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REFUGEE CRISIS AND MIGRATIONS AT THE GATES OF EUROPE: DETERRITORIALITY, EXTRATERRITORIALITY AND EXTERNALIZATION OF BORDER CONTROLS

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I. - INTRODUCTION. II. - THE BORDERS AND GATES OF EUROPE. III. - VULNERABILITY OF THE EUROPEAN BORDERS? IV.- 'EXTERNALIZATION', 'EXTRATERRITORIALITY' AND 'DETERRITORIALITY' OF MIGRATION CONTROL. V. - CONCLUSIONS

ABSTRACT: The refugee crisis has shaped a new perception of the migration reality in Europe. The ramifications of its impact on European integration are visible and enduring. The EU's response has included a certain strategic perspective, albeit weighed down by an excess of eurocentrism and a security perception that does not take third countries' interests into balanced account. The major economic effort being made supports a far-reaching strategy, only now beginning to be outlined, to promote economic development in the countries of origin and transit of migrants. Additionally, issues such as the monitoring of respect for migrants' human rights have not yet been suitably globally defined in this strategy.

Although the behaviour and response capacity of the EU and its Member States can be assessed in different ways, the truth is that the migration debate has decisively swayed a block of countries that are openly reluctant to engage in intra-European solidarity and accept the new realities and responsibilities entailed by the refugees already present and yet to come to Europe. This position is very negative in the medium and long term, since, as noted, the crisis has also underscored the permanence of migration trends and flows and the consolidation of the routes or *gates of entry* to Europe.

This contribution considers the vulnerability of the European borders designed and in operation in the Schengen Area. The internal borders were the most affected at the start of the migration crisis and are likely to be marked by current regulatory changes, which tend to allow exceptionality as a relatively common occurrence in the European 'federal' area of free movement. Nevertheless, the resilience of this system of the absence of internal border controls in the 'federal' area of free movement is undeniable.

The impact on the EU's external borders has been even greater, as it has shown once and for all that, more than fragile or vulnerable, some border controls, such as the sea border ones, are not practicable, especially those on Europe's southern sea borders.

It is precisely this infeasibility of border control in marine areas that leads to the accentuation of certain trends on Europe's external borders, such as the *externalization* of migration controls. New regulatory and strategic planning developments confirm this trend, as well as the current concern for deploying an integrated external border management system.

With regard to the phenomenon known as the 'externalization' of migration controls, the literature considers it to refer to EU actions aimed at reducing, sorting and controlling migration flows with the consent of third states in relations that are, by definition, asymmetrical. This article has addressed the different situations that arise, highlighting the advisability of differentiating between *externalizing* migration policy, on the one hand, and *extraterritorial* action concerning migration control, on the other.

In search of greater conceptual accuracy, the term 'deterritoriality' has been used, as it is more neutral than the other terms mentioned insofar as it evokes the idea of positioning outside the territory certain border control and migration policy functions, to be carried out by other states or by the state itself. Since these are situations and actions linked to migration and border control, they should be conceptually situated outside the territory; the *deterritoriality* option hypothetically makes it possible to encompass both the *externalization* and the *extraterritoriality* of border control functions concerning migration.

To this end, this article has focused on the various notions and activities that might be discussed in relation to the 'externalization' and the 'extraterritoriality' of migration controls and border functions, terms that, in sum, refer to migration control and management activities outside the territory, carried out by public officials of the EU states or by third states.

On the one hand, *externalization* is considered to refer to the management and control of migration flows, the activities of adopting agreements, programmes, action plans and measures to encourage third states to monitor their own borders and migration flows in order to control, restrict or impede physical access to the territory of the EU states, accepting the placement in their territory, or the rejection, of refugees and migrants from other states. It does not involve the presence of or direct exercise of control activities by public officials of the EU Member States. In fact, outside European territory it is highly debatable that states are strictly performing border control functions, as it is an area that may more accurately fall within the more generic field of *migration flow control* linked to migration policy and European external action.

On the other hand, *extraterritorialization* is understood to entail the performance of border control functions by states themselves outside their own territory. This case should involve the presence of or exercise by Member State public officials of some (effective) border control activities or functions in areas without state jurisdiction or in the territory of third states, with their consent.

We are witnessing a change in the very concept of border in this post-globalization era, in which certain functions are offshored and systematically placed outside a state's territory and checkpoints. However, territorial and extraterritorial actions must be differentiated from those occurring as part of external actions in or with third states for the purposes of migration policy and the control of migration flows.

The reality is that a new border space south and east of the Mediterranean has been configured for migratory flows, which needs a new policy of external borders for these areas. Therefore, we must reflect on new frontier spaces, with new concepts and approaches to the border that provide other parameters of action towards migratory flows and external controls.

Today, the Union needs new instruments and concepts for these new realities, especially so as not

to lose sight of the fact that, when it comes to tackling crises such as those related to migration and the rights of foreigners approaching or entering its territory and jurisdiction, Europe is a rational construct entailing a project for civilizational progress. As such, it must permanently incorporate its values and respect for human rights in all its policies, regulatory measures and actions with foreigners and third states, both on its own external borders and beyond them. This is essential for the identity and objectives of the European integration, and for the projection of the EU security, solidarity and values in accordance with the International and European Human Rights Law.

KEYWORDS: European Union, immigration, refugees, asylum, European values, border controls, immigration controls, migration policy, borders, internal borders, external borders, Frontex, maritime immigration, externalization, extraterritoriality, deterritoriality, human rights

CRISIS DE REFUGIADOS Y MIGRACIONES EN LAS PUERTAS DE EUROPA: DESTERRITORIALIDAD, EXTRATERRITORIALIDAD Y EXTERNALIZACIÓN DE CONTROLES FRONTERIZOS

RESUMEN: La crisis de los refugiados ha conformado en Europa una nueva percepción de la realidad migratoria. Las ramificaciones de sus impactos en la construcción europea son visibles y duraderas. La reacción de la UE ha tenido cierta perspectiva estratégica, aunque lastrada por un exceso de eurocentrismo y de percepción securitaria, que no tiene en cuenta equilibradamente los intereses de los países terceros. El gran esfuerzo económico que se está realizando sostiene una estrategia de largo alcance que sólo ahora empieza a esbozarse, para fomentar el desarrollo económico en los países de origen y tránsito de la emigración. Por otra parte, cuestiones como las de vigilancia del respeto de derechos humanos de los inmigrantes aún están por perfilarse adecuadamente de manera global en esta estrategia.

Aunque podemos hacer diferentes valoraciones del comportamiento y capacidad de reacción de la UE y sus Estados, lo cierto es que el debate migratorio ha decantado decididamente un bloque de países abiertamente reacios a la solidaridad intraeuropea, y a asumir las nuevas realidades y cargas que suponen los refugiados presentes y por venir a Europa. Esta perspectiva es muy negativa a medio y largo plazo, ya que, como hemos visto, la crisis también revela la permanencia de las corrientes y flujos migratorios, y la consolidación de los vías o *Puertas de entrada* a Europa.

Hemos considerado en el trabajo la vulnerabilidad de las fronteras europeas diseñadas y en funcionamiento en el Área Schengen. Las fronteras interiores fueron las más impactadas al comienzo de la crisis migratoria, y probablemente van a quedar marcadas por los cambios normativos en curso, que tienden a admitir la excepcionalidad como hecho relativamente común en el espacio 'federal' de libre circulación europeo. Pese a todo, la capacidad de resiliencia de este sistema de ausencia de controles fronterizos interiores en el espacio 'federal' de libre circulación, es incontestable.

El impacto en las fronteras europeas exteriores ha sido aún mayor, ya que se ha puesto de relieve en nuestra opinión definitivamente que, más que frágiles o vulnerables, ciertos controles fronterizos como los marítimos son impracticables, en particular los de las fronteras marítimas meridionales europeas.

Precisamente esta inviabilidad del control fronterizo en espacios marítimos es lo que lleva en nuestra opinión a acentuar ciertas tendencias en las fronteras exteriores europeas, como las de *externalización* de controles migratorios. Los nuevos desarrollos normativos y de planificación estratégica confirman esta tendencia, así como la preocupación actual por desplegar un sistema integrado de gestión de fronteras exteriores.

Respecto al fenómeno conocido como de 'Externalización' de controles migratorios, la doctrina ha venido considerándolo como actuaciones de la UE que buscan reducir, ordenar y controlar los

flujos migratorios en anuencia con Estados terceros, en relaciones por definición asimétricas. En nuestro trabajo hemos abordado las diferentes situaciones que se plantean, poniendo de relieve la conveniencia de diferenciar entre *Externalizar* las políticas migratorias, por una parte, de la actuación *Extraterritorial* de control migratorio, por otra parte.

Buscando una mayor precisión conceptual, preferimos utilizar el termino Desterritorialidad, que es más neutro que los referidos, al evocar la idea de ubicar fuera del territorio determinadas funciones de control fronterizo y de políticas migratorias, a desarrollar por otros Estados o por el propio Estado. Al tratarse de situaciones y actuaciones vinculadas a las migraciones y a los controles fronterizos, debemos conceptualmente situarnos fuera del territorio; por lo que esta opción de *Desterritorialidad*, permite hipotéticamente abarcar las dos situaciones de *Externalización* y de *Extraterritorialidad* de las funciones de control fronterizo respecto a las migraciones. Para ello nos centramos en las diferentes nociones y actividades que podrían debatirse respecto a la 'Externalización', 'Extraterritorialidad' de controles migratorios y funciones fronterizas, expresiones que, en suma, hacen referencia a actividades de gestión y control migratorio fuera del territorio, llevados a cabo por agentes públicos de los Estados UE, o por terceros Estados.

Por una parte, consideramos constituyen *Externalización* de la gestión y control de flujos migratorios, las actividades de adopción de Acuerdos, Programa, Planes y medidas que pretenden que Estados terceros vigilen sus propias fronteras y flujos migratorios, para controlar, restringir o impedir el acceso físico al territorio de los Estados UE, asumiendo la localización en su territorio, o el rechazo, de refugiados e inmigrantes de otros Estados. Esto no implicaría presencia ni ejercicio directo de actividades de control por agentes públicos de los Estados Miembros de la UE. En realidad, fuera del territorio europeo es muy discutible que los Estados estén realizando estrictamente funciones de control fronterizo, ya que se trata de un ámbito que se encuentra tal vez en el más genérico terreno del *control de flujos migratorios* y vinculado a la política migratoria y a la acción exterior europea.

Por otra parte, entendemos que la actuación *Extraterritorialidad* supone llevar a cabo funciones de control fronterizo por los Estados fuera de su territorio. Aquí debe existir en nuestra opinión presencia o ejercicio por agentes públicos de los Estados miembros de ciertas actividades o funciones de control (efectivo) fronterizo, en espacios sin jurisdicción estatal, o en el territorio de Estados terceros, con su acuerdo.

