# Shaping the normative contours of the European Union:

## a Migration-Border framework

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# INTRODUCTION

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## Normative contours of the EU building process

Most of the difficulties of the EU's plans to build a common migration framework are related to the lack of a normative foundation of an EU migration policy (Süssmuth, 2005). There is now a global research interest in drawing the normative contours of the EU building process. Within the context of the Schengen process, the Stockholm programme (2009-2014), which has succeeded the Tampere (1999-2004) and the Hague (2004-2009) programmes has not entailed a qualitative change, and the same normative difficulties remain,[1] which are related to the tension between EU policy-building and the loss of state sovereignty (Lahav, 2004).

In accordance with most of the literature that interprets Schengen as a bordering process,[2] we need also to distinguish it historically. Within this EU bordering process, the `others' are not nations understood as geopolitical security threats. It is not the collective defence of the EU from Russia, Turkey, or Morocco as military powers or national movements which is at stake. Instead, the supposed security threat takes the form of human movement - a host of transnational, social and identity threats. As far as we are concerned, this human mobility shares at least three basic assumptions, which may be interrelated. First, a political premise: the majority of people move from non-liberal democratic States or states with difficulties consolidating liberal democracy, to liberal democratic states. Second, an economic premise: there is a movement from the third world or developing countries to economically consolidated countries. Finally, a social premise is evident: there is a movement of people attracted by our welfare systems and social rights.

On this reading, the Schengen project of strengthening the external frontier of the EU represents a collective response by the wealthy states of Western Europe to the prospect of increasingly globalized patterns of migration. It is from this perspective that Schengen stands as a new iron curtain (*Fortress Europe*), designed to protect its member countries from the world's poor.

Reading Schengen from the inside, the main normative implication of internal free movement of EU citizenship is that it represents the begin-

1. See a critical view of the EU's immigration policy-building process in J. Mönar (2005), and more recently, S. Carrera, E. Guild and F. Geyer, (2008), E. Collet (2009), and S. Angenendt and R. Parkes (2010).

2. See, among others, A. Geddes (2000), W. Walters (2002), G. Delanty (2004), D. Bigo. and E. Guild. (eds. 2005), C. Rumford, C. (2006) H. van Houtum and R. Pijpers (2007).

ning of a process of *denaturalisation* of Borders (Walters, 2002). This EU bordering process is a dynamic which allows us to denaturalize the connection between borders and nation-states. It shows that the border/state relationship is not natural, but is instead political and historical. Borders are seen today as products of human agency. Although many borders appear natural where geographical criteria are invoked, few borders are determined by geography alone. As a political design, borders are like society itself; they are human artefacts. As societies change, so too does the border. Borders are reflections of the cultural life of a society as much of the territorial boundaries of the society (Delanty, 2004; 186).

Schengen highlights the historicity of borders, revealing the contingency of the configuration of sovereignty, territory, and population associated with the modern state. It prompts us to ask questions not just about future possible configurations, but about how the arrangement associated with the modern state first came into being, and how it came to be regarded as natural (Walters, 2002; 576).

Within this framework of discussion, I propose to use an approach allowing me to defend the argument that most of the problems of governance of migration at state level have normative implications, and that they are directly related to the lack of a foundation of an EU migration policy.

In addition to the Schengen process, research on migration in recent years has also been confronted with in-depth transformations of the definition of borders in the context of the enlarged EU. The European Union is endorsing an integrated approach to border management, promoting cooperation among member states and moving towards increasing policy harmonization. Although the emerging politics of border management remains complex, the materialization of new forms of flows management include such as cross-border policing, the externalisation of migration policies, and bilateral border management in the European Union (Aubarell, Zapata-Barrero and Aragall, 2009).

At the end of the 1980s, when political and social scientists started to debate the meaning of European polity, they engaged in a conflict between two mutually exclusive alternatives: either the nation-state (sovereignty, territory, population and institutions) would remain the fundamental political dimension of politics, policies and membership, or the European project would illustrate a new historical phase requiring a re-definition of most key social and political concepts. The elimination of internal borders by the Schengen agreement, the Tampere Summit's claims for a Europeanization of immigration policies and a less sharp distinction between long-term foreign residents and EU citizens are institutional frameworks that make a claim for separation between nationality and citizenship, elements of a supranational membership, and recognition of cultural and religious diversity from within the polity, as well as a new articulation between population, territory and identity. The key assumption of these debates was the emergence of a new political framework in which borders would be profoundly redefined as a political institution of both the separation between outsiders and insiders entitled to belong (rights and identity), and the control by political power of a territory (people's movement).

