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and the Rule of Law

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ABSTRACT

This paper takes a closer look at one of the EU's foundational values, the rule of law, and relates it to the external dimension of the EU's migration policy. It examines how the EU's powers in migration management have been put to use in order to project EU migration policies beyond the EU legal order, or more precisely to locate the physical control of migration outside EU territory. It categorises different types of extra-territorialisation, ranging from autonomous action by the Community, including Community action which requires third country cooperation, to action by way of international agreements and cases where third countries undertake to align their domestic law with the Community *acquis*. Starting from the prominence accorded to the rule of law in the EU's external policy, this paper examines an external dimension of the rule of law which goes beyond the desire to promote this value outside EU territory, and its application to the external dimension of the EU's migration policy. It highlights challenges for the rule of law posed by the increasing phenomenon of extra-territorialisation in EU migration policy. Practical examples taken from the EU's visa policy and operational cooperation in the field of external border control serve to support the argument that if the EU is to continue the use of extra-territorialisation as an instrument of its migration policy it must address seriously the issue of ensuring a concomitant extra-territorialisation of the rule of law, in particular the effective judicial review of administrative action.

KEYWORDS

Legal Issues

European law – fundamental/human rights – judicial review – rule of law

EU Policies and Themes

asylum policy – immigration policy – Schengen – security/internal

External Relations

security/external

Disciplinary Background of Paper

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The Extra-Territorialisation of EU Migration Policies and the Rule of Law

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and
Marise Cremona*

I. Introduction

Over the last decade, the identification of the European Union with a set of common values has become an increasingly important part of EU policy-making both internally and externally. The idea of common values has emerged as part of the Union's constitutional development and representative of that collective identity.

The core of the EU's values can be found in Article 6 EU, albeit enumerated as principles: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Not only are the EU's values conditions for membership, they also form the basis for essential elements clauses introduced into Community agreements as a matter of practice from 1990.¹

Since the Maastricht Treaty, the promotion of these values has been an explicit objective of the EC's development policy (Article 177(2) EC), as well as the EU's Common Foreign and Security Policy (CFSP, Article 11(1) EU). The Treaty of Nice inserted Article 181a(1) EC providing the basis for economic, financial and technical cooperation with third countries which refers to the promotion of democracy and the rule of law, as well as human rights and fundamental values. Under the Constitutional Treaty, the Union would have been required to safeguard and advance its values, as well as under a duty to uphold them (Article I-3(4) CT).²

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¹ COM(1995) 216, final, Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries.

² See for a more elaborate discussion of the role of EU values in the Constitutional Treaty: Cremona, M., 'Values in the EU Constitution: the External Dimension', in: Millns, S. and Aziz, M. (Eds.) *Values in the Constitution of Europe* (Aldershot, Ashgate, forthcoming).

An equally significant development in the last decade has been the progressive establishment of an EU *acquis* in justice and home affairs (JHA). Pre-Maastricht, cooperation in JHA took place outside the EC's law-making structure and the institutions did not play a significant role therein. Article K of the Maastricht Treaty brought this cooperation "out of the shadows of European integration" and established the Third Pillar of the EU on JHA.³ The Treaty of Amsterdam communitarised the Union's competences on asylum, immigration and civil cooperation and integrated the Schengen *acquis* into the EU legal order. The Treaty of Amsterdam also introduced the Area of Freedom, Security and Justice (AFSJ) as an official EU objective and the policy area has been one of the most dynamically evolving since.⁴

It may come as little surprise that the AFSJ rapidly developed a strong external dimension.⁵ Since the end of the Cold War the development of societal security concerns has meant that external security, covering the territorial integrity of the state, has become increasingly linked to questions of internal security. To this we may add that, as Walker has noted, the achievement of successful solutions is more probable where concurrent national interests within the collective framework can be mobilised against external threats to those interests.⁶

Initially the emphasis was on the integration of a JHA dimension into external relations generally, and the integration of the external dimension of JHA into the overall objectives of the AFSJ. The Tampere European Council conclusions stated that JHA should be "integrated in the definition and implementation of other Union policies", in particular external relations.⁷ The Council report to the Feira European Council in June 2000 argued that "developing the JHA external dimension is not an objective in itself. Its primary purpose is to contribute to the establishment of an area of freedom, security and justice. The aim is certainly not to develop a 'foreign policy' specific to JHA. Quite the contrary."⁸ More recently, in a subtle shift of emphasis, the Council and the Commission have both stressed the importance of the JHA dimension to the Union's external policy objectives. In its Communication on the External dimension of the Area of Freedom, Security and Justice the Commission sets out how the external dimension of JHA contributes - as well as to internal security - to the Union's external policy objectives, including the promotion of freedom, security and justice in third countries.⁹ In its Strategy on the external dimension of JHA, the Council

³ Peers, S., *EU Justice and Home Affairs Law* (Harlow, Longman, 2000), 16.

⁴ Monar, J., 'A New "Area of Freedom, Security and Justice" for the Enlarged EU? The Results of the European Convention', in: Henderson, K., *The Area of Freedom, Security and Justice in the Enlarged Europe*, (Hampshire, Palgrave MacMillan, 2005), 111.

⁵ Lavenex, S., 'EU External Governance in "Wider Europe"', 11 *Journal of European Public Policy* 4 (2004), 689.

⁶ Walker, N., 'In search of the Area of Freedom, Security and Justice: A constitutional Odyssey', in: Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (2004), 20.

⁷ Tampere European Council Conclusions, 15 and 16 October 1999, Council Document 2001/1/99, point 59.

⁸ Council Document 7653/00: European Union Priorities and Objectives for External Relations in the Field of Justice and Home Affairs: Fulfilling the Tampere Remit, point II.A.2.

⁹ COM(2005) 491 final, Commission Communication on a Strategy on the External Dimension of the Area of Freedom, Security and Justice.

states at the outset that the EU should “make JHA a central priority in its external relations.”¹⁰

Migration, increasingly seen as a non-traditional security threat, forms an excellent example of the external dimension of the AFSJ. First of all, internal EC policies related to migration such as visas and border controls produce effects far beyond the EU’s legal order. Moreover, cooperation on matters of migration has increasingly become integrated into the framework of EU external relations.¹¹ The Hague Programme, the follow-up to the Tampere Agenda, calls for the continued integration of migration into the EU’s external relations.¹² This is exemplified by the importance given to migration in the EU’s policy towards its immediate neighbours.¹³ The Hague Programme further confirms that, although attention is to be paid both to the prevention and the control of undesired migratory flows, the EU’s agenda is still very much dominated by the latter.¹⁴

This paper will take a closer look at one of the EU’s foundational values, namely the rule of law, and relate it to the external dimension of the EU’s migration policy. First of all it will examine briefly the concept of rule of law (II). It will then look at the relevance of this concept for the EU legal order (III). A next step consists of an evaluation of the EU’s powers in migration management, showing how these powers have been put to use in order to project EU migration policies beyond the EU legal order, or more precisely to locate the physical control of migration outside EU territory (IV and V). This will lead us to explore an external dimension of the rule of law which goes beyond the desire to promote this value outside EU territory, and its application to the external dimension of the EU’s migration policy (VI). Practical examples taken from the EU’s visa policy and operational cooperation in the field of external border control serve to shed light on the question whether in the field of EU migration policy the EU practices what it preaches.

II. The Rule of Law

Hayek defined the rule of law at its most basic: “government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”¹⁵ The equivalent French expression *Etat de droit* or German *Rechtsstaat* emphasise the link between law and

¹⁰ Council Document 15446/05: A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice, point 1.

¹¹ See Lavenex, S., ‘Shifting Up and Out, The Foreign Policy of European Immigration Control’, 20 *West European Politics* 2, 329-350.

¹² The Hague Programme, Council Document 16054/04.

¹³ Guild, E., ‘What is a Neighbour? Examining the EU Neighbourhood Policy from the Perspective of Movement of Persons’: <http://www.libertysecurity.org/article270.html>.

¹⁴ This is evidenced for instance by the importance the Hague Programme attaches to borders controls, both at the Union’s external borders, as well as in countries of transit and to ‘capacity building’ in countries of origin. See also Boswell, C., ‘The “external dimension” of EU immigration and asylum policy’, 79 *International Affairs* 3 (2003), 619-638.

¹⁵ Hayek, F.A., *The Road to Serfdom* (Chicago, Chicago University Press, 1994), 80.

State (and State institutions) within a constitutional system of government.¹⁶ Although the rule of law is a contested concept, one generally discerns a 'thin' theory or limited concept of the rule of law and a broader or 'thick' concept of rule of the law.

The thin theory as expounded by Raz emphasises that the law should be prospective, known and clear.¹⁷ Laws should apply equally to all, including those that govern. Additional requirements serve to ensure conformity with the rule of law and remedies in case of deviation from it.¹⁸ Thus, the judiciary must be independent, courts should have review powers and be easily accessible and the discretion of executive agencies exercising coercive powers should not be perverted. The broader version tends to widen the concept so as to include human rights protections, especially those associated with civil and political rights.¹⁹

In its political dimension, the rule of law emphasises due process of law and equality before the law, but is not limited to the judiciary and the court system. The institutional mechanisms for implementing the rule of law have increasingly been extended to members of the executive, scrutinising administrative action.²⁰ As such the rule of law will underpin goals such as equality, executive accountability, good governance and anti-corruption.

