



Working Paper
No. 454

**FLEEING TO EUROPE:
Europeanization and the Right to Seek Refugee Status**

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January 2008

* ISS MA Research Paper Award winner for the academic year 2006-2007

ISSN 0921-0210

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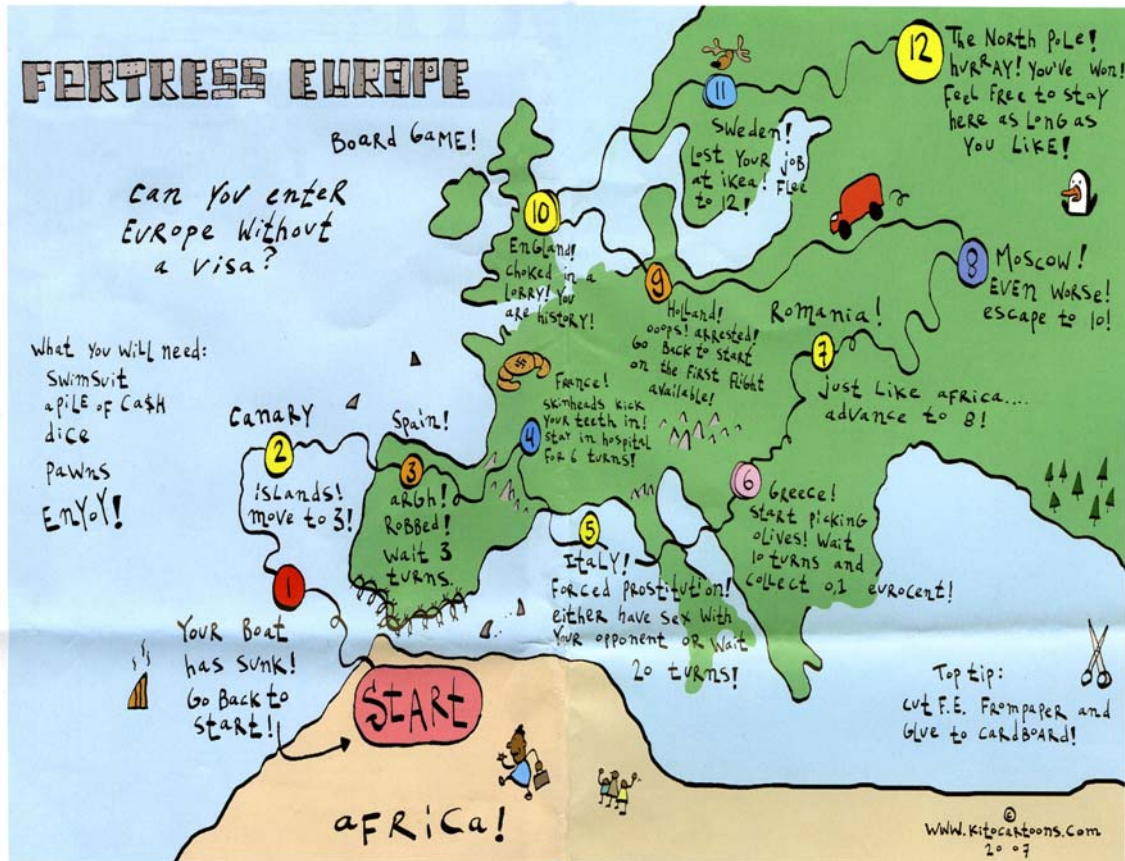
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LIST OF ACRONYMS

ACP	African, Caribbean and the Pacific
CEAS	Common European Asylum System
CEEC	Central and Eastern European Countries
CFSP	Common Foreign and Security Policy
EC	European Community
ECRE	European Council on Refugees and Exiles
EP	European Parliament
EU	European Union
ILPA	Immigration Law Practitioners' Association
IR	International Relations
JHA	Justice and Home Affairs
NGO	Non Governmental Organization
RABIT	Rapid Border Intervention Teams
QMV	Qualified Majority Vote
ToA	Treaty of Amsterdam
TPC	Transit Processing Centres
UNHCR	United Nations High Commissioner for Refugees

FLEEING TO EUROPE

Europeanization and the Right to Seek Refugee Status¹



¹ I would not have been able to write this paper without the help, patience and wisdom of friends, family and in particular my supervisors Karim Knio and Helen Hintjens. Above all I want to thank Björn, my boyfriend for 'putting up with me'.

1 INTRODUCTION

Thinking about ‘fleeing to the European Union’(EU), one cannot help but recall the unsettling pictures of African people stranded on the crowded beaches of the Costa del Sol. Today, an unknown number of people in search of a better life still leave their home countries for a dangerous and uncertain trip to European shores. In their midst are refugees fleeing from violent conflict or fear for persecution due to their political affiliation, a particular faith, or color of skin, who under International Law deserve protection. But in order to be granted protection a refugee first needs to reach the territory of a foreign state to lay down a claim for asylum.

For a person wanting to arrive in a ‘European Union Member State today to request asylum, there is a daunting challenge ahead’ (van Selm, 2004:3). Entering the EU legally poses difficulties due to travel document requirements hard to fulfill for a person in flight. Carriers are unwilling to take refugees on board for fear of getting fined for transporting ‘illegals’. And trying to reach territorial waters of an EU Member State, a refugee runs the risk of getting intercepted, by EU organization Frontex. Effectively a refugee fleeing to the EU might be denied the right to ever lay down a claim for asylum. But would it have been different had the EU not existed?

The EU, however, does exist. And as a next step in the European integration project, the Treaty of Amsterdam (ToA) drafted in 1997, asylum and immigration policy became a central element in the development of an ‘area of freedom, security and justice’. The ToA moved immigration and asylum issues from the intergovernmental third pillar, where it had been enshrined since the Treaty of Maastricht (1992), to the supranational first pillar under Title IV on visas, asylum and immigration. Simultaneously with this, in Brussels jargon ‘communitarization’, asylum and immigration became a ‘cross-pillar’ issue increasingly embedded in the EU’s involvement with third countries.

The development of policies at the European level is sometimes referred to as ‘Europeanization’. According to one Oxfam Report the Europeanization of immigration and asylum policy is leading to a ‘fast-moving internationalization’, shifting responsibility away from the EU (McKlever, 2005:ii), against the very principles of refugee protection. One could however also argue that Europeanization has the potential to uphold human rights standards, as it brings a new policy area under the jurisdiction of the EU. Also the communitarization so far has been partial, resulting in a hybrid system with blurred competences, opt-outs and a different status for new Member States. This paper aims to assess to what extent this character of the Europeanization of asylum and immigration policy affects the right to seek refugee status in congruence with International Refugee Law. This research starts from the hypothesis that the process of Europeanization of asylum and immigration policy is leading to a deterioration of this right to seek refugee status.

In order to verify this hypothesis, the first chapter will provide a conceptualization of the ‘right to seek refugee status’. On the basis of the UN Refugee Convention the right to seek refugee status will be defined as the right

not to be returned, nor to be rejected at the border if this means a potential threat to one's life or liberty. Against this definition the Europeanization of immigration and asylum policies will be assessed.

The second chapter subsequently will set out a policy analysis through the question: how does the nature of the Europeanization of asylum and immigration policy since the Treaty of Amsterdam and the steps towards a common immigration and asylum policy affect the right to seek refugee status? On the one hand the partial nature of the communitarization will be discussed and on the other hand the actual policies adopted relating to travel document requirements, carrier sanction and the transfer of responsibilities of the EU to 'safe' third countries will be addressed.

In order to explain the deteriorating effect of Europeanization on the protection of refugee, established in chapter two, chapter three will explore how the nature of the Europeanization of immigration and asylum policies can be understood through theories of European integration. Apart from addressing exogenous pressures, such as a rise in the number of asylum applications and functional pressures, primarily the abolition of internal borders, it will be argued that Europeanization of immigration and asylum policy can be characterized by the persistence of intergovernmentalism, because Member States, especially powerful ones like Germany, have been leading the integration process to the detriment of refugee protection. This intergovernmental explanation of integration will be contrasted with the neofunctional and constructivist assumptions of identity transformation and prevalence of supranational institutions, chiefly the Commission.

Before moving on to the conclusion, the last chapter will bring forward an illustrative case study under the guiding question: to what extent do the operations of Frontex undermine the right to seek refugee status? Since 2005, Frontex has been the European Agency for the management of operational cooperation at EU's external borders, and has chiefly been coordinating interception operations at sea. It will be argued that Frontex exhibits precisely those characteristics that have been associated with Europeanization throughout the rest of the paper, such as the increasing externalization of the refugee 'problem' and the neglect of refugees in policies targeting 'illegal' immigration.

This research aims to provide insight into the process of Europeanization in the area of asylum and immigration and its consequences for the preservation of refugee protection. Judging from the current state of world affairs, refugee streams, caused by the persistence of internal wars and human right abuses world wide, will probably remain one of the most pressing issues for global governance, putting a huge responsibility in the hands of the international community. Hence it is deemed important to assess whether and especially why the EU and its Member States are (not) living up to this responsibility of granting refugees the right to seek asylum.

2 THE RIGHT TO SEEK REFUGEE STATUS

When the striking images of stranded boatpeople on a beach full of Western tourists reach the news sporadically, it seems to provoke an already existing perception that the EU is caught up in an immigration and refugee crisis. In reality, the vast majority of refugees worldwide remain in their region of origin. In 2005 from the 8.7 million world's refugee population, 6.5 million were living in developing countries. Of the 2.2 million refugees that did flee to industrialized countries, only 260.700 asylum claims were lodged in Europe (UNHCR, 2007a:9). During the 1980's and 1990's however there was indeed a rapid increase in refugee movements, but this number 'decreased sharply during the first years of the new millennium' (UNHCR, 2006:16).

In response to this increase various governments over the past fifteen years have introduced restrictive asylum policies like carrier sanctions, interceptions and 'safe third country' arrangements (Edwards, 2005:293). Several scholars and NGOs have commented that this is leading to an increasing deterioration of the international refugee protection regime (McKleever, 2005; Guild, 2006). In order for this paper to assess whether policy making at the European level has contributed to this global trend it should first be understood what the right to seek refugee status in congruence with International Refugee Law entails.

Firstly, a brief explanation on the interdependent nature of immigration and refugee policies will be set out. Also some minimal background to the conclusion of the 1951 Refugee Convention will be provided. Subsequently a discussion of the definition the Convention assigns to refugee and the principle of *non-refoulement* will boil down to a conceptualization of the right to seek refugee status. Lastly the EU definition of a 'refugee' will be discussed.

2.1 Refugee – Immigration Nexus

The 'international refugee protection regime', referred upon in the introduction is 'embodied in core legal documents such as the Refugee Convention, the Refugee Protocol, institutions such as the UNHCR and the International Organization for Migration, and prominent non-governmental organizations' (Orchard, 2005:2). Such an overarching regime does not exist for migration. This is problematic as modern migration and refugee flows are inherently complex and may simultaneously contain a mix of economic migrants, genuine refugees and others (Lavenex and Uçarer, 2004). Due to the complex nature of migratory movements, measures combating 'illegal' immigration will inevitably also affect the protection of refugees.

In addition migration and refugee flows are a matter of high international interdependence, because denial of access to one country, means remaining in the territory of another. Hence states tend to believe that adopting liberal asylum policies will attract a higher number of asylum seekers at the 'expense' of the numbers flowing to neighboring countries (Lavenex and Uçarer, 2004:425). Thus policies trying to restrict the flows of immigrants enacted by one state will irrevocable have its impact on other states. 'Breaches of

international refugee and human rights law may encourage and legitimize similar trends outside the Union' (Da Lomba, 2004:284).

2.2 The Convention: an Inherent European Document

Under international law the treaty governing the reception and treatment of refugees is the UN Convention Relating to the Status of Refugees (1951) and its Protocol (1967). The creation of the Convention has its origins in the aftermath of the Second World War, when numerous refugees were scattered across the European continent and asylum was to serve as a redress for the horrible human rights violations that had taken place (Lavenex, 2001:857). The Convention was Euro-centric (and anti-communist) from the onset, because the majority of states that drafted it were Western European. Furthermore the Convention was limited to events before 1951 and states were permitted to limit the cause for flight to European events (van Selm, 2005:4).

After decolonization set in, more non-European states started to become party to the Convention and through the adoption of 1967 Protocol the abovementioned temporal and geographical limitations were lifted (Da Lomba, 2004:4). A total of 146 states nowadays have ratified one or both of the UN instruments. Furthermore, most norms of Convention and Protocol have developed into customary law. Regardless, all, including the new EU Member States are party to the 1951 Convention and its Protocol. It is ironic that precisely those states that initiated the drafting of the Refugee Convention now seem to be failing in their commitments, as 'many consider that there has been a resiling over the past two decades among the original Member States of the Union from their commitment to provide protection on their territory for persons fleeing persecution' (Guild, 2006:630).

2.3 Refugees, Non-refoulement and the Right to Seek Refugee Status

The legal definition of a *refugee*, is enshrined in article 1 (A) (2) of the Convention:

For the purposes of the present Convention, the term 'refugee' shall apply to any person who (...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; [...]

For the purpose of this paper, the most important characteristic derived from this article is that a refugee must have fled across the border of the country he is fleeing from, in order to be eligible for refugee status (Goodwin-Gill, 1985:240). No reservations are allowed to be made to article 1. Nevertheless states can adhere to additional grounds on the basis of which they assign the refugee status or another form of protection.

