

Cahiers de l'EDEM

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Chaque mois, ils se proposent de présenter quelques arrêts récents d'une juridiction nationale ou européenne dans ses domaines d'études, à savoir la mise en œuvre du droit européen de l'asile et de l'immigration en droit belge.

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These Commentaries are written by the European Law and Migration team (EDEM), which is part of UCLouvain.

Each month, they present recent judgments from national or European courts in the field of the implementation of European asylum and immigration law in Belgian law.

The Commentaries are written in French and/or English.

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Editorial – Cahiers de l'EDEM – August 2022

In the context of the international conference [Time of Territories](#), held on the occasion of the 10 years of the research team, the EDEM organised a [call for papers](#) addressed mainly to PhD students. Having received a great number of proposals, we were able to organize [two Young Researchers' Workshops](#). The workshop format resulted in rich exchanges among peers and senior academics on the broad topic of Law and Migration. For many of the researchers we hosted in Louvain-la-Neuve, this was the first chance to meet in person. We have now invited the Workshop participants to contribute to two consecutive Special Issues of the Cahiers de l'EDEM. In thanking all the contributors, we hope that it was an opportunity to nourish their research projects and further develop their own's research skills. We also thank the members of EDEM who supported us during the Workshops and during the coordination of the Special Issues.

While the [first Special Issue](#) was dedicated to the topic of vulnerability, this second Special Issue focuses on the notion of border. Understood in its legal, geographical and philosophical dimensions, the border can define who is in and who is out of the European Union territory, implementing dynamics of inclusions and exclusion from access to certain rights. Pushbacks, hot returns, fiction of non-entry, a-territoriality, transit areas are some of the concepts discussed in this Issue.

The first contribution explores the interrelationship between poor accountability for human rights violations at the borders and the inadequacy of national systems in ensuring human rights enforcement while presenting a critical reading of the European Commission's proposal under the Screening Regulation (**Gabriel Almeida**). Most of the contributions look at Member States' practices as an illustration of controversial border regimes – and in particular pushbacks – starting with the bottom-up influence of Spain on the ECtHR in the creation of an exception to Article 4 of Protocol No. 4 ECHR in the context of land pushbacks at the Moroccan-Spanish border (**Clara Bosch March**). A legal ethnographic analysis of the consequences of the reintroduction of border controls at the internal borders between Italy and France follows and discusses the “ambiguous territorial space near the borderline and exclusionary bordering processes” (**Bastien Charaudeau Santomauro**). The case of internal border controls in France is further explored in its relationship with the role of discretion in the decisions of the French administrative authorities (**Claire Bories**). Another contribution focuses on how the legal fiction of non-entry is implemented in a number of domestic legal frameworks as well as in EU law while examining how the New Pact on Migration and Asylum institutionalises the fiction of non-entry at the EU external borders (**Francesca Rondine**). Finally, the issue of pushbacks at the border is presented in its less known “digital” aspect through the practice of asylum refusal decisions and entry and residence bans between States Members of the Schengen area through the Schengen Information System (**Romain Lanneau**).

Underlying that the contributions hosted in this Special Issue are part of ongoing research projects, we hope that they will foster further exchanges and contacts among researchers. Comments and feedback are more than welcome.

On behalf of the EDEM,

Zoé Crine, Eleonora Frasca and Francesca Raimondo

Août 2022 - Édition spéciale

[Accountability at borders: between restrictive European border governance and fragmented national landscapes for human rights protection.](#)

Gabriel Almeida, European Network of National Human Rights Institutions, Belgium

*This article explores the interrelation between poor accountability for human rights violations at borders and broader deficiencies in ensuring the implementation and enforcement of human rights law at the national level. First, the author provides a brief overview of the complex and diverse landscape in the EU of national bodies with monitoring or accountability functions relevant to responding to human rights violations at borders, including National Human Rights Institutions (NHRIs) and National Preventive Mechanisms (NPM). Building on existing literature on the nature and effectiveness of domestic institutions, this contribution argues that these actors have become central in responding to systematic violations at borders. Yet, the potential of national frameworks for human rights protection at borders is not fully explored, resulting in a missing link for accountability for violations at borders. To illustrate this argument, the article provides a critical analysis of the European Commission's proposal under the Screening Regulation for the Member States to establish "border monitoring mechanisms". It is argued that the proposed approach fails to recognise, support, and mobilize existing domestic frameworks for human rights protection, and relies on a short-sighted notion of accountability. The author concludes by placing this debate in the broader context of *The Legal Production of the Margin: Migrants Between Border and Territory*. Bastien Charaudeau Santomaurof gaps in human rights governance at the international and EU levels.*

[Land pushbacks at the Moroccan-Spanish border: from illegal State practice to endorsement by the European Court of Human Rights. A turn of events "made in Spain".](#)

Clara Bosch March, PhD Student & Hardiman Scholar (University of Galway, Ireland)

