5 Europeanization and the Right to Seek Refugee Status: Reflections on Frontex

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5.1 Introduction

Since the end of the Cold War, relations between immigration politics and national security have undermined the continuing validity of the 1951 Refugee Convention in different parts of the world.[1] In the European Union (EU), the effects of the abolishment of internal borders since the Schengen Agreement in 1985 have fostered a linkage between migration and security politics, amplified also by unanticipated external pressures. Efforts to harmonize policy in the domain of migration and asylum within an enlarged EU have produced a hybrid system with blurred competences, opt-outs, and a different status for new member states. Furthermore, the creation of Frontex in 2005 has raised concerns about the legitimacy of extra-territorial border control, amongst many other issues.[2]

Frontex may be seen as the outcome of a re-balancing of powers between the member states, the Council and the Commission that has shifted the coordination of operational activity from an intergovernmental approach under the authority of the Council to that of the Community or a supranationalist approach (Neal 2009). Frontex seems to embody the persistent tension between these approaches to EU integration. At the time of writing, Frontex lacks its own operational power and relies on the consent of member states for all its activities.

The lack of consensus on adequate standards for border and pre-border controls – such as identifying asylum-seekers along EU borders and ensuring access to asylum procedures, deciding on where asylum-seekers should be disembarked when intercepted, and who should be responsible for the examination of asylum claims – means that border control operations are inevitably controversial from a human rights perspective. Frontex joint interception operations at sea since 2006 in the Atlantic (Hera), the central Mediterranean region (Nautilus) and the Western Mediterranean area (Poseidon) remain the most contentious tasks. Apart from the principle of *non-refoulement* that obliges states not to divert ships carrying people who seek asylum, international maritime rules also forbid a ship's captain from ignoring calls for rescue. The failure to agree on adequate human right standards for border and pre-border control modalities means that member states run the risk of violating the European Convention on Human Rights (Weinzierl 2008) and can also be vulnerable to critique of state-led group profiling and racism (Bunyan 2010).

This chapter places Frontex within the broader process of Europeanization and illustrates how its emergence manifests the evolution of thinking and manoeuvres behind EU policies on immigration that gradually undermines the validity of the Refugee Convention despite formal commitments by all member states. Frontex may be symptomatic of this wider process and in many ways has taken on the flaws inherent in the process of European integration itself. We will first explain how the right to seek refugee status has been compromised in the process of Europeanization. Next we will illustrate the process through which this compromise has emerged, was negotiated and enacted, giving birth to Frontex as an institutional reality. The remainder of the chapter will offer a perspective on the nature of Europeanization as a process and its outcome, drawing particularly upon Philippe Schmitter's identification of the dichotomy between transformative and reproductive approaches to Euro-

1 The 1951 United Nations Convention Relating to the Status of Refugees, is commonly known as the Refugee Convention. The recent EU documents concerning this Convention use the term, Geneva Convention.

2 Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the member states of the EU, by Council Regulation (EC) 2007/2004 (26.10.2004, OJL 349/25.11.2004).

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pean integration to explain the emergence of Frontex as an unfolding reality.

5.2 Europeanization of Immigration Policy and its Effects on the Right to Seek Refugee Status

The concept of Europeanization is used by scholars seeking to move beyond the one-dimensional concept of European integration as 'communitarization' or harmonization. Despite its popularity the definition of 'Europeanization' remains contested. Originally, the term was adopted to analyse the influence of EU Community Laws and supranational directives[3] on the institutional structures and policies of the various member states. Although this perspective is still the dominant approach in the literature (Faist/Ette 2007; Olsen 2002), the breadth of the term has been extended to denote a variety of changes within European politics, describing a multi-facetted process that is "variously affecting actors and institutions, ideas and interests" (Featherstone 2003: 3) across and beyond the EU. The meaning of Europeanization in its most minimalist sense is the responses to, and effects of, European integration and policies developed at the level of the European Community (Featherstone 2003). This definition appears appropriate for our analysis, which focuses mainly on the change of rules in governmental attempts to harmonize immigration policy at EU level and how they affect refugee and asylum policy.

The right to seek refugee status (or to claim asylum) itself can be inferred from the 1951 Refugee Convention to which all EU member states are party. To prevent *refoulement* as a core principle of the Convention, this right entails that anyone presenting him or herself at, or within, the borders of a particular country as someone seeking asylum due to political persecution should be granted a fair procedure of determination on an individual basis without the threat of return, or rejection before entry. Asylum seekers might however be transferred to a safe third country provided they will be granted the possibility to lodge a claim for asylum in that third country (Goodwin-Gill 1985; Rijpma/Cremona 2007).

The application of the Refugee Convention in the EU territory was far from uniform, embedded as it has been in member states' particular histories and politics, plus the fact that it is also bound by the principle of national sovereignty. A wide variance has existed insofar as the interpretation of the definition of a refugee is concerned. Harmonizing its application implies the major challenge of reducing disparities between member states' legislation and practices. A driving force behind the harmonization of migration and refugee policies has been the removal of systematic border controls between member states, while simultaneously strengthening them with non-members. The process of border removal and the subsequent harmonization of asylum and migration polices has gone through several stages of modification, moving gradually from an intergovernmental mode of cooperation, to attempts to create a Common European Asylum System at the supranational level. The different stages of Europeanization in the area of asylum and migration revealed the ongoing tension between state sovereignty and European integration, reflecting a fractured process.