Against the background of globalisation, there has been much academic debate on how the rule of law may be translated from the nation state to the international arena, governed by public international law.²¹ However, the nature of international law, with no international legislature or enforcement mechanism, as well as the executive's omnipresence in diplomacy has encouraged scepticism.²² One may nonetheless argue that, in the words of the Commission on Global Governance, "the world community has at least the beginnings of a potentially effective legal system to support global governance arrangements."²³ The Union actively supports the notion of global governance based on rule-based international systems. The Laeken Declaration speaks of the need for Europe "to shoulder its responsibilities in the governance of globalisation" and the Constitutional Treaty, in Article III-292, sets as one of the objectives of the Union's external action the promotion of "an international system based on stronger multilateral cooperation and good global governance." Prodi, while President of the European Commission, argued that global governance requires strong

¹⁶ See for a comparative perspective on these three related concepts: Fernandez Esteban, M.L., *The rule of law in the European Constitution* (The Hague, Kluwer Law International, 1999).

¹⁷ Raz, J., *The Authority of Law- Essays on Law and Morality* (Oxford, Clarendon Press, 1979), 214-219.

¹⁸ *Ibid.*, 218. See also: Raz, J., *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960), chapter 14.

¹⁹ Dauvergne, C., 'Sovereignty, Migration and the Rule of Law in Global Times', 67 *Modern Law Review* 4 (2004), 615. Sampford speaks of a development from rule of law to the rule of *just* law or even the rule of justice: Sampford, C., 'Reconceiving the rule of law for a globalizing world', in: Zifcak, S. (Ed.), *Globalisation and the Rule of Law* (London, Routledge, 2005), footnote 29.

²⁰ Sampford, C., *supra* note 19, 17.

²¹ See the various contributions in Zifcak, S. (Ed.), *Globalisation and the Rule of Law* (London, Routledge, 2005).

²² Eijsbouts, W., 'Introduction', in: Vandamme, T. and Reestman, J.-H (Eds.), *Ambiguity in the Rule of Law - The interface between National and International Legal Systems* (Groningen, Europa Law Publishing, 2001), 6.

²³ Commission on Global Governance, *Our Global Neighbourhood* (Oxford, Oxford University Press, 1995), chapter 6.

international institutions which, being rule-based, promote the rule of law and compliance with international law.²⁴

III. The Rule of Law and the EU legal order

The European Union is, in the famous words of the European Court of Justice (ECJ), “a new legal order of international law for the benefit of which the states have limited their sovereign rights.”²⁵ The rule of law features prominently amongst its core values in Article 6(1) EU. Respect for the rule of law has, as do the other constitutive values, both an internal and external dimension. Internally, it forms a criterion for assessing the legality of the action of its institutions and Member States. Externally, it is a value to be ‘exported’ beyond the border of the Union by means of persuasion, incentives and negotiation.²⁶ In its Strategy for the External Dimension of JHA the Council highlights the importance of the rule of law for the development of the AFSJ, stating that it “can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law, and promoting the respect for human rights and international obligations.”²⁷

One of the few descriptions of the rule of law given in an EU legal instrument states that it “permits citizens to defend their rights and (...) implies a legislative and judicial power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system.”²⁸ Here we see reflected elements of both the thick and thin version of the rule of law. The rule of law is linked to the values of democratic government and human rights guarantees and indeed in EU policy “democracy and the rule of law” are often combined and not clearly differentiated.²⁹ In our analysis of the rule of law implications of extra-territorialisation we will focus on two aspects of the more narrow rule of law theory, namely the legality of action and judicial review. The fact that these are often defined as fundamental rights themselves, necessitates a somewhat broader discussion on the protection of human rights by the ECJ in general.

In assessing the legality of EU action, an important difference between the EU and its Member States needs to be recalled at the outset: the fact that the European legal order is a system of attributed powers. This means that the EU does not possess a general legislative competence, but that it must be possible to trace back the EU’s actions to a particular legal basis laid down in the founding treaties. The question whether the EU disposes of a power to act is of fundamental constitutional importance. The system of attributed powers is one of the “defining features of the relationship

²⁴ Prodi, R., ‘Europe and Global Governance’ (Speech to COMECE congress Brussels, 31 March 2000), SPEECH/00/115.

²⁵ Case 26/62, *Van Gend & Loos* [1963] ECR 1.

²⁶ AG Mengozzi, Opinion in Cases C-354/04 P, *Gestoras Pro Amnistía et al.* and C-355/04 P, *Segi*, delivered 26 October 2006.

²⁷ Council Document 15446/05, *supra* note 10, para. 1.

²⁸ Article 2(c), Common Position 98/350/CFSP on human rights, democratic principles and the rule of law and good governance in Africa, *OJ* 1998, L158/1. The Common Position seeks to provide a benchmark for the coordination of EU, EC and Member State policy.

²⁹ Cremona, M., ‘The European Neighbourhood Policy: Legal and Institutional Issues’ (Stanford, CDDRL Working Paper 25, November 2004), 11.

between the Community and its Member States.”³⁰ It is a principle that is to be respected both internally and externally.³¹

In *Internationale Handelsgesellschaft* the ECJ held that respect for fundamental rights forms an integral part of the general principles of Community law, the observance of which is to be ensured by the Court.³² In *Nold* the Court identified as a source of these fundamental rights the constitutional traditions common to the Member States, as well as international human rights treaties which involved the Member States.³³ One of these treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), was specifically mentioned in *Rutili* and the Court has attributed specific significance to it since.³⁴ As follows from its preamble, the ECHR is strongly informed by rule of law theory. Various elements of the thin concept of the rule of law have been identified as fundamental rights, such as the protection from unlawful deprivation of liberty (Article 5), the right to a fair trial in the determination of civil rights and obligations and criminal charges (Article 6), as well as the right to an effective remedy (Article 13).

The ECJ will scrutinise for conformity with the general principles of EC law not merely Community action but also national measures which lie within the scope of EC law, ensuring that Member States will adequately respect fundamental rights.³⁵ The ECJ has identified further rule of law-based general principles that bind the Community institutions and the Member States when acting within the scope of Community law, such as the right to a fair hearing, and the principles of legal certainty and legitimate expectations, which may be either classified as fundamental rights or principles of administrative legality.³⁶ In either case there is an undeniably strong link with the thin concept of the rule of law.

The ECJ, in describing the EC as a “Community based on the rule of law” has held that the Member States and the institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law which include fundamental rights.³⁷ In *Johnston* the Court ruled that the requirement of judicial review of any decision of a national authority reflects a general principle stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR.³⁸ Advocate General Léger has described the right to challenge a measure before the courts as the “corollary” to the rule of law, and both “a victory over and an instrument” of it.³⁹

³⁰ Dashwood, A., ‘The Attribution of External Relations Competence’, in: Dashwood, A. and Hillion, C. (Eds.), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000), 116.

³¹ Opinion 2/94, Accession to ECHR [1996] ECR I-1759, para. 24.

³² Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

³³ Case 4/73, *Nold* [1974] ECR 491, para. 13.

³⁴ Case 36/75, *Rutili* [1975] ECR 1219, para. 32. See e.g. also Case C-36/02, *Omega* [2004] ECR I-9609, para. 33.

³⁵ Case C-260/89, *ERT* [1991] ECR I-2925, para. 42.

³⁶ Craig, P. and De Búrca, G., *EU Law - Text, Cases and Materials* (Oxford, Oxford University Press, 2003), 371.

³⁷ Case 294/83, *Les Verts* [1986] ECR I-1339, para. 23 and C-50/00 P, *UPA* [2002] ECR I-6677, para. 38.

³⁸ Case 222/84, *Johnston* [1986] ECR 1651, para. 18. See also e.g. Case C-459/99, *MRAX* [2002] ECR I-6591, para. 101.

³⁹ Case C-224/01, *Köbler* [2003] ECR I-10239, para. 68, quoted also by AG Mengozzi in his Opinion in Cases C-354/04 P and C-355/04 P, *supra* note 26, para. 101.