As well as in the academic arena, global research interest in drawing the normative contours of the EU building process has also emerged

in the social and policy realm. While European politicians are quarrel about a common approach to immigration and the definition of EU borders, migrants reconstruct the EU as a political community and challenge EU borders by entering irregularly or regularly by different procedures depending on the EU Border area (sea-air-land, east-west-south). Ironically, the absence of a common migration policy highlights the lack of such a vision on political community and borders within the EU. Migration flows from outside the EU demonstrate that the EU has become an "imagined community", at least for those that do not belong to it. The lack of imagination "from inside" is problematic in both pragmatic and in normative terms. If there is any normative justification for managing migration from outside the EU, this is to be found in building a sense of community (Zapata-Barrero, 2009).

At present, since the European Council of Tampere in 1999, the disappearance of internal borders and the establishment of the Schengen area, one of the strategic actions of the EU has been to establish stronger external action and effective control of the external borders, in order to build an area of freedom, security and justice. In other words, the EU follows the argument that it is necessary to reinforce external borders to ensure an internal area of freedom. The last European treaties and policies are developing a new way of managing migration and border policies that seem to be leading the process of emergence of a European community.

It is within this academic and social/policy context that this book proposes a research framework based on the interplay between Migration and Border. The goal of this volume is to tackle both the institutional and the normative aspects of EU and member states policies, and to open a wide debate on the interplay between Migration and Border policies. The book is particularly interested in promoting a research framework which examines the interplay between the policy answers to migratory systems in Europe, on the one hand, and the emergence of a definition of EU external border on the other hand. The specific aim is to explore how the analysis of migration policy can contribute to EU bordering processes. But before properly presenting the M-B framework, let me introduce the category of Border we want to work with.

## The political category of Border in the EU context

Border is a concept that is taken for granted in current migration debates. Nowadays, there is strong empirical evidence that supports the necessity of opening such a line of reflection at the EU level. This includes the topics derived from peoples' movement across borders, up to the redefinition of existing borders or the drawing of new borders, since they appear in theories of nationalism, or even in new policy directions such as the externalisation of migration policies or drawing politics to be implemented beyond borders, or some new phenomena such as trans-nationalism that can be defined in terms of transcendence of borders.

As a political category it has at least three basic simultaneous proprieties: it is a structure and a primary political institution, it is a concept-process and it is a functional notion.

Border is first of all a structure and an institution, and as such it must be analysed.[3] We can even say that 'border' is a *primary political institution*.

3. See, for instance, D. Newman (2003) and J .P. Cassarino (2006).

Seeing it as an *institution* involves assuming at least three premises:

First of all, the *historical premise* that we consider there is neither a "natural border" and that it has ever existed. The notion of a "natural border" is, simply, a political myth (Balibar, 2001; 174). That means that as institution, border is first of all a historical category that must always be understood in its own biography, as the result of a particular history. E. Balibar (2001; 163) rightly says that borders have reached their "historical limit", beyond what their internal and external functions have increasingly difficulties to be fulfilled. The second premise can be formulated through the *stability premise.* Here the idea is not only that border is an institution, but it is an *institution-limit*. This expression comes from E. Balibar (2001; 174). The author says that borders (*frontières*) have to be considered as *Institutions-limites*, in the sense that "il faudrait qu'elles demeurent stables tandis que toutes les autres institutions se transforment, il faudrait qu'elles donnent à l'État la possibilité de contrôler les mouvements et les activités des citoyens sans faire l'objet elles-mêmes d'aucun contrôle." If we grant this stability assumption of border as institution, when this institution becomes instable (that means basically that it is changing its original function), as is the case today, then all the other institutions on which this stability depends also become a matter of discussion. Finally, there is the *undemocratic premise*, in the sense that, as institutions, borders are the result of a non-democratic decision-making process, and the most evident illustration of discretionary power (Balibar, 2001; 174).

In some sense the *stability premise* introduces also the dimension that it is not only an institution, but a *primary* institution, in the sense that it is an institution from which other depends, or in the sense that it is a *non-dependent institution*. Let me clarify the basis for this dimension.