Although it is important to understand who constitutes a refugee under international law, this paper is rather concerned with whether a supposed

refugee is granted the possibility to *claim* to be in need of international protection. For this purpose, the central concept that arrives from the Convention is that of *non-refoulement* enshrined in article 33(1) on the 'Prohibition of Expulsion or Return' ("Refoulement"):

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to *the frontiers of territories* where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The only ground for violating this principle of *non-refoulement* is when a state has reasonable grounds to believe that the refugee constitutes a danger to the security of the country and certainly not that someone is suspected of being 'bogus' (art.33(2)). Article 33 is one of the two articles for which reservations are proscribed.

Particularly important is the reference to 'frontiers of territories'. UNHCR has emphasized that 'the different wording (...) make[s] it clear the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution' (in: Da Lomba, 2004:5). Indirectly this also includes 'chain *refoulement*', which occurs when a refugee is transferred back to a 'safe' country that subsequently sends the refugee back to the country where his life or freedom is threatened (McKleever et al, 2005: ix). The principle of *non-refoulement* has developed into a norm of customary international law (Goodwin-Gill, 1985:99). The Convention also included an article on the means of entry, which maintains that Contracting States shall not impose penalties on the illegal entry or presence of refugees (art.31(1)). The Convention is however silent on the issue of rejection when refugees present themselves at the borders of a state before entry. Nevertheless, 'by and large, states in their practice and in their recorded views have recognized that [*non-refoulement*] applies to the moment at which asylum-seekers present themselves for entry [...thus] the concept now encompasses both non-rejection and non-return' (Goodwin-Gill, 1985:77, see also Rijpma and Cremona, 2007). Can we infer from this conceptualization of *non-refoulement* that a right to seek asylum exists?

Although 'asylum seeker' is often used synonymic to refugee, they constitute distinct, although vastly overlapping categories. Whereas a refugee is someone fulfilling the criteria of the Convention with or without having declared himself to an authority, the status of asylum seeker is of declaratory nature; an asylum seeker is 'someone who has applied for asylum and is waiting for the authorities to determine whether or not he or she will be recognized as a refugee or given another form of protection' (McKleever et al, 2005:vii).

Although 'the right to seek asylum' itself is enshrined in the 1948 Universal Declaration of Human Rights (art.14), there are no corresponding duties on the part of states to accept that people land on their territory (van Selm and Cooper, 2006:48). Thus the right to grant asylum remains an act of state sovereignty. Nevertheless 'some commentators assert that, although there is no right to be 'granted' asylum de jure, there may exist an implied right to asylum de facto, or, at the very least, a right to apply for it' (Edwards,

2005:300). Such an implied right to seek asylum can be deduced from the above analysis of the concept of *non-refoulement*. However, this access to asylum procedure can only be embarked upon once the person fleeing has reached foreign territory. As such the right to seek refugee status is not a universal human right that can be relied upon anywhere, but rather as a procedural right, that should be granted once someone presents himself to the authorities of a foreign state. In addition, because the right to grant asylum remains a sovereign act of state, potential asylum seekers might be transferred to a 'safe' third country, as long as 'a state proposing to remove a refugee or asylum seeker undertakes a proper assessment as to whether the third country concerned is indeed safe' and will grant access to a refugee determination procedure (Lauterpacht and Bethlehem, 2003:122).

2.4 Refugees and the EU - the Qualification Directive

Although the next chapter will embark upon the legislation adopted by the EU in the field of asylum and immigration, the 'Qualification' Directive (2004/83/EC) adopted in 2004 will be analyzed here, because of its importance for the European conceptualization of a 'refugee'. The Directive describes among other things 'the minimum standards for the qualification and status of third country nationals'. The Directive for the most part follows the definition of the Convention, but adds two positive dimensions, that are now binding upon all Member States, except for Denmark which has opted out.

Firstly, the Directive moves beyond the scope of the Convention by including persecution of a gender-specific nature (art.9.2(f)), meaning that female asylum seekers 'with a well-founded fear of, for example, sexual violence [...], female genital mutilation or forced prostitution [...] will now be entitled to refugee status across the EU' (McKleever et al, 2005:22). Secondly, also beyond the scope of the Convention, is the inclusion of non-state actors as possible agents of persecution (art.6(c)). Both these provisions however will become meaningless if refugees are prevented from lodging a claim in the EU, to be discussed in the next chapter.

On the other hand, the Directive under consideration also contains a clause bearing the danger of *refoulement*, because it regards 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' (art.7(1(b))) as potential actors for protection. However 'quasi-state entities controlling part of a territory are often, by their very nature, temporary and unstable, as has been seen in Somalia' (McKleever et al, 2005:22). Thus the danger of *refoulement* remains.

2.5 Conclusion

It has been argued that the 1951 Refugee Convention as the cornerstone of the international refugee protection regime has been a European creation from the onset that gradually developed into international customary law. It is ironic that precisely those states responsible for the creation of the protection regime are now reported as not fulfilling their obligations under the Convention. Due to

the interdependent nature of the refugee regime and the interconnectedness of immigration and refugee policies, it seems likely that more restrictive asylum and immigration policies at EU-level will legitimize a multiplier effect into non-EU territory undermining the right to seek refugee status on a global scale.

Arriving from article 31 on irregular entry and article 33 on the principle of *non-refoulement*, as well as from customary law, the ‘right to seek refugee status’ has been defined as the protection of the principle of *non-refoulement*, including both non-return and non-rejection and thus the right of access to an individual and fair refugee determination procedure. In order to embark on this right, asylum seekers need to be territorial present and might be transferred to a safe third country provided that they are granted the possibility to lodge a claim for asylum there.

The next chapter will analyze to what extent the process of Europeanization has affected this right to seek refugee status. In this chapter the Qualification Directive has already been put forward as slightly positive by providing protection for gender-based and non-state actor persecution and very negative by regarding non-state agents as a potential source for protection, which are likely only to be able to grant temporary protection.

3 EUROPEANIZATION AND THE RIGHT TO SEEK REFUGEE STATUS

In the previous chapter it was concluded that a ‘right to seek refugee status’ can be inferred from the 1951 Convention, meaning that anyone presenting him- or herself at or within European borders should be granted an individual and fair refugee determination procedure without being returned, or rejected before entry. The commitments to the Convention have been repeatedly reaffirmed in documents of EU-institutions. And yet human rights organizations are accusing ‘European governments and institutions [...to] continue to scale back rights protections for asylum seekers and migrants’ (McKleever et al, 2005:14).

With the Treaty of Amsterdam (ToA) asylum issues became communitarized, while simultaneously the EU embarked upon a ‘cross-pillar approach’, by enshrining asylum and immigration into its dealings with third countries. Whether the ‘scaling back of rights protection’ can to a certain extent be traced back to the process of Europeanization will be discussed through the following question: how does the nature of the Europeanization of asylum and immigration policy since the ToA and the steps taken towards a common immigration and asylum policy affect the right to seek refugee status?

To conduct the analysis, a conceptualization of Europeanization will be put forward first. Moreover, some historical background will be provided on the development towards a common European asylum and immigration policy. Subsequently the first part of the analysis will address the way in which the nature of the communitarization process itself, which has only been partial, might affect the right to seek refugee status. The second part of the analysis will look into the policy-steps that have been taken, such as visa policies and

carrier sanctions. The third part will look at the increasing externalization of asylum and immigration policies.

3.1 Europeanization – a Multi-faced Process

The concept of Europeanization has recently gained currency amongst scholars of the European Union. And yet no consensus seems to exist as to what the concept entails. Originally the term Europeanization was adopted as a top-down perspective to analyze the influence of EU-level policies on the institutional structure and policies of the various Member States. Although this perspective is still the most dominant approach in the literature (Faist and Ette, 2007), the breadth of the term has been extended and Europeanization is now ‘a newly fashionable term to denote a variety of changes within European politics’, describing a multi-faced process that is ‘variously affecting actors and institutions, ideas and interests’ (Featherstone, 2003:3) across and beyond the EU. Furthermore, the concept, in contrast with the notion of European integration, denotes ‘dynamism, imbroglia and limits to determinism in present day Europe’ (Featherstone, 2003:19). It is precisely because of this ‘imbroglia’, that ‘Europeanization’ is relevant to use as an analytical lens because the communitarization of asylum and immigration policy has only been partial.

Europeanization throughout the paper will be conceptualized in its most minimalist sense as the responses to and effects of policies of the EU (Featherstone, 2003:3). Within the literature, a variety of taxonomies of the various dimensions of Europeanization exist (see for example: Wong, 2005; Olsen, 2003; Featherstone, 2003). For the purpose of this paper I would like to elaborate on three of these dimensions.

3.1.1 Europeanization as: developing institutions and policies at the European level

The first dimension is closest to the concept of ‘European integration’, where Europeanization denotes the development of institutions and policies at the European level. Disagreements exist among scholars as to what or who leads this process, which will be discussed in chapter three. Radaelli simply calls this ‘direct Europeanization’: ‘where regulatory competence has passed from the member states to the European Union’ (in Wong, 2005:139).

Communitarization is the most comprehensive form of Europeanization of this nature, but the regulatory competence might also be of intergovernmental and even informal nature. For the purposes of this paper this will be the most relevant level of analysis of Europeanization as it is precisely the case with asylum and immigration policies that regulatory competences were (partially) passed to EU institutions. However, policies enacted at the European level are likely to have a different impact on various member states, as well as an impact outside the EU-territory, hence two other dimensions of Europeanization are looked at.

3.1.2 Europeanization as: domestic impacts of European-level institutions

As mentioned above, most frequently Europeanization is understood as the reverberations of EU-level policies on domestic institutions and policies. European level development may have direct and indirect as well as intended and unintended domestic impacts. Radaelli for example refers to 'indirect Europeanization' where member states 'begin to imitate and adjust to each others policies as a consequence of Europeanization in other areas' (in: Wong, 2005:139). This may lead to a de-facto harmonization of policies.

Policies enacted at the European level in general are likely to impact various national settings differently, because 'the (West) European political order is characterized by long, strong and varied institutional histories' (Rokkan, 1999 in: Olsen, 2002:934). Most authors do account for the domestic impact of Europeanization as a process of 'diversity and asymmetry' being 'refracted, translated, and edited in various guises by domestic political systems' (Featherstone and Radaelli, 2003:336). However, hardly anyone writes about the anti-European effects policies stemming from EU-institutions may have on the continuation of the deeper integration of Europe, in the event that states act defensively. This paper will illustrate that certain policies outlined at EU-level may lead to what I would like to call de-Europeanization in other respects, implying 'that national policies and politics become less "European" than they were' (Faist and Ette, 2007:18).

3.1.3 The external dimension of Europeanization

The third dimension of Europeanization as externalization refers to the extra-territorial effects European integration can have when its dynamics are extended beyond EU-boundaries, which might be the intended or unintended result of actions on behalf of the EU. For example, third countries might autonomously respond to (negative) externalities of EU policies like 'rising numbers of asylum seekers as a consequence of tighter controls at the EU's external borders' (Lavenex and Uçarer, 2004:421). Third countries may also be affected in a context of external Community actions, where the consent of this third state is needed, for example in the case of operations in the territorial waters of third states, to be discussed in chapter four. For the purpose of this research this externalization constitutes an important dimension, because the right to seek refugee status inevitably involves third countries, or at least third country nationals.

3.2 Historical Background

3.2.1 Intergovernmental cooperation

Before the EU was formally established in 1992, asylum and immigration issues had played a non-existing role in the integration process (Guild, 2006:633). With the ratification of the Treaty of Maastricht, the EU, as a single market with free movement of goods, persons, services and capital was

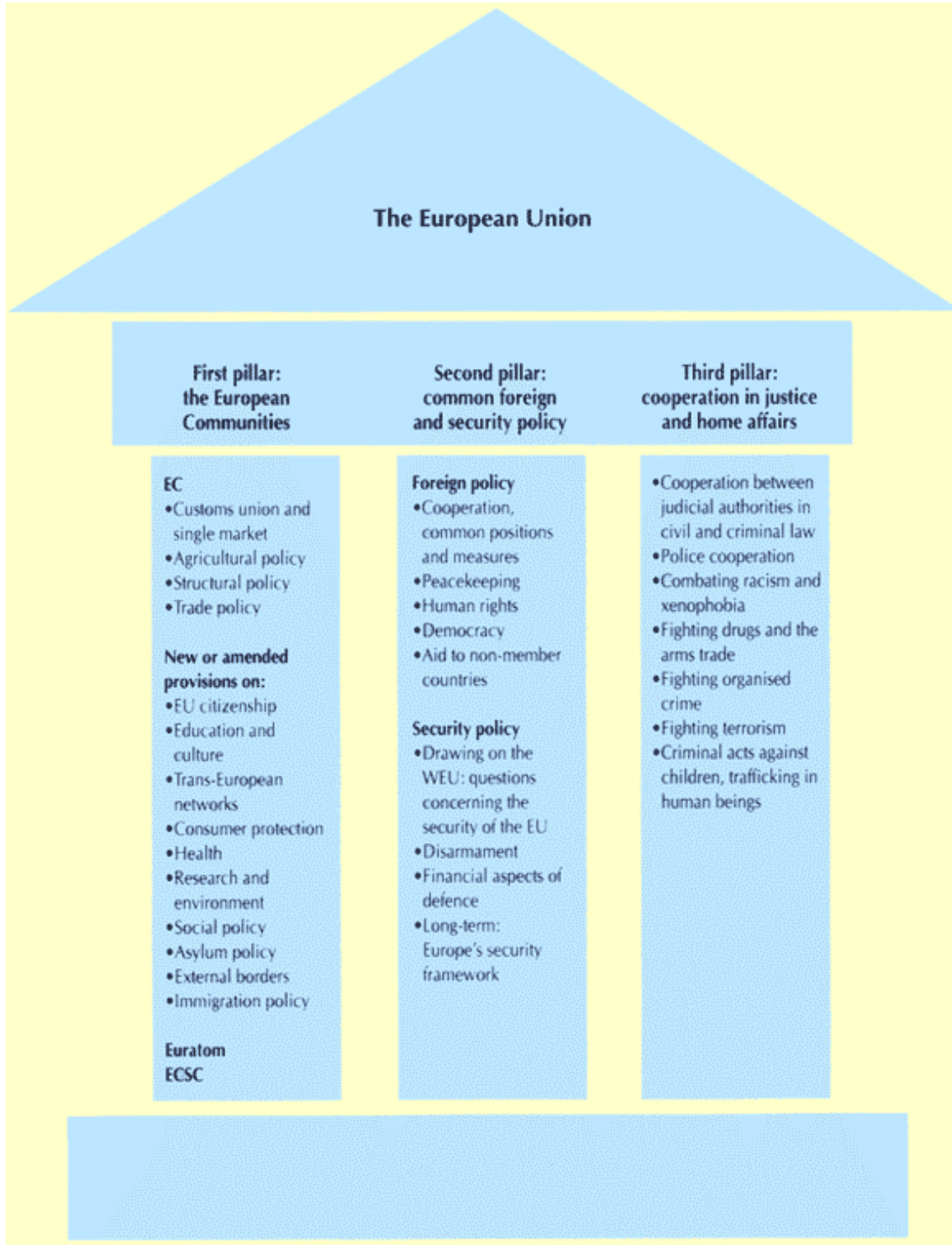
created. However, one category was excluded from the free-movement-mantra, as ‘an exception to the logic of territorial integration [was] created out of the bodies of refugees’ (Guild, 2006:637).