Estamos ante un cambio en la concepción misma de la frontera en esta era pos-globalización, donde determinadas funciones se deslocalizan y se sitúan sistemáticamente fuera del territorio y los puestos fronterizos de los Estados. Sin embargo, las actuaciones territoriales y extraterritoriales deben diferenciarse de las que se producen en actividades de acción exterior en o con terceros Estados a fines de política de inmigración y control de flujos migratorios. La realidad es que se ha configurado para los flujos migratorios un nuevo espacio fronterizo al sur y este del mediterráneo, que necesita una nueva política de fronteras exteriores para este área. Por ello debemos reflexionar sobre nuevos espacios e imaginarios fronterizos, con nuevos conceptos y enfoques de la frontera que aporten otros parámetros de actuación hacia los flujos migratorios y los controles exteriores.

La Unión necesita hoy instrumentos y conceptos nuevos para estas nuevas realidades, y sobre todo para no perder de vista que, a la hora de afrontar crisis como las migratorias y de derechos de los extranjeros que se acercan o entran en nuestro territorio y jurisdicción, Europa es una construcción racional que supone un Proyecto de progreso civilizatorio, y que como tal debe incorporar permanentemente sus valores y el respeto de derechos humanos en todas sus políticas, medidas normativas y actuaciones con extranjeros y Estados terceros, en sus propias fronteras exteriores y más allá de las mismas. Esto es esencial para la identidad y objetivos de la integración, y para la proyección de la seguridad, solidaridad y valores de la UE conforme al Derecho internacional y europeo de los Derechos Humanos.

CRISE DES RÉFUGIÉS ET MIGRATIONS AUX PORTES DE L'EUROPE: DÉTERRITORIALITÉ, EXTRATERRITORIALITÉ ET EXTERNALISATION DES CONTRÔLES DES FRONTIÈRES

RÉSUMÉ : La crise des réfugiés a forgé une nouvelle perception de la réalité de la migration en Europe. Les conséquences de ses impacts sur la construction européenne sont visibles et durables. La réaction de l'UE a eu une certaine perspective stratégique, bien que pénalisée par un excès de perception de l'eurocentrisme et de la sécurité, qui ne tienne pas compte des intérêts des pays tiers. Le grand effort économique en cours appuie une stratégie à long terme qui commence seulement à être esquissée pour promouvoir le développement économique dans les pays d'origine et de transit de l'émigration. D'autre part, des questions telles que la surveillance du respect des droits humains des immigrés doivent encore être correctement établies de manière globale dans cette stratégie.

Bien que nous puissions évaluer différemment le comportement et la capacité de réaction de l'UE et de ses États, le débat sur l'immigration a décidément décliné en bloc un groupe de pays ouvertement réticents à la solidarité intra-européenne et à assumer les nouvelles réalités et les responsabilités que posent les réfugiés. Cette perspective est très négative à moyen et long terme car, comme on l'a vu, la crise révèle également la permanence des courants et des flux migratoires, ainsi que la consolidation des routes ou portes d'entrée en Europe.

Nous avons examiné à l'œuvre la vulnérabilité des frontières européennes en fonctionnement dans l'espace Schengen. Les frontières intérieures ont été les plus touchées au début de la crise migratoire et devraient être modifiées par les propositions réglementaires en cours, qui tendent à admettre que l'exceptionnalité est un phénomène relativement courant dans l'espace «fédéral» de la libre circulation européenne. Malgré tout, la résilience de ce système d'absence de contrôle aux frontières intérieures dans l'espace «fédéral» de libre circulation est incontestable.

L'impact sur les frontières extérieures de l'Europe a été encore plus grand, car il a été clairement souligné à notre avis que, plutôt que fragiles ou vulnérables, certains contrôles frontaliers tels que les contrôles maritimes sont irréalisables, notamment ceux des frontières maritimes du sud de l'Europe.

C'est précisément cette impossibilité de contrôler les frontières dans les espaces maritimes qui conduit, à notre avis, à accentuer certaines tendances aux frontières extérieures européennes, telles que celles de l'externalisation des contrôles migratoires. Les nouveaux développements réglementaires et stratégiques en matière de planification confirment cette tendance, ainsi que la détermination actuelle de déployer un système intégré de gestion des frontières extérieures.

En ce qui concerne le phénomène appelé «externalisation» des contrôles de l'immigration, la doctrine l'a considéré comme une action de l'UE visant à réduire, ordonner et contrôler les flux migratoires en accord avec les États tiers, dans des relations asymétriques par définition. Dans notre travail, nous avons abordé les différentes situations qui se présentent, en soulignant l'opportunité de différencier les politiques migratoires d'externalisation, d'une part, de l'action extraterritoriale de contrôle de l'immigration, d'autre part.

À la recherche d'une plus grande précision conceptuelle, nous préférons utiliser le terme Desterritorialité, qui est plus neutre que ceux auxquels il est fait référence, lorsqu'il évoque l'idée de localiser certaines fonctions de contrôle des frontières et certaines politiques de migration en dehors du territoire, à développer par d'autres États ou par l'État lui-même. Lorsque nous traitons des si-

tuations et des actions liées à la migration et aux contrôles aux frontières, nous devons nous placer conceptuellement en dehors du territoire; par conséquent, cette option de déterritorialité permet, de manière hypothétique, de couvrir les deux situations d'externalisation et d'extraterritorialité des fonctions de contrôle des frontières en matière de migration. Pour cela, nous nous concentrons sur les différentes notions et activités pouvant être discutées concernant «l'externalisation», «l'extra-rritorialité» des contrôles migratoires et des fonctions des frontières, expressions qui, en bref, désignent des activités de gestion et de contrôle des migrations hors du territoire prises par des agents publics des États de l'UE ou par des États tiers.

D'une part, nous considérons que l'externalisation de la gestion et du contrôle des flux migratoires constitue une activité d'adoption d'accords, de programmes, de plans et de mesures visant à garantir que les États tiers surveillent leurs propres frontières et flux migratoires, afin de contrôler, restreindre ou empêcher l'accès physique sur le territoire des États membres de l'UE, en supposant que le réfugié et l'immigré en provenance d'autres États sont situés sur leur territoire. Cela n'impliquerait pas la présence ou l'exercice direct d'activités de contrôle par des agents publics des États membres de l'UE. En fait, hors du territoire européen, il est très discutable que les États exercent strictement des fonctions de contrôle des frontières, car il s'agit peut-être d'un domaine qui est peut-être le domaine le plus générique du contrôle des flux migratoires, plutôt lié à la politique migratoire et à l'action exterieure européenne.

D'autre part, nous comprenons que l'action Extraterritorialité implique que les États situés à l'extérieur de leur territoire exercent des fonctions de contrôle des frontières. À notre avis, il doit exister une présence ou un exercice par des agents publics des États membres de certaines activités ou fonctions de contrôle des frontières dans les espaces en dehors de la juridiction de l'État ou sur le territoire d'États tiers, avec l'accord de ces derniers.

Nous sommes confrontés à un changement dans la conception même de la frontière en cette ère de post-globalisation, où certaines fonctions sont délocalisées et systématiquement situées en dehors du territoire et des postes frontières des États. Toutefois, les actions territoriales et extraterritoriales doivent être distinguées de celles qui se produisent lors d'activités d'action extérieure dans ou avec des États tiers à des fins de politique d'immigration et de contrôle des flux migratoires. La réalité est qu'un nouvel espace-frontière au sud et à l'est de la Méditerranée a été configuré pour les flux migratoires, ce qui nécessite une nouvelle politique de frontières extérieures pour cette zone. Par conséquent, nous devons réfléchir sur de nouveaux espaces frontières, avec de nouveaux concepts et approches de la frontière qui fournissent d'autres paramètres d'action en matière de flux migratoires et de contrôles externes.

Aujourd'hui, l'Union a besoin de nouveaux instruments et concepts pour ces nouvelles réalités, et, surtout, pour ne pas perdre de vue le fait que face aux crises telles que les migrations et les droits des étrangers qui s'approchent de notre territoire ou y entrent, l'Europe est une construction rationnelle qui implique un projet de progrès civilisationnel. En tant que tel, l'Europe doit intégrer de manière permanente ses valeurs et le respect des droits de l'homme dans toutes ses politiques, mesures réglementaires et actions auprès des étrangers et des États tiers, à ses frontières extérieures et au-delà. Cela est essentiel pour l'identité et les objectifs de l'intégration, ainsi que pour la projection de la sécurité, de la solidarité et des valeurs de l'UE conformément au droit international et européen des droits de l'homme.

MOTS-CLÉ: Union européenne, immigration, réfugiés, asile, valeurs européennes, contrôles aux frontières, contrôles migratoires, politique d'immigration, frontières, frontières intérieures, frontières extérieures, Frontex, immigration maritime, externalisation, extraterritorialité, déterritorialité, droits de l'homme

I. INTRODUCTION

The so-called refugee crisis of 2015 has muddled many aspects of European integration. It is not just a matter of migration policy or the reception of asylum seekers, but of numerous aspects linked to the very essence and nature of the Union and of European integration. European values themselves are at stake when it comes to tackling the challenges posed by current and future migratory pressure towards Europe.[2]

This article will assess the impact of the 2015 refugee crisis on the European system of internal and external borders and the new aspects of migration control at the external borders, which go beyond the areas under state sovereignty or jurisdiction.

To this end, it will analyse (II) the structure of the European 'federal' area of free movement of persons and its border system, in force since 1995. The analysis of the crisis, its effects and the EU's response will show that this specific crisis falls within a framework of migration flows and migratory pressure whose access routes to Europe are well known and are determined by the migration paths referred to here as the *gates of Europe* with the neighbouring states of Turkey, Morocco and Libya.

It will also examine the situation of the internal and external borders following the crisis and present and future migration challenges (III). Specifically, it will analyse the obstacles to free movement and the status of the external borders as migration control evolves. In this regard, it will assess the problems of migration by sea and the current concern to implement and develop an Integrated External Border Management System.

Part IV will focus on the externalization of migration policy and controls. It will review the various situations and propose classifying the set of experiences, norms and practices carried out beyond state jurisdiction and the EU's external action as 'deterritorialization'. The author will share his view regarding the advisability of differentiating between externalizing migration policies to third states and extraterritorial action for border migration control. The conclusions (V) will recap the main takeaways.

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[2] For a previous analysis of these issues, DEL VALLE GÁLVEZ, A. "Unión Europea, crisis de refugiados y *limes imperii*", *Revista General de Derecho Europeo* 38, 2016, and "Los refugiados, las fronteras exteriores y la evolución del concepto de frontera internacional", *Revista de Derecho Comunitario Europeo,* Year No. 20, 55, 2016, p. 759.

