Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States

Evelien Brouwer

1. Introduction: Oh, border where art thou?

“The border for movement of an individual is the place where a control takes place which is constitutive of whether the individual can pass or not”.¹ It is clear that for EU Member States this meaning of “border”, the place where authorities control the entry of persons to national territory of one of the EU Member States, has changed significantly in the last twenty or thirty years. These changes not only concern the location where border controls are taking place, but also the actors involved. With regard to the territorial scope of EU borders, the classical external (land, sea, or air) borders of each individual state changed into the external borders of first, Benelux, then Schengen, and currently the territory of the 27 EU Member States. Aside from this “enlargement” of the territory, states also transferred their controlling activities to places beyond their own territory. One of the most traditional extraterritorial controlling mechanisms is the visa regime or entry clearance, by which the state of destination requires individuals of certain nationality to obtain prior authorisation before leaving their country. Since 1993, within the Schengen framework, the participating states have established common visa lists of third countries whose nationals must obtain a visa before entering those Schengen States. In 1999, with the Amsterdam Treaty, the Schengen lists were incorporated into EU law. Other mechanisms of pre-border immigration controls are “pre flight checks” or “juxtaposed control” through which states post liaison officers in the airports of countries, which are (comparably to the states included in the visa lists) known as sources of “unwanted” migrants.

Considering the actors of border control, it is clear that this function is no longer exclusively performed by the authorities of the state desiring to control the movement of persons in and out its territory. On the basis of bilateral or

international visa agreements between different EU Member States, national embassies may decide upon visa applications on behalf of another state. Private actors are involved in the process of migration control through, for example, the outsourcing of visa applications, but also by the legal obligation of air carriers to control and process the identity and travel documents of their passengers. Furthermore, even if with some restraint, exclusive national powers of border controls are transferred to the EU level by the development and widening of the powers of the EU agency Frontex. Another relevant development in this field is the involvement of third states, mostly based on bilateral agreements with EU Member States, resulting in measures taken by the authorities of these third states to prevent migrants from leaving these countries for the EU. While this chapter will only describe measures taken explicitly to control the immigration of third-country nationals to the EU, it is clear that (extraterritorial) border control measures do not envisage immigration control solely. As has been made explicit for example by the European Commission in the EUROSUR Communication, controlling the external borders of the EU is not only aimed at preventing illegal immigration, but also at countering cross-border crime, such as the prevention of terrorism, trafficking in human beings, drug smuggling, illicit arms trafficking, etc.²

These developments in EU migration policy have important consequences for the protection of human rights. In the words of Rijpma and Cremona:

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 the desired movement of people, such as trade and tourism. 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. Therefore, a State would be responsible for anyone acting within the effective control of that State party.³

This chapter will investigate the legal basis for the responsibility of both the EU and its Member States for activities or situations outside their territory which interfere with the human rights of an individual. I will differentiate in this contribution between two situations:

– national acts or decisions by Member States’ or EU actors, resulting in the extraterritorial violation of human rights;

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