With the Treaty of Maastricht, the ‘European integration project’ moved beyond mere economic issues as the dismantling of borders also required cooperation in other fields. Hence the pillar structure was created (see figure 3.1). The first pillar (the European Communities (EC) pillar) is the only supranational pillar and remains the core of the European Union dealing mainly with economic, as well as related social and environmental policies. The second pillar came to deal with EU’s external relations under the name Common Foreign and Security Policy (CFSP). Asylum and Immigration became enshrined in the third pillar called Justice and Home Affairs (JHA). When Amsterdam in 1997 moved asylum and immigration policy to the first pillar, the third pillar was renamed into Police and Justice Cooperation in Criminal matters (PJCC).

The difference between the first and the other two pillars lies primarily in the mode of decision making. The first pillar is characterized by supranationality, where Member States have partially transferred sovereignty, which will be discussed in the coming paragraphs. Decisions in the other two pillars are still predominantly intergovernmental and thus enacted on the basis of unanimity. The powers of the European Parliament, the Commission and the European Court of Justice in these two pillars are fairly limited.

The only two initiatives at European level in the field of asylum that existed before the Treaty of Maastricht were enacted outside the framework of the European Community. In 1985, the Schengen Agreement on the Gradual Abolition of Checks at the Common Borders was signed, but only in the follow-up Treaty in 1990 (Schengen II) were measures included relating to third country nationals and asylum seekers. Also an Ad Hoc Working Group on Immigration was established in 1986, which created the Dublin Convention (1990) that established the criteria for determining the Member State responsible for examining an asylum application. After the ToA, both Dublin and Schengen became Community Law under the first pillar. With the Treaty of Maastricht (1992), the cooperation on immigration and asylum policies became formalized under the third pillar, but not much progress was made and only in the form of non-binding instruments (Rees, 2005:215).

FIGURE 3.1
Pillar structure of the European Union



Source: Website Carleton University

3.2.2 Uneasy communitarization

With the ToA, asylum and immigration became ‘communitarized’ under the new Title IV on ‘Visa, Asylum, Immigration and other policies related to free movement of persons’. Also the Schengen Agreement was incorporated into the *acquis communautaire*, the total body of EU law. However, three states, the UK, Ireland and Denmark, chose to remain outside of Title IV and the Schengen provisions (Rees, 2005:216). The ten New Member States that acceded to the Union in 2004 and the two in 2007 were on the other hand obliged to adopt the full *acquis*. Also a transitional period of five years was set during which decisions would still be taken by unanimity of the Council. So although under the first pillar the Council could now adopt binding legislation, the policy area did not become communitarized in terms of decision making. What the ToA did positively specify for the first time was that all measures must be in accordance with the Geneva Convention and its Protocol (art.63(1)).

After the ToA came into force, the major aims and principles of the common asylum policy were agreed upon in October 1999 at the European Council in Tampere (Finland). It was decided that in the long run one common European Asylum System (CEAS) was to be established. In order to accomplish this, the first stage was to harmonize the Member States ‘legal frameworks on the basis of common minimum standards before May 2004’ (European Commission, 2007). Common minimum standards in particular were to be adopted concerning procedures, reception conditions, responsibility designation and the definition of a refugee. A shift away from unanimity was made conditional upon agreements on these minimum standards. In November 2004, as a follow-up The Hague Programme was agreed to, which amongst other things called ‘for the continued integration of migration into the EU’s external relations’. Below it will be analyzed how this specific character of Europeanization as centre-building, with only partial communitarization, opt-outs, and a transitional period of five years influences policies affecting the right to seek refugee status.

3.3 Europeanization as Developing Institutions at the European Level – Partial Communitarization

Amsterdam meant that the policy area of immigration and asylum, originally belonging to the sovereignty of the individual member states, now fell under the competence of the Community. In theory, the transfer of competences to the Community pillar could ‘facilitate the adoption and ensure the application of measures in line with international refugee and human rights law’ (Da Lomba, 2004:36) for several reasons. Firstly, under the first pillar a much larger role is enshrined for both the Commission and the European Parliament (EP), which both had been expressing ‘concern about the protection of the right to seek refugee status’ (Da Lomba, 2004:36). The Commission, the executive arm of the Union, under the first pillar holds the exclusive right of initiative to submit proposals to the Council, the legislative arm, existing depending on the

topic of one national minister per state. The EP is granted the right to co-decide, which ensures a higher degree of democratic control over EU-legislation. Secondly, a major difference is that decisions taken under the first pillar are binding. 'Hence, provided that EC standards in the field of asylum comply with international refugee and human rights law, the community offers a more effective system as it imposes more stringent obligations and constraints on the Member States' (Da Lomba, 2004:36). This binding nature of legislation is reinforced by the role of European Court of Justice (ECJ) that has the competence under the first pillar to check Member States on their implementation and interpretation of adopted EC-legislation. Lastly, the normal method of decision making in the Council is Qualified Majority Voting (QMV)². Except for speeding up the decision process, QMV also minimizes the need for compromise. Many authors make the argument that decision making by unanimity leads to the adoption of the lowest common denominator, because all states need to accept the proposed legislation (van Selm, 2005; Lavenex, 2001).

As mentioned above, the transfer of asylum and immigration policies to the first pillar meant a breach with the traditional first pillar decision making, with the provision of a transition period. Although transitional periods are not uncommon in the European integration process, it was uncommon that unanimity prevailed in the first pillar and that in addition the shift to QMV was made conditional on the prior adoption of minimum standards (Lavenex, 2001:65). This shift only took place after more than six years, in December 2005. This conservation of the unanimity bore the risk that 'the foundations of a common European asylum system endorse the lowest standards in force in the Union, thus threatening compliance with international law' (Da Lomba 2004:43). The adoption of a lowest common denominator also bears the risk, due to the interdependent nature of the refugee protection regime, that states with a more liberal asylum law will also lower their standards. This risk of 'harmonizing down' might also happen de-facto when, as a spillover effect of the abolition of internal borders, states begin to emulate each others practices (McKleever et al, 2005:21).

Oxfam and Amnesty, as well as other NGOs and scholars, are outspokenly negative in their evaluation of EU efforts to create a common asylum system. Amnesty comments that 'harmonization through minimum standards has produced outcomes that in some cases do little more than catalogue national practice and on key issues contravene international refugee and human rights law' (2004:1).

Thus prima facie, the common perception that unanimity voting leads to the adoption of the lowest standards seems to hold true. Two reservations

² Qualified majority voting is a system of voting in the Council, which requires a decision to receive a set number of votes (each member state has a certain number of votes, weighted broadly on the basis of population), and is agreed by a majority of members.

however need to be made. Firstly, in chapter one it was concluded that the Qualification Directive adopted a definition of refugee going beyond the Convention's definition by including 'gender-based' persecution and persecution by non-state actors as valid grounds for protection, while these grounds had certainly not been embedded in some of the national refugee laws of EU-states (Lavenex, 2001:861). Even Amnesty welcomed the Directive on its wide scope of application (2004). However, the Directive should not be celebrated too much if other measures in the field of asylum will turn it into a dead letter.

A second, more substantive reservation is that unanimity can also be used by more liberal states to prevent 'stricter collective action' (Antoniou, 2003). A telling example is the proposal by the United Kingdom to create Transit Processing Centers (TPC) 'to be located in countries bordering the EU that are transited by people who might claim asylum in EU member states' (Schuster, 2005:1). This would be a severe deterioration of the right to seek refugee status, as asylum seekers effectively will be denied entry to the jurisdiction of contracting states to the Convention. Nevertheless, this proposal seemed to enjoy widespread support among member states. Sweden however, was able to block the proposal from the start, later joined amongst others by Spain and France (Schuster, 2005:9).

Following from this example it seems that the advocates against unanimity voting are forgetting that through a shift to QMV certain Member States might become more powerful. According to Antoniou QMV 'will only facilitate the adoption of acts satisfying the majority of the bigger states like Germany, France, Spain and UK. What would help, is efficient judicial control on policies of the EU and a role for the European Parliament' (Antoniou, 2003). Since December 2005, the EP has indeed been granted this right of co-decision. The right of ECJ however remains severely circumscribed, as it can only give a ruling when a case is pending before a court of a Member State against whose decisions there is no judicial remedy under national law. Up until now no case law has been produced under Title IV relating to asylum seekers. Hence the process of Europeanization, even if QMV prevails might work to the detriment of refugee protection, if no adequate safeguards by the ECJ and EP are in place and if the preferences of bigger Member States are in favour of stringent asylum policies. Concerning the latter, in chapter three it will be illustrated that indeed the preferences of bigger states have prevailed at the detriment of refugees, although through unanimity, not QMV.

To conclude this section, it can be argued that a process of dirty communitarization has been taking place, where 'community's instruments are used in the framework of intergovernmental decision-making with the main objective being the adoption of minimum standards' (Antoniou, 2003), leading to a deterioration of the refugee protection.

3.4 Europeanization as Domestic Impact

3.4.1 *Opt-outs and new member states*

The second dimension of Europeanization described in the analytical framework was the domestic impact of EU-developments. So how were different Member States affected by this ‘dirty communitarization’?

Ironically the proposal for Title IV found its origin in a proposal by Ireland that together with the United Kingdom (UK) and Denmark eventually decided not to take part.³ The main consequence of these opt-outs is ‘the risk of political and legal fragmentation [that] may impede the development of a comprehensive and coherent asylum policy’ (Da Lomba, 2004:40). The effect on the right to seek refugee status however is not self-evident, and would require in depth study of the three countries opting out, which lies outside the scope of this paper.

More illustrative of the uneven impact of Europeanization is its influence on the new Member States, who ‘were required to adopt all decisions made prior to their accession as part of the EU *acquis*’ including the Schengen agreement. Traditionally, the Central and Eastern European Countries (CEEC) had not been major refugee countries, and as such did not have well-developed asylum systems. They were however seen as important transit countries for asylum seekers trying to make their way to Western Europe. Hence, for (some of) the EU-15 it was critical that the New Member States would adhere to the same restrictive standards they did in order to prevent immigrants and refugees ‘penetrating’ the EU through porous Eastern borders (Hélène, 2007:2).

In one respect the Europeanization of the CEECs was slightly positive, because the new Member States were required to sign the Geneva Convention and the European Convention on Human Rights. On the other hand, most of the policies adopted on a European level were of a restrictive nature and thus the stage set for the newly created asylum systems in the CEECs was restrictive from the start. The extension of the process of Europeanization through conditionality can thus be said to have had a detrimental impact on the protection of refugees.

A case in point for the effect of this prescriptive Europeanization is Poland, where the amendments of the Alien Act in 2001 and 2003 enshrined European immigration policies, like temporary residence permits, carrier sanctions and the safe third country concept. In addition, ideas and discourses of the political elite were also Europeanized as ‘the perception of uncontrolled immigration as a threat and the ‘fortress Europe’ approach have been effectively transferred to the Polish ground notwithstanding the small numbers of immigrants in Poland’ (Faist and Ette, 2007:26).

³ These opt-outs are not absolute. The UK and Ireland can decide to opt-in into discussions and accept Title IV measures. In addition Ireland can also decide unilaterally to renounce its Protocol, just as Denmark.

3.4.2 Harmonizing down and de-Europeanization

Many authors have commented that the adoption of standards at the lowest common denominator ‘has helped limit liberal regimes in traditional refugee-receiving countries’ (Lavenex, 2001:861). In addition the disappearance of internal borders is also said to lead to de facto harmonization. Yet no systematic analysis exists on the development of national asylum and immigration policies in Member States since Amsterdam. Such a comparative analysis of national adaptation of EU-asylum policy also lies outside the scope of this paper, so just some illustrative material has to suffice.

