Immigration controls and free movement in Europe

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Abstract

*Effective control of cross-border activities is nearly impossible in market-economy
regimes which, in order to remain viable, have to keep their borders open to goods,
capital and services. This article exposes the tensions between a legal system predicated
on openness and a groundswell of security-driven rhetoric justifying coercive and
ostracizing practices against foreigners.*

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The principle of free movement – a core value of the European Union

From the outset, the crucial role of the free movement of goods, capital, infor-
mation and services in what is now the European Union was enshrined in the
Treaty of Rome.[1] Free movement of services supposes free movement of labour. As
a result of normative importance of the Treaty on the Single European Act of 1992[2]
(which set out to make Europe something more than a common market), and in
keeping with the consistent case law of the European Courts regarding family
reunification, the concept of free movement was explicitly defined as the free
movement of persons. The persons in question were defined as all individuals
living on the territory of the European Union, i.e. citizens of the Member States of

the Union plus all third-country nationals residing legally within Europe's borders.[3]

This conception of free movement of persons has created a distinction between internal borders (i.e. borders between European Union countries) and external European Union borders (i.e. national borders that also serve as the outer borders of the Union). The Schengen Agreement and its implementation treaty officially instituted this distinction when they came into force in 1995, by providing for controls to be lifted at internal borders within the Union and concomitantly reinforced at the Union's external borders.[4] However, this simple idea is not always reflected in practice. There has also been no significant dip in cross-border flow of persons, despite the advent of a form of 'policing at a distance' aimed at blocking foreigners upstream before they leave their own countries, tracking systems that pick up the traces left by people moving from one country to another, and even, in some countries, moves towards expulsion and forced return, involving inter-State co-operation with countries of transit and origin.

The proliferation of laws on immigration has given rise to enormous legislative efforts, some virulent debates, a degree of legal uncertainty as to the law applicable to the facts in a given case, and procedural ambiguities that give police considerable latitude. However, this has not changed the demographic and economic realities.[5] There have doubtless been serious consequences for the legal status of individuals living on the territory, but it should be clearly stated that the legal measures and public policies adopted by politicians have not had the intended impact. The political will to curb immigration, buoyed up as it has been by popular sentiment, has had next to no impact in terms of effective control of cross-border practices in market-economy regimes whose borders have to remain open to goods, capital and services in order to remain viable.[6]

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1   Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957, entered into force on 1 January 1958.
2   Treaty on the European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993.
3   E. Guild and J. Niessen, *The Developing Immigration and Asylum Policies of the European Union*, Kluwer Law International, The Hague/London, 1996.
4   Didier and Elspeth Guild Bigo, *La Mise à l'Ecart des Etrangers: Le Visa Schengen*, L'Harmattan, Paris, 2003; Vendelin Hreblay, *La libre circulation des personnes: les accords de Schengen*, Politique d'aujourd'hui, Presses Universitaires de France, Paris, 1994; Alexis Pauly (ed.) *Schengen en panne*, European Institute of Public Administration, Maastricht, 1994.
5   Didier Bigo, *Polices en réseaux. L'expérience européenne*, Presses de Sciences Po, Paris, 1996.
6   James Anderson and Liam O'Dowd, 'Borders, border regions and territoriality: contradictory meanings, changing significance', *Regional Studies*, Vol. 33, No. 7, 1999; Peter Andreas and Timothy Snyder (eds); *The Wall around the West. States Borders and Immigration Controls in North America and Europe*, Rowman and Littlefield, Lanham/Boulder/New York/Oxford, 2000; Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in Ryszard Cholewinski Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden, 2004; Stephen Castles, 'Migration and Community Formation under Conditions of Globalization', *International Migration Review*, Vol. 36, No. 4, 2002; Gustav Mohar and Maria-Elena Alcarz, 'U.S. Border Controls: A Mexican Perspective', in Peter Andreas and Timothy Snyder (eds), *The Wall around*

Free movement of persons called into question?