We use the analytical difference of the theory of goods of J. Rawls (1971), which has orientated the debate on justice during the two last decades of the 20th century. Namely, in terms of the differentiation between primary goods and secondary goods, we can say that there are primary and secondary political institutions. Primary goods are those that every rational person needs in order to realize his life expectations. This is why these goods are the object of distribution in a theory of justice. In this logic, it is relevant for our purposes to remember that M. Walzer (1983; chap. 1) added citizenship to the list of primary goods, as the primary condition without which a person could not be even an object of a theory of justice. Citizenship as a primary distributive good is the condition without which other goods cannot be distributed inside a State. We need to be citizens before we can enjoy all goods distributed by the State.[4]

In the same way, we can say that there exist *primary political institutions*, in the sense that their existence is the condition without which other political institutions cannot exist. Within this framework, the "physical border" has today become a primary institution. For the theory of nationalism, there can be neither states nor political community without this institution (Miller, 1995). For migration theory, without this primary institution it would not even be possible to deal with one of the most basic political foundations of our democracies today: the differentiation of rights between immigrants and citizens. The border as a *primary political institution* is, then, fundamental as a political category.

Secondly, *the border describes a process*, which is the result of political decisions. To make this dimension clear, some literature prefers to speak about *Bordering* or even the *process of bordering*, highlighting the

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4. On these theories, see R. Zapata-Barrero (2001).

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dynamics of inclusion / exclusion.[5] It is this process that makes distinct political communities possible. As a process it is, then, essential in the creation of "otherness". In other words, we create separate identities through the maintenance of the border. The bordering process creates order through the construction of difference (Newman, 2003; 15). As such, and in terms introduced before, it must always be conceived as a *changeable political primary institution*, and governed by criteria of variation. These include not only changes that can take place at the physical location of the border, as a line that separates two States, but also the variations that are supposed to regulate the movement of persons and of goods, for example. In this second sense, the border as a process is the answer to two basic questions: Who enters and How many? It is at this level of analysis that the debate of Open/Closed borders takes place, and the idea of a foundation for regulating the control of flows.

Finally, *the border is a functional notion*. This means that the border cannot be defined without indicating the functions it fulfils. Identifying its functions is part of the task of defining it. In general, the border has a territorial barrier function, since it limits movement across a territorial line, but internally, it also has the function of obtaining stability. Without borders, the word would be unstable. At this point some familiar notions of border, such as border-safety and border-protection, come into play. As a functional notion, it has been also the great implicit of the contractual theories, i.e. those which have always supposed an idea of border. I refer both to the classic contractualist theorists such as Hobbes and Rousseau, and contemporary representatives such as J. Rawls. The state of nature on which the classical contractualism is based is a state without borders. In one sense, contractual theories seek to justify borders. For Rousseau this "state without borders" is the ideal and original condition of beings. It is here that the ideal romantic thought of a borderless world is based.

The first border is not so much the collective one, which is planned in a community, but the one based on selfish individual interests: the private property. This idea of a limit on action is also considered by Hobbes – the need of the State to limit the scope of freedom without restriction, freedom without borders. The idea of justifying limits of action, which is at the foundation of liberalism, is also the basis of a border political theory. A theory of liberalism is a theory of borders. In the original stance of the liberal theory of J. Rawls, people did not have an idea of a border, although this was assumed by Rawls himself. Rawls' theory of liberal justice and the tradition that originated to create the foundations of a just society take the existence of borders for granted. Without borders, the most basic principles of justice would have difficulties in being implemented (Kymlicka, 2001).

This complexity of research on borders in the European context takes in several levels. Research on basic principles of a European political theory of borders would benefit, first, from migration studies, both in terms of migrants' movements and policies of border control. The very evolution of the European project itself (including multileveled governance issues) as well as its interplay with the nation-state order (including cross-border region policies) must also be incorporated in such a research programme. Finally, evolution of the place of the different EU member states in the global context of international migrations must be added, as migration is already a concern of all 27 Member states. It is this research programme that can be encompassed within what I call the "Migration-Border framework (M-B framework). Let me now introduce it.

[5.] See, for instance, E. Berg and E. Van Houtum (eds. 2003), H. Van Houtum, O. Kramsch and W. Zierhofer (eds.) (2005).