II. THE BORDERS AND GATES OF EUROPE

1. SCHENGEN, INTERNAL BORDERS AND EXTERNAL BORDERS

The function of borders as a place for the control of goods and persons plays a decisive role in the process of European integration as it determines both the movement of goods and the mobility of people. Historically, this function of controlling people has been fulfilled at the border itself or at points near the dividing line. However, the European integration process has wrought significant changes in this border control function, primarily due to the progress made on economic and political integration. The creation of a unified economic area in the continental territories of the EU Member States has given rise to the need for functional simplification of the rules governing the internal movement of goods and people of any nationality in this common economic area.

This economic vector of functional unification of the territories of the states participating in the integration was amongst the powerful factors leading to the Schengen Agreements of 1985 and 1990 and responsible for the entry into force, in 1995, of the Schengen Implementing Convention — subsequently integrated into EU law by the Treaty of Amsterdam in 1997 — establishing homogeneous systems for controlling movement into and out of the 'federal' internal territory. It is undeniably a new historical experience of territorial coexistence for European states and an authentic evolution of the classical international border concept and models, resulting in the introduction of a distinction between 'internal borders' and 'external borders' in European states.[3]

In short, it consolidated the reality of what has come to be known as the *border-free Europe* : "*Europe without borders*" a term that actually refers to a territory with *no controls* at the land, sea and airport borders between Member States and thus elides the term *control*. Indeed, legally speaking, a more accurate term would be a *Europe free of internal border controls*. The achievement of Europe's new internal border model, implemented in 1997, had a solid legal foundation:

[3] See our Studies "La refundación de la libre circulación de personas, Tercer Pilar y Schengen: el espacio europeo de libertad, seguridad y justicia", 3 *Revista de Derecho Comunitario Europeo* , nº 3, 1998, pp. 41-ss; "Las fronteras de la Unión - El *modelo europeo* de fronteras", 12 *Revista de Derecho Comunitario Europeo,* 12, 2002, p. 299; "Control de Fronteras y Unión Europea", 7 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 7, 2003, p. 67, at 72 *et seq.*

the definition of the single market itself since 1986 as an "*area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*"(today, Article 26 TFEU)

The TEU and TFEU currently in force include a provision that enshrines in primary law the functionalist need for regulation of the free movement of persons in the area or unified economic territory, clearly differentiating between internal and external borders.

Under the TFEU, the European internal border system has the clear and powerful aim of eliminating controls and, therefore, establishing free movement in a 'federalized' territory free of border control. Article 77 TFEU, in the Chapter on Policies on Border Checks, Asylum and Immigration of the Title on the Area of Freedom, Security and Justice, provides:

1. The Union shall develop a policy with a view to:
(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders'.

This provision was drafted with the explicit aim of encompassing all internal border-control situations ('ensuring', 'absence of any', 'whatever their nationality'), establishing a clear mandate with no room for divergent interpretations regarding the obligatoriness for states of not implementing border controls for people.

This system is complemented by the external border system, with the necessary controls due to the elimination of all types of controls at the internal borders between states. Article 77 TFEU further provides:

1. The Union shall develop a policy with a view to:
(b) carrying out checks on persons and efficient monitoring of the crossing of external borders.

Thus, the Treaty regulates external border crossings with less detail than internal border crossings: it is necessary to carry out checks on persons and, also, monitor external border crossing; moreover, this monitoring must be efficient. However, the term 'efficient' is difficult to pin down legally and, thus, calls for subsequent assessment, probably of a political nature.

However, parallel to the elimination of the internal border controls, the Treaty clearly establishes the need to maintain the checks at Europe's external borders. Hence, the permanent nature of the institutional and legal construction of Europe's external borders and of the ensuing need for integrated ma-

nagement (Article 77(1)(c)), which will inevitably lead to the gradual reinforcement and development of the European border model.

These primary law objectives and regulation endow the Union's external borders with very special characteristics and properties and make them an evolving and fundamental construct inherent to European integration.

One of the most impressive achievements of European integration is precisely the development of its own border *model*, whereby the function of border control has been adapted to the reality of integration and the Schengen Area through the peculiar reorganization of the public power functions of monitoring and controlling the borders between Member States. Thus, through its regulation under the Treaty of Amsterdam, in force since 1999, the *European border model* already transformed the traditional concept of border by eliminating internal border controls, with the correlative security measures, and undertaking innovations in international law, such as the generalization of 'hot' pursuit on land.[4]

In this context, the analogy of the EU as a political entity with some attributes similar to those of a state ideally requires the international integration organization to have the elements of a state, namely: nationals (European citizens); a common immigration law (its own set of rules regulating access to, stays in and exit from EU territory); and a territory delimited by borders where its main powers are exercised. At the same time, the nascent political entity must have a border policy for common control and relations with neighbouring countries.

2. THE 2015 REFUGEE CRISIS AND MIGRATION TO EUROPE

During the years 2015 and 2016, millions of people came to Europe as part of a phenomenon mainly caused by the civil war in Syria. It came to be known as the *refugee crisis*, and it overwhelmed all of Europe's external border control systems.

In principle, the crisis was caused by the historical confluence of various factors, including the consequences of the Arab springs in countries such as Tunisia, the effects of the intervention and war in Libya, and the Syrian civil war.

However, in a context of a progressive increase in the arrival of migrants to Europe's borders, the crisis decisively exposed the reality of migration to

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[4] These ideas are discussed in 'Las fronteras de la Unión…', *supra* note 3, *Ibid.*

Europe as a structural component of its existence from here on out. In this order of ideas, the Commission considers that migratory pressure is, and will continue to be, the new normal for the EU[5] in the medium and long term. This refers to the **highly likely continued existence of migratory pressure** or the massive arrival of displaced persons, who, due to crises, conflicts and environmental problems, amongst other reasons, may reach European territories.

In addition to its enormous media impact, this particular crisis has had profound consequences for public opinion and European integration itself, with all kinds of repercussions in the European Union and its Member States. Of course, many aspects that now seem to be a consequence of the crisis were already present or in an embryonic state prior to it. With the crisis, they have emerged or been called into question and thus need to be discussed and addressed legally, politically and institutionally.

A brief overview of some of the issues that, in the author's view, are the main effects of the refugee crisis could be instructive.[6]

First, there is a terminological problem related to the use of varied terms, which the media often treat as synonyms: immigrants, refugees, asylum seekers, people who have 'fled', displaced persons, etc. Indeed, the crisis has exposed the conceptual confusion surrounding migration, as witnessed by the interchangeable use of the terms '**refugee/migrant**', which, in turn, are confused with the term 'asylum seekers'. The migratory reality has led to the loss of the specific reference of refugees as defined under the Geneva Convention. This traditional conceptual category, well regulated under international law and in the Member State's respective legal systems, is today dealt with diffusely, as a large variety of situations, ranging from economic or environmental refugees to subsidiary protection, asylum seekers or mass displacements of populations, have been cast as humanitarian conditions.

In this context, the European regulatory system for the asylum and refugee procedure, known as the Dublin system, has been strongly questioned, as it places the main responsibility on the applicants' state of entry into the EU, which invariably places a larger economic and procedural burden on external

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[5] *External migratory pressure is the "new normal" both for the EU and for partner countries*, COM(2016) 385 final, 7 June 2016, at 6.

[6] See the author's aforementioned articles, "Unión Europea, crisis…" and "Los refugiados…", *supra* note 2.

border states (Italy, Greece and Spain). The Commission has proposed adapting the Dublin asylum claim-processing system with a corrective distribution key, amongst other measures.[7]

At the same time, the system devised for the immediate reception and hosting during the refugee crisis, known as 'hotspots', does not seem to have been acceptably implemented. The **hotspots**, or immigrant identification centres in Greece and Italy, have been widely criticized for their tenuous respect for the human rights of the foreigners at the centres. Their management shows that the systems for reception and registration upon arrival deployed at the hotspots in both Greece and Italy have been clearly insufficient[8] and require better coordination of agencies and appropriate regulation.[9]

Of course, more careful consideration of the concepts and classification of the situations of foreigners arriving in Europe is certainly needed, as the concepts are linked to and determine specific legal statuses, which, in turn, determine the different rights and obligations of people in European territories.

Additionally, one key aspect for the European experience of integration by means of the EU is the free movement of goods and persons in the 'federal' area of free movement that the Schengen Area establishes between 22 EU states and 4 non-EU states (Norway, Switzerland, Iceland and Liechtenstein). With the refugee crisis, the essential issues linked to the EU's internal market, with its **free movement, Schengen Area and internal and external borders**, have been subject to considerable debate and a troubling political questioning, with numerous requests to re-establish control at some internal borders. Indeed, as a result of the arrival in Central European countries of more than two million people in 2015 alone, the controls at the EU's internal borders in Germany, Denmark and Austria were reactivated (in accordance

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[7] Communication from the Commission to the European Parliament and the Council *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, Com(2016) 197 final, 6 April 2016. See

[8] Billing F., "The ECtHR on Disembarkation of Rescued Refugees and Migrants at Greek Hotspots", at *EJILTALK.org, 25 Octiber* 2019; European Council on Refugees and Exiles (ECRE)*, The Implementation of the Hotspots in Italy and Greece – A Study*, December 2016; PRIETO, B. "Los hotspots, un eslabón débil en la gestión de la crisis de los refugiados", *Análisis del Real Instituto Elcano*, ARI 25/2016, 4 March 2016.

[9] These are the proposals Fernández Rojo makes in "Los *hotspots:* expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol", 61 *Revista de Derecho Comunitario Europeo,* nº 61, 2018, p. 1013.

with the planned procedures). Thus, the survival of one of the pillars of integration, namely, free movement in the Schengen Area, was threatened at peak moments of the crisis.

Therein lies an unresolved substantive issue, namely, the legal status of displaced persons within the Schengen Area seeking international protection. In this crisis, displaced persons have overwhelmingly applied for refugee status, in the hope of obtaining humanitarian protection from the host state, or 'subsidiary protection' status, one of EU law's contributions to international refugee law.

Additionally, as will be seen below, the dramatic crisis has shown that control of the external Mediterranean Sea borders is an outstanding problem, as all the measures put into place by the states and coordinated by Frontex so far have been counterproductive or ineffective and have sparked major internal controversy, especially in states with external sea borders (Spain, Italy and Greece).

It is likewise worth noting that the crisis has highlighted the **method of EU advancement**, as, historically, it is the periodic crises that rock Europe that have ultimately led it to take small steps forwards in the integration of Europeans. In this regard, the transformation of Frontex into the **European Border and Coast Guard Agency**[10] with an increase in staff and expanded mandate, including new powers to conduct search-and-rescue operations, may be illustrative.[11]

However, the migration crisis has opened deep cracks in the political te-

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[10] See Acosta Sánchez M., "La nueva Guardia Europea de Fronteras y Costas, una necesaria evolución de FRONTEX", *Boletín IEEE,* Nº 4, 2016, p. 466; De Bruycker, PH., "The European border and coast guard: a new model built on an old logic", *European Papers*, Vol. 1, Nº. 2, 2016, p. 559; Santos Vara, J., "La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?" *Revista de Derecho Comunitario Europeo*, Nº 59, 2018, p. 143.