The speeches of the French Minister of Immigration, Integration and Identity, Brice Hortefeux, and his successor Eric Besson – stating the government's will and ability to effectively send home all illegal migrants and to prevent the entry of the new ones – seemed to call into question the very principle of free movement of persons, restricting its understanding to a 'European only' free movement. Many NGOs have reacted strongly to this new wave of populist argument played out in France, Italy and Austria. In any case, beyond the modulations of discourses by politicians, it is central to understand that this symbolic politics calling for opening or closure – always playing with a very narrow construction of European cultural identity – has no effect on the reality of illegal entries and re-entries into the territory. As demonstrated by the Frontex statistics on passages across the Union's borders,[7] there is a veritable abyss between the politicians' desire to control borders more or less tightly through discourses and law making, and the effective practices of bordering the EU. The swiftness with which the government attempts to send people home gives rise to arbitrary treatment of certain individuals, but does nothing to solve the problem. Detention and expulsion of foreigners are not effective solutions, and raise issues of legitimacy and fundamental rights.[8] Immigration policy based on policing is a massive failure, albeit not yet recognized as such, and as far as possible this failure is being kept under wraps. This approach is the clumsy application of an American policy to a non-federal entity which, even in its original context, is not particularly effective.

As pointed out by several reports to the European Parliament and Commission, Member States' intention to go no further along the path to 'communitarization' than the institution of police measures (relating to entry at borders, stays of less than three months, visas, countering document fraud, and possibly expulsions) creates an almost farcical situation. Checks are rigorously applied in some places such as airports where it is easy to institute them, but are totally lacking along thousands of kilometres of land or sea borders that cannot be policed except at a prohibitively high cost.

It is vital to have a long-term economic and social policy on migration that provides for decent conditions of family unification, equal wages and pension rights, and cross-border movements facilitated by international agreements. Free movement of persons definitely entails problems in terms of fraud, but a prohibitionist policy creates more problems than it solves inasmuch as it is does not prevent fraud, but causes it to become professionalized. This type of policy always

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the West. States Borders and Immigration Controls in North America and Europe, Rowman and Littlefield, Lanham/Boulder/New York/Oxford, 2000.

7   See FRONTEX, General Report 2008, p. 12, available at http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2008.pdf (visited 9 September 2009), which reports 175,000 instances of illegal border crossing into the EU in 2008, a 20% increase compared with the year before.

8   Carolina Kobelinsky and Chowra Makaremi, 'Confinement des étrangers: technologies et acteurs', Cultures et Conflits, No. 71, 2008.

costs the tax-payer more than alternative approaches and has a highly deleterious effect on the way foreigners are treated. There is therefore a knock-on effect in terms of foreign and even security policy. However, the package of proposals currently in the pipeline turns its back on the results of research and perpetuates belief in the dogma of a border that is open but totally controlled ('smart border'), and would allow each State to act more or less as it sees fit.

Pact on immigration

The Pact on Immigration,[9] put forward by the French presidency and adopted in 2008, aimed at remedying some of these aberrations by calling for a longer-term policy. It partially dissociates itself from the policing and security vision – or perhaps it would be more accurate to say that it presents that vision as a necessary step on the way to a further goal in the form of a compromise between various States on expulsion rationales and their impact on human rights and the Union's image abroad. However, even if it is reinterpreted in that light, the Pact is far from being a solution. It again aims to divest the European Commission of its powers at a time when it might finally be able to use them, and seeks to give the Council of the European Union and Member States the means to undermine the principles of free movement and move towards 'Eurosurveillance', i.e. systematic control of foreigners entering the territory of the Union and even control of EU citizens within the Union's borders, in the name of the fight against terrorism and illegal immigration. In particular, the Pact system seeks to prevent illegal immigration arising as a result of people overstaying legally obtained three-month tourist visas. At the same time, the borders would be opened up to a larger number of (qualified) people entering through legal immigration channels.[10]

A tiny group in charge of technical systems within the European Commission is playing into the hands of a handful of Members States that wish to call into question the free movement of persons, and propose in its place a speedy movement of persons under high surveillance with no physical obstacles (as in the special access corridors in airports for those who have accepted beforehand to give all their personal data and to submit themselves to multiple biometric identifiers) that would then create the impression that there is still freedom, because of that speed. There is a tendency to align the Union's policy with Australian and American practices, despite the fact that they have been almost unanimously criticized by jurists and international courts. This comes at the risk of setting up extremely expensive systems that will be condemned by national and European courts as soon as they come into effect.