France and Germany, arguably the driving forces behind cooperation in asylum matters, and certainly the two most influential states, both fundamentally altered their asylum system during the 1990’s. In both countries ‘the advocates of restrictive reforms managed to reframe the domestic asylum problem into one of negative redistribution in a ‘porous’ *Europe passoire*’ (Lavenex, 2001:862). Hence assisted by the development at EU-level both national constitutions were amended in a restrictive sense. Post and Niemann argue that Germany was able to adopt a more restrictive constitution by downloading a ‘security oriented European policy’ (2007:2). The restrictive nature of the new constitution is mainly expressed in the institutionalization of the “safe third country rule”, to be discussed below.

Although it might be premature to draw general conclusion based on these examples, it is quite illustrative that the two biggest states, of which Germany was traditionally known as a fairly liberal country, have been harmonizing down. Coupled with the general perception by many authors, it seems reasonable to conclude that at least Europeanization has been instrumental in lowering standards for refugee protection.⁴

But not only has the adoption of the lowest common standard led to downward harmonization, also instances of de-Europeanization, ‘where the preferences of the national government are in contradiction to the development of European immigration policy’ can be unravelled (Faist and Ette, 2007:18). Especially the Dublin system that led to a redistribution of asylum seekers by default has had this de-Europeanizing effect (Lavenex, 2001). The Dublin Regulation ((EC)343/2003) does not provide for a burden sharing mechanism, but instead provides rules to determine which state is responsible for dealing with an asylum application, whilst simultaneously preventing multiple applications in several Member States. The Regulation determines amongst other things that the Member State through which the asylum seeker entered the territory irregularly (art.10) will be responsible for its application. As asylum seekers have hardly any possibility to obtain access to the EU legally, entry into the EU will almost always be irregular. Thus these provisions place a disproportionate responsibility on the states at the external

⁴ For other case studies on the domestic impact of Europeanization on immigration and asylum systems see: Faist and Ette (2007), e.g. on Germany and UK.

borders of the Union, resulting *de facto* ‘in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location’ (European Commission, 2007:10).

What Italy and Malta call a ‘European’ problem has, thanks to this regulation, reverted to being clearly their national problem [...] in some senses this is a paradoxical and counter-intuitive result of deepening European integration (van Selm and Cooper, 2006:47/59).

In the absence of European burden-sharing-mechanism, border states have started to make their own arrangements to ‘relieve’ their disproportionate burden. A case in point is Italy, which has independently sought to sign readmission agreements with various Maghreb states, most strikingly with Libya, that is not a party to the Geneva Convention, nor has a functioning asylum system (Baldwin-Edwards, 2006:320). Sending back supposed-to-be ‘illegal’ immigrants to Libya, without a fair refugee determination procedure, could result in violating the principle of *non-refoulement*, which is what happened in Lampedusa in October 2004, when ‘Italy returned 1.000 people, without allowing them to claim asylum, to Libya, which in turn deported them to Egypt and Nigeria’ (Schuster, 2005:12). Unfortunately this example is not an incidence but a repeated practice also reported to be conducted by amongst others Spain and Malta (see for example: Selm and Cooper, 2006; McKleever, 2005).

3.5 The External Impact of Europeanization

Except for the Dublin Regulation and the Qualification Directive already discussed, this section will look at the most important policies the EU has set out affecting the right to seek refugee status.

3.5.1 Limitation of access to EU territory

As explained in chapter one, measures aimed at combating irregular migration, might ‘undermine the right to seek refugee status by hampering access to the EU and its asylum procedures’ (Da Lomba, 2004:106). The prime example of this ‘hampering’ of access is interception at sea, to be discussed in chapter four. Other measures hampering access might include travel document requirements and carrier sanctions.

One of the first Regulation adopted under Title IV concerned visa for stays not exceeding three months ((EC)539/2001). It should be noted that of all people, persons in need of international protection are in the worst position for obtaining these kinds of documents (Tekofsky, 2006:11). And although the Regulation provides for a list of exceptions for visa requirements, no reference is made to asylum seekers or the Geneva Convention. Because the right to seek refugee status cannot be called upon extra-territorially, visa requirements are not a breach of international refugee law, but ‘only’ make it more difficult for asylum seekers to seek protection.

In addition, carrier sanctions aggravate the need for valid travel documents. These sanctions penalize carriers that transport passengers not adequately documented when crossing the external borders of the Union (Da Lomba, 2004:112). In the Schengen agreement, it was already enshrined that carriers bringing in aliens that are refused entry are obliged to assume responsibility for them, by either returning them home or to a third state (art.26). To supplement this provision, the Council adopted a Directive (2001/51/EC) to harmonize the financial penalties imposed by the Member States on carriers who breach their obligations, when the carrier refuses to take 'the alien' back on board, or the State of destination refuses entry and have the alien send back (art.2(a)(b)). Fines now rank between 3.000 and 5.000 Euro.

It is positive that the Directive at least mentions that its application is without prejudice to the obligations resulting from the 1951 Convention and that fines shall not be imposed if the third country national seeks international protection. In effect however, the Regulation means a privatization of border control where responsibility to (pre)determine whether someone is eligible for asylum is shifted to border guards or carrier personnel. However, 'such persons are unlikely to be trained in refugee law, and are certainly unaccountable for their actions under international law' (McKleever et al, 2005:38). Also, the principle of *non-refoulement* might be violated, when carriers are returning third country nationals whose applications have not been properly considered.

Although both visa policies and carrier sanction were not new before it became a European competence to make legislation on these issues, through the process of Europeanization these practices became binding upon all Member States, thus limiting room to adhere to a more liberal visa system or to the non-application of fines for carriers. The combined effect of visa requirements and carrier sanctions make it nearly impossible for asylum seeker to enter the Union regularly.

3.5.2 Limitation of access to asylum procedures

Once asylum seekers have managed to reach European shores, legally or illegally, they should be granted access to a fair status-determination procedure. Member States can transfer this responsibility to each other through the Dublin system, which is already a highly questionable practice in the absence of harmonized rules on granting asylum. In addition, external transfers of responsibility to 'safe third countries' outside of the EU also take place.

The safe third country principle maintains that an asylum seeker is denied a substantive determination procedure if the person in question has traveled through a deemed safe country where he could have requested refugee protection. The principle was included in the Procedure Directive (2005/85/EC). The application of the concept is not necessarily in breach with Refugee Law, as long as a proper assessment is undertaken as to whether the third country concerned is indeed safe. But the Directive adopted goes even further by denying access to a procedure all together. In case of a 'super-safe third country', Member States should be granted:

the possibility not to examine an application for asylum and send the person to a 'supersafe' third country through which he/she has traveled [...if] the third country observes the Refugee Convention and the European Convention on Human Rights and has in place an asylum procedure prescribed by law (EU JHA Website).

Although the super-safe country concept has included the Geneva standards in its formulation, it is problematic that the Directive does not provide for any obligation to conduct regular updates on the safety of a third country. Apart from the idea that a country can be deemed safe for anyone is contentious, "safe" places may [also] become rapidly "unsafe" (McKleever et al, 2005:25-26), it may be even more important that the principle also leads to an unfair "externalization" of migratory pressure on neighbouring countries with less resources and less developed asylum systems (Post and Niemann, 2007:31).

The Procedure Directive provides for a common binding list to be adopted, but no proposal has come forward from the Commission yet. Regardless, the principle has already become firmly embedded in EU-discourse, which led Member States to embed it in their national law, as was already exemplified by the case of Poland. However, a safe third country rule is only relevant when the 'safe-third states' in question admit the nationals (back) onto their territory, hence the need for readmission agreements.

3.6 Externalization

Several authors have noted that the external dimension has rapidly developed into the most important aspect of a 'common refugee policy', leading to a shift of responsibility for asylum seekers to third countries (Rijpma and Cremona, 2007). In other words, the EU is trying to 'keep them out' or 'send them back' using every possible means. The sending back of individuals can happen by means of readmission agreements or clauses. Readmission agreements are legal instruments that require a state party to readmit its own nationals and sometimes also third country nationals at the request of another state party. Readmission agreements existed bilaterally before the EU did, but since Amsterdam the Community was granted the competence to conclude readmission agreements alongside Member States. During the Seville Council in 2002 this competence was taken a step further by demanding that each future EU association or cooperation agreement should include a clause on joint management of migration flows and compulsory readmission in the event of 'illegal' immigration.

In essence, readmission measures are aimed at combating unauthorized immigration, but in doing so often fail to provide for the specific circumstances of asylum seekers. 'They are symptomatic of a trend that consists in addressing asylum issues through the lens of migration control to the detriment of refugee protection' (Da Lomba, 2004:153/154). In the first three readmission agreements with Hong Kong, Sri Lanka and Macao, only reference is made to 'without prejudice to the rights, obligations and responsibilities' of the parties arising from 'International Law', but there is no

specific reference to human rights or refugee law (Peers, 2004). More worrisome, in the absence of refugee protection clauses, is the type of countries the EU is negotiating its agreements with, like Libya, China, Tunisia, Morocco and Syria (EU website). All the while the EU itself has for example acknowledged that Morocco does not have a functioning asylum system (Baldwin-Edwards, 2006:321).

More striking even are the far-reaching rules on readmission in the fight against irregular migration enshrined in the Cotonou Agreements with the ACP-countries (African, Caribbean, Pacific). Although those countries successfully blocked the obligation to readmit third country nationals, they are obliged to take back their own residents (Lavenex and Uçarer, 2004:434). Not only are these among the poorest countries of the world, but they also tend to produce refugees in need of protection, such as countries like Somalia and the Democratic Republic of Congo.

Europeanization as the reverberation of EU-policy making on third countries, in the case of readmission agreements, seems to be led by conditionality linking EU-aid to matters of asylum (Rees, 2005:215). In case a third state fails to meet its readmission requirements, the EU threatens that 'inadequate cooperation by a third State could hamper further development of relations with the EU' (Peers, 2004:5). And although the conclusion of such agreements is not new, the fact that they now fall within the competence of the Union has turned the practice into a Community tool and made it more widespread.

3.7 Conclusion

This chapter started off by questioning in what way the nature of the Europeanization of asylum and immigration policy since the ToA and the steps towards a common immigration and asylum system taken affect the right to seek refugee status. In conformity with the hypothesis, it has been illustrated that there has indeed increasingly been a restrictive interpretation and externalization of the obligations under the Geneva Convention, threatening the right to seek refugee status and violating the principle of *non-refoulement*.

First of all, Europeanization, as the process of building EU-level institutions has led to 'dirty' communitarization, where unanimity voting and the lack of public scrutiny or judicial control in general has led to the adoption of standards at the lowest common denominator. It has been argued however that in case QMV would have prevailed, in the absence of adequate scrutiny-mechanisms, the process of Europeanization might also have led to the adoption of more stringent asylum policies, in line with the preferences of bigger Member States.

In terms of Europeanization as the impact on the domestic level of Member States this lowest common denominator has allowed traditionally more liberal states, like Germany, to lower their standards too. Furthermore, through prescriptive Europeanization the New Member States were forced to adopt the full *acquis* and hence the stage was set for restrictive domestic asylum policies. On the other hand, through the Dublin Regulation heavy burdens

were placed on border states, who in the absence of a burden sharing mechanism started to ‘de-Europeanize’ their immigration policies by pursuing their own defensive policies.

Moreover, in terms of actual policies conducted at the EU level, visa requirements and the harmonization of carrier sanctions have impeded access to the whole of the EU. Carrier sanctions in addition also constitute a risk of *refoulement* when carriers are forced to transport back asylum seekers to prevent getting fined.

Lastly, there has been an increasing externalization of EU-responsibility over asylum seekers to third countries, amongst others through the Union wide acceptance of the safe-third-country principle and the conclusion of readmission agreements, which now fall within the competence of the Union. Not only does this practice place a heavy burden on countries that are less well resourced, but it also risks a violation of the principle of *non-refoulement* in the absence of refugee-safeguards.

Of course, in actual numbers it is impossible to assess how many refugees have not been able to leave their country, have been readmitted to unsafe places, or fell victim to chain-*refoulement* as a result of EU-policies. What is assessable is the ‘sharp downward trend in the number of new asylum-seekers arriving on the continent. Between 2002 and 2005, the number of new asylum claims submitted in Europe almost halved’. According to the UNHCR ‘it is generally believed that more restrictive asylum policies in many parts of Europe’ have hugely contributed to this decrease (UNHCR, 2007a:46). This chapter has illustrated that ‘more restrictive asylum policies’ have been facilitated and aggravated by the process of Europeanization. The next chapter will explain, through theories of European integration, why this Europeanization process has been characterized by dirty-communitarization and externalization.

4 THEORIZING EUROPEANIZATION AND THE RIGHT TO SEEK REFUGEE STATUS

In the previous chapter it has been argued that the shift of asylum and immigration policies to the EU-level has led to deterioration of the right to seek refugee status. Firstly, through a process of ‘dirty communitarization’, unanimity voting led to policy-making at the lowest common denominator, which on the one hand allowed more liberal states to adjust their asylum systems downwards, and on the other hand made New Member States adjust their premature asylum-systems to the restrictive parameters of the rest of the Union. Secondly, the Europeanization of asylum issues has led to externalization of the responsibility for refugees, by making it practically impossible to reach European soil ‘normally’, because of strict travel document requirements and carrier sanctions. Furthermore, ‘arrived’ asylum seekers run the risk of *refoulement*, through the adoption of safe-third-country rule and the conclusion of readmission agreements. Lastly, the implementation of a mechanism for determining Member State’s responsibility of refugees in the

absence of a burden sharing mechanism, has led some border states to pursue their own even more restrictive practices. This chapter will try to do explain how this particular nature of the Europeanization of immigration and asylum policies can be explained through theories of European integration.