[11] See, for example, Esteve García, "The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders", *Paix et sécurité internationales*, nº 5*,* 2017, p. 93, <https://revistas.uca.es/index.php/paetsei/article/view/4654>. A revised Regulation was adopted by the Council the 8th November 2019,<https://www.consilium.europa.eu/en/press/press-releases/2019/11/08/european-border-and-coast-guard-council-adopts-revised-regulation/>, see Fernández Rojo, D. "The Umpteenth Reinforcement of Frontex's Operational Tasks: Third Time Lucky?", *EU Law Analysis*, 04.06.2019.

rrain and the legitimacy of integration. There is evidence of **serious conse-quences for the EU's political integration**, due to the direct economic and demographic impacts of the massive influx of people in search of protection, which involve the presence (at least in the medium term) on European soil of hundreds of thousands of people requiring aid and services from public authorities.

Unfortunately, some EU states have shown a rampant lack of solidarity: following the 2015 decisions to take in 160,000 refugees, a referendum was called in Hungary to question the refugee redistribution decisions and some states have even rejected refugee quotas. This led to a severe internal crisis in the EU. However, in the author's opinion, the repercussions of these internal attitudes and policies for the essence, values and identity that the Union embodies and protects are of an even greater scale insofar as they call into question the legitimacy and narrative of the European integration project itself.

The lack of internal agreement and solidarity of the Member States is largely what has overshadowed the adoption of structural and temporary measures by the EU, preventing an effective institutional, legal and political response to the crisis. Of course, the EU had not anticipated a critical migration situation such as the one it experienced, and its institutional and decision-taking mechanisms are complicated and poorly suited to enable a rapid response equal to the task.

The 2016 deal with Turkey is perhaps a clear example of this lack of foresight and poor coordination of legal-institutional responses, notwithstanding some short-term successes in terms of halting the massive arrival of refugees and displaced persons mainly from Syria,[12] the main burden for which conti-

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[12] The overall deal with Turkey, which played a key role in the 2015-2016 migration crisis, was reached in October 2015. It provides for both moving forwards on chapters of the accession negotiations, opened in 2005, and a commitment by Turkey to visa liberalization and greater control of border crossings from Turkish territory into Greece, with generous European aid to this end. The agreement (Statement) with Turkey on the readmission of refugees and relations with bordering countries was formally adopted on 18 March 2016 (Agreement or Statement contained in Press Release 144/16 of the Council, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-state-ment/>; LISA, P. 'The EU-Turkey Agreement: a turning point in the EU's policy approach to the refugee crisis but with the devil lurking in the detail', *Real Instituto Elcano* Expert Comment 15/2016, 8 April 2016).

The nature of the agreement was subject to considerable legal debate. See, for example,

nues to be assumed by Turkey.[13]

However, the Commission's overall approach, via its **European Agenda on Migration** of May 2015, has given rise to extremely important operational, legal and economic measures[14] and has a very valuable strategic profile. In addition, other measures taken, such as the *New Partnership Framework*[15] are quite far-reaching and can construct a foreign policy of their own to address the major problems of any kind caused by migratory pressure towards Europe.

Santos Vara, J. "La declaración Unión Europea-Turquía de 18 de marzo de 2016: ¿un tratado disfrazado?" in *Retos para la acción exterior de la Unión Europea* , 2017, p. 289; and Uria Gavilan, "La declaración Unión Europea-Turquía: la externalización de la seguridad en detrimento de la protección de los derechos humanos", in E. J. Martínez Pérez, C. Martínez Capdevila, M. Abad Castelos and R. Casado Raigón (eds), *Las amenazas a la seguridad internacional hoy*, 2017, p. 89. This is because its legal status as a treaty or a simple political statement has significant consequences in terms of monitoring its implementation and its enforcement by EU and state powers. In its decision on the case from February 2017, the European Court of Justice indicated that it was not a treaty signed by any EU institution, but rather, where applicable, by the Member States (Orders of the General Court of 28 February 2017 in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council, in which the General Court of the EU declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis, ECLI:EU:T:2017:128, 129 and 130).

[13] For more information on the current situation and additional mobilization of funds for, for example, schools and access to healthcare for Syrian child refugees, see the overview provided in the Communication *EU Facility for Refugees in Turkey: the Commission proposes to mobilise additional funds for Syrian refugees*, 14 March 2018, IP/18/1723, and the factsheet 'EU-Turkey Statement – Two years on', April 2018, available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf>.

[14] The *European Agenda on Migration*, in COM(2015) 240 final, 13 May 2015. For information on progress on the Agenda's implementation, see the Communications of the Commission of 10 February 2016, available at <https://europa.eu/rapid/press-release_IP-16-271_en.htm>, and of 28 September 2016, available at <https://europa.eu/rapid/press-release_IP-16-3183_en.htm>. More recently, Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126 final, 6.3.2019 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf>; and the *Progress report on the Implementation of the European Agenda on Migration* of 16.10.2019, COM(2019)481 final.

[15] COM(2016) 385 final 07.06.2016, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on *establishing a new Partnership Framework with third countries under the European Agenda on Migration.*

Overall, the EU's actions to address and regulate migration, refugee and asylum issues have been impressive in recent years.[16] However, the set of measures and policies is strongly hindered by a Euro-centric vision based on security issues and the formula of development cooperation in exchange for control of borders and migration flows in the states of origin and transit. This vision does not place African, Middle Eastern and Central Asian countries' interests and approaches on an equal footing with Europe's medium- and long-term interests in these complex migration issues.

In this context, the *European Agenda on Migration* continues to be implemented.[17] The Commission believes that the situation is still fragile[18] and aims to strengthen the EU's Asylum Agency[19] by shifting the emphasis to the regulations for the return of migrants[20] and to strengthening the European Border and Coast Guard Agency.[21] However, possible avenues of legal access to Member States, such as access to international protection through the European Humanitarian Visa, have not yet been clearly defined.[22] The formulas proposed to date (new Blue Card, new resettlement scheme, strengthening of cooperation with third states with pilot projects)[23] ostensibly seem insufficient as a strategic response.

3. THE GATES OF EUROPE: TURKEY, MOROCCO AND LIBYA

There is already a certain well-established perspective regarding the routes of entry into Europe. Although the European federal area of free move-

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[16] For an overview, see *EU Asylum, Borders and External Cooperation on Migration – Recent developments*, European Parliament PE621.878, EPRS May 2018.

[17] See the Commission Communication '*European Agenda on Migration: Continuous efforts needed to sustain progress*', 14 March 2018, IP/18/1763, setting out the next steps and objectives to be pursued in the framework of the Agenda.

[18] Communication '*European Agenda on Migration: Still fragile situation gives no cause for complacency*', 16 May 2018 IP/18/3743.

[19] MEMO/18/5714 of 12 September 2018.

[20] MEMO/18/5713 of 12 September 2018.

[21] MEMO/18/5715 of 12 September 2018.

[22] See SÁNCHEZ LEGIDO, A. "El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el Visado Humanitario europeo", *Revista de Derecho Comunitario Europeo* ,nº 57, 2017, p. 433.

[23] IP/18/5712 of 12 September 2018.

ment was effectively created in spring 1995, it was not until the creation of the Frontex Agency, in 2004, that there began to be a global EU approach, with data and verification of the points of entry, external border crossings and migration trends.

It was thus verified that the main routes of entry for irregular immigration are not, as was once feared, via the external borders of Eastern Europe, but rather the external Mediterranean borders of the southern European countries. Specifically, most of the arrivals take place in Italy, Greece and Spain, although these countries are not usually the final destinations of the people who irregularly or illegally cross their external borders.

Various aspects of this finding should be highlighted:

— There is an obvious physical proximity factor, determined by geography, that facilitates irregular access. In the case of Spain, access occurs in two areas: the area of the Strait of Gibraltar and the cities of Ceuta and Melilla, and the Canary Islands area. In the case of Italy, it occurs through the Italian islands off the Tunisian coast, such as Lampedusa. In the case of Greece, it occurs through both the European land border with Turkey delimited by the River Evros (or Maritsa) and through the Aegean Sea route, to the islands under Greek sovereignty closest to the Turkish coast.

— All three European countries are accessed from neighbouring states in the southern Mediterranean that are countries of transit or origin of migration: from Morocco to Spain, from Tunisia and Libya to Italy, and from Turkey to Greece.

— These areas of transit are home to territorial claims or disputes between countries on the northern and southern shore of the Mediterranean: between Spain and Morocco over the Spanish cities, islands and rocks on the African coast[24]; and between Turkey and Greece over the Aegean Islands under Greek sovereignty.

— These neighbouring and bordering states, in turn, are located in or border with regions, continents and countries that produce, and will continue

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[24] The link between migrations and territorial claims in GONZALEZ GARCIA, I., "Rechazo en las fronteras exteriores europeas con Marruecos: inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo*, Nº. 43, 2017; "The Spanish-Moroccan Cooperation on Immigration: The Summary Returns Cases of Isla de Tierra-Alhucemas (2012) and Ceuta and Melilla (2014)", *Spanish yearbook of international law*, Nº 19, 2015, 349.

to give rise to, migration flows from North Africa, sub-Saharan Africa, the Middle East, West Asia and Central Asia.

— In all cases, the migration takes place across sea borders, although in the cases of Greece and Spain, it also takes place across external land borders. Nevertheless, since 2005, the largest number of migrants to reach or attempt to reach Europe has come by sea.

— There are EU agreements with these southern Mediterranean countries, and even bilateral agreements (Spain-Morocco, Italy-Libya), that have restricted access by means of short-term solutions that fail to address the structural issues underlying irregular migration to Europe. It is worth noting in this regard that the approach pursued to date has not been the formal one consisting of the conclusion of mixed Treaties, Agreements by the EU or bilateral Agreements by its Member States. For instance, it is argued that the EU-Turkey deal of 2016 should not be maintained as such, due to its significant shortcomings, including its very nature as a dubiously legal instrument questionably regulated by Public International Law.[25]

Additionally, bilateral agreements between EU states and third states have become a necessary complementary instrument for issues of migration flows to the EU. Particular attention should be called to the 'agreement' between Italy and Libya,[26] also criticized for the legal format used, i.e., a Memorandum of Understanding (MOU), and the direct and indirect negative consequences it has had regarding respect for the basic fundamental rights of migrants in Libyan territory[27].