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9   Adopted by the Council of the European Union, 24 September 2008, available at http://register. consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf (visited on 10 August 2009).
10 See Julien Jeandesboz, *An analysis of the Commission communications on future development of Frontex and the creation of a European border surveillance system (EUROSUR)*, Briefing Paper, European Parliament Directorate-General Internal Policies of the Union, Brussels, June 2008, available at http:// www.libertysecurity.org/IMG/pdf_JeandesbozEN.pdf (visited 27 August 2009).

This trend is extremely worrying, as the previous European Union regime drew its very strength and legitimacy from the promotion of the values of free movement of persons that other regional groups of States, including the North American Free Trade Agreement (NAFTA) made up of the United States, Canada and Mexico, had restricted to the utmost. By making free movement a key value in its relations with neighbouring countries and promising that they too will be able to share in these great freedoms of movement in the future even if they do not join the Union's political institutions, the European Union has raised hopes beyond its borders. However, if it follows the example of the other regional blocs that focus almost exclusively on the security dimension, it will sow the seeds of discontent and transform its neighbours into potential enemies. Coercive measures ostensibly justified by security concerns are often the first to foment insecurity and the very violence they purport to combat. It is therefore necessary to think hard before launching into a technological regime that primarily benefits the security industry and does not necessarily help the citizens of the Union.

Free movement of persons – the end of a European specificity?

This policy of openness advocated by the Commission, particularly in those units linked to the first pillar,[11] emphasizes the role of borders as meeting points rather than as barriers. It is worth noting that in their public communications, when seeking to differentiate Europe from George Bush's America and its ultimatum in the war against terrorism, both the Commission and the Council refer to free movement of persons and extol the Union's values. However, these statements have not prevented them from adopting projects within the third pillar that will 'normalize' the Union as part of a trans-Atlantic security area.

For the time being, Eurosur and the European Entry-Exit system are still under consideration. They have not yet been accepted and a keen struggle is going on around them. The European Commission and Parliament take the view that the principle of free movement of persons is not just empty rhetoric that could be disavowed in the name of the fight against illegal migration. According to their arguments, which are based on law and the interpretations of the courts, the post-Amsterdam European governance system has so far constrained governments to abide by their previous undertakings. In so doing it has prevented certain powerful States from reneging on their European and international commitments, notwithstanding promises by their governments to close borders, better control illegal immigration by all possible means, challenge family unification, put an end to the

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11 Three 'pillars' form the basic structure of the European Union: the first pillar corresponds to the three Communities (European Community, European Atomic Energy Community and the former European Coal and Steel Community); the second pillar is devoted to common foreign and security policy; the third is devoted to police and judicial co-operation in criminal matters – see EUROPA, *Glossary: Pillars of the European Union*, available at http://europa.eu/scadplus/glossary/eu_pillars_en.htm (visited 9 September 2009).

'asylum-seeker scandal' and more generally, to protect their citizens from 'foreigners'. On the other side of the argument, Member States and the Council of the European Union are seeking to free themselves from what they perceive as the trammels created by the lobby of fundamental rights lawyers and pro-Federalists who, they claim, have not grasped the significance of the state of emergency Europe faces, and of popular calls for protection.