The first stage of harmonization began with the Schengen Agreement signed in 1985;[4] the transformative stage with the Treaty of Amsterdam in 1997 and beyond. The first step of implementation of the Agreement was the Gradual Abolition of Checks at the Common Borders of signatory countries. In parallel, an Ad Hoc Working Group on Immigration was formed in 1986 and created the 1990 Dublin Convention in an attempt to harmonize asylum policies in the EU, beyond the signatories of the 1985 Agreement. This convention seeks to avoid two types of situations: the shuttling of refugees from one member state to another, and multiple or simultaneous applications. It ensures that every application for asylum is examined by a member state and requires in principle that individuals make their application for asylum in the first EU country they enter. Although the Schengen area has come to represent a territory with common application of some rules and procedures with regards to visas, asylum requests and border controls, not all countries cooperating in Schengen are parties, either because they do not wish to eliminate border controls or because they do not yet fulfil the required conditions.[5]

3 EU Community Law is also known as *Acquis communautaire*. This includes all the treaties, regulations and directives passed by the European institutions as well as the rulings of the Court of Justice.

4 Five of the then ten member states of the European Community (Belgium, France, Luxembourg, the Netherlands and West Germany) signed this Agreement.

The introduction of a number of Treaties (Maastricht 1992, Amsterdam 1997, Nice 2001, Lisbon 2009) gradually altered the decision making structure within the EU. The Treaty of Maastricht (1992) created a single market with free movement of goods, persons, services and capital, under a three-pillar structure of decision-making. The first pillar – the European Community – is the only supranational one. It deals mainly with economic integration and related social and environmental policies. The second pillar deals with EU's external relations under the name of Common Foreign and Security Policy. The third pillar focuses on *Justice and Home Affairs* (JHA) where asylum and immigration reside. The Treaty excluded one category from the free-movement-mantra: refugees. "Thus an exception to the logic of territorial integration [was] created out of the bodies of refugees" (Guild 2006: 637).

Under the Treaty of Amsterdam (1997) mandated to create an area of "freedom, security and justice" for citizens of member states, decision-making on the movements of third-country nationals into, and within, EU territory shifted from the third to the first pillar under Title IV on Visas, Asylum and Immigration. In this shift, the two pre-existing initiatives at European level in this field – the Schengen Agreement and the Dublin Convention – became Community Laws.[6] The third pillar received a new name: Police and Justice Cooperation in Criminal matters.

The difference between the first and the other two pillars lies primarily in the mode of decision-making. The first pillar is characterized by the supranational principle, according to which member states partly transferred their sovereignty in decision-making to the Community level, whereas decisions in the other two pillars are predominantly intergovernmental and enacted based on voting by unanimity. The powers of the European Parliament, the Commission and the European Court of Justice in these two pillars are limited. The 1999 Tampere Programme set out policy guidelines and practical objectives for the progressive implementation of the Treaty, including agreements on minimum standards to be decided upon by unanimity.

Despite the repeated reaffirmation of the commitments to the protection of refugees in documents of EU institutions, human rights organizations are accusing "European governments and institutions [...to] continue to scale back rights protections for asylum seekers and migrants" (McKleever/Schultz/Swithern 2005: 14). Scholars have extensively covered the scaling back of protection as permeated through EU policy developments (Lavenex 2004; Lavenex/Uçarer 2004; Da Lomba 2004; Guild 2006; Rijpma/Cremona 2007; van Selm 2005). They have noted three key trends: 1) impeding access to EU territory, 2) impeding access to the process of fair determination, and 3) externalization of border control.

An examination of some key directives of the European Council that affect the right to seek asylum shows that major compromises had been made at the EU level.[7] The Visa-Regulation ((EC) 539/2001), for example, lists the countries whose nationals must be in possession of visas when crossing the external borders, and those whose nationals are exempted from that requirement. It is a case-by-case approach to the assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries. Article 1, Clause 7 on stateless persons and recognized refugees allows member states to decide whether these categories of persons shall be subject to the visa requirement or not; exemption should be based on the third country in which these persons reside and which issued their travel documents. Persons in need of international protection are in the worst position for obtaining these kinds of documents (Tekofsky 2006: 11). Visa requirements are not a breach of international refugee law per se, but do make it more difficult for those trying to seek protection.

5 The Schengen area now covers nearly all EU member-states, with the exception of the United Kingdom and Ireland, Bulgaria, Cyprus and Romania, see at: <http://ec.europa.eu/youreurope/nav/en/citizens/travelling/schengen-area/index_en.html> (30 March 2010).

6 In practice, this shift makes Asylum and Immigration a cross-pillar issue since member states increasingly turn to third country solutions.

7 This chapter examined treaties, policies, conclusions and other EU documents published up till October 2009. In 2008–2009, several relevant developments have taken place that require further analysis such as: Judgment of the European Court of Justice, 6 May 2008, C-133/06. European Parliament v. Council of the European Union; Return Directive (Directive 2008/115/EC, 16 December 2008); European Pact on Immigration and Asylum (adopted by the European Council, 15–16 October 2008, document 13440/08); Stockholm Programme (adopted by the Council, 10–11 December 2009); Treaty of Lisbon (entered into force 1 December 2009); Frontex External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, by COWI, January 2009.

In addition to visa requirements, the Schengen Agreement already imposed penalties on carriers that bring in aliens without proper identification papers and are refused entry by obliging them to assume responsibility by returning the individuals concerned either to the home country or to a third country. To supplement this provision, the Council adopted a directive (2001/51/EC) that lays down provisions for obligations on carriers transporting passengers into the territory of member states. The directive also sought to harmonize financial penalties currently provided for by member states in cases where carriers fail to meet their obligations (e.g. when the carrier refuses to take the alien back on board or the state of destination refuses entry and has the alien sent back). Taking into account the differences in legal systems and practices between member states, the fines for failure to control the validity of travel documents and visas adequately now vary between Euros 3,000 and Euros 5,000 per person, or a single fine of 500,000 € without taking into account the number of persons carried.[8]

In effect, this regulation implies the devolving of responsibility of border control to private agents, although the directive mentions that its application is without prejudice to the obligations resulting from the 1951 Convention and that fines shall not be imposed if third country nationals seek international protection. McKleever and colleagues (2005: 38) point out that carriers' personnel are "unlikely to be trained in refugee law, and are certainly unaccountable for their actions under international law". Thus, while the intention of the penalty rule may be a mechanism to pre-empt entries without valid documents, it can have the effect of violating the principle of non-refoulement, particularly when carriers are returning third country persons in need of protection without them having had access to procedures for asylum application.