In order to do so, first the classical dichotomy in European integration theory will be set out, based on International Relations (IR) theory: neofunctionalism versus (liberal) intergovernmentalism. A short description of a third IR-approach, constructivism, will be delivered, before drawing a dichotomy on a parallel level between sociological and rational choice institutionalism. Subsequently these prevailing dichotomies will be regrouped in transformative or actor-based approaches and reproductive or structure-based approaches. Afterwards both approaches will be applied to the case of the Europeanization of asylum and immigration policy.

4.1 Theories of European Integration

Although there seems to be a global consensus that the Union is ‘an extraordinary achievement in modern world politics’ (Moravcsik, 1998:1), there is less consensus when it comes to the nature of the Union and the causes of its development. As tools for explaining the process of Europeanization, longer-established meta-theoretical frames, such as neofunctionalism, new institutionalism, constructivism or liberal intergovernmentalism can be employed (Featherstone, 2003:12). Due to space constraints, only major assumptions of these overarching meta-theoretical frames will be presented. It should however be realized that a huge variety of approaches exists within these ‘frames’. Furthermore, theories of European integration are not necessarily incompatible and neither do any of them explain the entire EU. Hence it might be preferable ‘to see integration theory as a mosaic in which different perspectives come together in their own right’ (Wiener and Diez, 2004:242).

4.1.1 Neofunctionalism versus (liberal) intergovernmentalism

The classical dichotomy in European integration theory finds its origin in IR theory. The first attempts to theoretically conceptualize the nature of the European integration process date back to the 1950’s, when Ernst Haas published *the Uniting of Europe* (1958). Neofunctionalists attempt to explain why states are voluntarily pooling their sovereignty in supranational institutions by adopting a pluralist view of international politics. As a reaction against the then prevailing realist school, neofunctionalists assume that the state is neither a unified actor, nor the only player on the international stage. On the one hand government policies are determined by pressures from various interests groups. On the other hand supranational institutions, in this case the Commission can play a pivotal role in pushing for further integration (George and Bach, 2001:9). Pressures for deeper integration build up through functional, as well as political spillover effects. Functional spillover happens ‘when an original goal can be assured only by taking further integrative action’

(Post and Niemann, 2007:7). Political spillover denotes a convergence and shift of loyalties and identities to the European level by elites, who will 'adjust their aspirations by turning to supranational means when this course appears profitable' (Haas, 1966 in: George and Bach, 2001:12).

In the 60's, a counter-argument, drawing on the prevailing state-centered IR-perspective realism, was developed. Stanley Hoffman (1964; 1966), the protagonist of the early intergovernmental perspective, although not denying some influence of actors outside the governments, maintained that national governments are and would always be the 'ultimate arbiters of key decisions' (George and Bach, 2001:13). From the intergovernmental perspective the nature and pace of the integration process are determined by national interests and the power of bigger member states. Decisions to cooperate at the European level should be regarded in relation to the position of the state in a wider world system, by which its autonomy is being constrained. The argument is that in the anarchical surrounding of the state system, governments are strengthened, rather than weakened, as a result of the intergovernmental cooperation (George and Bach, 2001:12). This intergovernmentalist model could however not convincingly explain why states were handing over sovereignty to supranational bodies, especially after 1985 when the European project was reactivated leading to the single European market.

After twenty 'doldrums years' for both the European integration process and its scholarship, Andrew Moravcsik crafted a more rigorous version of intergovernmentalism that could elucidate this supranational institution building from a state-centered perspective: liberal intergovernmentalism. Like realism and 'traditional' intergovernmentalism, this approach started from the premise that states are rational and the principal actors in the international arena and that their actions are constrained by their position in the interdependent structure of the international system. But in contrast Moravcsik did not treat states as black-boxes, but rather like neofunctionalists, started from a liberal conceptualization of the state.

EU integration can best be understood as a series of rational choices made by national leaders. The choices responded to constraints and opportunities stemming from the economic interests of powerful domestic constituents, the relative power of each state in the international system, and the role of institutions in bolstering the credibility of interstate commitments (1998:18).

From this quote Moravcsik 'three-step-model' of European integration can be derived. In the first step he adheres to a 'liberal theory of national preference formation', where pressures stemming from the economic interests of domestic groups determine the position of the national government in international negotiations (1993:81). Within these international negotiations, domestic actors do not play a significant independent role (Schimmelfennig, 2004:77). Rather, outcomes in the second step are determined by the relative bargaining power of member states. The third step is to agree on a suitable institutional set-up to ensure the compliance of all member states to the outcomes of the negotiations. Hence (powerful) member states might push for supranational institutions, in which sovereignty is pooled, to prevent defecting.

But the supranational institutions are themselves thought to have little influence over policy outcomes. Thus historic intergovernmental agreements are perceived to have been driven by:

a gradual process of preference convergence among the most powerful member states, which then struck central bargains among themselves, offered side-payments to smaller member states and delegated strictly limited powers to supranational organizations that remained more or less obedient servants of the member states (Pollack, 2005:18).

4.1.2 Social constructivism

Social constructivism arrived at EU-studies quite late (end of the 90's), but as an IR-approach has been around for a while. Social constructivism in contrast with the neofunctional and (liberal) intergovernmental approaches, rejects the notion of rationalism, but instead maintains that:

human agents do not exist independent from their social environment and its collectively shared systems of meanings [...]. The social environment in which we find ourselves, defines ('constitutes') who we are, our identities as social beings' (Risse, 2004:160/161).

In relation to IR, this means that ideational factors and identity should be accorded just as significant a causal role as pure material interests (Hay, 2002:20/21). However as such 'social constructivism does not make any substantive claims about European integration' and can easily join a variety of approaches (Risse, 2004:160), for example the institutionalist school to be discussed below.

4.1.3 Sociological versus rational choice institutionalism

On a parallel level with the dichotomy in IR-theory, but this time derived from comparative politics, 'the 1990's witnessed the emergence of a new dichotomy in EU studies, pitting rationalist scholars against [social] constructivists' (Pollack, 2005:25). This dichotomy also became embedded in the new institutionalism schools that in general maintains that the institutional setting itself had been neglected by the classical integration theories. On one side of the spectrum, sociological institutionalists question the rationalist assumptions and argue that EU institutions have an effect on 'social identities and fundamental interests of actors' (Risse, 2004:160/161). Hence their ontological starting point is social constructivist. Deeper European integration from a sociological institutionalist point of view can thus be explained by the constitutive and transformative character of EU institutions, in which member states act on the basis of the 'logic of appropriateness'.

On the other side of the spectrum, rationalist approaches, like liberal intergovernmentalism, start from the 'logic of consequentialism', where actors are perceived to act as utility maximizers whose preferences and identities are a given. Rational choice institutionalists added to this that 'social institutions including the EU primarily constrain [...] the behaviour of actors', but can also

act as opportunity structures (Risse, 2004:163). For example, decision making rules shape policy outcomes in predictable ways. An example of this is unanimity voting, leading to the adoption of the lowest common denominator.

One approach within rational choice institutionalism deemed particularly relevant for the study of the Europeanization of asylum and immigration is the concept of *two-level bargaining*. 'The insight of the "two-level" metaphor is that governments, acting in the domestic and international arena's simultaneously, have to conciliate domestic demands with international pressures' (Post and Niemann, 2007:6). On the one hand, when negotiating on the international level, governments may (ab)use domestic constraints as bargaining power. On the other hand, governments may seek to be bound by international agreements to impose domestic reforms (Featherstone, 2003:9). As will be illustrated, the two-level 'game' has been played two-ways by Germany at the detriment of refugee protection.

A drawback of institutionalist theories is that no explanation is provided for the root causes of European integration. Therefore it might be fruitful to link them up with traditional IR theories in order to explain the process of integration at large.

4.1.4 Regrouping: transformative versus reproductive approaches

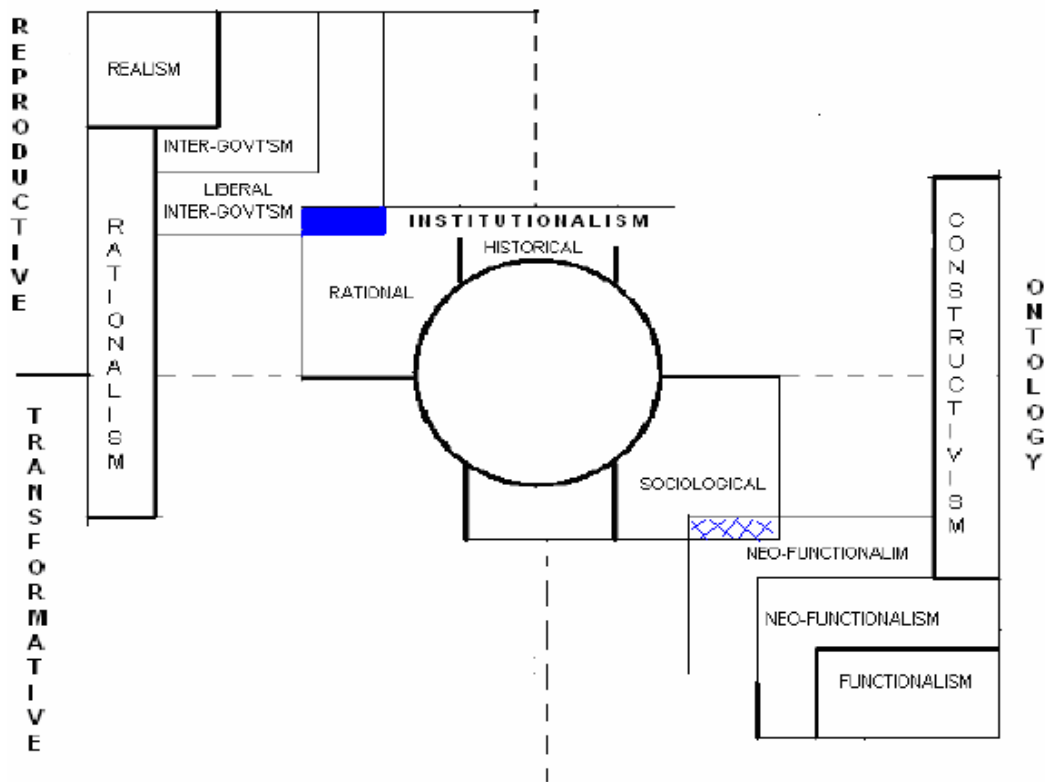
Indeed some aspects of the meta-theoretical approaches are not necessarily incompatible, but just explain different parts of the 'beast'. In an attempt to map the various European integration approaches, Philippe Schmitter drafted the Figure 4.1.⁵

As becomes clear from the shaded areas, there are two defining dimensions that pit neofunctionalism together with sociological institutionalism against (liberal) intergovernmentalism coupled with rational institutionalism, the former groups being characterized as 'constructivist' and 'transformative', whereas the latter is described as 'rationalist' and 'reproductive'.

To start with the transformative group, both neofunctionalism and sociological institutionalism presume that 'both actors and the "games they play" will change significantly in the course of the integration process' (Schmitter, 2004:47). The starting point of neofunctionalism is rather different from the assumptions of constructivism, because neofunctionalist accounts start from the rationalist assumption of utility-maximizing elites as the initial drive for integration. However, once integration has been set into motion, political spillover leads to convergence of identities to the supranational level by implying 'some constitutive effect of European integration on the various societal and political actors' (Risse, 2004:162). Thus, both neofunctionalism

⁵ The graph has considerably been simplified. For a full depiction and a thorough explanation see: Schmitter (2004).

FIGURE 4.1
Theories of regional integration



Source: Schmitter 2004, p.48

and sociological institutionalism, although coming from a different starting position, revolve around the transformation and construction of European norms, beliefs and identities. Alternatively, they could also be branded actor-based approaches, as the driving force for integration are the identities of the *actors* involved. However, a critique that could be voiced is that these actor-based approaches offer no explanation as to which or whose interests are involved in shaping and modifying this identity; they lack power perspective.

In contrast stand liberal intergovernmentalism and rational choice institutionalism that start from the premise that integration 'reproduces the existing characteristics of its member-state participants and the interstate system of which they are part' (Schmitter, 2004:47). In these approaches sovereign states will remain the central actors, whose preferences will determine the pace and outcome of the integration process. However, not every member state is in an equal position to determine this pace and outcome. Existing power-inequalities in the state system mean that the integration process will predominantly be determined by the interests of bigger, more powerful member states. From a rational institutional perspective, these existing power disparities between Member States also tend to be reproduced

in the institutions created at the European level, for example apparent in the relative weight that is given to each vote in the Council (roughly weighted on the basis of population). In contrast with the actor-based approaches, this reproductive perspective is derived from a 'structuralist' point of view, in 'that it takes as its object of investigation a 'system', that is, the reciprocal relations among parts of a whole, rather than the study of the different parts in isolation' (Palma, 1989 in Cypher and Dietsz, 1997:171). Hence the relationship of Member States vis-à-vis each other is determined by their position in the state-system as a whole. But structuralist explanations need not be confined to the level of the state.

This seems to be a lacuna in any of the approaches discussed; there is a lack of attention for power relations beyond the state level. As argued the transformative approaches seem to be completely void of power relations. In the reproductive approaches, power and interests do play a vital role in shaping the integration process. But power is conceptualized at the level of the state. Although Moravcsik accounts for state preferences being shaped by domestic economic power configurations, these configurations do not play a role when bargaining at the international level. None of these approaches gives attention to other possible constituencies of the 'system', such as companies or classes that could be shaping the integration process (Smith, 2001:246). An analysis of power structures beyond the level of the state, will unfortunately also fall outside the scope of this paper, but would be an interesting field for further inquiry.