Focus on state security

In earlier deliberations on the European concept of Integrated Border Management, the Council stated unequivocally that '[b]order management is a security function in which all Member States have a common interest that stems from the Schengen arrangement. First and foremost, border management is an area of policing, where security interests have to be met while fully recognizing the commitments in the field of international protection and human rights'.[12] Only the last part of the sentence pays lip service to human rights, while the first part focuses on operational measures. This attempt by several governments to whitewash their real intentions is not merely a symptom of the post-11 September security syndrome.[13] It is a manifestation of the populism or 'government xenophobia' that has affected many political parties, including ones on the left, and has made huge inroads into the tabloid press distributed by a handful of major international press groups. It has flourished by taking advantage of human-interest stories featuring crimes perpetrated by foreigners, illegal entry of foreigners into the country, their plight and their perceived role as scroungers taking advantage of the bounty of a welfare state to which they have made no contribution.[14] Following a sort of watered-down McCarthyist logic, minority parties outside national parliaments – or in some cases even within coalitions – have attacked governments for their inability to resolve the problem of illegal immigration and stem the flow of foreigners into the country or the naturalization of their children. Some have even advocated procedures that would 'clarify' (i.e. screen for) allegiance based on identity, claiming that a citizen's bond with his country has a quasi-sacred quality that goes beyond territorial links and cultural integration.

The Self and the Other

There is scarcely a country in Europe – be it Austria, Denmark, the Netherlands, France, the United Kingdom, Hungary or Bulgaria – that, over the past fifteen years, has not experienced this temptation to indulge in the rhetoric of rejection of

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12 Council of the European Union, *Integrated Border Management; Strategy Deliberations*, 13926/06, FRONT 207/COMIX 826, Brussels, 2006, p.3.
13 Didier Bigo, Laurent Bonelli and Thomas Deltombes, *Au nom du 11 Septembre, les démocraties à l'épreuve de l'antiterrorisme*, La Découverte, Paris, 2008; Didier Bigo and Anastassia Tsoukala, *Terror, Liberty, Insecurity: Illiberal practices of liberal regimes*, *Liberty and security*, Routledge, London, 2008.
14 Jérôme Valley, 'Xénophobie de gouvernement, nationalisme d'Etat', *Cultures et Conflits*, No. 69, 2008.

the Other in the name of protection of the Self. The focus may be on the State's national security interests, on economic growth supposedly threatened by foreigners' cheating the system, or on the threatened identities of majorities under the impression that they are becoming minorities in their own countries and alarmed by the eclipse of their own values as central and quasi-monopolistic values in the society in question.[15]

A host of individual voices pointing to specific dangers and linking them to the arrival of foreigners or their presence in the country link up to form a network and refer to one another as portents of an overarching truth. The word 'immigrant', which may refer to 'others' already in the country and those entering it, has generally been ethnicized and 'racialized' by association with the idea of the non-Community immigrant or third country national. The concept of a 'third' country almost invariably conjures up in the imagination images of the poorer countries of the South and almost never of countries like the US, Japan or Australia. The immigrant of the popular imagination, who comes from the South and does not have sufficient resources to be a good consumer, has become the scapegoat for many of society's ills. He is held responsible for organized crime and trafficking in drugs.

We have tried to show in detail how transfers of legitimacy may operate, semantically and organically, between instruments used in the fight against terror and organized crime.[16] For these transfers to operate (and who would not favour the arrest of dangerous terrorists?), all it takes generally is for the communications of public or private security agencies to connect these phenomena. For example, techniques of enquiry developed to combat terrorism or organized crime could also be used against a person using a prohibited software programme. It then remains for these agencies to focus on individuals or 'target groups' whose profile suggests that they may move from harmless to more dangerous categories.

Insecurity continuum

At European level, emphasis is placed on the fact that the acts in question take place across at least one State border. We have referred to this as an insecurity continuum, whose focus is often the migrant. This continuum sets out to feed the impression that we are threatened by insecurity on a world scale in which crime, war and political violence are inextricably bound up, thus forcing the police, the army and the intelligence services to work together both at national level and internationally.[17] Anastassia Tsoukala and Alessandro dal Lago have also

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15 Arjun Appadurai, 'Dead Certainty: Ethnic Violence in the Era of Globalization', *Public Culture*, Vol. 10, No. 2, 1998.
16 As well as the fight against other phenomena such as drugs, hooliganism, money-laundering, human trafficking, trafficking in goods, works of art or money, petty transfrontier crime, delinquency and unruly behaviour in the inner cities, protests accompanied by violence and hate rhetoric, or even computer piracy.
17 Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives*, No. 27, Supplement, 2002, pp. 63–92; Christina Boswell, 'Migration control in Europe after

demonstrated how this insecurity continuum is propagated in the media and how it is implicitly echoed even by pro-migrant communications.[18]