Article 68 EC restricts the role of the ECJ under Title IV EC, which covers immigration policy. Only national courts from which no further judicial remedy is possible may refer questions on the interpretation of this title to the ECJ, and indeed have a duty to do so.⁴⁰ The Court's jurisdiction is further excluded from measures taken under Article 62(1) EC - the legal basis for measures related to the abolition of internal border controls - in as far as they relate to the maintenance of law and order and the safeguarding of internal security.⁴¹

The second indent of Article 67(2) EC, required the Council to take a decision at the end of the 5 year transitional period following the entry into force of the Treaty of Amsterdam with a view to adapting Article 68 EC. Notwithstanding that this period ended on 1 May 2004, the Council has not yet taken such a decision.⁴² The Commission has recently come forward with a Communication to "contribute to the adaptation" of Article 68 EC, annexing a draft Council Decision which would disapply the Article in its entirety.⁴³ The Commission argues that the principle of effective judicial protection is "one of the fundamental rights that help to define the very concept of the rule of law."⁴⁴ In view of this sweeping statement, one may wonder why the Commission did not call upon the Council to act earlier, a first step in a possible procedure against the Council before the ECJ for failure to act.⁴⁵

The Constitutional Treaty would have given the ECJ full jurisdiction over the whole of the AFSJ. The only exception that would have remained is the exclusion of the possibility for the Court to review the legality and proportionality of operations carried out by a Member State's police or other law enforcement agencies or of the exercise of a Member State's duty to maintain law and order and safeguard internal security.⁴⁶ This exception is currently contained in Article 35 EU with regard to the Third Pillar.

Monar has argued that this restriction is in line with the principle of respect for the essential state functions in maintaining law and order and safeguarding internal security, as is laid down in Article I-5(1) CT.⁴⁷ Others have argued in the same vein that this clause reflects the position of the Member State governments as ultimate providers of security for citizens.⁴⁸ The House of Lords however considered this restriction to be unjustified, arguing that the Court should be entitled to assess the validity of action, whether that of the Union or of Member States and their authorities when implementing Union legislation, against the norms contained in the Charter of Fundamental Rights which would have formed an integral part of the Constitutional Treaty.⁴⁹ In addition,

⁴⁰ Article 68(1) EC. In the case in which a Member State has made a declaration according to Article 35(3)b EU, this means that in practice jurisdiction of the ECJ may be more restricted under Title IV EC than under the Third Pillar of the EU.

⁴¹ Article 68(2) EC. A similar exception is contained in Article 2(1) of the Schengen Protocol.

⁴² On the basis of the second indent of Article 68(2) EC, the Council did decide to extend the application of the co-decision procedure: Decision 2004/927/EC, *OJ* 2004, L396/45.

⁴³ COM(2006) 346 final.

⁴⁴ *Ibid.*, 5.

⁴⁵ Article 232 EC.

⁴⁶ Article III-377 CT.

⁴⁷ Monar, J., *supra* note 4, 129.

⁴⁸ Elise Consortium, 'Security Issues and critical institutional balances in the on-going IGC': http://www.eliseconsortium.org/article.php3?id_article=146.

⁴⁹ House of Lords, 'The Future Role of the European Court of Justice' (House of Lords Paper 47, 6th Report of Session 2003-2004, London, 15 March 2004), 37.

under the Constitutional Treaty the powers of review of the Court would have been extended to acts of bodies, offices and agencies of the Union, producing a legal effect vis-à-vis third persons.⁵⁰

IV. The EU's competences in migration

Bearing in mind the fundamental importance of the principle of attributed powers in assessing the legality of EU action, this section will examine in more detail the EU's competences in the field of migration.

The Maastricht Treaty brought the Member States' - until then purely intergovernmental - cooperation in migration matters within a constitutional framework, in what became known as the Third Pillar.⁵¹ Only visa policy for third country nationals became a Community competence.⁵² The subsequent Treaty of Amsterdam transferred all the remaining policies related to visas, asylum and migration to the EC Treaty, to be dealt with under Title IV, the restructured Third Pillar dealing with the remaining issues of police and judicial cooperation in criminal matters. Thus, EC competences under Title IV EC include the crossing of internal and external borders, including visas (Article 62(1) and 62(2) EC), asylum (Articles 63(1) and 63(2) EC), legal and illegal immigration (Article 63(3) EC), as well as administrative cooperation in these areas (Article 66 EC).

The Treaty of Amsterdam further incorporated the Schengen *acquis* into the EU legal order. In two Council Decisions based on Article 2 of the Schengen Protocol, the Council identified the content of the Schengen *acquis* and assigned a legal basis to its various parts.⁵³ Rules relating to visa, migration and asylum were brought under the new Title IV EC, whilst the provisions for mutual legal assistance in criminal matters were moved to the Third Pillar.⁵⁴ The Schengen provisions on asylum had been superseded by the 1990 Dublin Convention, which has now been incorporated into EU law as the Dublin II regulation.⁵⁵

The reforms brought about by the Treaty of Amsterdam surely meant important improvements for the rule of law in this policy area, particularly in terms of increased

⁵⁰ Article III-365(1) CT.

⁵¹ Snyder, F., 'Institutional Developments in the European Union: Some Implications of the Third Pillar', in: Monar, J. and Morgan, R. (Eds.), *The Third Pillar of the European Union – Cooperation in the fields of justice and home affairs* (Brussels, European Interuniversity Press, 1994), 93.

⁵² Article 100c TEC.

⁵³ Council Decision 1999/435/EC concerning the definition of the Schengen *acquis*, *OJ* 1999, L176/1 and Council Decision 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, *OJ* 1999, L176/17.

⁵⁴ Den Boer, M., 'Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization', 3 *Maastricht Journal of European and Comparative Law* 4 (1997), 313.

⁵⁵ Dublin Convention, *OJ* 1997, C254/1; Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1.

transparency and accountability.⁵⁶ Nonetheless, as noted in the previous section, the ECJ's powers under Title IV EC are still restricted, and even now Community competence in relation to migration is not simple. The special arrangements for Member States not willing to participate in Title IV EC, the position of newly acceded Member States, as well as arrangements for third countries that wish to participate in the Schengen *acquis*, have added to the chequered legal landscape of JHA.

The UK and Ireland, as well as Denmark, negotiated protocols on their position with regards to Title IV. Denmark remains bound by the Schengen *acquis* on the basis of 'ordinary' public international law. It has the possibility to opt-in to proposals building upon the Schengen *acquis* under the First Pillar within six months.⁵⁷ Measures under Title IV EC which are not considered a development of the Schengen *acquis* are outside the scope of the opt-in. Denmark has concluded an international agreement with the EC on the application of the Dublin II regulation.⁵⁸

The UK and Ireland on the other hand are not bound by the Schengen *acquis*, but may request to take part in some or all of the provisions of the *acquis* after which the Council shall take an unanimous decision.⁵⁹ In addition both the UK and Ireland may request either before or after the adoption of a new measure under Title IV EC to participate therein, whereupon they shall be entitled to do so.⁶⁰ As Peers notes, in practice the UK has opted into all proposals concerning asylum (including Dublin II) and nearly all proposals concerning illegal migration. It participates in hardly any of the measures concerning visas, borders, and legal migration. The Irish practice has been nearly (but not quite) identical to that of the UK.⁶¹ Legal disputes have, unsurprisingly, arisen as to what is, and what is not, a development of the Schengen *acquis*.⁶²

Article 8 of the Schengen Protocol requires that the Schengen *acquis* be fully accepted by all states candidates for admission. This has been interpreted to mean that all new Member States need to fulfill the requirements of the *acquis* upon accession.⁶³ Consequently, the 10 Member States that joined the EU in 2004 have aligned their visa

⁵⁶ The communitarisation was subject to a five year transitional period according to Article 67 EC, during which several intergovernmental elements of the Third Pillar were retained, such as a shared rights of initiative for the Commission and Member States and unanimous decision making.

⁵⁷ Article 5, Protocol on the Position of Denmark.

⁵⁸ Agreement between the EC and Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the EU and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, *OJ* 2006, L66/38.

⁵⁹ Article 4, Schengen Protocol. See Council Decision 2000/365/EC concerning the UK's request to take part in some of the provisions of the Schengen *acquis*, *OJ* 2000, L131/43 and Council Decision 2002/192/EC concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, *OJ* 2002, L64/20.

⁶⁰ Articles 3 and 4, Protocol on the Position of the UK and Ireland.

⁶¹ Peer, S., 'Veto, Opt-outs and EU Immigration and Asylum law' (Statewatch Briefing, December 2004): www.statewatch.org/news/2004/dec/eu-immig-opt-outs3.pdf.

⁶² The UK has recently brought two actions for annulment before the ECJ, arguing that it had been excluded from the adoption of legislation on the basis of an erroneous interpretation of the relationship between Articles 4 and 5 of the Schengen Protocol, and alternatively an erroneous interpretation of what constitutes a development of the Schengen *acquis*: Case C-137/05, *UK v. Council*, *OJ* 2005, C132/16 and Case C-77/05, *UK v. Council*, *OJ* 2005, C82/25.

