 August 2004, pp. 28-35.

⁶⁹ See amongst many other documents: Green Paper on Community return policy for illegal residents (European Commission, COM (2002) 175 final, 10 April 2002); Communication from the Commission to the Council and Parliament on a common policy on illegal immigration (COM(2001) 672 final, 15 November 2001); Council Decision of 27 March 2000 on the improved exchange of information to combat counterfeit travel document O.J. L81, 1 April 2000; Council Regulation EC/2725/2000 of 11 December 2000 concerning “Eurodac”, O.J. L 316, 15 December 2000; EU Presidency Conclusions on Justice and Home Affairs of the Laeken European Council, 17 December 2001; EU Presidency Conclusions to the Brussels European Council 25/26 March 2004 including the Hague Programme, and Council Decision 2005/267/EC of 16 March 2005 on

strong commitment to a rigid territory-identity link. In this respect, it is significant that policy making under Title IV of the EC Treaty is strongly unbalanced in favour of measures that emphasise security and border control.⁷⁰

Apart from an upward shift, Member States have externalised migration control through various EU policies, in what can be described as a shift “outwards”.⁷¹ They have done so in different ways which all lead to a separation between the concept of the border and the perimeter of European territory.⁷² The first of such policies is the Schengen system of visa regulation.⁷³ The Schengen visa system governs movement of potential migrants in their countries of origin instead of at the moment of their arrival at the actual border of the Member States. Particularly in combination with carrier sanctions,⁷⁴ through which private actors are made responsible for the typical sovereign act of control over borders, the European visa requirements lead to a construction in which control over movement is more easily exercised because the extra-territorialisation of such control facilitates the evasion of human rights obligations. The regulation of visa under Schengen is also indicative of the fact that States are not averse of ceding formal sovereignty if they can win back substantive powers of exclusion: participating states are under an obligation to refuse entry if the Schengen conditions are not met.⁷⁵

The stationing of immigration liaison officers in third countries in order to prevent irregular migration is another illustration of the extra-territorializing of traditional conceptions of territorial sovereignty. Similarly, certain provisions of

establishing a secure web-based Information and Co-ordination Network for Member States’ Migration Management Services, O.J. L 083, 1 April 2005, pp. 48-51.

⁷⁰ G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, Martinus Nijhoff Publishers, Leiden and Boston, 2006, at 292.

⁷¹ Guiraudon and Lahav, *op. cit.*

⁷² E. Rigo, *Draft Paper: Citizens and foreigners in the enlarged Europe. Implications of enlargement for the rule of law and constitutionalism in post-communist legal orders*; European University Institute, Florence. 28-29 November 2003, at 6.

⁷³ See more extensively Bigo and Guild (2005), *op. cit.*

⁷⁴ Based upon Art. 26 of the 1990 Supplementation Agreement of the Schengen Convention.

⁷⁵ J.D.M. Steenbergen, ‘Schengen and the movement of persons’ in: *Schengen: Internalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, H. Meijers (ed.), Leiden: Stichting NJCM-Boekerij; 1992 at 65.

the Hague Programme, in particular relating to the establishment of a Border Control Agency (Frontex), make it possible to organise joint EU-level measures to intercept persons travelling on the high seas.⁷⁶ Frontex has also co-ordinated the instalment of patrols in the territorial waters of West African states.⁷⁷ The intent of these patrols, which are carried out under the formal responsibility of individual Member States, is clear: prevention of international movement. Spain and Senegal reached agreement over joint patrols commandeered by two vessels of the Spanish Guardia Civil in Senegal's territorial waters.⁷⁸ In August 2006, a Portuguese patrol vessel arrived at Cape Verde for a 45-day mission against 'illegal' migration.⁷⁹ The Spanish-Mauritanian patrols that have been running since April 2006 have resulted in the interception of several hundreds of emigrants.⁸⁰

Other venues for the extension of control and police methods concerning international movement consist of shifting responsibility to third countries: "third countries are encouraged, or in the case of candidate countries, obliged, to apply EU standards of migration management, or to enter into agreements for readmitting irregular migrants."⁸¹ Readmission agreements fit very well in the global system based on territoriality as discussed above: they are a means by which control over movement is exercised as they govern populations both inside and outside a state's territory.⁸² While such a means of regulating populations may be disrupted on the grounds of certain human rights considerations, concepts such as safe third country and safe country of origin, now commonly used by all

⁷⁶ European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, Council Regulation (EC) No 2007/2004 of 26 October 2004. ILPA in House of Lords (23 March 2003), p. 34. See also European Commission Newsroom 4 August 2006: "EU common patrols to control maritime borders will be organised shortly in the south Mediterranean region."