Although individual EU member states already started to introduce both visa policies and carrier sanction practices in the 1980's and early 1990's, it was through the process of Europeanization that these practices became binding upon all Member States, and therefore limited room for more liberal practices at national levels with regards to visa systems or the non-application of fines for carriers (Da Lomba 2004). The combined effect of visa requirements and carrier sanctions make it difficult for asylum seekers to enter the EU through regular channels, forcing them to resort to dangerous and illegal forms of travel.[9]

In addition to restricted access to EU territory, other policies can jeopardize access to a fair determination procedure. For instance, Article 7 (1(b)) in the Qualification Directive (2004/83/EC) – on the 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 – refers to "parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State" as potential actors for protection. Given that "quasi-state entities controlling part of a territory are often, by their very nature, temporary and unstable" (McKleever/Schultz/Swithern 2005: 22), to recognize them as "potential actors for protection" can imply sending asylum seekers back to such places under the safe-third country principle. Furthermore, the two positive additions in the directive [persecution of a gender-specific nature (art.9.2(f)) and non-state actors as possible agents of persecution (art.6(c)] contain no specification on fair procedures of determination of persecution or on guarantees of access to a territory within the EU once such determination is established. These are left to national legislatures.

The Council Directive 2005/85/EC of 1 December 2005 [on Minimum Standards on Procedures in member states for Granting and Withdrawing Refugee Status] introduces the safe third country, which entails that an asylum seeker is denied a substantive determination procedure if the person in question has travelled through a country deemed 'safe', where he could have applied for refugee protection. The application of the safe third country concept is not in breach with refugee law, as long as a proper assessment is undertaken as to whether the third country concerned is indeed safe. The directive goes further by granting member states the possibility *not to examine an application at all* in case of a *super-safe third country*. The idea that a country can be deemed safe for anyone is contentious, and safe places might become unsafe overnight. The directive does not provide for the obligation to conduct regular updates on the safety of a third country. More importantly, the principle of a 'safe third country' also leads to the 'externalization'

8 See at: <http://www.statewatch.org/news/2003/jun/03spain.htm> (30 January 2010).

9 See at: <http://www.statewatch.org/analyses/crimes-of-arrival.pdf > (15 Oct 2009); Webber, Frances, 1996/2000: "Crimes of Arrival: Immigrants and Asylum-seekers in the New Europe".

of migratory pressure on neighbouring countries with limited resources and less developed asylum systems (Post/Niemann 2007).

Perhaps the most significant development has been the creation of Frontex, which reflects the externalization of refugee protection on the one hand (by impeding access to EU-territory and/or procedures), and a democratic deficit on the other (given the limited role of the European Court of Justice, the European Parliament and national parliaments of individual Member States). Frontex website describes its raison d'être as the integration of "national border security systems of member states against all kinds of threats that could happen at, or through, the external borders of the member states". The agency carries out risk analysis and research, and is responsible for both establishing common training standards for national border guards and providing support to joint return operations. All joint-operations are based on risk assessments, which 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 remains hidden from the public (for reasons related to the risk of being adversely used by human smuggling and trafficking networks, not to mention other actors).

These joint return operations as well as the (interception) operations at sea[10] in particular pose problems for the protection of the right to seek refugee status. The joint-return competence, through which Frontex provides assistance in the transfer of presumably illegal immigrants back to their country of origin or a transit country, "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" (Jorry 2007: 17–18). The lack of a Common European Asylum System (CEAS)[11] makes joint-return operations controversial because there is no possibility for verifying: 1) whether there are asylum seekers among these 'illegal migrants'; 2) if there were, whether asylum seekers have been put through a fair process; 3) whether some authority has determined the status of a safe country.

Interception operations at sea, which Frontex coordinates, have been most visible. These operations can occur either in the territorial waters of a member state of the EU, in the open sea, or in the territorial waters of a third state. Their purpose is to discourage immigrants from setting off in the first place. In the case of vessels having already set out to sea, the joint forces of Frontex attempt to intercept them in the territorial waters of a third country in cooperation with that state, and transport them back; mostly to African shores. Only if vessels have already passed the 24-mile zone and find themselves in international waters, are they guided to the nearest EU territory to grant asylum seekers the ability to make an asylum claim (Carrera 2007; Jorry 2007). These interceptions in the territorial waters of third states can be regarded as preemptive action in the domain of migration, and in effect, they can also prevent people in need of asylum from leaving a country.

Bilateral agreements between the main countries involved are required for these joint operations to take place in territorial waters of third countries. The actual substance of these bilateral agreements remains closed to the public (Carrera 2007; Rijpma/Cremona 2007), making these operations appear dubious. For example, a UNHCR official commented, "difficult situations may arise out on the high seas and it is difficult to tell what is going on in interception operations"[12] (see also Kopp 2007; Jorry 2007). When asked about the fate of refugees who might be targeted by these kinds of operations, the director of Frontex, Mr. Laitinen, responded: "Refugees? They aren't refugees, they're illegal immigrants".[13] Frontex reports mainly on how many people are intercepted, diverted or sent back. No information is released on the identity of those who have not been sent back. Until recently, asylum-seekers were simply non-existent in its vocabulary.

It is remarkable that an organization that deals with border management – thus inevitably also with those fleeing political persecution, violence and conflict – until recently made no reference to asylum seekers, refugees or member states' obligations under the Refugee Convention. Until very recently its regula-

10 Frontex tasks are not limited to operations at sea, but include any area of border protection including airports and land-borders.

11 For more information on CEAS see: Ferguson Sidorenko, Olga, 2007: *The Common European Asylum System* (The Hague: T.M.C Asser Press).