4.2 Theories of European Integration and the Right to Seek Refugee Status

The question that lingers is how these theories can explain why the outcome of the integration process in terms of asylum and immigration has been partial, cross-pillar and overall detrimental for refugee protection. Hence this second part will, after analyzing the exogenous factors and functional spillovers guiding the Europeanization of immigration and asylum policy, successively apply a transformative and a reproductive approach.

4.2.1 Exogenous pressures

The EU does not develop in a vacuum and thus exogenous pressures, originating outside of the integration process, might play a pivotal role in the drive for integration. For neofunctionalists in an 'increasingly global world, states seek international solutions to domestic problems' (Faist and Ette, 2007:7/8). Due to exogenous spillover effects, states decide to transfer sovereignty to a higher supranational level, because issues go beyond their national ability to solve. Liberal intergovernmentalism on the other hand would argue that exogenous pressure leads 'to the convergence of national preferences and therefore establish a precondition for cooperation' (Faist and Ette, 2007:8).

In the case of the immigration and asylum policies, there was a manifold of exogenous pressures that led to ‘Europeanization’. Firstly, due to the end of the Cold War, globalization and the unification of Germany, there was a huge upsurge in the number of asylum seekers crossing European borders during the nineties. This upsurge was combined with rising levels of unemployment throughout Western Europe, leading to civil unrest and rising levels of xenophobia and consequently a rise of right-wing governments, who started to introduce more restrictive national legislation. Due to the interdependent nature of the refugee protection regime and arguably due to a functional spillover effect of the Schengen agreements, more liberal governments felt the need to follow suit. Furthermore, advancing globalization also resulted in increased cross-border crime and terrorism. Hence ‘measures towards harmonizing the treatment of asylum seekers arriving in the EU have become confused with issues of security’ (Amnesty, 2004:1). The 9/11 terrorist attacks only intensified this securitization of immigration and asylum issues.

4.2.2 Functional spillovers

Within the neofunctional approach to European integration functional spillovers are an important drive for deeper European integration. In this case the most important functional pressure was the abolition of internal border controls, which meant that once an asylum seeker crossed any EU-border he could practically apply for asylum in any or even a multitude of Member States. In order to contain this increased risk of ‘asylum shopping’, mechanisms to assign the responsible Member State were put in place, but these in turn created their own functional pressures to harmonize asylum systems (Post and Niemann, 2007:7). An additional functional pressure was the looming enlargement, expanding the borders of the EU to ‘porous’ frontiers eastwards, hence it became essential the Eastern states would be ‘secured’ from heaps of immigrants flowing in.

A strong argument can be made that the drive for cooperation on the EU level in the field of asylum and immigration was at least partly the result of functional spillover pressures of the desire to bring down borders. However, these pressures in themselves cannot explain why the communitarization took the shape it did (partial and cross-pillar). In addition, functional pressures can also be used in a liberal intergovernmentalist argument where these pressures build up to national preference convergence.

4.2.3 Transformative approaches and the Europeanization of asylum

Therefore, in order to explain the character of communitarization from a transformative perspective, we should be looking into the role of the Commission, political spillover effects and the role of interest groups. To start with the latter, because migration and asylum tend to be framed as a security rather than economic issues, this excludes the usual suspects of economic interest groups and multi-national corporations, to have played an important

role. In general, ‘immigration politics [...] are usually regarded as elite-dominated and characterized as a policy sector with strong executive dominance and only minor access by the legislatures, political parties and interest groups’ (Faist and Ette, 2007:24). It is however highly unlikely that elite-convergence of loyalties towards EU-level, through political spillover, had taken place before the communitarization. This is because the national ministries of the interior prevailing in the field of immigration had thus far hardly been involved in the European integration process (Lavenex, 2001:867). In addition there is ‘sparse evidence for socialization of national officials into European preferences or identities’ at all (Pollack, 2005:25).

Furthermore, the role of the Commission as a ‘stimulator of political spillover’ has also been contested. Concerning the communitarization of asylum policies, if it had indeed been the Commission that called the tune for further integration, why then was a transitional period of five years included and why were some states allowed to opt-out? Also, decision making during those transitional years have been characterized as cumbersome negotiations in the Council, with ‘the tendency of the Council to water down the most liberal proposals’ coming from the Commission (Antoniou, 2003). And if there indeed had been a transformation of the loyalties of the political elites, why then were member states so reluctant to hand over sovereignty and created such a hybrid and cross-pillar system? Hence it seems that a transformed identity does not come in as a helpful explanatory tool for the ‘turn to Europe.’ Consequently, we turn to the reproductive approaches.

4.2.4 Reproductive approaches and the Europeanization of asylum

It is hardly deniable that functional pressures have been a prime incentive for European cooperation in immigration and asylum issues, but neither can it be denied that Member States were reluctant to give up sovereignty exemplified by the incorporation of unanimity voting in the first pillar. In addition, the shift to QMV was made conditional upon prior unanimous adoption of minimum standards. Also many asylum issues were only dealt with in the second pillar. Lastly, the fact that three member states were allowed to opt-out all together seems to hint at the persistence of the primacy of Member State in congruence with the reproductive approaches.

As already argued, immigration was framed as a security issue, therefore the liberal assumption, that national preferences reflect the balance of economic interests at first sight, does not seem to hold true. It rather seems more likely that national preferences in this case were largely shaped by the exogenous pressures described above, chiefly the large influx of asylum seekers, in addition to the functional spillover of the abolition of internal borders. These exogenous and functional spillovers, could be argued to have shaped electoral preference for more stringent asylum policies. This on its turn led to a convergence of national preferences of several Member States, which set the stage for further cooperation in the field of immigration.

However, the conclusion that national preferences in the case of immigration are not determined by national economic interests might be

premature. It could be argued that, in an industrial type of economy, economic elites might push for liberal migration policies, as this will guarantee the supply of cheap labour. However, in the de-industrialized phase of most European economies, this demand for cheap labour is largely replaced by high skilled labour and the influx of immigrants would only threaten the welfare systems of these economies. To what extent economic interests might have played a role in shaping the process of Europeanization would be an interesting field for further research beyond the scope of this paper.

It should be realized that not all Member States were affected equally by the exogenous pressures described, since some countries take a much larger share of asylum seekers. Moravcsik and Nicolaïdis analyzed that ‘Germany is the government most vulnerable for external interdependence, since it takes a disproportionate share of EU immigrants and was [thus] the most adamant promoter of greater EU involvement’ (1999:63). Germany also shares the largest border with the New Member states, making it particularly vulnerable for asylum seekers coming from the East; hence it was important for Germany that functioning, restrictive asylum policies were put into place before the New Member States would accede and that accession was made conditional upon the adoption of these policies. Germany in particular sought to have the EU endorse its bilateral agreements with countries of eastern and central Europe on policies of returning immigrants to transit countries (Moravcsik and Nicolaïdis, 1999:63). Indeed, through the ToA, the EU was granted the competence to conclude readmission agreements alongside the Member States.

On the other hand, countries like Britain and Ireland, which being islands naturally have stronger control over their own borders, opposed supranational involvement. Britain threatened to use a veto, but eventually was allowed to opt out, together with Ireland and Denmark. The third Member State with quite some bargaining power was France, which was hesitant to put more power into the hands of the Commission and would only go along with the communitarization if a transitional period would be installed (Moravcsik and Nicolaïdis, 1999:78-79). Hence it seems that indeed the outcomes of negotiation in Amsterdam were a reflection of the relative bargaining power of Member States, where Germany set the stage, France determined the pace and UK left the table:

The primary lessons of Amsterdam for bargaining theory is that no amount of institutional facilitation or political entrepreneurship, supranational or otherwise, can overcome underlying divergence or ambivalence in national interests’ (Moravcsik and Nicolaïdis, 1999:83).

Then how can we explain the choice for supranationalism by the rest of the Member States after the transitional period? A rational choice theory of institutional choice maintains that states pool sovereignty through QMV, to enhance credibility of their agreement. In this case this in particular made sense in light of the enlargement. Restrictive immigration and asylum policies and thus tight border controls would not be desirable for the New Member States, as they ‘could notably endanger local economies’ (Hélène, 2007:4). On the one hand, states were reluctant to give up sovereignty in the field of asylum; on the

other hand they needed to be sure that especially the new Member States would not defect. Therefore the five year-transitional period allowed them to agree on minimum standards by unanimity that the New Member States would have to comply with. There is also another institutional logic to this, derived from historical institutionalism being that institutions and 'its' decisions are 'sticky'. So once those minimal standards would be agreed upon, QMV constitutes a high hurdle to overturn past choices (Pollack, 2005:20-21).

Lastly the institutional structure of the Amsterdam Treaty, notable the unanimity rule, permitted the Member States to play two-level games, and hence to uphold specific domestic procedures. Post and Niemann analyzed that Germany, during the negotiation of the Procedure Directive, discussed in Chapter 2, was able to export its "super-safe-third-country" concept to the European level. Germany, facilitated by unanimity voting, was pointing at domestic constraints to strengthen their bargaining position at the EU-level. Particularly forceful was the argument that Germany wanted to prevent constitutional change, as the safe-third-country-principle was embedded in their 1993 Constitution. Interestingly during the change of the Constitution itself, the German government 'played the game' the other way around 'as conservative policy-makers skilfully argued that ratification and functioning of European initiatives would require' a change of the Constitution (Post and Niemann, 2007:32). Hence it could be argued that the position of the government of Germany was strengthened, instead of weakened through EU cooperation, as it was able to manipulate domestic and international constraints to push through its own preferences.

4.3 Conclusion

This chapter started with the question how the nature of Europeanization, which led to the deterioration of refugee rights, can be explained through theories of European Integration. First it has been established that IR theories of and comparative approaches to European integration can be grouped into transformative and reproductive approaches. The former, including neofunctionalism and sociological institutionalism, start from a social-constructivist ontology and revolve around the construction and transformation of identity, norms and loyalties of actors and provide for a role of supranational institutions to enhance this identity. However, this perspective has been criticized for being void of power relations. The latter, including liberal intergovernmentalism and rational choice institutionalism, start from a structuralist perspective, focusing on the reproduction of power structures at the European level and giving primacy to (powerful) sovereign Member States. Although this approach does include a power perspective, it does not go beyond the level of the state, which would be an interesting field for further studies.

It has been analyzed that a reproductive approach provides the best explanation for the Europeanization of asylum and immigration policies. Given that states have been reluctant to hand over sovereignty - exemplified by the partial character of the communitarization with its opt-out's and the

adoption of minimum standards, lacking a full-fledged harmonization and a burden-sharing mechanism, and the cross-pillar approach - it seems highly unlikely that there has indeed been a transformation or socialization of elite identity towards deeper integration. In addition the Commission has only played a marginal role, as the proposals it has been putting forward have been watered down consistently by the Council.

Furthermore neofunctionalism, in terms of functional (though not political) spillover, does seem to have a huge explanatory value. One of the major drives for cooperation namely has been the abolition of internal border controls. In addition exogenous pressures such as the increase in asylum seekers and cross-border crime, due to the end of the Cold War, globalization, the unification of Germany and 9/11, created the need for a common policy. These neofunctionalist spillovers and exogenous pressures have been argued to have led to national preference convergence compatible with liberal intergovernmentalism.

In sum, it seems that in line with a reproductive approach, Member States have remained the principal actors at the expense of supranational institutions, chiefly the Commission, and that existing power structures have reproduced itself on the European level, by largely adopting the German agenda as the European agenda. However, the bargaining process might be expected to have flowed 'smoothly and without significant domestic political conflict because the restrictive European asylum measures have been supported by most national governments' (Faist and Ette, 2007:17).

This is a rather unfortunate conclusion. 'By privileging the sovereignty of the Member States *vis-à-vis* both European integration and refugee protection, the securitarian policy frame has impeded a substantive harmonization of national asylum policies' (Lavenex, 2001:855). Would the Commission have been the driving force for the communitarization of asylum and immigration issues, the policies adopted would probably have been more 'refugee-friendly' as has been illustrated by the persistent tendency of the Council to water down liberal proposal made by the Commission (Antoniou, 2003).

5 FRONTEX AND THE RIGHT TO SEEK REFUGEE STATUS⁶

So far a general overview has been provided of the Europeanization of asylum and immigration policies. It has been argued that the shift of asylum and immigration policies to the EU-level has been partial and detrimental to the protection of refugees. Amongst other things this is because EU-Member States have been harmonizing their respective asylum systems downwards and policies have been adopted that make it practically impossible to reach European borders legally. In addition there has been an externalization of

⁶ For this chapter Frontex has repeatedly been approached, but has not been available for commentary.

responsibility for refugees, by making it possible to send potential asylum seekers back to third countries or countries of origin which are deemed safe, but which sometimes are dangerous, thus risking *refoulement*.

From a theoretical point of view, it has been argued that this harmful nature of the partial-Europeanization process can be traced back on the one hand to functional spill-over effects, chiefly the abolition of internal borders. On the other hand intergovernmentalism has persisted in this policy area, where Member States have been careful only to transfer a minimal amount of sovereignty, and have tried to deal with migration issues in the intergovernmental second pillar as much as possible. Also, powerful member states have been able to push through their preferences, like the push by Germany to grant the EU competence to conclude readmission agreements.

Left aside so far is that the abolition of internal borders, has also led to an increase in the control of external borders. In order to coordinate the operational cooperation between Member States on border security, since 2005 an EU-community body has been called into being: Frontex. This chapter will analyze whether Frontex, as an illustrative case-study, suffers from the same characteristics of the wider Europeanization, like the reluctance to hand over sovereignty, and the externalization of the ‘refugee problem’, under the guiding question: how does Frontex and in particular its operations affect the right to seek refugee status?