⁷⁷ Operation HERA II. See also Communication from the Commission to the Council, *Reinforcing the management of the European Union's Southern Maritime Borders*, COM(2006) 733 final, Brussels, 30 November 2006.

⁷⁸ Source: Reuters, 22 August 2006.

⁷⁹ Source: JeuneAfrique, 12 August 2006.

⁸⁰ Source: Agence Presse, 14 August 2006.

⁸¹ Boswell, *op. cit.*, at 624.

⁸² Walters, *op. cit.*

Member States, attempt to maintain a rigid system of territoriality in which the national quality of both persons and territory define the scope for individual movement.

Further proof of the pushing of borders outwards, thereby ‘de-territorializing territorial sovereignty’, is provided by proposals made by Italy, Germany, and the UK, for so-called Transit Processing Centres. These proposals were inspired by Australia’s ‘pacific solution’, its asylum policy consisting of “patrolling a naval barrier created around Australia’s territorial waters in order to prevent unauthorized vessels carrying asylum seekers from entering. Intercepted vessels are diverted to offshore processing centres in countries to host [these] in return for financial incentives. [...] If granted refugee status, the refugees are then resettled in third countries.”⁸³ European ideas for Transit Processing Centres similarly envisaged the processing of claims that were made in one of the Member States outside the territory of the EU, thereby facilitating the contracting out of asylum services to third countries.⁸⁴ It is persuasively argued by several authors that significant legal obstacles would be encountered in realising these plans,⁸⁵ which perhaps explains why they have not been adopted by the Commission. However, Member States seem to think that these obstacles can be evaded if camps for illegal immigrants are set up in countries such as Algeria, Tunisia, Mauritius, Morocco, and Libya, not under formal supervision of the EU, but of these respective countries.⁸⁶ Increasing co-operation between individual Member States and North African countries, such as between Italy and Libya or Mauritania and Spain, shows a willingness on both sides to contain the alleged threat of

⁸³ O. Lynskey, ‘Complementing and completing the Common European Asylum System: a legal analysis of the emerging extraterritorial elements of EU refugee protection policy’, *European Law Review* 31, 2006, pp. 230-250 at 242.

⁸⁴ Id. at 247; and I. Saint-Saens, ‘À Distance,’ *Vacarme*, 29, 2004.

⁸⁵ Lynskey, *op. cit.*; and G. Noll, ‘Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones’, *European Journal of Migration and Law* 5, 2003, pp. 303-341.

⁸⁶ D. Helmut, The Desert Front: EU refugee camps in North Africa? *Statewatch*, March 2005; and R. Andrijasevic, *How to balance rights and responsibilities on asylum at the EU's southern border of Italy and Libya*. Central European University (Center for Policy Studies), Open Society Institute; 2005, at 15-16.

migration on the non-European side of the Mediterranean.⁸⁷ Such co-operation has also been institutionalised within the framework of the EU.⁸⁸ In 2006, it adopted a package of measures to help Mauritania contain the flow of illegal immigrants to the Canary Islands.⁸⁹ In Libya, the European Commission has similar projects and a recent visit there led by Frontex aimed at advising the Libyan authorities how the EU could best assist with the management of its borders.⁹⁰ The background of such initiatives is a growing unwillingness on the part of the EU to deal with the effects of migration on its own soil, but to contain the problem in non-Member-States, who are enticed to co-operation with political and financial advantages. Although occasionally worded in terms of humanitarian concern, Member States use EU cooperation with third countries to export their views on territorial sovereignty, even though the situation in these third countries is hardly comparable to the situation in Europe. Similarly, plans for regional protection programmes,⁹¹ even though arguably partly motivated by a genuine wish to provide more accessible and effective protection for refugees in their

⁸⁷ Such as Italy financing the construction of detention camps in Libya. See European Commission, Technical Mission to Libya on illegal immigration, 27 November - 6 December 2004, Report. Brussels: 2005, at 59. Spain has agreed to pay for the construction of detention centres for illegal immigrants in Mauritania (Reuters, 17 March 2006).

⁸⁸ For example in the Aeneas Programme, Regulation (EC) 491/2004 of the European Parliament and the Council of 10 March 2004 establishing a programme for financial and technical assistance for third countries in the areas of migration and asylum, O.J. 18 March 2004 L80/1. See also Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union's relations with third countries, European Commission (COM(2002) 703 final, 3 December 2002); and Communication from the Commission to the European Parliament and the Council, Thematic program for the cooperation with third countries in the areas of immigration and asylum (COM (2006) 26 final, 25 January 2006).