— The EU considers the Eastern, Central and Western Mediterranean to be routes or gates of access. Frontex data show that the closure of or increa-

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[25] For the agreement with Turkey, see PEERS, S. 'The final EU/Turkey refugee deal: a legal assessment*', EU Law Analysis* 18 March 2016; DEN HEIJER and SPIJKERBOER, 'Is the EU-Turkey refugee and migration deal a treaty?', *EU Law Analysis*, 7 April 2016; and TOYGÜR and BENVENUTI, 'One year on: an assessment of the EU-Turkey statement on refugees', *Análisis del Real Instituto Elcano*, ARI 21/2017, 21 March 2017.

[26] PALM, '"The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?", *EU Immigration and Asylum Law and Policy*, <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>*, 2 October 2017. The Italy-Libya MOU is available at <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

[27] "Italy to renew anti-migration deal with Libya". *The Guardian* 31.10.2019.

sed border control along one route leads to the reactivation of one of the other two, such that the routes alternate across different periods, due to crises or diversions of the access routes to Mediterranean Europe.

All these considerations suggest that these arrival routes through what is graphically referred to as the *Gates of Europe* are quite likely to be permanent in the near to medium- and long-term future.

III. VULNERABILITY OF EUROPE'S EXTERNAL BORDERS?

External border control in the EU dates back more than 24 years, and identified problems, such as external airport borders, which no longer pose a structural problem, or land borders, have been addressed. Important measures have been taken, such as the introduction of biometric identifiers on visas.[28] The trend of strengthening access control at external borders has been confirmed in the wake of jihadist terrorism attacks. For instance, measures have been taken to reinforce checks at the borders of the Schengen Area, expanding them to include EU citizens in general[29] through the amendment of the Schengen Borders Code.[30]

However, the inbound migration of recent years has posed a serious problem of vulnerability of the EU's external borders [31], both on land and at airports.

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[28] See, for example, Art. 13 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), *OJ* L 243, 15 September 2009, p. 1-58.

[29] Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015) 670 final, 15 December 2015.

[30] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* L 105, 13 April 2006, p. 1.

[31] See the Conclusions of the European Council of 20.06.2019, and the *New Strategic Agenda 2019-2024:* "We must ensure the integrity of our territory". The migration policy issues of this Strategic Agenda are referred in the chapter "Protecting citizens and freedoms", cfr. <https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf>.

1. INTERNAL BORDERS AND RESILIENCE OF THE SCHENGEN AREA

The logic of the Schengen common area of free movement entails establishing common external border control so as to enable the free movement of any person of any nationality within the area referred to here as 'federal' for the purposes of free movement. This has an important consequence, namely, it makes it possible to determine which people are entering or leaving through the common external border; in contrast, once they have entered the federal common area, they cannot be tracked, as there are no mechanisms for doing so. As the Frontex Agency itself has noted, "There is no EU system capable of tracing people's movements within the EU following illegal border-crossing".[32]

The fact is that the massive inflows to Greece, mainly with a view to reaching Germany and Sweden, led to overflowing movements known as 'secondary displacements'. These people were forced by geography to follow land routes mostly through the Balkans to reach the Schengen territory via Slovenia or Austria. These sudden arrivals of hundreds of thousands of people led to the establishment along internal borders of fences, barriers and strong access control against the backdrop of an initially receptive Germany. This, in turn, led some countries to reintroduce certain intra-European controls. Additionally, the brutal jihadist terrorist attacks in Paris (November 2015) and Nice (July 2016) prompted France to declare a state of emergency and to re-establish systematic control at its borders.

The problem with the reintroduction of internal border controls is that they could potentially become permanent and that these types of events could be prolonged, making them the norm, rather than the exception, as provided for by law. Additionally, Member State notifications of the temporary reintroduction of control in accordance with Article 25 of the Schengen Borders Code have increased sharply since 2015, with references in recent years to threats due to the existence of 'significant secondary movements'.[33]

In the author's view, this very appreciable impact on the Schengen system of free movement has caused serious, albeit reparable, damage. Indeed, as

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[32] FRONTEX, *General Report 2015*, at 2.1, p. 10. Frontex - *Risk Analysis for 2016*, p. 6

[33] See the list of Notifications 2006-2018 at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf>.

argued elsewhere,[34] several powerful legal and practical arguments confirm the reversibility of the measures taken by the Member States at some of their internal borders:

- Primary law: As seen above, Article 77(1)(a) TFEU has a legal force that leaves no room for doubt regarding the agreed attribution of powers and the practical objective to be achieved, i.e. non-control of any internal land, sea or airport border between Schengen Area states.

- The short-term nature of the internal controls in the 'federal' Schengen Area implemented as a result of the refugee crisis. Control is restored in accordance with pre-established procedures, namely, notification of the temporary reintroduction of border control, in accordance with a specific regulation, Regulation 1053/2013, which is being applied.[35] This regulation provides for regular situation reviews and Council authorizations to prolong control at certain points or sectors due to the existence of a threat to the overall functioning of the Schengen Area.[36]

- The highly partial geographical nature of the temporary reintroduction of control, which is not carried out along the entire land, air or port border of some states, but solely at certain border crossings on sections determined in advance to be problematic. Only in the case of France was notification given of the reintroduction of control on all borders, due to the state of emergency declared following the attacks in Paris and Nice, as well as for events such as the Tour de France.

These reasons are complemented with planning, from the start, by the Commission for the gradual reinstatement of complete freedom of move-

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[34] DEL VALLE GALVEZ, 'Los refugiados, las fronteras exteriores…', *supra* note 2, at 762-765.

[35] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, *OJ* L 295 of 6 November 2013, p. 27 *et seq*.

[36] Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, *OJ* L 15 of 18 June 2016, at 8 *et seq*.

ment.[37] Overall, whilst in the early years the refugee crisis did lead to a visible repeal of the non-control of persons at certain internal border points in the Schengen Area, the general system of free movement of persons tends to be progressively restored, although not with the speed initially envisaged for the return to normal movement without control in the Schengen Area.

In fact, a proposal for a Regulation amending the framework for the temporary reintroduction of border control at internal borders is currently making its way through the legislative process.[38] The Commission intends to allow an increase in the time limit for this type of control, although with greater safeguards and procedural and evaluation requirements, in accordance with its conviction that it must always be approached as an exceptional measure of last resort.[39] As noted, it is ultimately a question of imposing order on these state initiatives that could involve an attempt to renationalize responses to threats to the public order and internal security, placing special emphasis on the exceptional nature of any limitation that may arise in relation to the free movement of persons.[40]

A separate question is the related issue, not adequately addressed by the EU or its Member States, of displaced persons seeking refuge and moving within the EU until they reach their destination, without identification and in

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[37] *Back to Schengen - A Roadmap*, Communication of 4 March 2016, COM(2016) 120 final, since the Commission adopted a plan to return to a situation of normality in March 2016.

[38] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017) 571 final - 2017/0245 (COD), 27 September 2017. See European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders (COM(2017)0571 – C8-0326/2017 – 2017/0245(COD)).

[39] Communication on preserving and strengthening Schengen, COM(2017) 570 final, 27 September 2017; State of the Union 2017 - Preserving and strengthening Schengen to improve security and safeguard Europe's freedoms, 27 September 2017, IP/17/3407, <http://europa.eu/rapid/press-release_IP-17-3407_en.htm>.

[40] Janer Torrens, "El restablecimiento temporal de controles en las fronteras interiores de la Unión Europea como respuesta a las amenazas al orden público y a la seguridad interior: entre la excepcionalidad y la normalidad", *Revista de Derecho Comunitario Europeo*, Nº 61, 2018, p. 899, at 931.

a situation of clear vulnerability.[41] This is also a consequence of the Member States' option of not creating macro-camps in EU territory for the reception, registration, identification and processing of refugees' asylum claims, as Frontex once proposed.

In any case, whilst the common European response to the migration challenge may have fallen short of a 'collective epic',[42] the case of the refugee crisis has shown that the Schengen Area is reasonably robust and resilient in unexpected serious situations. In the 24 years since it came into force in 1995, this historical experience has followed a course that has evidenced fragility, but also, at essence, a great capacity to withstand and overcome challenges in tricky or delicate situations. In the author's view, this has to do with many factors, the very strong soundness of the unified economic area being one of the most important.

Since the agreement between the EU states and Turkey of March 2016 stopped the inflow of refugees, the asylum claims of the millions of people who arrived in 2015-2016 have begun to be studied or they have been placed under the protection of the different states. Therefore, the problem today is not one of internal borders and the guarantee of free movement, but of massive access to and reception at the EU's external borders, where controlled management of the crossings and registration and hosting of this huge influx of arrivals proved impossible, a situation that could happen again in the short, medium or long term.

2. EXTERNAL BORDERS AND THE NON-VIABILITY OF SEA BORDER CONTROL

The Union's external borders have very special characteristics, as they were created by the Schengen Agreements according to a model that was later inherited and assumed by the EU from 1997 onwards. Sharing the same control systems for entry into and exit from the 'federal' internal territory of free movement is, as noted, an historical experience and evolution of the

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[41] NAÏR proposes the massive concession of ID cards entitling the bearer to travel freely, a transit passport based on the 'Nansen passport' model (*Refugiados*, Barcelona, 2016, Chapter 13).

[42] The term 'collective epic' (*épica colectiva*) was coined by JANER TORRENS ('El restablecimiento temporal…', *supra* note 40, at 930) in his overview of the reintroduction of internal border control following the refugee crisis.

European states' borders.[43] Additionally, as a political entity *in statu nascendi*, the Union needs to maintain a well-defined territory in which entry and exit across external borders is well controlled. The cumulative experience since 1995 — including under the international-law Schengen system prior to its absorption into EU law — means that the EU already has more than 20 years of experience with external border control.[44] The model's evolution has allowed it to reasonably assume control at land, airport and even seaport borders.

However, there are significant obstacles to carrying out border control at the external sea borders. By their very nature, these borders are very difficult to manage, especially given the continuous mass arrivals of migrants over the years via the Mediterranean. No single state, nor even the EU without the co-involvement of its Member States, can tackle these problems of emigration in the Mediterranean Sea and of the sudden mass arrivals or avalanches of dozens or hundreds of thousands of people alone.

In fact, the system has not proven to work well when the control tasks are carried out in marine areas beyond state jurisdiction, i.e. beyond the 12 miles of territorial sea. Indeed, the definition of external border has gradually been adapted to the need to push some border control functions beyond the port, into the high seas or even the marine areas of third states from which immigrants depart, as in the case of Senegal and the *cayuco* boat crisis of 2006 in the Canary Islands (Frontex Joint Operation Hera).