12 See at: <http://www.europeanvoice.com/archive/article.asp?id=27753>, 2 November 2009; Crosbie, Judith, 2007: "Frontier Agency Keeps Migrants in its Sights", in: *European Voice*, 13, 13 (4 April 2007).

13 See at: <http://www.goethe.de/ins/sn/dak/ges/en2081562.htm>, 2 Nov 2009; Kopp, Karl, 2007: "Rights on the Edge - The EU's Common Asylum Policy".

tions, website and the evaluation of the joint operations reflected this gap. As Rijpma and Cremona (2007: 20) note, the EU appears to be "erecting a 'Berlin wall on water' to control its border while removing it from public scrutiny". An external evaluation of Frontex conducted by a European consulting firm (registered as COWI) reveals that the budget of the agency has increased remarkably in its relatively short existence – from more than 6.2 million in 2005 to more than 70.4 million Euros in 2008. The total budget for 2008 was about twice that of 2007 and four times that of 2006, the first full operational year. Controlling at sea absorbed about 62 per cent of the total.[14] In an attempt to prevent unauthorised immigration to the EU, the movement of those in need of asylum is also being curbed.

Public pressure led to gradual changes. In 2007, Frontex invited UNHCR to establish an institutional form of cooperation for the training of border guards (UNHCR 2007b). In addition, the original Frontex Regulation was amended by the RABIT-Regulation ((EC) 853/2007). Article 1 of this Regulation establishes Rapid Border Intervention Teams (RABIT) to provide operational assistance to a member state in urgent cases, such as the arrival of large numbers of third-country nationals. Notwithstanding the implications of such RABIT-teams, Article 2 includes that it "shall apply without prejudice to the rights of refugees and persons requesting international protection". However, Frontex has not made clear anywhere how the protection of refugees is to be made operational and has restricted the amount of public information available. It is difficult, therefore, to check whether safeguards for asylum-seekers are really in place (ECRE 2007; ILPA 2007). The European Council meetings of 18/19 June and of 29/30 October 2009, underlined the need to strengthen Frontex's coordination of operations and the need for clear rules of engagement for joint patrolling, including rules on disembarkation of rescued persons. The meetings also stressed that when conducting a border surveillance operation, member states are obliged to observe specifically cited international laws.[15]

In sum, EU policymaking – through visa requirements, carrier sanctions, the embedding of the safe-third country rule and in particular the creation of Frontex – has raised fundamental questions for the protection of the right to seek refugee status to which all member states have expressed commitment. Understanding the process leading up to the creation of Frontex is important to develop new insights on the nature of Europeanization itself.

5.3 The Making of Frontex in the Europeanization of Immigration Policy

Da Lomba (2004: 36) suggests that, in principle, there are three reasons why the transfer of competences regarding matters of immigration to the first pillar might help facilitate the adoption of appropriate measures and ensure their application in line with international refugee and human rights law. First, being supranational this pillar provides a larger role for bodies that have expressed concern about the protection of the right to seek refugee status: the European Commission and the European Parliament. Second, the supranational role of the Community can ensure a more effective system as it can impose more stringent obligations and constraints on the member states, provided that European Union standards in the field of asylum comply with international refugee and human rights law. Third, the European Court of Justice – entrusted under this pillar with the competence to check member states on their implementation and interpretation of legislation adopted by the European Council – reinforces the stringent nature of legislation.

Yet, the process of Europeanization in the field of migration asylum seems to have worked to the detriment of refugee protection. This requires an explanation for underlying forces that have driven the process of Europeanization in this particular field. Scholars have identified various dynamics in this process of Europeanization of immigration policy that may help shed some light on the detrimental outcome of the process in terms of refugee protection. These are: voting by unanimity; downward harmonizing; the lack of public scrutiny; the accession of new member-states; and externalization.

14 See at: <http://www.statewatch.org/news/2009/may/Frontex-eval-report-2009.pdf>, 26–27, 29 January 2010.

15 The United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention relating to the Status of Refugees, the European Convention on Human Rights and other relevant international instruments. See: Council of the European Union, 5323/1/10 REV 1, Brussels, 21 January 2010.

Qualified Majority Voting (QMV)[16] is the normal method of decision-making by the European Council under the first pillar, which, in principle, should minimize the need for compromise and thus often speeds up the decision-making process at the intergovernmental level. However, the transfer of asylum and immigration policies to the first pillar, the supranational level, has involved a transitional period. Notwithstanding the fact that transitional periods are relatively common in the European integration process, it is important to note that for the first time unanimity prevailed in the first pillar and that the shift to QMV was conditional on the prior adoption of minimum standards at the supranational level (Lavenex 2001). The role of both the Commission and the European Parliament in human rights enhancement was therefore temporarily sidelined. The fact that national ministers, who approve decisions in Council, have to be accountable to their national parliaments counterbalanced this lack of democratic control at the supranational level.

The shift to QMV took place in December 2005, one year after the creation of Frontex by Council Regulation (EC) 2007/2004 (26.10.2004, OJL 349/25.11.2004) and six years after the introduction of the Tampere Programme, and during the first year of European enlargement. The conservation of the voting by unanimity rule carried the risk that "the foundations of a common European asylum system [would] endorse the lowest standards in force in the Union, thus threatening compliance with international law" (Da Lomba 2004: 43). This mode of decision-making is often said to have led to the adoption of the lowest common denominator, because all states need to accept the proposed legislation (Van Selm 2005; Lavenex 2001). Indeed many authors have commented that the adoption of such standards "has helped limit liberal regimes in traditional refugee receiving countries" (Lavenex 2001: 861).