⁸⁹ A € 2.45 million programme, which includes capacity building for detection, apprehension and detention; revision of existing legislation; and institutional support. See European Commission Press Release, 10 July 2006, Brussels, IP 06/967.

⁹⁰ See Frontex-led EU Illegal Immigration Technical Mission to Libya, 28 May - 5 June 2007.

⁹¹ Communication from the Commission to the Council and the European Parliament, Regional Protection Programmes. European Commission (COM (2005) 388 final, 6 April 2005). At the Vienna Justice and Home Affairs Council, EU Justice and Home Affairs Ministers agreed upon launching regional protection programmes in Belarus, Moldova, Ukraine and Tanzania.

regions of origin, also fit within a rigid perception of the link between territorial exclusion and the foreigner.

The Treaty of Amsterdam also incorporated policy making in the field of legal migration in the Community framework. Article 63(3) of the EC Treaty provides that the Council is to adopt “measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits” In 2001 the Commission presented a proposal for a Directive dealing with “the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.”⁹² Whilst the other European Institutions gave positive opinions, discussion in the Council was limited to a first reading of the text⁹³ and currently there is no existing legislation pertaining to labour immigration in general nor are there any proposals under negotiation,⁹⁴ despite the fact that the Thessaloniki European Council of 19-20 July 2003 stressed “the need to explore legal means for third-country nationals to migrate to the Union [...]”⁹⁵ In 2005, the Commission presented a Policy Plan on Legal Migration, in which it announced the legislative initiatives that it intended to take in the then remaining period of the Hague Programme (2006-2009). These concern proposals for directives dealing with the conditions and the procedures of admission for four selected categories of economic immigrants - highly skilled immigrants, seasonal workers, Intra-Corporate Transferees and remunerated trainees – and a general framework directive intending to establish which rights a third-country national in employment shall enjoy once he/she has been admitted

⁹² COM(2001) 386.

⁹³ Commission, Green Paper on an EU Approach to Managing Economic Migration, Brussels, 11 January 2005, COM(2004) 811 final.

⁹⁴ Although it should be noted that there is some legislation in place pertaining to legal migration, namely Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23 December 2004, p. 12–18; and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3 November 2005, p. 15–22.

⁹⁵ Council of the European Union, Brussels, 1 October 2003, par. 30.

to the territory of a Member State.⁹⁶ However, it is significant that unanimity remains the voting rule concerning the adoption of measures in the field of legal migration of third-country nationals to the Member States as referred to in Article 63(3)(a) EC Treaty.⁹⁷ Thus, despite the fact that Community competence exists over important aspects of legal migration, Member States will retain veto power in this area in the foreseeable future. As a consequence, also when it comes to most venues for legal migration of third-country nationals, the national border is all but abolished, a fact which was recently emphasised by commissioner Frattini after the High-level Conference on Legal Migration held in September 2007 in Lisbon:

“With my future proposals on legal migration, I have no intention of calling into question the jurisdiction of any EU Member State, which is the sole authority determining the number of migrants admitted onto its territory.”⁹⁸

4. Conclusions: the National Territorial Ideal in Europe

I have argued here that, paradoxically as it may seem, the importance that national states attach to the national territorial ideal is exemplified by the Europeanization of immigration policy and by the legal framework regulating free movement of third-country nationals within the EU. The way in which national states have recourse to national sovereignty when it comes to free movement rights of third-country nationals *within* the EU makes that an area without internal

⁹⁶ Communication from the Commission, Brussels, 21 December 2005, COM(2005) 669 final. See also Communication from the Commission to the Council and the European Parliament, *The global approach to migration one year on: Towards a comprehensive European migration policy*, Brussels, 30 November 2006, COM (2006) 735 final, in which the development of a policy on labour migration is regarded as an important aspect of the “global approach”.

⁹⁷ Recital no. 7 of Council Decision 2004/927/EC of 22 December 2004.

⁹⁸ Franco Frattini, European Commissioner responsible for Justice, Freedom and Security, “Shaping Migration Patterns”, Speech delivered in the European Parliament, Brussels, 20 September 2007. See also Article 69b of the Reform Treaty the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

frontiers has not truly been established. Internal or national borders, although they are now free of physical control, still differentiate between various kinds of movement depending on the nationality of the individual concerned. Member States' reluctance to abolish the function of the internal border with regard to third-country nationals and the ensuing consequences for the delimitation of competences between the EU and its Member States with regard to the admission of third-country nationals who are family members of EU citizens has also led to inconsistency and inequality in the legal regime regulating their rights of free movement.⁹⁹ We have seen that the motives underlying the Europeanization of policy-making regarding immigration *into* the EU show that the process of integration in this field is similarly driven by a deeply felt wish to maintain the traditional role of territorial boundaries in protecting the identity of the nation state. Law and policy making under Title IV of the EC Treaty has thus far put strong emphasis on protecting the territorial border by preventing new arrivals and fighting 'illegal' migration. The way in which Member States choose to focus on integration with regard to the protection of territorial borders, and find it much more difficult to achieve integration in the field of legal migration, affirms that they prioritise the relation between territorial sovereignty and modern concepts of nation and national identity. Similarly, the adoption by the EU of Member States' own security discourse¹⁰⁰ when addressing migration signifies an inability to break away from traditional perceptions in which immigration is mainly seen as a threat to the territorial integrity of the state.