The jurisprudential U-turn in the case of N.D. and N.T. v. Spain was heavily criticised, among other things, for its lack of predictability. Indeed, the ECtHR was accused in this case of inventing all sorts of new limitations to Article 4 of Protocol No. 4. However, as I argue in this paper, these new limitations may not have been invented by the ECtHR, but rather drawn from Spain—the first State in the Council of Europe to implement and to legalise land pushbacks, and also the one which convinced the ECtHR to create an exception to Article 4 of Protocol No. 4. Far from what may seem at first sight, this is a crucial—and problematic—difference. Indeed, it would suggest an atypical "bottom-up" influence from the State level to the ECtHR which would raise, in turn, a series of substantive and methodological issues with regards to the ECHR. This is an avenue worth exploring because it may cast a new light on the case of N.D. and N.T. and help fully grasp the real extent of the Grand Chamber's U-turn. Therefore, the question explored is structured in three parts: Part I outlines the relevant Spanish framework; Part II discusses the bottom-up influence of this framework on N.D. and N.T. from a substantive point of view; Part III approaches it from a methodological point of view. The paper concludes with some final remarks on this influence from below.

[The Legal Production of the Margin: Migrants Between Border and Territory.](#)

Bastien Charaudeau Santomauro, Ph.D. Candidate Sciences Po Law School, Yale University (Fox International Fellow), Institut Convergences Migrations (Fellow)

It has been more than six years since France reintroduced controls at its internal borders, thus derogating from Schengen's ordinary rules. A new border regime has emerged from this situation, one characterized by frequent reports of migrants' rights violations. Combining legal ethnography at the French-Italian border and legal theory, this article explores the notion of "legal margin" to understand what happens between the border and the territory. This concept shows that the borderline affects how legal norms are applied within the territory next to it. It further unfolds through two ideas. Firstly, the maintenance of legal indeterminacies by the State updates and reinforces in an original way a fiction of a-territoriality—people apprehended near the border are considered as if they were not in the territory—which places migrants outside the protective dimension of the law. Secondly, the regime of admission (the refusal of entry) is applied without the corresponding detention procedure (the waiting zone), thus allowing for what appears to be extralegal detention practices. The concept of margin seeks to enable legal theory to grasp what transpires in the ambiguity of the territorial space near the borderline and further explain exclusionary bordering processes.

Malaise aux frontières, frontières du malaise. Des droits limités et des pratiques discrétionnaires aux frontières des États membres de l'Union. L'exemple de la France

Claire Bories, Université Toulouse 1 Capitole, France

De Röske au large de Lesbos, en passant par l'enclave de Ceuta, la forêt de Białowieża ou la zone de Calais, les décisions de construction de murs ou de clôtures destinés à empêcher le passage des migrants créent un malaise. Il en va de même dans les zones d'attente et aéroports français : les décisions souvent discrétionnaires des agents aux frontières, les conditions parfois précaires de maintien des migrants et demandeurs d'asile et l'hétérogénéité des pratiques administratives et policières créent un malaise. Ces situations sont de plus en plus fréquentes et contrastent, non sans malaise, avec l'accueil des réfugiés ukrainiens dont la singularité avec les précédentes vagues de populations mérite toute notre attention.

Between physical and legal borders: the fiction of non-entry and its impact on fundamental rights of migrants at the borders between EU law and the ECHR.

Francesca Rondine, PhD candidate in Human Rights Law (Sapienza University, Rome, Italy)

This article examines the legal fiction of non-entry and its impact on the human rights of migrants at the borders within the framework of the ECtHR and EU law. The analysis focuses on three main areas of law: detention, asylum and expulsion. The contribution will first give a definition of the fiction of non-entry and explain how it is implemented in a number of national legal frameworks concerning third-country nationals at the borders. In particular, the case of France (before and after the Amuur ECtHR judgment) and the case of Germany will be examined. The article will then analyse the fiction of non-entry in the ECtHR jurisprudence, in particular with regards to Article 5 ECHR. The third section explores how such a legal fiction is implemented in EU law, throughout the analysis of the relevant provisions of the Schengen Border Code and of the EU Directives related to asylum and expulsion of third-country nationals. Finally, the New Pact on Migration and Asylum will be investigated, namely how it institutionalises the fiction of non-entry at the EU external borders within the framework of the new proposals for a pre-entry screening and for an asylum procedures regulation.

Digital pushbacks at European borders: an ongoing threat to the rule of law in the Schengen Area.

Romain

Lanneau

This article paints a less-known picture of pushbacks. One that does not take place in a remote forest of Eastern Europe but in a border guards office in Northern and Western Europe. The exchange of asylum refusal decisions and entry and residence bans between State Members of the Schengen area through the Schengen information system brings a systematic risk for individuals in the context of the rule of law crisis. Hungary will be taken as an example of a country recording pushbacks decisions in the Schengen information system. Digital pushback is the perpetuation of the infringement of EU law at the external border, amounting to a pushback, by another Member State because of information exchanged about a third-country national. This research investigates if the current legal standards, in the jurisprudence of the CJEU, on the protection of the right to an effective remedy, Article 47 of the charter of the EU, are adapted to prevent digital pushbacks.

[Vie privée](#)

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