Hence, the seemingly unsolvable issue of the Mediterranean Sea borders, as the control of external borders originally designed for the Schengen Area is poorly suited to this environment. Therefore, the European marine areas and borders pose certain specific challenges that make ensuring *effective* surveillance quite difficult: the marine environment itself, the existence of large areas of the high seas, and the existence of differentiated SAR rescue areas, all in a conflict-ridden context of third states from the southern coast of the Mediterranean with diverse but highly complex problems. Furthermore, with regard to the rescue of immigrants on the high seas, wide-open questions continue to surround the SAR regions in the Mediterranean and states' obli-

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[43] See, 'Las fronteras de la Unión…', *supra* note 3.

[44] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* L 105, 13 April 2006, p. 1.

gations in these regions, especially concerning the disembarkation of rescued persons.[45]

Nothing tried to date to halt or prevent sea immigration has offered good prospects of becoming a sustainable, reasonable and permanent solution to the problems, which include the fight against human trafficking. An original body of law has been adopted to address issues affected by gaps in international law, ranging from the regulation creating Frontex to that creating the Border and Coast Guard Agency, by way of the rapid border intervention teams (RABITs) regulation[46] or the regulation establishing rules for the surveillance of external sea borders in the context of joint operations. There have even been moments of flirtation with the idea of a military response, in some cases fortunately averted by the UN itself and, in others, undertaken within the context of NATO or EUNAVFOR MED/Operation Sophia.[47]

The extraordinary fragility and insecurity of Europe's Mediterranean borders make maritime surveillance insufficient and give rise to myriad new problems. These problems include issues such as the extraterritorial processing of asylum claims, the human rights of migrants in different marine areas, or the disembarkation of migrants in third states.[48] The most widely reported

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[45] Another sensitive issue is the applicable regulation and obligation for merchant boats to proceed to the rescue and disembarkation of immigrants. See SMITH, "Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean", *Paix et sécurité internationales* nº 5, 2017, 29, <https://revistas.uca.es/index.php/paetsei/article/view/4652>.

[46] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* L 199 of 31 July 2007, p. 30-39.

[47] See CARLI, E., "Operation eunavfor med sophia in the framework of the european agenda on migration: Practical aspects and questions of international law", *Freedom, Security & Justice: European Legal Studies*, N°. 2, 2018, p. 135; ACOSTA SÁNCHEZ, M. "Sobre el ámbito competencial de las operaciones de paz: El enfoque integral de la operación militar Sophia de la UE ante la crisis migratoria", *Revista del Instituto Español de Estudios Estratégicos*, nº 12, 2019, p. 15.

[48] See MARINAI, S. "The interception and rescue at sea of asylum seekers in the light of the new EU legal framework". *Revista de Derecho Comunitario Europeo*, 55, 2016, at 901. In 2015, no actions were taken to disembark migrants rescued in the Mediterranean by joint operations in third countries, cfr. *Frontex' Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders,* 2016.

cases of NGO or merchant vessels carrying migrants rescued in the territorial waters of Libya or on the high seas being denied access to port (as in the case of the *Aquarius*, in 2018, or the *Open Arms* case in 2019)[49] fall into this category.

In fact, the barrage of legal problems posed to international and European law by irregular migration and migration in the Mediterranean in terms of the different practical control and rescue actions carried out by states and the EU is simply overwhelming.[50] This is especially true with regard to issues of respect and protection of the human rights of migrants[51] found at sea with the intention of reaching Europe. In this context one finds the morally devastating fact that the maritime migration routes account for the brunt of the horrifying objective data on massive daily deaths of migrants trying to reach Europe by sea, migrants pushed mainly by human trafficking rings into terrifying situations of danger and death at sea.[52]

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[49] In this regard, see the lucid analysis by PAPASTAVRIDIS, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?', at *EJILTALK.org*, 27 June 2018.

[50] Amongst others, see: DI FILIPPO, M., "Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea"*, Paix et Sécurité Internationales* (2013), nº 1, 53; FRA-European Union Agency for Fundamental Rights, *Fundamental Rights at Europe's southern sea borders*, Luxembourg, 2013; MARINAI, S., "The Action of Greece and Spain against Irregular Migration by Sea", in A. DEL VECCHIO (ed.), *International Law of the Sea – Current Trends and Controversial Issues* (The Hague, 2014) 29; MORENO-LAX V. – PAPASTAVRIDIS, E. *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach- Integrating Maritime Security with Human Rights, Brill, 2016;* RIJPMA, J., "The Patrolling of the European Union's External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea", in *International Law of the Sea – Current Trends…, cit.*, at 77; and SOBRINO J. M. and OANTA, G., "Control y vigilancia de las fronteras en los diferentes espacios marítimos", 14 *Anuario de la Facultad de Derecho de la Universidad de La Coruña*, nº 14, 2010, p. 759. The Commission Staff Working Document *Study on the international law instruments in relation to illegal immigration by sea,* SEC(2007)691, 15 May 2007, likewise remains of interest.

[51] See the author's examination of external border issues from a human rights perspective in DEL VALLE GÁLVEZ, 'La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controles migratorios', in J. SOROETA LICERAS and N. ALONSO MOREDA (eds), *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, Volume XVIII-2018, Tirant lo Blanch, Valencia 2019, p. 25. See SANCHEZ LEGIDO, A. "Externalización de controles migratorios versus Derechos Humanos" *REEI*, 37, 2019.

[52] See, for example, AMNESTY INTERNATIONAL, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 2014.

In this context, the EU's aim of coordinating its sea border control in the Mediterranean and on the southern external sea borders is not viable. Migratory pressure will continue in the short, medium and long term along the channels of arrival by sea to Europe (Eastern, Central and Western Mediterranean) and may even be occasionally accentuated in critical periods due to the changing and unstable situation of the African and Middle Eastern neighbourhood. Experience shows that the EU has, in the past, been overwhelmed and thrown into crisis by the sudden arrival by sea of a few thousands of people (as in the case of the *cayuco* boats in the Canary Islands in 2006[53] or the frequent arrivals to the Italian islands off the coast of Tunisia in the Central Mediterranean). Consequently, the internal conflicts of third states could relatively easily call the EU's entire system of reception and free movement within its internal territory into question once again.

In the author's opinion, it is thus the EU's sea borders that will require it to undertake a new border policy. Indeed, the circumstances and problems discussed here confirm that new approaches to migration flows and external border control must be organized, subject to a more integrated management.

3. ACTIVATING THE INTEGRATED EXTERNAL BORDER MANAGEMENT SYSTEM

The refugee crisis in Europe in recent years also seems to have led to the consolidation of the aspect of the border control policy known as the integrated border management system.

What the TFEU calls the 'integrated management system for external borders' (currently referred to as *European Integrated Border Management*) is provided for under the decisive Article 77 TFEU:

'1. The Union shall develop a policy with a view to:
(c) the gradual introduction of an integrated management system for external borders.'

The title of the relevant chapter of the TFEU (Policies on Border Checks, Asylum and Immigration) points to three main areas, but the subsequent provisions seem to describe a gradually descending level of EU border activity: very powerful with regard to internal borders, likewise significant with regard to external control, but less farsighted with regard to the regulation of

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[53] See Acosta Sánchez and Del Valle Gálvez, "La crisis de los cayucos. La Agencia Europea de Fronteras – FRONTEX y el control marítimo de la inmigración clandestina", *Tiempo de Paz,* nº 83, 2006, p. 19.

the external border management system.

In fact, no specific article is devoted to the integrated border management system, unlike asylum (Article 78) and immigration (Article 79), suggesting a lower level of intensity in terms of EU regulation and powers. Indeed, insofar as it is an objective of the common policy (Article 77(1)), the treaty only provides for the subsequent adoption of legal acts. Specifically, Article 77(2) (d) provides:

> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:
> (d) any measure necessary for the gradual establishment of an integrated management system for external borders;

Following the migration crisis, however, the time for its activation seems to have come. In this regard, attention should be called to the *Plan to develop an Integrated External Border Management Strategy*, adopted on March 2018, whose main elements are: greater cooperation and shared information, with the Border and Coast Guard playing a key role; enhanced harmonization of the common rules and standards applied under the Schengen Borders Code; and risk analysis, providing for contingency plans and rapid response capabilities. The stated need to integrate other policies, such as the Security Policy and the fight against cross-border crime, and to cooperate with third states, especially on returns, should likewise be highlighted. Finally, the need to improve the funding and technical and human resources of the Integrated Border Management System is also underscored.[54]

The main element of this integrated management strategy is undoubtedly the Border and Coast Guard. To this end, in September 2018, the Commission approved the proposal for a new Regulation of the European Border and Coast Guard, which includes EUROSUR; this Regulation was finally adopted in November 2019.[55]

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[54] *The main elements for developing the European Integrated Border Management Strategy* - Annex 6 of the Communication 'Progress report on the Implementation of the European Agenda on Migration' COM(2018) 250 final of 14 March 2018.

[55] See supra note 11, and the 23.10.2019 last Proposal at <https://data.consilium.europa.eu/doc/document/PE-33-2019-INIT/en/pdf>. Other documents: Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the Euro-

IV. 'EXTERNALIZATION', 'EXTRATERRITORIALITY' AND 'DETERRITORIALITY' OF MIGRATION CONTROL

In a context of widespread *perception*, in public opinion and amongst European governments, of vulnerability of the southern external border, references to the so-called 'externalization' of border control are increasingly common.[56]

Border action by EU Member States outside of European territory seems to be an inevitable trend in Europe, with various manifestations of new and complex border control functions that are problematic in several ways, with control instruments extending not only beyond borderlines, but into various places and areas of Europe's bordering territories and those of other neighbouring states. Several manifestations of this trend can be found, all referring to extraterritorial problems related to the performance of border functions, in the margins of or outside EU territory, with European pre-border control instruments.[57]

The following sections will look at various aspects of this recent external border dimension.

1. THE DETERRITORIALIZATION OF MIGRATION CONTROL AND BORDER FUNCTIONS

An initial issue has to do with the concepts and terms used to refer to these topics. In the author's view, there are shortcomings in how they are used both in the literature and in the media in reference to migration realities.

The terms are quite varied, since the practices have been given different names. Nagore Casas and Abrisketa Uriarte refer, for example, to an extensi-

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pean Parliament and of the Council; European Parliament legislative resolution of 17 April 2019 (COM(2018)0631 – C8-0406/2018 – 2018/0330A(COD)) TA/2019/0415. See also *Report from the Commission to the European parliament and the council on the evaluation of the European Border Surveillance System (EUROSUR)* A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM (2018/632), 12.09.2018.

[56] See RIJPMA J. and CREMONA, M. "The Extra-Territorialisation of EU Migration Policies and the Rule of Law", *EUI Working Papers* - Law 2007/1; DEL VALLE GÁLVEZ, A., "Refugiados y crisis migratorias: fronteras y desterritorialidad en las puertas de Europa", Chapter in RIPOL CARULLA S., *Derecho, Inmigración y Empresa*, Barcelona, 2019, p. 89.