Precisely the making of a European immigration policy and the shaping of a legal framework regulating the status of third-country nationals within Europe could have provided an opening to question stubborn and reified notions about the link between territorial sovereignty and exclusion of the foreigner. The fact that this opportunity has not been grasped is not merely a theoretical issue, but "the obduracy of the national border" in Europe deeply influences the rights and freedoms of the individual. In the first place, this is so because the perception of a self-evident relation between territorial sovereignty and exclusion of the foreigner makes that we lose sight of the individual that is actually affected by exclusionary

⁹⁹ See also A-G Geelhoed in his opinion to the *Jia Case*.

¹⁰⁰ Kostakopoulou, *op. cit.*

measures in the area of immigration. As the discourse of territorial sovereignty dominates the state's stance on matters relating to immigration, the rule of law is only in a very limited number of cases capable to challenge sovereign decisions of the state regarding territorial exclusion of the other. This trend of limited accountability is much stronger at the European level, where measures relating to immigration are often concluded in secret and are difficult to access and control. Moreover, the fact that these policies are increasingly taking form at the European level makes it more difficult to raise broader public awareness and debate. The way in which Member States work together at preventing what they call illegal immigration – by intercepting migrants in the coastal waters of West Africa – provides a good example of just such tendencies: these practices are barely subjected to any democratic accountability, not at all to any form of judicial control and public debate concerning the legality of such measures is negligible.¹⁰¹ And although some attention has been paid to these practices in academic debate, the main focus there has been on the interests of asylum seekers and refugees.¹⁰²

The fact that the interests of irregular immigrants have mostly been ignored raises the impression that intercepting “mere migrants” raises no fundamental questions. The recurring emphasis on asylum seekers and refugees in critical appraisals of EU policies is understandable in view of their particular vulnerable position and need of protection. However, if these appraisals fail to address the more fundamental sovereign assumptions that underlie contemporary immigration policies in general they run a risk of resulting in an affirmation of the dominant discourse in which mere immigration – unqualified by international refugee law or a limited amount of human rights – is portrayed as engaging solely territorial sovereignty. The result of such a discursive approach to immigration is

¹⁰¹ And although the Reform Treaty introduces the ordinary legislative procedure for measures related to border checks, asylum and immigration, in Article 66a, the Treaty also explicitly allows for Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

¹⁰² See e.g. A. Fischer-Lescano and T. Löhr, *Menschen- und flüchtlingsrechtliche Anforderungen an Maßnahmen der Grenzkontrolle auf See*, European Center for Constitutional and Human Rights, September 2007.

that most personal interests that are affected by sovereign decisions in this field stay largely invisible, a process that is facilitated by keeping the individuals concerned far away from us (one of the many logics underpinning *police à distance*) or by portraying them as very different from “us”.

We can conclude that in the EU, the quintessential function of the national/territorial border is not changing, although its location and the manner of its enforcement on the individual have been evolving. It has been said in this context that Europe reveals “a system of differentiated memberships, framed by the norms that identify boundaries at each level of the European polity”¹⁰³ Indeed, whereas before the concept of nationality was the main tool with which to distinguish between legitimate and illegitimate movement,¹⁰⁴ the EU and its Member States have brought about a considerably more sophisticated system of maintaining a structure based on territoriality. Concepts such as EU citizens, third-country nationals, safe country of origin, safe third country, Schengen, and readmission agreements are the constituent elements of this novel structure. However, notwithstanding the novelty of the tools, maintaining the self-evident link between territorial exclusion and the individual who is defined as the “other” is the ratio behind the very existence of that structure. The perceived self-evidence of that very link – which has now found a definite place within “Europe” – may well be the essence of the nationalism that plays a fundamental role in the self-understanding of the modern state.

¹⁰³ Rigo, *op. cit.*, p. 11. See also W. Walters, ‘Mapping Schengenland: denaturalizing the border’, *Environment and Planning D: Society and Space*, 20(5), 2002, at 567.

¹⁰⁴ Crowley, *op. cit.*, at 33.