⁶³ Article 3(1), Act of Accession, *OJ* 2003, L236/33. Borissova, L., 'The Adoption of the Schengen and the Justice and Home Affairs *Acquis*: The Case of Bulgaria and Romania', 8 *European Foreign Affairs Review* 1 (2003), 110-111.

policy with that of the 'old' Member States.⁶⁴ However, border controls have not been not lifted immediately upon accession and the visas issued by the new Member States are national, not Schengen visas. The lifting of internal borders between the old and new Member States is dependent on a separate Council decision for each country independently based upon "careful examination of the legal and practical readiness of the new Member States."⁶⁵ This decision is expected to be taken in 2008, after the Schengen Information System (SIS) II has become operational.⁶⁶

Notwithstanding its incorporation into EU law, Norway, Iceland and Switzerland have associated themselves with Schengen cooperation.⁶⁷ Liechtenstein has expressed interest in starting negotiations on accession.⁶⁸ Norway, Iceland, and Switzerland have further associated themselves to the EU's asylum policy.⁶⁹

It should be noted that the competences the Community possesses under Title IV EC are not exclusive in the sense of representing a complete transfer of powers from the Member States to the Community; they are held concurrently with the Member States. However, shared competences may become exclusive where the EC has enacted legislation and thereby preempted the powers of the Member States. This is for example the case with short term visas under Article 62(2)(b) EC.

Title IV EC does not confer any express external competences in migration policy. In fact such express conferral of external competence in the EC Treaty is rare. Instead the ECJ has developed an elaborate doctrine of implied external competences. At the basis thereof lies the *AETR* case, which held that external competence may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty.⁷⁰ For instance, readmission agreements have been based on Article 63(3)(b) EC; although this provision does not expressly refer to the conclusion of international agreements, their conclusion is considered an important means whereby the objectives of that provision, i.e. repatriation, can be achieved.⁷¹

⁶⁴ See Jileva, E., 'Visa and free movement of labour: the uneven imposition of the EU *acquis* on the accession states', 28 *Journal of Ethnic and Migration Studies* 4 (2002), 683-700.

⁶⁵ Chapter 24 on Justice and Home Affairs, *acquis communautaire*: http://europa.eu.int/comm/enlargement/negotiations_eu10_bg_ro/chapters/chap24/index.htm.

⁶⁶ The SIS is an information system shared by the Schengen signatories, providing data on persons or objects, such as people under arrest warrant or missing object as recorded by the participant countries. SIS II was initially expected to be up and running in 2007 (Council Document 9778/2/05). See also: *European Voice*, 28 September 2006: 'Commission blamed for Schengen data shambles'.

⁶⁷ Agreement concluded by the Council and Iceland and Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, *OJ* 1999, L176/36; Council Document 13054/04, Agreement between the EU, the EC and Switzerland on the association of Switzerland with the implementation, application and development of the Schengen *acquis*.

⁶⁸ www.liechtenstein.li/en/pdf-fl-wuf-aktuell-artikel-060605.pdf.

⁶⁹ Agreement between the EC and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, *OJ* 2001, L93/40; Agreement between the EC and Switzerland concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, signed 26 October 2004.

⁷⁰ Case 22/70, *Commission v. Council* (AETR) [1971] ECR 263, para. 16.

⁷¹ Readmission agreements impose upon the third country not merely an obligation to readmit their own nationals, but also third country nationals who have transited through their territory before entering the EU without authorisation.

The *AETR* case further established that when the Community adopts provisions laying down common rules, whatever form these may take, the Member States lose the competence to conclude agreements in that area which affect those rules; the exercise of Community competence may thus have a pre-emptive effect also on the Member States' power to conclude international agreements.⁷² Taking however a bilateral readmission agreement between a Member State and a third country as an example, it is by no means clear whether such agreements would 'affect' a Community readmission agreement with that country, thereby indicating the pre-emptive character of the Community agreement. Practice seems to indicate that the EU and Member States remain jointly competent to conclude such agreements.⁷³

Protocol 8 (on external borders) attached to the EC Treaty states that Article 62(2)(a) EC is "without prejudice to the competence of Member States to negotiate and conclude agreements with third countries." It is unclear whether this provision should be interpreted as limiting the application of the *AETR* case law, or rather as a confirmation that Member States retain competence to sign agreements on external borders *as long as* the Community has not acted in these fields.⁷⁴ Again practice seems to confirm the former reading.

Even where Member States retain competence, they are legally constrained by the Community law principle of loyal cooperation, which affects the way in which those competences can be exercised in practice, and in particular imposes obligations of information and consultation.⁷⁵ An expression of this principle can be found in the founding Regulation of the 'European Border Agency' (FRONTEX). Whilst Member States remain competent to cooperate at the external borders with third countries where such cooperation complements the action of the Agency, they are under a duty to inform the Agency thereof.⁷⁶

V. Extra-Territorialisation

In examining the way in which EU migration policies produce effects beyond the EU's borders, a wide variety of concepts have been applied by commentators and scholars. The concept of 'external governance' developed by Lavenex has been used to analyse the (selective) extension of EU's norms, rules and policies in general.⁷⁷ She describes external governance as a shifting of the legal boundary beyond institutional integration.⁷⁸ It is important to note however that in legal terms the boundary does not

⁷² Case 22/70, *supra* note 70, para. 17.

⁷³ Compare the shared external competence in development policy, Case C-316/91, *Parliament v. Council* [1994] ECR 625, para. 26.

⁷⁴ Peers, S., *supra* note 3, 79.

⁷⁵ Article 10 EC; c.f. Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805.

⁷⁶ Article 2(2) of Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1.

⁷⁷ Lavenex, S., *supra* note 5, 683.

⁷⁸ *Ibid.*

really move in the sense that the EU's legal order is enlarged.⁷⁹ Rather third countries adopt parts of the EU *acquis* in their own domestic legal orders.

Externalisation is another term which is often used in discussing the external dimension of EU migration policies.⁸⁰ However, taking into account its original context in the field of economics, this term could be interpreted as having a somewhat narrower meaning than this might imply.⁸¹ It involves the transfer of a business function to an external entity, requiring a degree of coordination and trust between the outsourcer and this external entity.⁸² When transposed to the analysis of the EU's migration policies, aspects of the EU's migration policy which have considerable effects outside the EU's territory nonetheless do not fall within this concept, namely those policies that can be formulated independently of the involvement of third countries.⁸³

In this paper the term extra-territorialisation will be used. This term covers the means by which the EU attempts to push back the EU's external borders or rather to police them at distance in order to control unwanted migration flows.⁸⁴ Extra-territorialisation includes the way in which the EU and its Member States attempt not only to prevent non-Community nationals from leaving their countries of origin, but also to ensure that if they manage to do so, they remain as close to their country of origin as possible, or in any case outside EU territory. It furthermore covers measures that ensure that if individuals do manage to enter the EU, they will be repatriated or removed to 'safe third countries'.

Before we attempt an analysis of the different ways in which extra-territorialisation of EU migration policies occurs, an initial point may be made with respect to the concept of EU territory and its borders. The logical conclusion of the variable geometry in relation to the Schengen cooperation described above is that Schengen external borders do not coincide with those of the EU. It is the Schengen external borders that have become the focus of legislative activity for the purpose of migration control.⁸⁵ Each

⁷⁹ One may argue it does to a more limited extent in the case of the EEA agreement, in which there is a judicial authority, the EEA Court, which ensures a coherent development of EEA and EU law.

⁸⁰ See for instance the study issued by the European Parliament's Subcommittee on Human rights: 'Study on the external dimension of the EU's asylum and immigration policies - summary and recommendation for the European Parliament' (D\T\619330EN.doc, 8 June 2006), 8.

⁸¹ Being 'Franglais' for out-sourcing.

⁸² See Grosman, G. and Helpman, E., 'Outsourcing in a Global Economy' (London, CEPR Discussion Paper 3165, January 2002), 2.

⁸³ An example is the EU's visa policy. Rules on visa have nevertheless an important external dimension. It would be incorrect to speak of externalities, yet another term borrowed from economics, as these consequences are entirely intended.

⁸⁴ See Guiraudon, V., 'Before the EU border: Remote Control of the "Huddled Masses"', in: Groenendijk, K., Guild, E. and Minderhout, P. (Eds.), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 191-214. The concept of remote policing, has been applied both to specific procedures and technologies which control the movement of individuals before arrival, as well as the deployment of police officers or private actors outside national territory: Bigo, D. and Guild, E., 'Policing at Distance: Schengen Visa Policies', in: Bigo, D. and Guild, E., *Controlling Frontiers – Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 234.

⁸⁵ See *inter alia* Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1. See for the relation between the Schengen *acquis* and the EC freedom of movement: Case C-503/03, *Commission v. Spain*, judgment of 31 January 2006, *nyr*.

Schengen Member guards its own part of the external border, in accordance with its national law and the Schengen Borders Code.⁸⁶

Although the Schengen Members have transferred parts of their sovereignty as regards their powers to regulate borders, these are still defined by reference to the Member States' territory. This has allowed Member States to try and deny the *legal* presence of those *physically* present, for instance through the creation of international transit zones at airports.⁸⁷ The European Court of Human Rights (ECtHR) has already ruled that despite their name these zones do not have extraterritorial status for the application of the Convention.⁸⁸ Nonetheless, the ECJ in a case on Airport Transit Visas held that these visas fell outside what was then the scope of EC competence because no external borders were crossed.⁸⁹ Thus, the extent to which extra-territorialisation has really taken place may be legally contested.