Firstly the mandate and tasks of Frontex will be discussed in relation to the obligation to protect refugees. Subsequently special attention will be given to the longest running joint operation at sea, operation Hera around the Canary Islands, to illustrate the possible consequences of interception operations at sea for the right to seek refugee status.

5.1 Frontex’ Tasks and the Right to Seek Refugee Status

The name Frontex is derived from the French *Frontières extérieures*. The agency was legally established under Council Regulation (EC) 2007/2004, for which the legal basis can be found under Title IV of the ToA (art.62.2.a/66). Hence Frontex should be regarded as part of the process of communitarization of asylum and immigration policies (Carrera, 2007:17).

According to its own website, Frontex *raison d’être* is ‘to integrate national border security systems of Member States against all kind of *threats* that could happen at or through the external border of the Member States.’ Like the shift of immigration and asylum to the first pillar, the creation of Frontex should also be seen as a result of exogenous and functional spillover pressures. The former, essentially, increased cross-border crime and terrorism resulted in the framing of immigration and border management as security concerns. Functionally speaking, the abolishment of internal borders led to the increased importance of collective protection of external borders.

The border-agency supposedly is intelligence-based, independent and depoliticized. Its primary task is to coordinate and assist in operational cooperation between Member States in the management of external borders.

In addition, Frontex also carries out risk analysis and research, and is assigned the task to establish common training standards for national border guards. Lastly, the agency is also deemed to provide support for joint return operations.

Frontex' operations will usually take place at the request of one or several Member States, and need the agreement of all states involved. Mr Laitinen, Frontex' director, recently made clear that: 'Frontex doesn't have any vessels itself [...]. These assets belong to the Member States and they are subject to their will to deploy them' (2007). It is repeatedly stated, in the Regulation, at the Frontex-website and in its public communication that responsibility for the control of the external borders lies with the Member States, not with Frontex. This demonstrates the politicized nature of the organization, as its capacity to act 'is overly dependent on the actual level of cooperation from the Member States' (Carrera, 2007:9), which in conformity with previous chapters points at the reluctance of Member States to hand over sovereignty.

In addition, there is a severe lack of democratic control over the agency's activities. Although Frontex is a 'first-pillar-organization' and thus its budget has to be approved by the EP, in all other matters the Parliament is left out. The basis for all joint operations are risk assessments. These describe 'among other issues, the roots, routes, modus operandi, patterns of irregular movements, conditions of the countries of transit, statistics of irregular flows and displacement' (Carrera, 2007:14). Yet the substance of those assessments are kept secret for the public.

In addition to the persistence of intergovernmentalism, and the lack of public scrutiny, there is another parallel to the overall character of communitarization of immigration. Despite Frontex' first-pillar nature, it fulfills many tasks belonging to the second pillar (ILPA, 2007). The majority of the joint operations are enacted outside the territory of the EU. Frontex also takes part in joint-return-operations, assisting with the transfer of supposed 'illegal' immigrants back to their country of origin or a transit country. For these operations, Community financial means might be used. This joint-return-competence 'is the most widely discussed assignment of the Agency, especially as regards human rights, the increasing number of expulsions and the lack of common EU policy in immigration and asylum' (Hélène, 2007:17-18). Particularly the lack of a fully harmonized asylum system makes it problematic that Frontex assists in returning potential asylum seekers, without verifying whether someone has actually been put through a fair process.

But this criticism on the lack of attention for the protection of refugees can be applied to the entire organization. It is highly remarkable for an organization which deals with border management and thus inevitably with asylum seekers, that absolutely nowhere, not in its Regulation, nor on the Frontex website, nor in the evaluation of the joint operations, any reference is made to asylum seekers, refugees or Member States' obligations under the Geneva Convention. Only recently, Frontex has invited UNHCR to establish an institutional form of cooperation. UNHCR has urged Frontex to 'include training on international human rights and refugee law in the revised Common Core Curriculum for border guards' (UNHCR, 2007b:48).

Only very recently, in July 2007, the original Frontex-Regulation was amended by the adoption of the RABIT-Regulation ((EC)853/2007). This Regulation establishes Rapid Border Intervention Teams (RABIT) to provide operational assistance to a Member States, in urgent cases, such as the arrival of large numbers of third-country nationals (art.1). Leaving aside the potential implications of such RABIT-teams, what is important is that the Regulation includes that it 'shall apply without prejudice to the rights of refugees and persons requesting international protection' (art.2). The RABIT Regulation was one of the first pieces of co-decision legislation to be adopted under Title IV. Hence the EP was able to exert influence and incorporate the protection of refugees into the Regulation. But in recent statements both the European Council on Refugees and Exiles (ECRE) and the Immigration Law Practitioners' Association (ILPA) have criticized Frontex for not making clear anywhere how it will make the protection of refugees operational. And as Frontex hardly makes any information publicly available, it is difficult to check whether safeguards for refugees are really in place (2007).

5.2 Frontex' Joint Operation at Sea and the Right to Seek Refugee Status

Frontex tasks are not limited to operations at sea, but include any area of border protection including airports and land-borders. Operations at sea have however been Frontex' main occupation in its short history of existence. Examples are Operation Poseidon, focusing on the Eastern Mediterranean region, where vessels amongst other things have been diverted to Turkey, and Operation Nautilus, centering on the Central Mediterranean to tackle the migration flows to Malta and Italy. The longest running joint operation has been Operation Hera, on the Atlantic, near the Canary Islands (belonging to Spain). This operation will be taken as an example to explain the drawbacks of joint interception operations for refugee protection.

Operation Hera was started on the request of Spain, in response to migration flows departing from the coast of West Africa and heading for the Canary Islands. The first stage of the operation (July-October 2006) consisted of a group of experts from various EU countries giving support to the Spanish National Police with the identification of irregular immigrants who arrived to the Canary Islands without papers (Carrera, 2007:20). The main purpose was to identify countries of origin to make return easier and to catch the facilitators of the immigration flow. The second stage (Hera II: August-December 2006) brought together 'technical border surveillance equipment from several Member States with the aim to enhance the control of the area between the West African coast and the Canary Islands, thus diverting the vessels using this migration route' (Frontex website). The actual purpose of the operation was to discourage immigrants from setting off from the African West-Coast in the first place. In case vessels would go to sea anyway, the joint forces of Frontex would attempt to intercept the boats in the territorial waters of in this case Mauritania and Senegal and transport the intercepted boats back to African shores. Only if vessels had already passed the 24-mile zone and found

themselves in international waters, were they guided to the Canary Islands and granted the possibility to make an asylum claim (Carrera, 2007:21). The latter case means that at least in first instance the principle of 'non-return' was upheld. However this does not hold true for the principle of non-rejection, seeing that potential asylum seekers are denied entry or at least have been denied to leave without any proper hearing.

In addition, some reports severely doubt whether vessels already in international waters have indeed not been intercepted and returned, which would mean the principle on *non-refoulement* might have been violated. For example a UNHCR official commented that: 'Difficult situations may arise out on the high seas and it is difficult to tell what is going on in interception operations' (in: Crosbie, 2007, see also Kopp, 2007).

In congruence with other Frontex material made available to the public, none of the information on operation Hera contains the notion of asylum seeker or refugee. 'When the director of Frontex Mr Laitinen was asked about the fate of refugees who might also be targeted by these kinds of operations, he responded: "Refugees? They aren't refugees, they're illegal immigrants"' (Der Standard (21-12-2006) in: Kopp, 2007).

Joint operations like these, taking place in territorial waters of third countries, can only be conducted with the consent of these third countries (Rijpma and Cremona, 2007:14). In case of the Frontex operations, it is required that the main countries involved, in this case only Spain, conclude a bilateral agreement with the countries in whose sea the surveillance operation will take place. According to Heijer the 'African authorities [...] are well paid for this "service" by Spain and the European Union' (2007). However, the actual substance of these bilateral agreements remains closed to the public (Carrera, 2007), making these operations appear dubious at the least.

In their public presentation the joint operations tend to be framed in a humanitarian discourse, such as: 'joint operations at sea contribute to the reduction of human lives lost at sea during the dangerous long journey' (Frontex website). Except that no proof exists for this fact, as 'immigrants' might try to find other, even more hazardous ways to make their way to the EU (Spijkerboer, 2007), questions can also be raised about the humanitarian discourse itself, by arguing that the EU 'is erecting a 'Berlin wall on water' controlling its border while removed from public scrutiny' (Rijpma and Cremona, 2007:20). What is 'disregarded' in this extra-territorial border control is that, in the attempt to prevent immigrants making their move to the EU, the mobility of potential asylum seekers is also being curbed, undermining the right to seek refugee status (ECRE, 2007:3).

Besides that, throughout all Frontex documentation 'illegal' immigrants are treated as 'numbers', without any compassion for the complexity of their situation, and the only thing that is reported is how many have been intercepted, diverted or sent back, no information is released on the identity of those that have not been sent back. Asylum-seekers are simply non-existent in Frontex' vocabulary. And:

Since it is not known whether any of the thousands of individuals that have come into contact with Frontex coordinated border guards wanted or attempted to seek asylum, we cannot be satisfied that adequate safeguards are in place to ensure that access to asylum is guaranteed (ECRE, 2007:8).

5.3 Conclusion

Based on the question how Frontex and its operations affect the right to seek refugee status, it has been illustrated that Frontex can serve as a mini-universe, suffering from the same characteristics as the wider harmful nature of Europeanization in the field of immigration and asylum. First of all, Frontex also came into existence as a result of exogenous and functional spillovers, chiefly the increase in cross-border crime and the abolishment of internal borders. Furthermore, Member States have been reluctant to hand over sovereignty in the field of border protection, which is why Frontex does not possess any operational power and is reliant on the consent of Member States. Frontex can thus be seen as an embodiment of EU's Member States. There has also been a severe lack of public scrutiny as the European Parliament only has a say over the budget, while risk assessments and readmission agreements, on the basis of which operations are conducted, are kept secret.

Most importantly, Frontex has been painstakingly silent on the mere existence of refugees, which is highly remarkable for an organization dealing with external borders. Furthermore, the joint interception operations at sea coordinated by Frontex should be seen as symptomatic for the externalization of the responsibility over refugees. It has been illustrated that Operation Hera, enacted in the territorial waters of Senegal and Mauritania, might or might not have violated the principle of *non-refoulement*, as Frontex claims that refugees that managed to cross territorial waters have been granted the possibility to lodge an asylum claim, but by some this is questioned. However, by intercepting third-country nationals without establishing their legal status in the territorial waters of third states, the mobility of refugees has been severely curbed (Carrera, 2007:25).

One might argue, had Frontex not existed, 'Member States would go it alone, under bilateral or other agreements with third countries' (ILPA, 2007). The difference however, is that in such a case at least national governments would be more directly accountable to their Parliaments. Now there seems to be an accountability gap. In addition, because of Europeanization community budget was made available for interception operations on behalf of the whole Union. Thus again Europeanization led to the deterioration of refugee protection.

To conclude, only last summer a new Regulation (the RABIT-Regulation) was adopted, for the first time through co-decision of the European Parliament, that positively specifies that Frontex' operations should take into account refugee protection. However, Frontex has until today not made clear how this will be made operational. And all the while there is no way to scrutinize the actions carried out by Frontex on behalf of Member States, as almost all information is kept secret.

6 CONCLUSION

At the beginning of this paper a picture was drafted of refugees being caught up in an undifferentiated movement of 'illegal' immigrants. For these refugees, a daunting challenge lay ahead to reach European shores safely in order to lodge a claim for asylum. The hypothetical question was posed whether this challenge would have been easier had the EU not existed. But the EU does exist and the ToA (1997) even 'communitarized' the policy areas of asylum and immigration. By looking at how the Europeanization of asylum and immigration policy affects the right to seek refugee status in the European Union in congruence with International Refugee Law, this paper has illustrated that this 'existence of the EU' has been leading to deterioration of the protection of refugees.

Europeanization itself has been conceptualized as the responses to and effects of policies of the EU. First of all, it has been argued that the Europeanization, as building EU-level institutions, has led to partial and 'dirty' communitarization where unanimity voting and the lack of public scrutiny or judicial control has led to the adoption of standards at the lowest common denominator and allowed Member States to harmonize their respective asylum systems downwards, whereas other Member State have opted out of this policy field altogether. However, arguably a shift to QMV without putting into place adequate scrutiny mechanisms might have had the same effect, as restrictive policies in line with the preferences of bigger Member States would have prevailed. Moreover, prescriptive Europeanization made New Member States adjust their premature asylum-systems to the restrictive parameters of the rest of the Union. Lastly the implementation of a mechanism for determining Member State's responsibility for asylum seekers (the Dublin II Regulation), in the absence of a burden sharing mechanism, has led some border states to pursue their own even more restrictive practices, being branded as de-Europeanization.

Secondly, Europeanization as externalization has led to a shift of responsibility for refugees to non-EU countries, which are usually less resourced and with less developed asylum systems. On the one hand it has been made near to impossible to reach European soil 'normally', through the adoption of EU visa requirements and carrier sanctions, where the former fails to make any provisions for the special circumstances of refugees and the latter has led to a privatization of border control. Furthermore, through the widespread acceptance of the safe-third-country principle and the conclusion of readmission agreements, this risk of *refoulement* has become very topical. Also the joint interception operations by Frontex, the community organization for the coordination of border protection, should be seen in the light of externalization of responsibility. The intercepting of third-country nationals without establishing their legal status in the territorial waters of third states does severely curb the mobility of refugees, just as travel document requirements, carrier sanction and safe-third country rules do. In this light of the deterioration of refugee protection, the painstaking silence of Frontex on

the mere existence of refugees is most remarkable for an organization that deals with the protection of external borders.