[57] CASAS, N., "The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers?", in European Commission – *FRAME*, 31 May 2016, 30.

ve catalogue of academic terms used to refer to this reality.[58] Of course, one can also find terms such as 'border displacement', the 'delegation' or 'remote control' of migration, 'off-shore asylum', and 'policing at a distance',[59] as well as those that can be summed up in the term *policies of non-entrée*.[60]

Most of these terms seek to reflect border realities that, whilst different or novel, nevertheless affect the will of the EU and the Member States to distance or prevent the arrival of migrants at their external borders through a twofold series of measures leading to the apparent displacement or sharing of border control functions with third states:

– First, with measures such as programmes, action plans or international agreements to encourage third states (of origin or transit) to monitor their borders and migration flows in order to prevent them from physically accessing EU Member State territory, accepting the positioning in their territory, or the rejection, of refugees and migrants in general who come from other states but aim to reach European states as their final destination.

– Second, through the carrying out of border control functions by the Member States themselves outside their sovereignty and/or territorial jurisdiction (land and sea).

In general, the terms *externalization* or *extraterritorialization* of borders and their control are frequently used, often as synonyms.[61]

[58] 'In addition to "politics of non-entrée", several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: "outsourcing, externalisation, offshoring or extraterritorialisation of migration management; external migration governance; remote migration policing"; "de-territorialisation of border control"; "politics of extraterritorial processing"; "neo-refoulement"; or "limes imperii". All of these terms refer to the various types of interception measures used by states against asylum-seekers and refugees, measures which are usually developed by the wealthiest states, notably the United States, Australia, Canada and EU Member States', Casas, N. writes (*Ibid.*, at 31-32). See also the terms cited in Abrisketa Uriarte, "La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del *non-refoulement*", *Revista de Derecho Comunitario Europeo*, nº 56, 2017, p. 119, at 125-126.

[59] See, for example, Guild E. and Bigo, D., "Policing at a distance: Schengen Visa policies" in *Controlling Frontiers - Free Movement Into and Within Europe*, London, 2005, p. 203.

[60] See Sánchez Legido, A., 'El arriesgado acceso…', *supra* note 22, at 439 *et seq.*

[61] See, for example, Moreno-Lax, V. and Lemberg-Pedersen, M. "Border induced displacement: The ethical and legal implications of distance-creation through externalization", *QIL,. Zoom-in*, 56, 2019, at 5; Gabrielli, L. 'La externalización europea del control migratorio. ¿La acción española como modelo?', *Anuario CIDOB de la inmigración* (2017) 127; and Zapata

However, these concepts should be used with greater accuracy, in order to determine the consequences and legal scope of the related terms. These terms are sometimes figurative (e.g. to create a 'buffer zone' or 'buffer states' around Europe) and are intended to reflect the reality of the systematic outsourcing of certain border and migration control functions beyond the borderline and the land, seaport and airport checkpoints and border crossings. The terms or definitions used by authors are sometimes stark.[62] However, there is some awareness of encompassing a variety of situations that should be differentiated.[63]

In short, these are situations that place certain functions that states have traditionally performed at the border or at checkpoints, as well as certain measures and actions related to immigration and migration flows, outside their land, air and sea territory. Accordingly, for the purposes of the present article, this set of situations will be referred to as the *deterritorialization* of migration control, as the various scenarios and realities all take place outside EU territory.

Therefore, in keeping with this effort to achieve greater conceptual accuracy, a more useful term might be **deterritoriality**, which is more neutral than

BARRERO R. and ZARAGOZA CRISTIANI, 'Externalización de las políticas de inmigración en España ¿giro de orientación política en la gestión de fronteras y flujos migratorios?', 8 *Panorama social*, nº 8, 2008.

[62] For example, FANJUL points to 'la lógica de "externalizacion" que ha seguido la política migratoria europea desde la crisis de los cayucos de 2005-2006: comprar o forzar la colaboración de semidemocracias en el trabajo sucio' [the logic of "externalization" that European migration policy has followed since the *cayuco* boat crisis of 2005-2006: paying or forcing semi-democracies to cooperate on the dirty work] [translated from the Spanish]; whilst PINYOL writes of 'colaborar con países vecinos para delegarles el control de sus fronteras, en un intento de reducir la presión migratoria (habitualmente sobreestimada) y no responsabilizarse de la protección de derechos de las personas migrantes' [cooperating with neighbouring countries to delegate control of their borders to them, in an attempt to reduce (routinely overestimated) migratory pressure and avoid the responsibility for protecting the rights of migrants], [translated from the Spanish], in *Agenda Exterior* sobre Inmigración y Refugio, 28 June 2018.

[63] See ABRISKETA URIARTE, 'La dimensión externa…', *supra* note 58, at 157. In 'Member State Responsibility for Migration Control within Third States: Externalisation Revisited", *European Journal of Migration and Law,* 2013, p. 319, MCNAMARA differentiates between 'externalisation' and 'external dimension', using the latter in situations in which state control is weaker and indirect.

those mentioned above, as it evokes the positioning of certain border control and migration policy functions outside the territory, to be carried out by third states or by the state itself. The Dictionary of the Royal Spanish Academy defines 'territorial' as 'of or relating to a territory'. As these are situations or actions linked to migration and to border control, they should conceptually be situated outside the territory; therefore, the *deterritoriality* option hypothetically makes it possible to encompass the situations of both the *externalization* and *extraterritoriality* of border control functions.[64]

2. EXTERNALIZATION OF THE MANAGEMENT AND CONTROL OF MIGRATION FLOWS VS EXTRATERRITORIALITY OF BORDER CONTROLS

The literature often notes that some EU and EU Member State border control functions are performed by third states using imprecise legal notions, such as the 'delegation', 'attribution' or 'remote control' of the 'containment of migratory flows' or directly referring to the outsourcing by the EU of part of its border control outside its territory.[65] Usually, the legal link between the Member States/EU and the performance of these border migration control practices by third states is not clear in these analyses.

However, it is very difficult to consider, from a legal perspective, that the European states or the EU itself exercise direct or indirect control over the third states' actions. It is a very hard conclusion to reach based solely on the political and legal agreements entered into to date (including the paradigmatic case of the 2016 EU-Turkey deal) or the secondary regulations adopted by the EU. Apart from the difficulty of proving it, from an international law perspective, this does not seem to be a case of international responsibility of the European states or the EU itself for a third state's migration management

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[64] RIJPMA and CREMONA use the term 'extra-territorialisation' with a similar content to that used here ('The extra-territorialisation…', *supra* note 58). REYES TOVAR uses it in a different context, linked identities in migration, in 'La Desterritorialización como forma de abordar el concepto de frontera y la identidad en la migración', *Revista Geográfica de América Central* (2011), at 2. NARANJO GIRALDO conceives of the deterritorialization of a border as the performance of certain border controls outside a state's territory. See 'Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España-Marruecos', *Estudios Políticos* 45, 2014, p. 13.

[65] See, for example, D'HUMIÈRES, 'La cooperation Union Européenne/Afrique: l'externalisation des politiques migratoires européennes', *Fondation Robert Schuman Policy Paper* No. 472, 20 April 2018, at 1.

conduct (e.g. border control by Tunisia or the return or regularization of migrants by Morocco). Thus, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Part 1, Chapter II, Articles 4-11, 'Attribution of Conduct to a State')[66] do not seem to apply. Nevertheless, the idea that the EU has transferred its responsibility by contracting migration controls out to third states is common in the literature and in analyses by organizations and NGOs.[67] This is inaccurate and does not reflect the international legal reality.

Given this lack of definition in the analyses, it might be reasonable to differentiate between the concepts of 'externalization' and 'extraterritorialization'. Indeed, according to the Dictionary of the Royal Academy, they are clearly distinct situations. Whilst the sole definition of *extraterritorial* is 'to be or be considered outside the territory of jurisdiction', the first definition of *externalizar* (externalize, outsource), a term taken from economics, is 'said of a company or public institution: to entrust the performance of internal tasks or services to another company'.

First, the *externalization* of border control is understood as those situations in which there is neither the presence nor direct exercise of control activities by public officials of the Member States. The third states perform certain border control and migration policy functions (surveillance of their borders, detention and return of migrants, regularization processes and residence permits for migrants) as a direct or indirect consequence of agreements with the EU or with EU Member States, or according to programmes and action plans agreed with the EU or its Member States.

Indeed, it seems more appropriate to classify externalization of migration control activities as generic *migration flow management or control* activities, because they have components, activities and purposes that are not strictly those of controlling the entry of foreigners into the territory through border control at checkpoints or borders. This more generic line would encompass

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[66] *Draft articles on Responsibility of States for Internationally Wrongful Acts*, text adopted by the International Law Commission in 2001. See the analysis of international rules in the various scenarios they propose in GAMMELTOFT-HANSEN and HATHAWAY, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law*, 53 (2), 2015, p. 235.

[67] See, for example, RODIER, 'Externalisation of migration controls', in *Shifting Borders – Externalising migrant vulnerabilities and rights?* Red Cross EU Office, 2013, at 7.

references to the 'externalization of protection responsibilities'.[68]

It should be recalled that 'efficient management of migration flows' is a component of the common immigration policy (Article 79(1) TFEU), not of the border control policy (Article 77 TFEU). In any case, these activities or situations aim to keep migrants and refugees in general far from the territory of EU states (even if they have not been identified and classified as such by any agency or European or third-state authority). Therefore, the bias the EU has given thus far to the content of migration flow management consists of actions by and in third states to deter and prevent the arrival to EU territory[69] of certain categories of foreigners.

Second, it is necessary to differentiate the foregoing from situations involving the *extraterritoriality* of border control functions, restricting this latter category to those situations involving the presence of or performance of certain control activities or functions by public officials of the EU Member States in the territory of third states, with their agreement. In other words, extraterritoriality refers to situations involving the direct or indirect exercise of state jurisdiction, applying EU law or the internal law of an EU state.

The presence of the public official acting on behalf of the EU state or of the EU itself may be the decisive, differential factor for this conceptual difference. This presence takes place in a context of *control* by the Member State of the migration situation in question, as can be deduced from the ECtHR case *Hirsi Jamaa*.[70] In any case, the problems arise with regard to the rights of

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[68] See *The EU-Turkey Statement and the Greek Hotspots – A Failed European Pilot Project in Refugee Policy*, The Greens/European Free Alliance – European Parliament, June 2018.

[69] The notion of preventing entry into the jurisdictions of EU Member States is central in some definitions of the generic concept of externalization of migration controls. See FRELICK, KYSEL and PODKUUL, 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal of Migration and Human* Security 4(4), (2016, p. 190, at 193.