As this example suggests, extra-territorialisation is not a new phenomenon. It was already present as a component of the migration policies of the Member States and in the forms of intergovernmental cooperation that preceded the communitarisation of migration policy. The 1990 Schengen Implementation Convention (CISA), for example, contained provisions on visa policy and carrier sanctions.⁹⁰ However, since the entry into force of the Treaty of Amsterdam, there has been an increase in its use in a way which poses difficult questions for the Community legal order and its foundations on the rule of law.

In terms of interaction between the Community legal order and the domestic legal order of third countries, extra-territorialisation may occur in a number of ways.

It may, first, be used to describe action taken by the EU itself, independently of third countries, which nevertheless impacts on the legal order of that third country and the position of third country nationals outside the territory of the EU. It is possible to identify a number of autonomous competences which the Community can use independently of third countries. Visa policy for stays not exceeding three months is regulated by Regulation (EC) no 539/2001.⁹¹ A proposal for recasting as a regulation the Common Consular Instructions (CCI) on issuing visas has been presented in July 2006.⁹² Detailed rules on carrier sanctions are found in Directive 2001/51/EC.⁹³ Rules on the crossing of external borders have been laid down in the Schengen Borders

⁸⁶ Article 15, Schengen Borders Code, *ibid.* The Hague Programme at point 1.7.1 underlines once more that the control of external border lies with the Member States and their authorities.

⁸⁷ Gil-Bazo, M.-T., 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', 18 *International Journal of Refugee Law*, 3-4 (2006), 593.

⁸⁸ *Amuur v. France* - 19776/92 [1996] ECHR 25 (25 June 1996), para. 52. We would argue that the same should apply to the 'no man's land' between the two border fences around the two Spanish enclaves of Ceuta and Melilla.

⁸⁹ C-170/96, *Commission v. Council* (Airport Transit Visas) [1998] ECR I-2763, para. 30.

⁹⁰ Article 10 and Article 26 CISA, respectively.

⁹¹ Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001, L81/1.

⁹² Common Consular Instructions, OJ 2002, C313/1. COM(2006) 403 final, Draft Proposal for a Regulation establishing a Community Code on Visas.

⁹³ Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ 2001, L187/45.

Code.⁹⁴ Operational coordination at the external borders has been given a boost with the creation of FRONTEX.⁹⁵

Second, extra-territorialisation may take place in a context of external Community action. Here, although the policy instrument may take the form of an international agreement, we can also see more complex interactions involving autonomous Community instruments which nevertheless require the consent or active cooperation of a third country in order to operate effectively.⁹⁶

An example of this latter category is the establishment of an immigration liaison officers network by Regulation (EC) No 377/2004.⁹⁷ The network consists of immigration officials posted by the Member States. It is therefore the individual Member States' external relations with the third country in question that determine the conditions under which the liaison officer operates. Similarly, joint operations coordinated by FRONTEX may take place in the territorial waters of a third country. This will require the consent, whether or not laid down in an international agreement, of the third country in question. A recent initiative to set up regional protection centres will also require the consent of the country in which they are to be based.⁹⁸ At the same time it is clear that the Community may set up and fund such a project under the AENEAS Programme, or in the future under the European Refugee Fund for the period 2008-2013, and in that sense they may be seen as autonomous actions.⁹⁹

A final example of a measure necessitating the active cooperation of third countries is the determination of the list of safe countries of origin. Although the Community can decide under Directive 2005/84/EC which countries are to be considered safe¹⁰⁰ and may fund return operations, in practice it will require the cooperation of the third country, notwithstanding the duty under international law for a country to take back its own nationals.¹⁰¹

⁹⁴ Schengen Borders Code, *supra* note 85.

⁹⁵ Regulation (EC) No 2007/2004, *supra* note 76.

⁹⁶ Lavenex and Uçarer rightly note that the EU's treaty making power is only one way in which EU policies may gain an external dimension: Lavenex, S. and Uçarer, E., 'The External Dimension of Europeanization', 39 *Cooperation and Conflict* 4 (2004), 418. For clarity it should be stressed that we are dealing here with the EC's external relations, not the Union's Common Foreign and Security Policy under the Second Pillar.

⁹⁷ Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, *OJ* 2004, L64/1.

⁹⁸ COM(2005) 388 final, Communication on Regional Protection Centres. See also the Council's conclusion on the Communication: Council Document 12797/05.

⁹⁹ Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), *OJ* 2004, L80/1. The European Refugee Fund 2008-2013 forms part of the Commission Proposal on the establishment of a framework programme on Solidarity and the management of Migration Flows for the period 2007-2013, COM(2005) 123 final.

¹⁰⁰ Article 29, Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005, L326/13. The Directive allows member states to maintain their own lists of 'safe third countries' irrespective of the agreed list in Annex II. Disagreement within the body of Commissioners on which countries are to be considered safe has so far prevented it to come forward with a proposal: <http://www.eupolitix.com/EN/News/200605/0427410f-8d2b-46f8-ac0b-0b3fa1877b42.htm>.

¹⁰¹ See e.g. Article 12(4) of the International Covenant on Civil and Political Rights. A recent example at Member States level shows however the practical need for cooperation with the country of origin: 'Senegal cancels repatriation deal with Spain': www.afrol.com/printable_article/19559. Return operations are currently funded under either the European Refugee Fund 2005-2010 (Decision

The example of an effective return policy brings us to the use of international agreements as an independent instrument for the extra-territorialisation of migration policy. The Council considers that “co-operation with third countries - both of origin and transit - on return and readmission is of vital importance to the success of a Return Action Programme.”¹⁰² It has stressed in this respect the importance of the conclusion of readmission agreements. Not only does the Community attach great value to this type of agreement for an effective return policy, it also believes that these agreements will encourage third countries to monitor their own borders more effectively.¹⁰³

Thirdly, extra-territorialisation may describe the promotion, by the EU, of its own *acquis* towards third countries, and their adoption of that *acquis* into their own domestic legal orders. This promotion may take place as part of a formal agreement with that third country (such as an association agreement) but need not do so. At its fullest, this process may lead to third countries participating in an indirect way¹⁰⁴ in the Community’s legal order, as is the case for example, for the non-EU members of the Schengen system.

An external policy in which we see reflected all these different ways in which the Community may seek to involve third countries in its migration policy, is the European Neighbourhood Policy. The ENP was first outlined in the Commission Communication on Wider Europe, followed by the Strategy Paper on the ENP.¹⁰⁵ In line with the security objective of “promoting a ring of well governed countries” around the EU, the ENP has set the ambitious goal of creating a “ring of friends” around the EU, focussing on both the southern and eastern neighbours.¹⁰⁶ In line with the concept of external governance, it does so by offering them a share in the internal market without membership of the EU.

The ENP focuses on developing bilateral relations between the EU and individual countries, in an attempt to influence their internal and external policies. It does so by using a number of different instruments, both autonomous and contractual, within the framework of ENP Action Plans (ENP AP). These are negotiated after the preparation of a Country Report by the Commission. The ENP APs are not international agreements. They are policy documents, setting out priorities and objectives. They are adopted as recommendations of the Association or Cooperation Councils set up under the Association Agreements or Partnership and Cooperation Agreements (PCA) already

2004/904/EC, *OJ* L381/52) or the AENEAS Programme, *supra* note 99. Since 2005 the Commission has been funding preparatory actions for the Return Fund, which will be set up in the framework programme on Solidarity and the management of Migration Flows, *supra* note 99.

¹⁰² Return Action Programme, Council Document 14673/02, point 14.

¹⁰³ The EU Schengen catalogue on recommendations on removal and readmission, for example, states that “[r]eadmission makes the Member States and the Third States responsible for controlling their borders efficiently”: ‘Schengen catalogue for external border control, removal and readmission: recommendations and best practices’ (February 2002), 55.

¹⁰⁴ This participation will be indirect in the sense that third countries do not participate directly in EC/EU decision-making.

¹⁰⁵ COM(2003) 104 final, Commission Communication, Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours and COM(2004) 373 final, Commission Communication on the European Neighbourhood Policy - Strategy Paper.

¹⁰⁶ ‘A Secure Europe in a better world - The European Security Strategy’, approved by the European Council held in Brussels on 12 December 2003, 8; COM(2003) 104 final, *ibid*, 4.

in force between the EU and the third countries concerned.¹⁰⁷ These Association and Partnership and Cooperation Agreements are binding under international law. They set up an institutional framework and under the ENP APs these bodies are given the additional task of monitoring the implementation of the action plans. As Guild notes a question may arise to what extent this is compatible with the powers given to those bodies under the agreements; however the cooperation provisions within the agreements are broadly drafted and there seems no reason why additional tasks outside the formal scope of the agreements should not be given to these bodies, especially where such tasks do not have legal effect.¹⁰⁸ Indeed, one of the advantages for the EU of the ENP Action Plans is that their 'soft' status removes the need for a 'hard' Treaty legal base, and thus does not raise competence questions.¹⁰⁹ When specific concrete action such as financial assistance, an operation on the ground, or the conclusion of an agreement with the partner country is taken, however, a legal base will need to be found.¹¹⁰

Each of the ENP APs contains a heading dedicated to migration, which includes legal and illegal migration, readmission, visas and asylum, as well as a separate heading on border management. The Commission in its Wider Europe Communication stated that free movement of people and labour could be a possible long-term objective.¹¹¹ In the Communication on the ENP a year later its tone is already more careful: the goal should be to facilitate movement of persons, whilst maintaining or improving a high level of security.¹¹² In practice (free) movement of persons seems to have become a means, rather than an objective. This is shown for instance by the fact that negotiations on visa facilitation are intimately linked to negotiations on increased border controls and readmission agreements. The ring of friends is in reality a buffer zone, required to act as a first line of defense against unwanted flows of immigration.