The European players in control policies

It is tempting to ascribe these opposing tendencies to specific groups according to their ideological colouring (populist right, pro-open-borders left) or institutional affiliations, with some Members States and the Council taking a pro-sovereignty stance, while the Commission advocates an open policy and the European Parliament and the courts (the Court of Justice of the European Communities and the European Court of Human Rights) position themselves as guardians of the rule of law and free movement. However, although the empirical studies carried out over the past few years do not fundamentally call these assumptions into question, they nevertheless reveal a much more complex picture. In many cases, past outcomes of struggles between these different groups, including some compromises, have not been the fruit of in-depth discussions on European migration policy. On the contrary, almost all these groups have avoided addressing the subject in all its ramifications and have deeply divided the debate.

'Three-month' policy, myopia on migration

For many years, in their public statements, policy-makers at national and European level responsible for police and border issues have focused almost exclusively on illegal border crossings, people smugglers and all the consequences of the 'three-month' policy. The matter of people entering legally and outstaying tourist visas seemed too complex to mobilize opinion, and would not always have drawn attention to the population groups who were the primary targets, even though experts were fully aware that people outstaying tourist visas represented almost 75% of so-called unlawful migration flows. Those responsible for asylum matters, on the other hand, preferred to focus on the idea of fraud and 'asylum shopping' instead of discussing contemporary conditions of persecution and the status of camps; their counterparts in charge of criminal justice policy have left the media free rein when it comes to reporting on insecurity in the inner cities and the correlation between crime and foreigners. This is despite the fact that overall levels of homicide and robbery have dropped, and that when it comes to violence, criminological studies have long shown that we should be more afraid of our spouses or ex-spouses than of foreigners.

9/11: explaining the absence of securitization', *Journal of Common Market Studies*, Vol. 45, No. 3, 2007, pp. 589–610.

18 Alessandro Dal Lago, *Non-persone: l'esclusione dei migranti in una società globale*, *Interzone*, Feltrinelli, Milan, 1999; A. Tsoukala, 'The perception of the "other" and the integration of immigrants in Greece', in A. Geddes and A. Favell (eds) *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, Ashgate, Aldershot/Brookfield/Singapore/Sydney, 1999.

Particularly in the early days, in order to justify their role, the European agencies often tended to overstate the cross-border dimension of crime and talk about international drug or organized crime rings on a world scale. However, arrest patterns have rather tended to indicate the presence of local pools of criminals circulating within a fifty-mile radius but crossing, for example, the borders between France, Belgium, the Netherlands and Luxembourg.

Police-driven approach

Heads of State have often acknowledged that migration policy is almost exclusively the preserve of their home affairs and justice ministries. The labour, industry and trade ministries have remained on the periphery while security and identity issues and, more recently, integration from an assimilationist standpoint, have remained at the heart of the debate. The justice and home affairs ministries, either at home or collectively within the Council or particular groups (Schengen in its early days, and now Prum) see themselves as 'laboratories': in practice, they or the officials they have seconded to the Directorate-General (DG) for Home Affairs (which subsequently became the DG for Justice and Home Affairs and is now the DG for Justice, Freedom and Security) will always favour a police-driven approach to activities linked to free movement and crossing of borders. This approach supposes a degree of respect for individual rights, but where compromises are necessary, it will always favour efficient policing over other considerations.

Often, within the different directorates, officials' allegiances to their origins give rise to differences of sensibility when it comes to the degree of latitude police forces should be allowed. Within Europol, the point of view of those police forces who support a strict 'criminal investigation' approach (in which the information gathered is validated by magistrates and which consequently allows for a high degree of trust between the various stakeholders) has been undermined by those who seek to maximize proactive intelligence gathering (even where the information is of doubtful origin and unconfirmed). The latter view is justified on the grounds that it may help when it comes to suspects or groups of people whose profiles are similar to those of others who have committed crimes, even if there is no evidence that they are guilty of criminal conduct.