No systematic analysis exists on the development of national asylum and immigration policies in member states since the abolition of internal borders. Available evidence seems to support the claim of downward harmonization. For example, France and Germany, arguably the driving forces behind cooperation in asylum matters, and certainly the most influential states, both made amendments to their constitution restricting their asylum system during the 1990's (Faist/Ette 2007; Post/Niemann 2007).[17] The disappearance of internal borders has been cited as a factor leading to de facto harmonization, as states begin to emulate each other's practices (Da Lomba 2004; Guild 2006; McKleever/Schultz/Swithern 2005; Post/Niemann 2007). 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).

With the creation of Frontex a democratic deficit arose: national parliaments of most member states are not involved in decision-making and the European Parliament is left out in all matters except the approval on its budget (Rijpma/Cremona 2007). The matter of different status being assigned to the new EU-member states is also an issue. The ten new states that acceded to the Union in 2004[18] and the two in 2007[19] were obliged to adopt the full *Acquis* and to participate in Frontex, whereas others had had the opportunity to opt-out.[20] Central and Eastern European Countries (CEEC) had never been major refugee receiving countries, and did not have well-developed asylum systems; but they were seen as important transit countries for asylum seekers trying to make their way to Western Europe. For some of the EU-15 it was therefore critical that the new member states adhere to the same restrictive standards they did in order to prevent immigrants and refugees penetrating the EU through porous Eastern borders (Jorry 2007; Webber 1996). In one respect the accession of these new member states was positive, because they were required to sign the Refugee Convention and the European Convention on Human Rights. Given that most of the policies adopted at a European level were of a

16 *Qualified majority voting* (QMV) 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 based on population). The decision must be agreed by a majority of members.

17 For case studies on the domestic impact of Europeanization on immigration and asylum systems, see Faist and Ette (2007), e.g. on Germany, Poland and the UK. The proposition of downwards harmonization calls for further inquiry.

18 Malta, Cyprus, Slovenia, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary

19 Romania and Bulgaria

20 Another anomaly of the communitarization process is the opt-outs of the UK, Ireland and Denmark. These opt-outs are not absolute. The UK and Ireland can decide to opt-in into immigration and asylum measures. Ireland and Denmark can also unilaterally decide to renounce the Protocol. The effect of these opt-outs on refugee protection is not self-evident.

restrictive nature the asylum systems in the new member states could likewise not be other than restrictive.[21]

As we have seen, the enlargement of the EU eastward was accompanied by a shift in Visas, Asylum and Immigration policies from an inter-governmentalist approach to EU level in 2005 given that decisions are now made through QMV. Although this mode could minimize the need for compromises at the lowest common denominator, it is not a guarantee by itself for higher standards of refugee protection. QMV could well work to the detriment of refugee protection if the preferences of larger member states are in favour of stringent asylum policies; unanimity can also be used to prevent stricter collective action. 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".[22]

Furthermore since the process of Europeanization has also led to the framing of asylum and migration as external relations issues, member states have tried to deal with such issues through third-country channels by using the inter-governmental second pillar. Several authors note that these practices have rapidly developed into a shift of responsibility for asylum seekers to third countries (even within the EU) as the most important aspect of a "common refugee policy" (Rijpma/Cremona 2007; Lavenex/Uçarer 2004). This externalization of asylum and migration issues is particularly apparent in the set-up of Frontex and its responsibilities. The interception operations in the waters of third countries coordinated by the agency can be seen as symptomatic for the externalization of the responsibility over asylum seekers, as these operations curb the mobility of asylum seekers and place a burden on these third states (Carrera 2007).

Incomplete Europeanization appears to have led not only to the introduction of restrictive asylum systems in new members states, but also to instances that could be called de-Europeanization, "where the preferences of the national government are in contradiction to the development of European immigration policy" (Faist/Ette 2007: 18). The Dublin system is a case in point. The Dublin Regulation ((EC) 343/2003) provides for rules to determine which state is responsible for dealing with an asylum application, while simultaneously preventing multiple applications in several member states. Article 10 of Regulation states that the member state through which the asylum seeker entered the territory irregularly 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 usually be irregular. Thus, these provisions place a disproportionate responsibility on states at the external borders of the Union, leading to a redistribution of asylum seekers by default (Lavenex 2001). "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/Cooper 2006: 47, 59).

In the absence of European burden-sharing mechanisms, border-states have started to make their own arrangements to relieve their disproportionate burden. A case in point is Italy. This country has independently sought to sign readmission agreements with various Maghreb states, most strikingly with Libya, a non-party country to the Refugee Convention without a functioning asylum system (Baldwin-Edwards 2006). Sending back to Libya people categorized as 'illegal' immigrants prior to the process of determination could result in *refoulement,* as evidenced by the case of 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). Similar reports surfaced in Spain and Malta (see van Selm/Cooper 2006[23]; McKleever/Schultz/Swithern 2005).

Since December 2005 the European Parliament (upon initiatives of the Commission) has enjoyed the right of co-decision; but does not have the right to initiate new legislation. The right of the European Court of Justice remains circumscribed, given that it can only make a ruling when a case is pending before a court of a member state against whose decisions there is no judicial appeal under its national law. As the historical institutionalist school asserts, an institution and "its" decisions are "sticky" (Pollack 2005: 20–

21 A case in point 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. For analysis, see Faist and Ette (2007).

22 See Theofania Antoniou: "The Communitarisation of the Asylum Policy: a Ticket to Enhanced Human Rights Protection?", 30 June 2003; at: <http://www.cafebabel.co.uk/article/484/the-communitarisation-of-the-asylum-policy-a-ticket-to-enhanced-human-rights-protection.html > (5 November 2009).

23 See at: <http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf> (1 April 2010).

21). In this regard it might be difficult to overcome the minimal standards set in the years of unanimity voting in general and the foundations of Frontex in particular.