In this section we have seen that the Community may use both internal and external competences in order to achieve a degree of extra-territorialisation of its migration policy. External competences may be both autonomous and contractual. We have shown that even autonomous policies will frequently require the cooperation of third countries. Whereas legally binding measures require a clear legal base in the Treaty (express or implied), soft measures such as the ENP Action Plans are more flexible, especially with respect to the role of the institutions. Extra-territorialisation takes place through a complex mix of Member State and Community action, with the increased reliance on the involvement of third countries. This is one of the factors that complicate the operation of the rule of law in this field, a question to which we will now turn.

¹⁰⁷ PCAs should not be mistaken for Association Agreements. They are non-preferential agreements, covering a wide range of political, economic and trade related issues: Van Der Klugt, A., 'Association, Partnership and Cooperation Agreements with East European Countries,' 3 *Eipascope* (1993), 4; Hillion, C., 'Partnership and Cooperation Agreements between the EU and the New Independent States of the Ex-Soviet Union,' 3 *European Foreign Affairs Review* 1998, 399.

¹⁰⁸ Guild, E., *supra* note 13.

¹⁰⁹ For example, as to the extent to which specific Action Plan measures fall within the First, Second or Third Pillar. See further Cremona, M. and Hillion, C., 'L'Union fait la force? The Potential and Limitations of the European Neighbourhood Policy' (Florence, EUI Law Working Paper 22, 2006).

¹¹⁰ See also Rijpma, J., 'Bordering the EC legal order' (Paper delivered to the 2nd CHALLENGE Training School, Brussels, 6-7 October, publication forthcoming).

¹¹¹ COM(2003) 104 final, *supra* note 105, 10.

¹¹² COM(2004) 373 final, *supra* note 105, 17.

VI. An ignored external dimension?

The idea that remote control might circumvent legal constraints is based essentially on the understanding that State's obligations are engaged by a territorial nexus.¹¹³ Thus in the eyes of policy makers, extra-territorialisation allows them to evade the legal constraints on migration control within the Member States and appeals to public anxieties over migration, whilst allowing for desired movement of people, such as trade and tourism.¹¹⁴ As regards human rights, this territorial link is questionable, and it has been argued that it is jurisdiction more than anything else that triggers a state's responsibility for the protection of these rights.¹¹⁵ Therefore, a State would be responsible for anyone acting within the effective control of that State party.¹¹⁶

The ECtHR has recognised the extra-territorial application of the ECHR stating that "the responsibility of contracting parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory."¹¹⁷ Article 1 ECHR, in which the Contracting parties agree to secure the Convention rights of everyone within their jurisdiction, "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the Territory of another State, which it could not perpetrate on its own territory."¹¹⁸ The ECtHR did however rule that Article 6 ECHR (right to a fair trial) does not apply to decisions concerning entry, stay and deportation of aliens,¹¹⁹ whilst Articles 5 and 13 ECHR (right to liberty and security and right to an effective remedy) do.¹²⁰

Within the context of refugee law, the principle of *non-refoulement* is now widely accepted to be customary law.¹²¹ It is generally believed to apply also to rejection at the border.¹²² Goodwin-Gill argues that the principle works extra-territorially, *e.g.* in case of interception of refugees on the high seas, although it would not cover visa applications.¹²³ However, the Geneva Convention cannot be invoked by a person who is still within the territorial jurisdiction of his country of origin.¹²⁴

¹¹³ Gil-Bazo, M.-T., *supra* note 87, 593.

¹¹⁴ Guiraudon, V., *supra* note 84, 194.

¹¹⁵ Gil-Bazo, M.-T., *supra* note 87, 594.

¹¹⁶ See also the UN Human Rights Committee, 'General Comment No. 31 on the nature of the General Obligation Imposed on State Parties to the Covenant' (CCPR/C/21/Rev.1/Add.13, General Comments, 26 May 2004), para. 10.

¹¹⁷ *Loizidou v. Turkey (Preliminary objections)* - 15318/89 [1995] ECHR 10 (23 March 1995), para. 62.

¹¹⁸ *Issa and others v. Turkey* - 31821/96 [2004] ECHR 629 (16 November 2004), para. 71.

¹¹⁹ *Maaouia v. France* - 39652/98 [2000] ECHR 455 (5 October 2000), para. 40. Article 1 of Protocol 7 of the ECHR does grant certain procedural safeguards in the case of expulsion of aliens.

¹²⁰ *Conka v. Belgium* - 51564/99 [2002] ECHR 14 (5 February 2002).

¹²¹ Edwards, A., 'Human Rights, Refugees, and The Right "To Enjoy" Asylum', 17 *International Journal of Refugee Law* 2, 301.

¹²² Noll, G., 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *International Journal of Refugee Law* 3, 548. See Article 3(1), UNGA Resolution 2312 (XXIX), Declaration on Territorial Asylum, 14 December 1967.

¹²³ Goodwin-Gill, G., *The Refugee in International Law* (Oxford, Clarendon Press, 1996), 137.

¹²⁴ For this reason the House of Lords ruled in a case concerning the posting of British immigration officials at Prague Airport whose task was to prevent asylum seekers from boarding planes bound for the UK, that these asylum seekers could not invoke the Geneva Convention. It did rule that the controls amounted to racial discrimination against Roma Gypsies: *R. v. Immigration Officer at*

Dauvergne notes that human rights are still “dependent upon a venue in which to lay claim to them”, something to which those without legal status have no access. Consequently, the proliferation of human rights instruments has not led automatically to a similar proliferation of the rule of law.¹²⁵ This is important for instance when one considers the right to claim asylum as a procedural right, rather than a human right.¹²⁶ The close link between rule of law and sovereignty, understood as exclusive lawmaking and law enforcement within a certain territory,¹²⁷ means that extra-territorialisation may seek to evade not only the legal constraints imposed by human rights law, but also those of (the thin concept of) the rule of law, which do not necessarily coincide. As Advocate General Mengozzi put it: “[t]he rule of law is based not so much on rules and the proclamation of rights as on mechanisms that make it possible to ensure respect for rules and rights.”¹²⁸

It may be legitimate to argue that the EU in its policy of extra-territorialisation loses sight of an ‘intermediate’ dimension of the rule of law that lies between respect for the fundamental value internally and the promotion of it externally. This dimension would require respect for as well as promotion of the rule of law when the EU acts externally or projects its policies beyond its borders. The following two examples may serve to illustrate this point.

Examining the Schengen visa system, it soon becomes clear that the term ‘Schengen visa’ covers a number of different visas with different legal effects.¹²⁹ Logical as this may be for different modalities of travel or stay (single/multiple entry, transit), uniformity (and more importantly legal certainty) is jeopardised when the choice is left to national law whether or not to recognise a certain visa (group visa, CCI, I.2.1.4) or to limit its territorial validity (Article 10 CISA). In addition, as we have seen, border controls between ‘old’ and ‘new’ Member States following the 2004 enlargement have not been not lifted immediately upon accession and the visas issued by the new Member States are national, not Schengen, visas.

Schengen visas are issued by national consulates, on the basis of the CCI. The responsible consulate is determined on the basis of the CCI (point II.1.1). This is either the country of main destination, or in case the main destination cannot be determined the country of first entry. Despite the CCI, there is considerable difference in the way in which consulates handle requests for visas.¹³⁰ Importantly, it is national law which determines whether a duty to give reasons exist and whether there is the possibility of

Prague Airport et al., ex parte European Roma Rights Centre et al. [2004] UKHL 55, 9 December 2004.

¹²⁵ Dauvergne, C., *supra* note 19, 612.

¹²⁶ The Geneva Convention does not provide for a ‘right to asylum’, nor does any other international instrument.

¹²⁷ Dauvergne, C., *supra* note 19, 614.

¹²⁸ AG Mengozzi, Opinion in Cases C-354/04 P and C-355/04 P, *supra* note 26, para. 101.

¹²⁹ Guild, E. and Bigo, D., ‘Le visa Schengen : expression d’une stratégie de « police » à distance’, *Cultures & Conflits* 49 (2003), 22-37.