Faith in the ability to detect 'high-risk' individuals using technological means and profiling techniques based on expert systems combining human police knowledge and psycho-sociological criteria, or GPS systems built into mass screening software, has led to a merging of intelligence and prevention concerns with the traditional police concerns of investigating crime and punishing the guilty. The fact that the current Director of Europol and his predecessor are both Germans has probably heightened this trend. Both were influenced by their experiences at the German Federal Criminal Police Office, which has limited operational powers but has been able to gain recognition by developing this type of expertise.

Collection of data on individuals who cross borders or on foreigners with criminal records has been considered a priority since 1996. The proposal to harmonize criminal law at European level (*corpus juris*) and create a European

prosecution service has been dropped in favour of a more intergovernmental vision of 'mutual trust in each other's rules' rather than harmonization of categories. The upshot of this will be a Eurojust that will fall far short of a real European justice system and will improve the prosecution's procedural options without any corresponding Europeanization of the right to defence. As a result, the justice and freedom panels of the triptych will remain sketches, while the security panel has come to focus more and more on an investigative, forward-looking vision. This is a vision that embraces surveillance of the movements of foreigners who enter the European Union and are liable to remain there illegally, as well as their children born in the EU who have retained their parents' faith or continued to identify with it.[19]

Anti-terrorist measures

It would therefore be inaccurate to refer to 11 September 2001 as *the* critical juncture. Moves to step up security around immigration and the association of immigration with terrorism go back considerably further than that. However, the US decision of 13 September 2001 to give the President emergency powers plainly sped up these procedures in Europe, and was grist to the mill of all those who were already calling for a proactive approach based on prevention, technological intelligence gathering and more intrusive and comprehensive surveillance.

The list of anti-terrorist measures that have an impact on migration flows is impressive. The fight against terrorism has clearly served as a justification for strengthening control mechanisms whose efficacy in combating clandestine organizations is far from proven, but which 'help' the police in their surveillance and control of foreigners living in the Union. However, it should be pointed out that communications specific to migration policy or asylum have not necessarily used the argument of terrorism *per se*. It has never been said in so many words that migrants and their children or people who profess the Muslim religion were potential terrorists. Rather, at national and European level, the ploy has been an intensified call for the allegiance of these groups, requiring that they shout from the rooftops their rejection of the terrorism of Al Qaeda.

Several governments have tried to mobilize criminology and political sciences to help them distinguish between good and bad Islamists (the latter are often called Salafists, although analyses of perpetrators of terrorist attacks in Europe do not reveal any serious correlation between any specific tendency within political Islam and recourse to violence). These governments have vigorously condemned certain imams for terrorism apologia, giving many Muslims the impression that profession of their faith had become a suspicious sign and causing defenders of fundamental rights to fear for freedom of opinion. The integration tests policy has not helped to create an image of openness, particularly where it has

19 Didier Bigo *et al.*, *The field of the EU internal security agencies*, *Cultures et Conflits*, L'Harmattan, Paris, 2007.

been accompanied by a visa policy increasingly linked to biometric identification technologies.

Fortress Europe …

Many analysts have spoken about Fortress Europe, an electronic walls policy, a tendency to cling to a white nationalist identity tending towards racism, a war on immigrants who are viewed as a negligible human surplus that can be thrown out if the needs of the economy so require, or a militarization of the European borders via the States of the southern Mediterranean and the support operations of the Frontex agency. Some localized events like those in Lampedusa, Ceuta and Melilla show that at times, national political games and European support mechanisms come into play that unfortunately reinforce the tendency towards coercion disproportionate to the circumstances, highly reminiscent of the old colonial practice of deterrence by group punishment with no concern for individual cases.