Nevertheless, European Parliament involvement in Frontex has already had some effect. The RABIT Regulation in July 2007 was one of the first pieces of co-decision legislation to be adopted under Title IV and positively specifies that the agency's operations should take into account refugee protection (Carrera 2007: 4). Yet democratic control remains limited: The European Parliament only has a say on the agency when the regulation needs to be amended, and in terms of the budget. It is therefore difficult to scrutinize the actions of the agency on behalf of member states. The Lisbon Treaty, which came into force in December 2009, increases the legislative power of the European Parliament and places it on an equal footing with the Council in the co-decision procedure, which has been extended to cover areas such as immigration.[24] Article 18 of the Charter of Fundamental Rights of the European Union (2007/C 303/01) guarantees the right to asylum 'with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.[25]

5.4 Europeanization and Restrictive Asylum Policy: A Theoretical Reflection

The traditional debate on European integration has been between neo-functional spillover theories and intergovernmental state-centred explanations. A more recent debate focuses on policies rather than on the process of integration and sets social constructivist interpretations against rational choice theories. An even newer generation of EU integration theories argue that the intergovernmental state-centred perspective, especially, has neglected both the institutional setting and its (unintended) consequences. In an attempt to map various approaches to European integration, Philippe Schmitter clusters these theoretical orientations along the lines of a dichotomy between transformative and reproductive approaches. There are two defining dimensions that set neo-functionalism together with sociological institutionalism against (liberal) inter-governmentalism coupled with rational choice institutionalism; the former group being characterized as 'constructivist' and 'transformative', the latter as described as 'rationalist' and 'reproductive' (figure 5.1).[26]

Within the transformative group, both neo-functionalist and sociological institutionalist approaches 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 the neo-functionalist position is different from that of the constructivist in that the former starts from the rationalist assumption of utility-maximizing elites as the initial drive for integration, whereas the constructivist does not adhere to this. However, once integration has been set into motion, political spillover leads to convergence of socially constructed identities to the supranational level, leading to "some constitutive effect of European integration on the various societal and political actors" (Risse 2004: 162). Thus, both neo-functionalist and sociological institutionalist explanations revolve around the transformation and construction of European norms, beliefs and identities. Alternatively, they could also be branded actor-based approaches, as the driving forces for integration are the identities of the *actors* involved. One critique is that these actor-based approaches offer no explanation as to which or whose interests are involved in shaping and modifying this identity. These approaches lack a perspective on power.

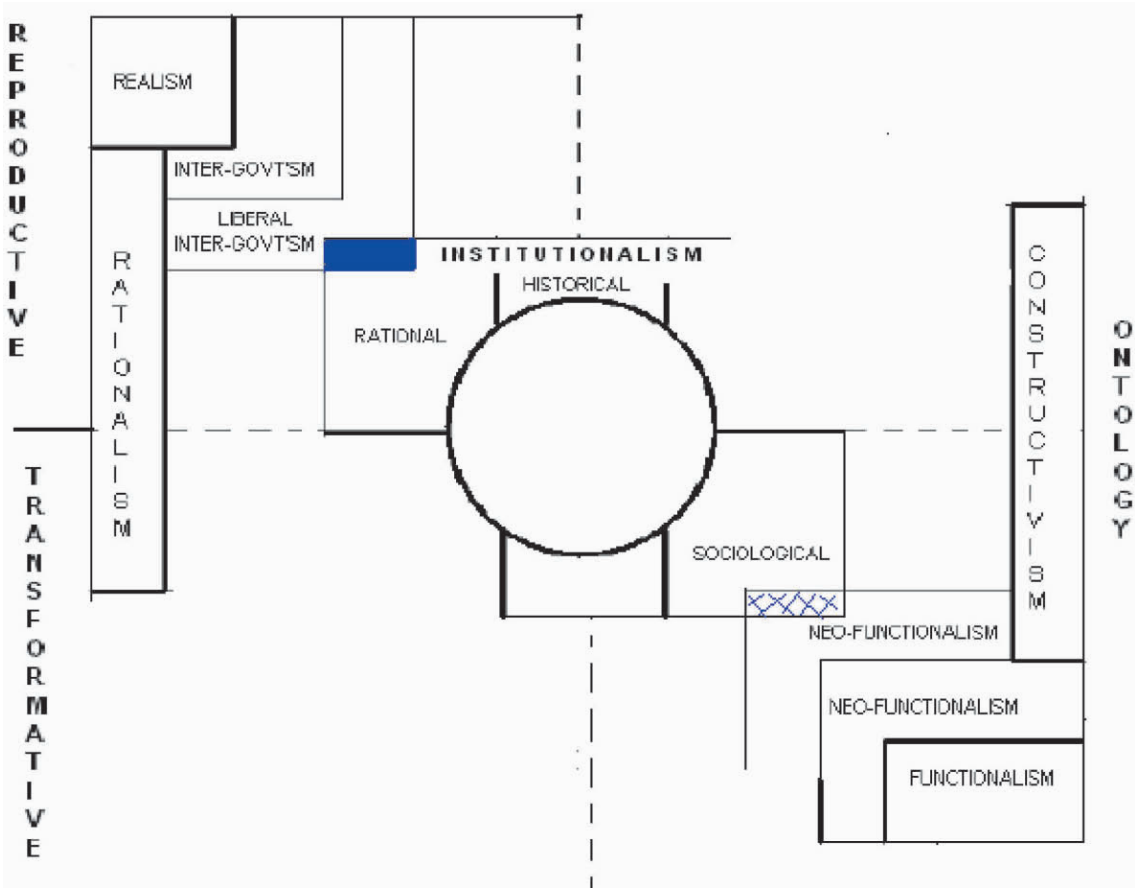
In contrast, liberal inter-governmentalism and rational choice institutionalism start from the premise that integration "reproduces the existing characteristics of its member-state as participants and the inter-state system of which they are part" (Schmitter 2004: 47). In these approaches sovereign states remain the central actors, whose preferences determine the pace and outcome of the integration process. Obviously not every member state is in an equal position to determine this pace and outcome. Existing unequal power relations within the EU as a system of states mean that the integration process will be – by and large – determined by the interests of bigger and more powerful member states. From a rational institutionalist perspective, these existing power disparities be-