From a theoretical point of view, it has been argued that the harmful nature of the partial-Europeanization process can be traced back to exogenous pressure like the increased influx of asylum seekers and the growth in cross-border crime in combination with functional spillover effects, chiefly the abolition of internal borders. In addition liberal intergovernmentalism has prevailed, as Member States have been careful only to transfer a minimal amount of sovereignty, and have tried to deal with migration issues in the intergovernmental second pillar as much as possible. Also, powerful member states have been able to push through their preferences, like the push by Germany to grant the EU competence to conclude readmission agreements and enshrining the safe-third-country principle in one of the directives.

On a more precautionary note, the creation of a common European asylum system is 'work in progress'. It was only recently that unanimity voting was abandoned, the Commission was granted the exclusive right of initiative, and the EP the right to co-decide. This happened right at the time that Europe ended up in a severe crisis, with the Dutch and French "No" against the Constitutional Treaty. The new Frontex Regulation has shown the positive impact co-decision can have as it at least includes the explicit protection of refugees. As yet however, the Court still does not have full competences, and most issues concerning asylum are dealt with in the second pillar. In addition, the historical institutional wisdom applies that 'institutions are sticky' and that decisions once taken are difficult to overturn. And thus 'the implementation of a 'securitarian', state-centred policy frame [...], paradoxically, poses severe constraints on the EU's capacity to develop a [true] common refugee policy' (Lavenex, 2001: 855).

It is ironic that the states that put up joint efforts after the Second World War to share global responsibility for those people in need of international protection are precisely those states that are failing to live up to their commitments under this Convention, and are now putting up joint efforts, through the EU, to ban illegal immigration, simultaneously shutting out refugees. Thereby the EU is threatening to cause a deterioration of global refugee protection, because due to the interdependent and fragile nature of the protection regime, breaches of international refugee and human rights law may encourage and legitimize similar trends outside the Union. I would therefore like to conclude with the words of former UN Secretary Kofi Annan:

When refugees cannot seek asylum because of offshore barriers [...] or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken. And the promise of the Convention is broken too (2004).

REFERENCES

- Amnesty International (2004) 'Threatening Refugee Protection: Amnesty International's Overall Assessment of the Tampere Asylum Agenda, June 1999–May 2004'. Retrieved on 28 August 2007 from: http://www.aieu.be/static/documents/Tampere_AI_June_2004.doc
- Annan, Kofi, UN Secretary General, Address to the European Parliament, 29 January 2004.
- Antoniou, Theofania (2003) 'The Communitarisation of the Asylum Policy: a Ticket to Enhanced Human Rights Protection?' 30.6.2003 (Bruges), retrieved on 5 September 2007 from: <http://www.cafebabel.com/en/article.asp?T=A&Id=484> .
- Baldwin-Edwards, Martin (2006) "'Between a Rock and a Hard Place'", North Africa as a Region of Emigration, Immigration and Transit Migration', *Review of African Political Economy* 108: 311-324.
- Carrera, Sergio (2007) 'The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document no. 261. Brussels: Centre for European Policies.
- Crosbie, Judith (2007) 'Frontier agency keeps migrants in its sights', *European Voice* 13 (13) (4 April 2007), retrieved on 2 November from: <http://www.europeanvoice.com/archive/article.asp?id=27753>
- Crisp, Jeff (2003) 'A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime', New Issues in Refugee Research Working Paper No.100. UNHCR Evaluation and Policy Analysis Unit.
- Cypher, James M. and James Dietz (1997) *The Process of Economic Development*. London and New York: Routledge.
- Da Lomba, Sylvie (2004) *The Right to Seek Refugee Status in the European Union*. Antwerp, Oxford, New York: Intersentia.
- ECRE and Refugee Council (2007), 'Refugee Council and the European Council on Refugees and Exiles (ECRE) Joint Response to Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry', 24 September. Retrieved on 2 November from: http://www.ecre.org/resources/policy_papers/955
- Edwards, Alice (2005) 'Human Rights, Refugees, and the Right "To Enjoy" Asylum', *International Refugee Law* 17(2): 293-330.
- European Commission (2007) 'Green Paper on the Future Common European Asylum System', Memo 07/229. Brussels 6 July.
- Faist, Thomas and Andreas Ette (eds) (2007) *The Europeanization of National Policies and Politics of Immigration: Between Autonomy and the European Union*. Basingstoke: Palgrave Macmillan.
- Featherstone, Kevin and Claudio M. Radaelli (eds) (2003) *The Politics of Europeanization*. Oxford: Oxford University Press.
- Featherstone, Kevin (2003) 'Introduction: In the Name of "Europe"', chapter 1 in: Kevin Featherstone and Claudio M. Radaelli (eds) *The Politics of Europeanization*, pp.3-26. Oxford: Oxford University Press.
- Flynn, Michael (2006) 'On its Borders: New Problems', *Bulletin of the atomic scientists* 62(6): 21-23.

- George, Stephen and Ian Bach (2001) *Politics in the European Union*. Oxford: Oxford University Press.
- Goodwin-Gill, Guy S. (1985) *The Refugee in International Law*. Oxford: Clarendon Press.
- Guild, Elspeth (2006) 'The Europeanization of Europe's Asylum Policy', *International Journal of Refugee Law* 18(3-4): 630-651.
- 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (2004) Brussels European Council, 4-5 November.
- Hay, Colin (2002) *Political Analysis: A Critical Introduction*. New York: Palgrave.
- Heijer, Maarten den (2007) 'Operation Hera III', 1948, 21 April. Retrieved on 2 November from:
http://weblog.leidenuniv.nl/fdr/1948/2007/04/operation_hera_iii_1.php.
- Hélène, Jorry (2007) 'Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the Frontex Agency a Decisive Step Forward?', CEPS Challenge Research Paper No. 6. Brussels: Centre for European Policy Studies.
- ILPA (Immigration Law Practitioners' Association) (2007), 'Ilpa submission to the select Committee on the European Union Sub Committee F - Frontex Inquiry September 2007', 26 September. Retrieved on 2 November 2007 from:
<http://www.ilpa.org.uk/submissions/menu.html>.
- Kopp, Karl (2007) 'Rights on the Edge - The EU's Common Asylum Policy'. Retrieved on 2 November 2007 from:
<http://www.goethe.de/ins/sn/dak/ges/en2081562.htm>.
- Laitinen, Illka (2007), 'Frontex - Myths and Facts', 11 June. Retrieved on 5 September 2007 from: http://www.frontex.europa.eu/newsroom/news_releases/art26.html.
- Lavenex, Sandra and Emek M. Uçarer (2004) 'The External Dimension of Europeanization –The Case of Immigration Policies', *Cooperation and Conflict* 39(4): 417-443.
- Lavenex, Sandra (2001) 'The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies', *Journal of Common Market Studies* 39(5): 851-874.
- Lauterpacht, Sir Elihu and Daniel Bethlehem (2003) 'The Scope and Content of the Principle of *Non-refoulement*: Opinion', in: Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law UNHCR's Global Consultations on International Protection*, pp. 122-181. Cambridge: Cambridge University Press.
- McKleever, David, Jessica Schultz and Sofia Swithern (2005) 'Foreign Territory: the Internationalization of EU Asylum Policy'. Oxford: Oxfam GB. Retrieved on 30 November 2007 from www.oxfam.org.
- Moravcsik, Andrew (1993) 'Preferences and Power in the European Community. A Liberal Intergovernmentalism Approach', *Journal of Common Market studies* 31(4): 473-524.
- Moravcsik, Andrew (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell University.
- Moravcsik, Andrew and Kalypso Nicolaidis (1999) 'Explaining the Treaty of Amsterdam: Interests, Influence, Institutions', *JCMS: Journal of Common Market Studies* 37(1): 59–85.
- Olsen, Johan (2002), 'The Many Faces of Europeanization', *Journal of Common Market Studies* 40(5): 921-52.

- Orchard, Phil (2005) 'Refugees and the International Sovereign State System The Need for a Relief Valve', paper presented at the Conference of the Canadian Political Science Association (2-4 June).
- Peers, Steve (2004) 'Vetoes, Opt-outs and EU Immigration and Asylum law', Statewatch briefing prepared for Statewatch, 23 December 2004. University of Essex (24 December). Retrieved on 7 September from: <http://www.statewatch.org/news/2004/dec/eu-immig-opt-outs3.pdf>
- Pollack, Mark A. (2005) 'Theorizing EU Policy Making', in: Helen Wallace, William Wallace and Mark A. Pollack (eds) *Policy-Making in the European Union*, pp. 13-48. Oxford: Oxford University Press.
- Pollack, Mark A (2004) 'The New Institutionalism and European Integration', Chapter 7 in: Antje Wiener and Thomas Diez (eds) *European Integration Theory*, pp. 137-156. Oxford and New York: Oxford University Press.
- Post, Dorothee and Arne Niemann (2007) 'The Europeanisation of German Asylum Policy and the "Germanisation" of European Asylum Policy: the Case of the "Safe Third Country" Concept', paper prepared for Conference of the European Union Studies Association (EUSA), Montréal, (17-19 May).
- Rees, Wyn (2005) 'The External Face of Internal Security', Chapter 10 in: Christopher Hill and Michael Smith (eds) *International Relations and the European Union*, pp 204-224. New York: Oxford University Press.
- Rijpma, Jorrit and Marise Cremona (2007) 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law', European University Institute Working Papers Law No. 2007/01.
- Risse, Thomas (2004) 'Social Constructivism and European Integration', Chapter 8 in: Antje Wiener and Thomas Diez (eds) *European Integration Theory*, pp. 159-175. Oxford and New York: Oxford University Press.
- Rumford, Chris (2006) 'Rethinking European Spaces: Territory, Borders, Governance' *Comparative European Politics*, 4(2-3): 127-140.
- Schimmelfennig, Frank (2004) 'Liberal Intergovernmentalism', Chapter 4 in: Antje Wiener and Thomas Diez (eds) *European Integration Theory*, pp. 75-94. Oxford and New York: Oxford University Press.
- Schmitter, Philippe C. (2004) 'Neo-neofunctionalism', Chapter 3 in: Antje Wiener and Thomas Diez (eds) *European Integration Theory*, pp. 45-74. Oxford and New York: Oxford University Press.
- Schuster, Liza (2005) 'The realities of a new asylum paradigm', COMPAS Working Paper No. 20. University of Oxford.
- Selm, Joanne van (2005) 'European Refugee Policy: is there such a thing?', New Issues in Refugee Research Working Paper No. 115. UNHCR Evaluation and Policy Analysis Unit.
- Selm, Joanne van (2004) 'The EU as a Global Player in the Refugee Protection Regime', AMID Working Paper Series No. 35. Washington: Migration Policy Institute.
- Selm, Joanne van and Betsy Cooper (2006) 'The New "Boat People" Ensuring Safety and Determining Status'. Washington: Migration Policy Institute.
- Smith, Steve (2001) 'Reflectivist and constructivist approaches to international theory', chapter 11 in: John Baylis and Steve Smith (eds) *The Globalization of World Politics: An Introduction to International Relation*, pp. 224-249. Oxford: Oxford University Press.

- Spijkerboer, Thomas (2007) 'The Human Costs of Border Control', *European Journal of Migration and Law* 9: 127–139.
- Seville European Council (2002, Presidency Conclusions 21 and 22 June.
- Tampere European Council (1999), Presidency Conclusions 15 and 16 October.
- Tekofsky, Aliza (2006) 'Security in European Union External Border Law', *Challenge, Liberty and Change*. Retrieved on 5 September 2007 from:
<http://libertysecurity.org/article846.html>
- UNHCR (2007a), '2005 UNHCR Statistical Yearbook: Trends in Displacement, Protection and Solutions'. Retrieved on 1 September from:
<http://www.unhcr.org/statistics/STATISTICS/464049e80.pdf>.
- UNHCR (2007b) 'Response to the European Commission's Green Paper on the Future Common European Asylum System'. Retrieved on 7 September from:
<http://www.unhcr.org/protect/PROTECTION/46e53de52.pdf>.
- UNHCR (2006), 'The 1951 Refugee Convention: Questions and Answers'. Retrieved on 27 September 2007 from:
<http://www.unhcr.org/basics/BASICS/3c0f495f4.pdf>.
- Wallace, William (2005) 'Post-sovereign Governance: The EU as a Partial Polity', in Willam Wallace and Helen Wallace (eds) *Policy Making in the European Union*, pp. 483-503. New York: Oxford University Press.
- Wiener, Antje and Thomas Diez (2004), *European Integration Theory*. Oxford and New York: Oxford University Press.
- Wong, Reuben (2005) 'The Europeanization of Foreign Policy', chapter 7 in Christopher Hill and Michael Smith (eds) *International Relations and the European Union*, pp. 135-253. New York: Oxford University Press.

TREATIES AND LEGISLATION

- 'Carrier sanctions Directive': Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.
- Convention Relating to the Status of Refugees (1951).
- 'Dublin II Regulation': Council Regulation (EC) No 343/2003 of 18 February 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.
- 'Frontex Regulation': Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.
- 'Procedure Directive': Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.
- Protocol Relating to the Status of Refugees (1967).
- 'RABIT Regulation': Regulation (EC) No. 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No

2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

'Qualification Directive': Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

'Visa Regulation': Council Regulation (EC) No 539/2001 of 15 March 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

WEBSITES

<http://www.ec.eu.org>

http://ec.europa.eu/justice_home/doc_centre/asylum/doc_asylum_intro_en.htm

<http://www.frontex.europa.eu/>

<http://www.carleton.ca/ces/EULearning/introduction/federations.html>