[70] Judgment of the European Court of Human Rights (ECtHR) (Grand Chamber) *Hirsi Jamaa and Others v. Italy*, No. 27765/09, 23 February 2012. On the issue of the requirement for 'effective control' according to ECtHR case law, see MCNAMARA, 'Member State Responsibility…', *supra* note 63. On the consequences and unlikely practical application of this judgment in situations of migration control at sea, see MORENO LAX, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?', 12(3) *Human Rights Law Review* (2012) 574.

migrants and refugees in situations outside the territory.[71]

Other options for establishing criteria for attributing state responsibility seem less robust, such as determining whether or not EU law or an EU Member State's law is being applied in the territory of third states or whether, by means of international responsibility, there exists consent or third-state agencies have been placed at the service of the EU state or the EU itself.

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The proof that this is an issue that must be explored with resolve from a legal perspective can be found in the theoretical confirmation by the EU of new models of extraterritorial border control. The European Council accepted the disembarkation of migrants in third countries as a formula under study at its meeting in July 2018.

This idea of centres in third states for internment and for the processing of asylum claims is a recurring proposal, like that of creating a centre in North Africa.[72] It refers to the creation of short-term reception centres or places, with the aim of hosting asylum seekers whilst their claims are being processed in Europe. It is a possibility that has always been considered to lack the minimum European or international legal cover to warrant a feasibility assessment, although every so often it is suggested anew in relation to the successive migration crises.[73] The multipurpose centre in Niger was created as a pilot experience for the prospects of such centres for advising migrants and processing any asylum claims that might arise[74].

[71] See ABRISKETA URIARTE, 'La dimensión externa…', *supra* note 58, on the scope of the principle of *non-refoulement*. SANCHEZ LEGIDO, A. "Externalización de controles migratorios…" *supra* note 51.

[72] NAÏR notes that the creation of 'transit processing centres', essentially offshore holding camps in regional protection areas in EU border or neighbouring countries, was proposed as early as 2003 (*op. cit.*, at 51-52).

[73] See, for example, "Macron wants asylum claims to start in Africa", *Euobserver.com*, 29 august 2017.

[74] See Parliamentary question E-008909-15 of 02.06.2015; or the question E-003065-16 of 26.04.2016, "State of play of the pilot multi-purpose centre in Niger", Answer given by Mr Avramopoulos on behalf of the Commission 26.07.2016, <https://www.europarl.europa.eu/doceo/document//E-8-2016-003065_EN.html>.

In any case, the question was already posed openly in 2017, following the migration and refugee crisis of 2015-2016, and, at its meeting in June 2018, the European Council[75] formally adopted the proposal to create *Regional Disembarkation Platforms* in third countries, in collaboration with the UNHCR and the International Organization for Migration,[76] and *Controlled Centres* in the territory of EU states[77] (the initial term of 'closed reception centres" was modified).

The feasibility of these platforms and centres is currently under study.[78] Numerous points need to be clarified regarding fundamental rights, the domestic or international legal status of these centres and the EU's responsibi-

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[75] See González Enríquez, 'The European Council and migration;: any progress? *Análisis del Real Instituto Elcano,* ARI 112/2018, 9 October 2018.

[76] Conclusions of the European Council meeting in Brussels, 28 June 2018, Doc. EUCO 9/18, Point 5: 'In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor.' <https://www.consilium.europa.eu/es/meetings/european-council/2018/06/28-29/>. Parliamentary Question E-002505-19 of 01.08.2019, about the Regional Disembarkation platforms.

[77] Point 6: 'On EU territory, those who are saved, according to international law, should be taken charge of, on the basis of a shared effort, through the transfer in controlled centres set up in Member States, only on a voluntary basis, where rapid and secure processing would allow, with full EU support, to distinguish between irregular migrants, who will be returned, and those in need of international protection, for whom the principle of solidarity would apply. All the measures in the context of these controlled centres, including relocation and resettlement, will be on a voluntary basis, without prejudice to the Dublin reform.'

[78] See the Non-papers and Follow-ups to the European Council Conclusions of 28 June 2018 'Non-paper on "controlled centres" in the EU', 'Non-paper on regional disembarkation arrangements', 'Factsheet on "controlled centres" in the EU' and 'Factsheet on regional disembarkation arrangements' in *Managing migration: Commission expands on disembarkation and controlled centre concepts*, 24 July 2018, IP/18/4629, available at <http://europa.eu/rapid/press-release_IP-18-4629_en.htm>. More recently, European *Council Working Document on Guidelines on temporary arrangements for disembarkation*, WK 7219/2019 INIT, 12.06.2019.

See the analysis of Carrera S. – Cortinovis R. "Search and Rescue, disembarkation and relocation arrangements in the Mediterranean- Sailing away from Responsibility?" *CEPS Paper* nº 2019-10, June 2019; and Künnecke, A. "Legal challenges and the practicability of disembarkation centres for illegal migrants outside the EU", *Análisis del Real Instituto Elcano* ARI 53/2019, 16.05.2019.

lity at them in light of the involvement of public officials from the Member States, of civil servants and public officials of the EU, or of civil servants of other international organizations.

V. CONCLUSIONS

The refugee crisis has shaped a new perception of the migration reality in Europe. The ramifications of its impact on European integration are visible and enduring.

The EU's response has included a certain strategic perspective, albeit weighed down by an excess of eurocentrism and a security perception that does not take third countries' interests into balanced account. The major economic effort being made supports a far-reaching strategy, only now beginning to be outlined, to promote economic development in the countries of origin and transit of migrants. Additionally, issues such as the monitoring of respect for migrants' human rights have not yet been suitably globally defined in this strategy.

Although the behaviour and response capacity of the EU and its Member States can be assessed in different ways, the truth is that the migration debate has decisively swayed a block of countries that are openly reluctant to engage in intra-European solidarity and accept the new realities and burdens entailed by the refugees already present and yet to come to Europe. This position is very negative in the medium and long term, since, as noted, the crisis has also underscored the permanence of migration trends and flows and the consolidation of the routes or *gates of entry* to Europe.

This article has considered the vulnerability of the European borders designed and in operation in the Schengen Area. The internal borders were the most affected at the start of the migration crisis and are likely to be marked by current regulatory changes, which tend to allow exceptionality as a relatively common occurrence in the European 'federal' area of free movement. Nevertheless, the resilience of this system of the absence of internal border controls in the 'federal' area of free movement is undeniable.

The impact on the EU's external borders has been even greater, as, in the author's view, it has shown once and for all that, more than fragile or vulnerable, some border controls, such as the sea border ones, are not practicable, especially those on Europe's southern sea borders.

It is precisely this infeasibility of border control in marine areas that, in the author's view, leads to the accentuation of certain trends on Europe's external borders, such as the *externalization* of migration controls. New regulatory and strategic planning developments confirm this trend, as well as the current concern for deploying an integrated external border management system[79].

With regard to the phenomenon known as the 'externalization' of migration controls, the literature considers it to refer to EU actions aimed at reducing, sorting and controlling migration flows with the consent of third states in relations that are, by definition, asymmetrical.[80] This article has addressed the different situations that arise, highlighting the advisability of differentiating between *externalizing* migration policy, on the one hand, and *extraterritorial* action concerning migration control, on the other.

In search of greater conceptual accuracy, the term *deterritoriality* has been used, as it is more neutral than the other terms mentioned insofar as it evokes the idea of positioning outside the territory certain border control and migration policy functions, to be carried out by other states or by the EU state itself. Since these are situations and actions linked to migration and border control, they should be conceptually situated outside the territory; the *deterritoriality* option hypothetically makes it possible to encompass both the *externalization* and the *extraterritoriality* of border control functions concerning migration.

To this end, this article has focused on the various notions and activities that might be discussed in relation to the 'externalization' and the 'extraterritoriality' of migration controls and border functions, terms that, in sum, refer to migration control and management activities outside the territory, carried out by public officials of the EU states or by third states.

On the one hand, *externalization* is considered to refer to the management and control of migration flows, the activities of adopting agreements, programmes, action plans and measures to encourage third states to monitor their own borders and migration flows in order to control, restrict or impede

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[79] See Campesi G., "Crisis, migration and the consolidation of the EU border control regime", *International Journal of Migration and Border Studies*, vol. 4, n° 3, 2018, at 196.

[80] Zapata-Barrero, 'La dimensión exterior de las políticas migratorias en el área mediterránea: premisas para un debate normativo', *Revista del Instituto Español de Estudios Estratégicos* n° 2, 2013, at 32 and 9.

physical access to the territory of the EU states, accepting the placement in their territory, or the rejection, of refugees and migrants from other states. It does not involve the presence of or direct exercise of control activities by public officials of the EU Member States. In fact, outside European territory it is highly debatable that states are strictly performing border control functions, as it is an area that may more accurately fall within the more generic field of *migration flow control* linked to migration policy and European external action.

On the other hand, *extraterritorialization* is understood to entail the performance of border control functions by states themselves outside their own territory. In the author's view, this case should involve the presence of or exercise by Member State public officials of some (effective) border control activities or functions in areas without state jurisdiction or in the territory of third states, with their consent.

We are witnessing a change in the very concept of border in this post-globalization era, in which certain functions are offshored and systematically placed outside a state's territory and checkpoints. However, territorial and extraterritorial actions must be differentiated from those occurring as part of external actions in or with third states for the purposes of migration policy and the control of migration flows.

The reality is that a new border space south and east of the Mediterranean has been configured for migratory flows, which needs a new policy of external borders for these areas. Therefore, we must reflect on new frontier spaces, with new concepts and approaches to the border that provide other parameters of action towards migratory flows and external controls. The treatment of migrations in the Mediterranean actually refers to large and medium-term strategies (as shown in the European Agenda on Migration and the 'New Partnership Framework'). So any adaptation or new model of borders towards the Mediterranean-Sahel area must include internal measures to the EU (integrated management system of external borders; a common asylum, refugees and temporary protection policy with major reforms in the Dublin system[81]); but also external measures, with a migration policy and a management of migratory flows that integrates third States in the adapted

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[81] See DI FILIPPO, M. "The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns", *Revista de Derecho Comunitario Europeo*, 59, 2018, 41-95.

new model of borders. Naturally, such a model demands a close connection to the CFSP, but also to the development of the legal statutes of Citizens and Aliens in the Union, and to the capital issue of creating a stable system of legal routes of immigration to Europe.

Today, the Union needs new instruments and concepts for these new realities, especially so as not to lose sight of the fact that, when it comes to tackling crises such as those related to migration and the rights of foreigners approaching or entering its territory and jurisdiction, Europe is a rational construct entailing a project for civilizational progress. As such, it must permanently incorporate its values and respect for human rights in all its policies, regulatory measures and actions with foreigners and third states, both on its own external borders and beyond them. This is essential for the identity and objectives of the European integration, and for the projection of the EU security, solidarity and values in accordance with the International and European Human Rights Law.

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