24 See at: <http://europa.eu/lisbon_treaty/glance/index_en.htm> (21 March 2010).

25 See at: <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> (30 March 2010).

26 The diagram has been considerably simplified; for a full depiction and a thorough explanation see Schmitter (2004).

Figure 5.1: Theories of regional integration. **Source:** Schmitter (2004: 48).



tween 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. In contrast to 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/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. [27]

How can these reproductive versus transformative approaches help to explain the reasons behind the partiality in the European integration process in terms of the outcomes of asylum and immigration policy? The EU does not develop in a vacuum, and thus pressures exogenous to the integration process can play a pivotal role in the drive for integration. Both reproductive and transformative approaches account for exogenous pressures and their spillovers, although assigning a different explanatory value to them. For neofunctionalists in an "increasingly global world, states seek international solutions to domestic problems" (Faist/Ette 2007: 7–8). Due to exogenous spillovers, states decide to transfer sovereignty to a supranational level, because issues go beyond their national ability to solve. Conversely from a liberal inter-governmentalist position, it would be argued that exogenous pressures lead "to the convergence of national preferences and therefore establish a precondition for cooperation" (Faist/Ette 2007: 8).

In the case of immigration and asylum policies, exogenous pressures that led to the 'Europeanization' of the policy field of migration were manifold and multilayered. The end of the Cold War accelerated economic globalization. The breakup of the former So-

27 In all of these approaches there seems to be a lack of attention to power relations beyond the state level, such as companies or classes that could be shaping the integration process, which would be interesting for further inquiry.

viet Union (plus the loss of its grip on Central and Eastern Europe) together with the unification of Germany meant a tremendous destabilization of previous ways of life and subsequently a remarkable upsurge in asylum seekers crossing European borders during the 1990's. This upsurge coincided with rising levels of unemployment throughout Western Europe, leading to civil unrest, rising xenophobia and consequently an increase in right-wing governments who introduced restrictive national legislation. Given the interdependent nature of the refugee protection regime, and perhaps also as a result of a *functional* spillover effect of the Schengen Agreement and the subsequent dismantling of internal borders, liberal governments felt the need to follow the course adopted by right-wing governments. Furthermore, advancing globalization resulted in increased cross-border crime and organized acts of terrorism. Hence, 'measures towards harmonizing the treatment of asylum seekers arriving in the EU have become confused with issues of security'.[28] The 9/11 acts of terrorism only intensified securitization of immigration and asylum issues.

The neo-functional approach saw functional spillovers as an important drive for deeper European integration. The most important functional pressure was the abolition of internal border controls, meaning that once an asylum seeker crossed any EU-border they 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 were created for determining which member state be responsible for processing an application; but these mechanisms in turn created their own functional pressures to harmonize asylum systems (Post/Niemann 2007).

An additional functional pressure at this stage was the looming enlargement in 2004: the EU borders were expanding to eastward frontiers that were 'porous'. It became essential that the old member states at the eastern border of the EU be secured from large inflows of immigrants. These functional pressures have been a prime incentive for European cooperation in the field of asylum and immigration, seemingly favouring a transformative explanation of EU integration. Yet these pressures cannot of themselves explain why Europeanization took the course it did. Functional pressures are also factors in a liberal inter-governmentalist argument where these pressures build up to a national convergence of preference. To ascertain whether the character of Europeanization can indeed be explained from a transformative perspective, the role of the Commission, plus political spillover effects, and the role of other interest groups need to be analysed.

Because migration and asylum issues became defined within the security framework, analytical approaches have not paid sufficient attention to economic interest groups and multinational corporations as having any major role in shaping policy. 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/Ette 2007: 24). It is unlikely that elite-convergence of loyalties occurred before the communitarization, because national ministries of the interior prevailing in the field of immigration had hardly been involved in the European integration process (Lavenex 2001: 867). There is 'sparse evidence for socialization of national officials into European preferences or identities' (Pollack 2004: 25). Had it been the Commission that called the tune for further integration, the question to be asked is: why was a transitional period of five years included, and why were some states allowed to opt out? In addition, decision-making processes during those transitional years have been characterized as cumbersome negotiations with 'the tendency of the Council to water down the most liberal proposals'[29] coming from the Commission. If indeed there had been a transformation of the loyalties of the political elites, why then were member states so reluctant to hand over sovereignty, and thereby create such a hybrid system? It seems that a transformed identity does not come in as a helpful explanatory tool for the 'turn to Europe'.

Although it is impossible to deny that functional pressures have been a driving force behind European cooperation in immigration and asylum issues, it is important to recall that EU member states were reluctant to give up sovereignty, as exemplified by the incorporation of decision-making by unanimity in the first pillar and the conditional shift to QMV. In addition many asylum issues were only dealt with in the second pillar. Moreover, the fact that three member states could opt out all together seems to hint at the persistence of the primacy of member states in con-

28 See at: <http://www.aieu.be/static/documents/Tampere_AI_June_2004.doc>, 28 Aug 2007; Amnesty International, 2004: 'Threatening Refugee Protection: Amnesty International's Overall Assessment of the Tampere Asylum Agenda, June 1999-May 2004', p. 1.

29 Antoniou 2003 see above.

gruence with reproductive approaches to European integration. With immigration and asylum framed as security issues the liberal assumption that national preferences reflect the balance of economic interests does not seem to hold true.[30] It seems more likely that national preferences were themselves largely shaped by the exogenous pressures described above – being chiefly the large influx of asylum seekers following the abolition of internal borders. This could then have shaped electoral preferences for more stringent asylum policies, which in its turn led to a convergence of national preferences of several member states, setting the stage for further cooperation in the field of immigration.