… within the rule of law

At the same time, we have seen massive protest movements against this type of practice. Governments have pulled back from their initial projects for fear of condemnation. International obligations of non-refoulement and the prohibition on mass expulsions have, on the whole, been complied with. The 'exceptionalist' rhetoric used to justify coercive actions by intelligence services and military special forces, so in vogue in the United States, has been largely contained. There has been no resort to policies prohibiting ships from landing, such as the ones applied by the US to Haitians and by Australia to Indonesians.

Still more importantly for the future, in a new institutional structure in which the immense majority of governments recognize the role of the courts and the importance of the European Human Rights Convention, there are a number of factors that may change the balance of power. This change may then limit the impact of the rejectionist populism promoted by certain press groups, as well as its instrumentalization by politicians or the European institutions and agencies. Among these factors are: the dismantling of the pillar systems (despite the fact that the new restrictions concerning police and national security matters will remain in place); the extension of the powers and obligations of the European Parliament to areas where it previously had no role; the growing role of the European data-protection controller and his links with national data-protection offices; the role of the Agency for Fundamental Rights; and even the role of mediators.

The complexity of the mechanisms, which cannot be reduced to a simple opposition between two sides, means that we should beware of hasty conclusions. The opening up of Europe was always ambiguous, even among its advocates in the 1950s (with their idea of 'European preference'), and, despite efforts after the fact to ensure that the status of European citizens does not become too disparate, the failure of a positive concept of European citizenship applicable to all those living on the territory was doubtless a key moment. The development of sectoral policies

within the so-called 'pillars' has undoubtedly had an even more negative impact on migration policies, and has been one reason for their gradual shift towards the security and crime-fighting vision. Other negative factors include the mounting climate of insecurity worldwide, and the gradual erosion of State power, including the monopoly on even large-scale forms of violence.

Tension between legal systems and security-driven rhetoric

Moreover, European (in)security professionals, be they European agencies, informal networks and their national affiliates, or private groups taking part in police work or providing police forces with technologies, have played on widespread fears and threats to justify a vision of Europe that is often not compatible with free movement. They have also constituted powerful and convergent networks of interests, despite internal disputes as to the threats that need to be combated on a priority basis. It would not be an exaggeration to speak of these (in)security professionals as a 'field of forces'.

At the same time, other sectors have been active in resisting these trends, opposing them by legal means, for example by mobilizing social and political pressures among foreigners, their children or groups that support them, as in the case of the demonstrations by the '*sans-papiers*'. Opposition has also taken place by setting constitutional mechanisms in motion, and by tapping into people's desires for a richer political life, a smaller democratic deficit at European level, and more binding obligations on national governments to entrench the rule of law and ensure respect for international treaties and fundamental rights.

At the same time, the process of affirming the rights and guarantees to which foreigners are entitled, the reform-treaty process, and the increase in avenues of appeal all help to contain national political dynamics of rejection, and often impose minimum standards and good practices. In the current context, the important thing to grasp is this tension between a legal system predicated on openness on one hand, and the groundswell of security-driven rhetoric justifying coercive and ostracizing practices against foreigners on the other. It is of course always tempting to look only at one side. The aim of this brief overview is to provide some additional parameters in order to enable everyone to form a judgement based on a more complete picture.

The absorption of migration issues into policy responses to security concerns is the result of a broad gamut of actions by politicians, security professionals and some media outlets, but it is not necessarily linked to any strategic intention.[20] Moreover, because of a certain resistance to fundamental rights, legal cohesiveness, social and political mobilization, as well as the wide range of issues subsumed under the terminology of migration, those most affected in practice are the most

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20 A shorter version of this paper was published in the journal *Migrations Société* (Vol. 20, No. 116, 2008) under the title 'Le «phagocytage» des questions de migration et de libre circulation en Europe par les enjeux de sécurité?'

vulnerable foreigners, second-generation immigrants and Muslims who are most visible in the practice of their faith, as well as people blocked in their countries because they are refused a visa. At the same time, the flows continue unabated – the will to control borders and screen foreigners on an individual basis remains an unrealistic technological dream that could, however, become a nightmare for us all. The result is arbitrariness in some places and some areas, and a total failure to meet the broader challenges effectively.