¹³⁰ Guiraudon, V., ‘Garanties financières exigées pour les demandeurs indiens de visas de court séjour (visite ou tourisme) : quelques exemples européens’, *Cultures & Conflits* 50 (2003), 49-52; Jileva, E., ‘La mise en oeuvre de Schengen : la délivrance des visas en Bulgarie’, *Cultures & Conflits* 50 (2003), 31-48. See also ‘Visa Policies of European Union Member States - Monitoring Report’ (Stefan Batory Foundation, Warsaw, June 2006).

appeal.¹³¹ The lack of a harmonised right to appeal and duty to state reason forms a serious impediment to the control of arbitrary decisions and a transparent visa policy.¹³² Unfortunately the Commission's Draft Proposal does not seem to seize the opportunity of recasting the CCI to incorporate such right.¹³³ The Hague Programme speaks of the development of common visa offices as a long term objective: this would open new possibilities for a more harmonised administrative practice.¹³⁴

The ECJ in the *Panayotova* case held that the procedure for the issue of a temporary residence permit to third country nationals from states with which the EU has concluded Association Agreements must be easily accessible and capable of ensuring an objective and timely examination of applications. Furthermore, refusals need to be capable of being challenged in (quasi)judicial proceedings.¹³⁵ Although this case needs to be seen in the context of the right of establishment laid down in the Association Agreements in question, the procedural requirements listed in this case deserve wider application, not least in view of the Court's reaffirmation of effective judicial protection as a general principle of Community law.¹³⁶

Another non-reported decision of the ECJ deserves attention in this respect: the *Dem'Yanenko* order.¹³⁷ In this case a Ukrainian national was expelled from Italy as her Schengen visa had expired, on the basis of the 'Bossi-Fini law' which does not require prior judicial intervention. The national court, intervening after the execution of the deportation, made a reference to the ECJ asking whether that system was in breach of the principle of effective judicial protection. The Court noted that in accordance with Article 23(3) CISA Italy had a duty to remove aliens without a valid visa who would not leave voluntarily. The Court however declared the reference manifestly inadmissible for lack of jurisdiction on the basis of Article 68(1) EC, since it considered that the requesting court was not a court of final resort, as Italian law foresaw the possibility of an *exceptional* appeal.¹³⁸

¹³¹ The majority of Schengen Members do allow for some form of (administrative) appeal, the UK does not. Of the 5 new Member States which we were able to obtain information from, only Poland allows for an appeal. A duty to state reasons is much rarer. When such duty exists the CCI prescribe the form in which they need to be given: point V.2.4., CCI, *supra* note 92.

¹³² See Stefan Batory Foundation, *supra* note 130, 57, as well as Boeles, P. *et al.*, 'Border Control and movement of persons - Towards effective legal remedies for individuals in Europe (Standing Committee of Experts in International Immigration, Refugee and Criminal Law (Meijers Committee), Utrecht, 2003).

¹³³ Article 23, COM(2006) 406 final, *supra* note 92. It does list a number of precise criteria for refusing a visa, which is in line with the Schengen Borders Code.

¹³⁴ The Hague Programme, *supra* note 12, point 1.7.3.

¹³⁵ C-327/02, *Panayotova et al.* [2004] ECR I-11055, para. 27.

¹³⁶ *Ibid.*

¹³⁷ Case C-45/03, *Oxana Dem'Yanenko*, order of 18 March 2004, OJ 2004, C106/16. The order, translated only in French and Italian, has not been published. It has been partially reproduced in the Italian review *Diritto, Immigrazione e Cittadinanza* 2 (2004), 107. Special thanks to Julio Baquero Cruz for pointing us to this case.

¹³⁸ This interpretation has been fiercely criticised: Baquero Cruz, J., 'El auto Dem'Yanenko: Expulsión de ciudadanos de terceros estados y TJCE', 8 *Revista de Derecho Comunitario Europeo* 19 (2004), 944.

In this case we see how the restricted jurisdiction of the ECJ under Title IV casts its shadow in a policy field with a strong external dimension.¹³⁹ Importantly, the ECJ does seem to affirm, albeit implicitly, that the expulsion order falls within the scope of application of EU law. In paragraph 44, it states that, *in the particular circumstances of the case*, it does not have jurisdiction to pronounce itself on Article 23(3) CISA. These particular circumstances would be the lack of jurisdiction due to the status of the referring court. After having recalled its case law on fundamental rights (as being an integral part of Community law which the Court is held to protect), it refers back to paragraph 44 when considering itself incompetent to consider the conformity of the national law (which gives effect to Article 23(3) CISA) with fundamental rights.¹⁴⁰

It should be remembered that a Schengen visa, issued by a Member State, is a condition for entry, but does not constitute a right of entry. This remains subject to assessment by a national border guard.¹⁴¹ With regards the control of the EU's external borders there is an increased emphasis on pre-border surveillance and interception, in which FRONTEX, the European Border Agency, plays an important role. This is particularly true for the EU's southern borders, which have been the scene of human tragedies as mostly sub-Saharan Africans have tried to reach the EU by means of anything but seaworthy ships. The aim of rescuing people from drowning is frequently put forward as a reason for pre-border checks, yet many have put question marks against this humanitarian component, arguing that the EU is erecting a 'Berlin wall on water',¹⁴² controlling its border while removed from public scrutiny.¹⁴³

FRONTEX as such does not dispose of any operational powers. As the Commission already noted in its initial Communication on the integrated management of the EU's external borders, conferring the prerogatives of public authority on European border guards who do not have the nationality of the Member State where they are deployed is highly controversial from a constitutional point of view.¹⁴⁴ The Agency does however coordinate so-called joint operations and pilot projects of Member States and facilitates operational cooperation with the competent authorities of third countries.¹⁴⁵ Joint operations are planned a year in advance, have a strong training component and may be co-financed by the Agency.

In accordance with the Hague Programme, the European Council Conclusions of 15 and 16 December 2005 called upon the Commission to bring forward by Spring 2006 a proposal on the creation of teams of national experts able to provide assistance at times of high inflows of migrants. It was not until mid-July of 2006 that the

¹³⁹ The Commission in its Communication on the adaptation of Article 68 EC specifically pointed out the danger that persons who consider their fundamental rights to be violated need to take a case up to the highest judicial instance., COM(2006) 346 final, 6.

¹⁴⁰ Case C-45/03, *supra* note 137, para. 47.

¹⁴¹ Article 5, Schengen Borders Code, *supra* note 85 and Point I.2.1 of the CCI, *supra* note 92.

¹⁴² Sassen, S., 'Migration Policy: from control to governance' (13 July 2006): http://www.opendemocracy.net/people-migrationeurope/militarising_borders_3735.jsp.

¹⁴³ Parkes, R., 'Joint Patrols at the EU's Southern Border – Security and Development in the Control of African Migration' (Berlin, SWP Comments 21, August 2006), 2.

¹⁴⁴ COM(2002) 233 final, Commission Communication 'Towards Integrated Management of the External Borders of the Member States of the European Union', 21.

¹⁴⁵ Articles 3 and 14 respectively, Regulation (EC) No 2007/2004 *supra* note 95.

Commission presented a proposal, at a time when the situation around Lampedusa and the Canary Islands had already become critical.¹⁴⁶

The proposal can be considered a first move towards a more centralised model of European Border Guards. It actually contains two important measures. Firstly, it establishes in a new Article 8a the mechanism for the creation of Rapid Border Intervention Teams (RABIT). These teams, composed by the Agency and consisting of national border guards from participating Member States, may be deployed on a temporary basis to a requesting Member State which faces a situation of particular pressure, such as the arrival of large numbers of migrants. The main difference with the joint operations is their prompt operability and the fact that they are financed entirely by the Agency.

Secondly and more importantly the proposal establishes common rules on the tasks guest officers may exercise, not merely when participating in a RABIT, but also during joint operations.¹⁴⁷ These tasks include controlling travel documents, interviewing persons crossing the border and searching means of transportation, all of which could potentially interfere with personal freedoms. For this reason, the proposal also regulates the criminal and civil liability of participating officers, equating them with border guards from the requesting Member State.¹⁴⁸

A RABIT operation might also generate issues of potential State liability, or the liability of the EC as an international organisation, invoked by a third State on behalf of one of its nationals. According to Article 6 of the Articles on State Responsibility adopted by the International Law Commission: “[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”¹⁴⁹ One could ask oneself to what extent the Member States could be considered agents of the EC in this sense, thereby triggering the responsibility of the EC under the equivalent provisions in the Draft Articles on the responsibility of international organisations.¹⁵⁰

Although the RABIT proposal has to be applauded for regulating the question of criminal and civil responsibility of guest officers a few remarks need to be made. First, the RABIT proposal is yet to be adopted. Nonetheless, a number of joint operations are already in full swing in both the Atlantic (Hera II) and in the waters around Malta (Nautilus). Both operations involve the surveillance of international waters, as well as the territorial waters of third countries from the coasts of which potential immigrants depart. The case of Nautilus demonstrates the importance for the

¹⁴⁶ COM(2006) 401 final, Proposal for a regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism. Considering the ‘event-driven’ character of EU law and policymaking it might well be that without these crises the proposal would have been due for much longer.