Some countries have taken in many more asylum seekers, proving that exogenous pressures do not affect member states in similar ways. Moravcsik and Nicolaïdis analysed how and why "Germany [was] the government most vulnerable for external interdependence, since it [took] a disproportionate share of EU immigrants and was [thus] the most adamant promoter of greater EU involvement" (Moravcsik/Nicolaïdis 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 and restrictive asylum policies were put in 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 the soon-to-be-member-states on policies of returning immigrants to transit countries (Moravcsik/Nicolaïdis 1999: 63), and through the Treaty of Amsterdam the EU received the competence to conclude readmission agreements alongside member states. Germany, facilitated by unanimity voting, was also able to export its 'super-safe-third-country' concept to the European level (Post/Niemann 2007).

By contrast, countries like Britain and Ireland, being islands with stronger natural borders, opposed EU involvement. Britain even threatened to use a veto but was eventually allowed to opt out of Title IV, together with Ireland and Denmark. The third member state with significant 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 was included (Moravcsik/Nicolaïdis 1999: 78–79). It seems that the outcomes of negotiations in Amsterdam were indeed a reflection of the relative bargaining power of member states: Germany setting the stage, France determining the pace and the UK being allowed to go its own way. 'The primary lesson 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/Nicolaïdis 1999: 83).

The reproductive approach seems to hold some validity with respect to the role of strong member states and the persistence of inter-governmentalism, but how then can we explain the shift away from unanimity voting and the choice for supra-nationalism by the rest of the member states after the transitional period? A rational choice theory inclined towards institutionalism maintains that states pool sovereignty through QMV in order to enhance the credibility of their agreements. In this case it made particular sense in light of the (then) forthcoming 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' (Jorry 2007: 4) and would entail a higher asylum burden on them. The dilemma for the old member states was that they were reluctant to give up sovereignty in the field of asylum and migration, while at the same time they needed to be sure that especially the new member states would not defect. The five-year transitional period allowed them to agree on minimum standards by unanimity that the new member states would have to comply with. An additional institutional logic is that institutions and their decisions are 'sticky', and therefore once those minimal standards had been accomplished, QMV became a major barrier to any attempt to rescind past choices (Pollack 2005).

5.5 Conclusion

This chapter has sought to explain the evolution of migration and asylum policy within the wider process of Europeanization by highlighting how member states have manoeuvred the key tensions arising from the desire to create a community without borders between member states but with strong borders between the Community and non-member states. Migration has continued to touch the heart of the sovereign nation-state. The "reproductive approach" to Euro-

30 To what extent economic interests did play a role in shaping the process of Europeanization regarding migration would be interesting for further research.

pean integration and the logic of consequentialism can explain how some member states apparently have been careful to transfer a minimal amount of sovereignty, whereas powerful member states seem to have been able to push through preferences in their own interest, placing a larger burden on weaker members and turning those situated at the enlarged EU borders into larger recipient countries of asylum seekers (van Selm/Cooper 2006).

This logic of consequentialism has led to a process of partial or incomplete Europeanization characterized by unanimity voting and a lack of public scrutiny or judicial control. This process has led to the adoption of policies that raise questions concerning the fundamental right to seek refugee status. The process may have concurrently led to a downward harmonization of asylum systems among member states and the emulation of each other's restrictive practices, although further research and a systematic analysis of national asylum systems would be required to verify this. Particularly evident is that the process of Europeanization has led to the externalization of international responsibility over refugees.

The creation of Frontex in 2005 can be seen as the embodiment of this externalization in the field of asylum and migration, as many of its tasks are enacted outside the territory of the EU, in particular the interception operations in the waters of third countries. From this perspective the creation of Frontex can be understood in the same "logic of consequentialism" as opposed to a "logic of appropriateness" applied to the wider process of Europeanization. The decision to create this agency was based on unanimity, with some member states opting-out, the new member states being obliged to join, and without the involvement of the European Parliament. In other words, Frontex is a direct result of the partial Europeanization process. Frontex also came about because of exogenous and functional spillover, such as the increase in cross-border crime, the abolishment of internal borders and above all the looming enlargement of the EU. Member states have been reluctant to relinquish sovereignty in the field of border protection, which can be seen in the reliance by Frontex on the consent of member states for all its activities. One democratic deficit may be noted in that the European Parliament is only marginally involved in deciding on the budget; national parliaments of most member states are not involved.

The creation of a Common European Asylum System and migration policy are works in progress. It was only at the end of 2005 that unanimity voting was abandoned, and the Commission was granted the exclusive right of initiative and the European Parliament the right to co-decision. This came at the moment of the European crisis when the Dutch and French voted 'No' against the Constitutional Treaty, a crisis which was resolved only towards the end of 2009. The 2007 Frontex Regulation has shown the positive impact of co-decision since it includes explicitly the protection of refugees. Yet the institutional structure of decision-making remains 'hybrid', reflecting the continuous tension between state sovereignty and European integration (Post/Niemann 2007).[31] The European Court of Justice still does not have full competences, and many issues concerning migration and asylum are dealt with in the second pillar, given the fact that a Common European Asylum System is yet to be created. 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).[32]

As an agency of the first pillar, Frontex is assuming tasks across the second pillar of foreign policy and security policy and the third pillar of surveillance and crime control inside and outside the EU. A broadened mandate of this agency is emerging, which will involve the coordination of national surveillance systems and foster their interconnection into a functioning network. This turning point poses new questions about the relationship between public security and civil liberty, which require efficacious scrutiny by researchers and human rights practitioners.

31 With enforcement of the Lisbon Treaty (December 2009) competences will change, which calls for a renewed analysis.

32 The Council of Europe Commissioner for Human Rights – Thomas Hammarberg – has raised his concern in September 2008 about the trend in criminalizing the irregular entry and presence of migrants in Europe; and how this corrodes established international law principles and causes many human tragedies without achieving its purpose of genuine control; at: <http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp> (6 February 2010).