¹⁴⁷ Article 7, COM(2006) 401 final, *ibid*.

¹⁴⁸ It is for this reason that the Commission does not see problems in the fact that visiting officers will have access to national databases, as well as the Schengen Information System (to which currently the 10 new Member States do not have access yet): SEC(2006)953, Commission Staff Working Document accompanying COM(2006) 401 final, 4.

¹⁴⁹ In its comment on the proposal the Meijers Committee does not seem to distinguish between these two forms of liability: Comment to the Members of LIBE Committee of the European Parliament (24 October 2006): www.statewatch.org/news/2006/oct/meijers-cttee-rabits.pdf.

¹⁵⁰ Article 5 of the ILC Draft Articles on international responsibility of international organisations, ILC Report of 56th Session, A/59/10, 2004, Chap. V.

EU of cooperation of third countries. This operation took off much later than expected and functions as an alternative to Jason I, an operation which was to cover a much larger area of the Mediterranean, as the Libyan authorities had refused to allow EU vessels access to its territorial waters. Interestingly, Libyan cooperation has been made conditional upon the EU providing equipment from the EU to control the influx of immigrants at its southern border.¹⁵¹

Second, within the territorial waters of a third country, the Geneva Convention does not apply to the nationals of that State. However, many migrants aboard the ships intercepted by the EU do not possess the nationality of that coastal State. The EU has time and again reaffirmed its commitment to the Geneva Convention, yet by operating in the waters off third countries, preventing departure and as a result effectively forcing potential asylum seekers to remain in countries such as Libya, which is not a party to the Geneva Convention, the EU's actions may involve the risk of chain *refoulement*.¹⁵²

Third, questions arise as to the civil and criminal responsibility of the EU border patrols acting in the territorial waters of a third state. The RABIT proposal is silent on this matter. The ECtHR has held that a State may be held accountable under the ECHR for violation of rights of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State.¹⁵³ In *Xhavara and others*, the ECtHR was asked to consider the case in which a boat with immigrants had sunk as the result of a collision with an Italian warship as Italian authorities tried to board the ship, an act permitted under an agreement between Italy and the Albanian government. Although the ECtHR held that the case was inadmissible for non exhaustion of local remedies, it clearly stated that the contracting parties were bound to protect the lives of those falling within their jurisdiction.¹⁵⁴ This implies that the victims were considered to fall under Italian jurisdiction (and thus the Italian warship had a duty of protection), notwithstanding the fact that the shipwreck took place within Albanian territorial waters.¹⁵⁵ Furthermore, one could argue on the basis of the Articles on State Responsibility that the third country in question could be held responsible for potential infringements by the RABIT of the rights of nationals other than their own.¹⁵⁶

The UN Convention on the Law of the Sea does not expressly allow for the shipping authorities of a State other than the flag State to intercept a ship on high seas and inspect it on illegal immigration grounds, but does in Article 110 allow for this

¹⁵¹ 'Operation Nautilus starts today', *Maltese Times*, 4 October 2006. See on the EU cooperation with Libya: Report on the Technical Mission to Libya on illegal immigration - 27 November - 6 December 2004 (Council Document 7753/05) and 'EU: European Commission technical mission to Libya: exporting Fortress Europe', 15 *Statewatch Bulletin* 2 (2005).

¹⁵² Libya does not take part in the Barcelona Process, a long-term process for cooperation in the Mediterranean, and is not included in the ENP. Provisions on the Geneva Convention do exist in the Libyan Constitution and Convention of the Organisation of African Unity, which has been ratified by Libya. Repatriation operations by the Libyan authorities have been carried out "without due consideration to detailed examination at an individual level", *Report, ibid.*, 6. Currently, only Italy has a readmission agreement with Libya; Malta is in the process of negotiating one, *Statewatch Bulletin, ibid.*

¹⁵³ *Issa and others v. Turkey*, *supra* note 118, para. 71.

¹⁵⁴ *Xhavara and fifteen v. Italy and Albania* - 39473/98 (11 January 2001), para. 1.

¹⁵⁵ Albahari, M., 'Death and the Moral State - Making Borders and Sovereignty at the Southern Edges of Europe' (San Diego, CCIS Working Paper 136, June 2006), 7.

¹⁵⁶ Article 6 of the ILC Articles on State Responsibility.

where the vessel has no nationality or its nationality is in doubt. This exception seems to be used by the EU in the interception of boats carrying migrants.¹⁵⁷

When intercepted in international waters, immigrants have been escorted to reception centres in the Canary Islands and allowed to make a claim for asylum.¹⁵⁸ When no application for asylum is made, according to the Schengen Borders Code a person shall only be refused entry on the basis of a substantiated decision, stating the reasons.¹⁵⁹ He or she shall have the right to appeal according to the national law of the Member States refusing entry.¹⁶⁰ This practice is in compliance with international and EU law obligations. However, it becomes clear that when extra-territorial control takes place within third country territory, or were practice to evolve further in such a way as to send back ships that have already reached international waters, the right to apply for asylum, as well as the procedural safeguards applicable at the Schengen external borders, become devoid of meaning.

VII. Conclusions

Starting from the prominence accorded to the rule of law in the EU's external policy, as a fundamental value it seeks to promote as well as to uphold, this paper has highlighted challenges for the rule of law posed by the increasing phenomenon of extra-territorialisation in EU migration policy. We have attempted to categorise different types of extra-territorialisation, ranging from autonomous action by the Community, including Community action which requires third country cooperation, to action by way of international agreements and cases where third countries undertake to align their domestic law with the Community *acquis*. These different instruments find their express or implied legal base in the Treaty, although some 'soft' measures such as the ENP Action Plans may avoid the need for an explicit legal base, at least until implementing action is taken.

As we have seen, EU migration policy is a complex network of actions by the EU institutions and the Member States and increasingly depends on the active cooperation of third countries. Fundamental elements of the rule of law where State (or Community) action affects individuals, including protection of human rights and the right to an effective remedy, are put into question where EU policy is carried out within a third country - in particular where there are no common procedural standards or guarantees agreed at Community level. In the case of visas, for example, the refusal of a visa is a matter for national authorities and procedural guarantees are therefore subject to national law.

In cases where the Community has entered into an agreement with a third country granting individual rights the Court has been prepared to hold that Community law principles of effective judicial protection apply to the actions of Member State

¹⁵⁷ Council Programme of measures to combat illegal immigration across the maritime borders of the European Union (Council Document 13791/03).

¹⁵⁸ Territorial waters may extend up to 12 mile. Countries may claim an additional 12 mile contiguous zone to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations": Articles 3 and 33, UN Convention on the Law of the Sea.

¹⁵⁹ Article 13(2), Schengen Borders Code, *supra* note 85.

¹⁶⁰ Article 13(3), Schengen Borders Code, *ibid*.

authorities exercising their right - prior to entry into the EU - to grant or withhold a visa or residence permit to that third country's nationals. It is not clear whether those same Community law principles apply in the absence of such an agreement.

Pre-border surveillance presents even more complex problems, as the deployment of FRONTEX joint operations and the proposed RABIT demonstrate. These operations involve national border guards operating in the territory (and territorial waters) of other Member States, of third countries and on the high seas. A current proposal would assist in identifying responsibility, as does the case law of the ECtHR. Nevertheless, rule of law questions remain, including the practical effect of such pre-border actions where the result is to force migrants to remain in states that do not subscribe to the Geneva Convention, or where migrants are intercepted in such a way that effective exercise of judicial remedies is almost impossible.

The EU constantly proclaims the virtues of the rule of law and human rights in its relations with third countries. It must expect to be judged by those same standards. As the Centre for Peace, Conversion and Foreign Policy of the Ukraine has commented, "Consular procedures and practices are perceived by Eastern Europeans as so-to-speak conformity checks on the European Neighbourhood Policy declarations against the actual intentions of the EU Member States."¹⁶¹ If the EU is to continue to use extra-territorialisation as an instrument of its migration policy it must address seriously the issue of ensuring a concomitant extra-territorialisation of the rule of law, in particular the effective judicial review of administrative action. In the context of complex overlapping competences and the extra-territorial operation of EU actions and instruments that we have examined in this paper, it is important to affirm that ultimate responsibility for compliance with the rule of law in the implementation of its migration policy remains with the Union.¹⁶² In addition, in those instances where EU law refers back to the domestic legal systems of its Member States, this responsibility will be shared with the Member States, as a matter of Community law obligation in the light of the duty of loyal cooperation.

¹⁶¹ 'Recommendations on EU visa policy towards citizens of the Eastern European States', (CPCFPU, Ukrainian Monitor, Policy paper 1, 2006).

¹⁶² As regards fundamental rights, the legality of a provision of a Community act could, in itself, be challenged for failure to respect fundamental rights if it requires or expressly or impliedly authorises the Member States to adopt or retain national legislation not respecting those rights: C-540/03, *Parliament v. Council*, judgment of 27 June 2006, *nyr*, para. 23.