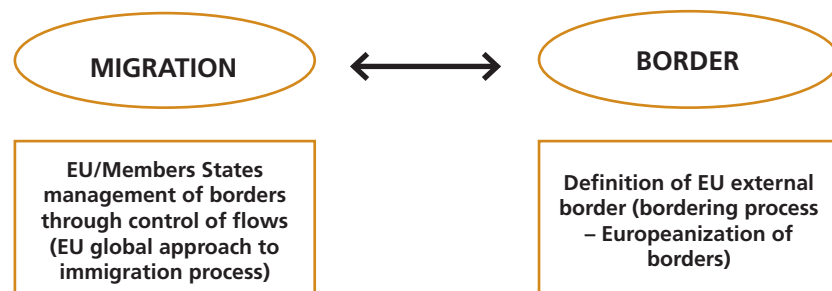## Migration-Border framework: a European political theory

The definition of basic principles of a European approach of Migration and Border must therefore be able to take contextual complexity into account. To do so, more inductive approaches should be favoured, based on the complexity of borders in Europe as political and social constructs, and including elements of a general theory. Among others, a premise to be considered could be to question how borders are instrumental to migration policies and politics in the highly contradictory context of the EU today, and what normative definitions of the borders are used for legitimating these policies; how borders are a resource for and a constraint upon collective mobilisations at local, national, transnational or regional levels; how borders are affected by the interplay between internal and external dimensions, and interfere with complex policy-making processes.[6] A European political theory of borders must then be able to simultaneously incorporate social practices related to border situations in the EU, and migration policies, i.e. the proposed M-B framework.

Finally, this could also go beyond usual the contradictions between security vs. human rights, national vs. supranational, nationalism vs. multiculturalism, open vs. closed borders, hard vs. soft borders, barriers vs. bridges, border-free EU vs. "European Fortress",[7] as these oppositions are generally the direct result of political conflicts on border which must be looked at, rather than an operational framework which could be used by social and political scientists seeking to identify the fundamentals of a political theory of borders in Europe.

Theoretically, the European Union case study can be considered as announcing a new historical path, given that the EU challenges the common traditional view that migration policy is grounded in a pre-existent political community, i.e. that one of the foundations of a migration policy is to defend an existing political community. Within the European framework, there is evidence that the opposite is also true: a new sense of community emerges with the management of migration (Zapata-@, 2009). The various chapters in this volume aim to contribute to a debate on how the definition of EU external borders is emerging as a polity through the management of migratory flows and the policy answers to migratory systems.

Graphically, the **M-B framework** can be represented as follows:

**Graph 1: Migration-Border framework at EU level**



MIGRATION ⟷ BORDER

EU/Members States management of borders through control of flows (EU global approach to immigration process)

Definition of EU external border (bordering process – Europeanization of borders)

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6. A framework to analyse the ethical dimensions of the tension between borders and free movement has been proposed in R. Zapata-Barrero (2010).

7. Apart from those quoted previously, see several works interested in analytical distinctions on the concept of border, with the main purpose of distinguishing our current historical period taking into account the EU external bordering process: E. Guild (2001), M. Anderson and D. Bigo (2003), M. Berezin and M. Schain (eds., 2003), A. Geddes (2005), G. Delanty (2006), C. Rumford (2006) H. van Houtum and R. Pijpers (2007).

This M-B framework makes visible at least two basic premises:

1. *Distinctive historical period:* How are we are historically witnessing an EU bordering process in a peaceful and democratic period, since these processes have historically been linked to war and protection against external invasion. The M-B research framework aims to show how the policy is a response to migratory systems in Europe which are driving this bordering process, and are even provoking interaction between these two processes: a European migration policy and a European external border processes. Both border crossings and migration policies bear witness to the two indissoluble functions of borders: to join and to separate. Although these functions are necessarily intertwined, migration policies can prioritise one or the other. The analysis of migration policy differences and migration policy changes can contribute to discussing a European approach. The *way the EU draws the red-line separating these two border functions is directly linked to the way EU defines its external borders.*

2. *Effects of migratory systems in general and of migrants in particular:* Behind the policy answers to migratory systems is a series of practices that can inform us how a definition of EU Border is being promoted. How migrants do play a crucial role in the EU bordering processes? Turning to the *Interplay between Migration (management of flows) and Border (definition of EU external border),* there are some dimensions which merit closer consideration. What is at stake here is not so much the structure but rather the *genesis*, the emergence of political borders and, in particular, the emergence of the bordering process and/or the Europeanization of borders. Indeed, it is easy to overlook that European borders arise in *response* to migratory flows. While European politicians quarrel about a common approach to migration, *migrants* play a crucial role in defining the EU's external border. A certain paradox emerges here. Indeed, the EU does not manage its borders because its Member States and European citizens *already* view themselves as parties to a political community. In fact, and ironically, the absence of a common migration policy highlights the lack of such a vision of European borders within the EU itself. In short, to the extent that the genesis of a definition of external EU borders is linked to the management of flows, the emergence of a European polity is not, in the first instance, the outcome of a collective decision of Europeans, but rather rendered possible by acts of migrants, who paradoxically contribute to constituting the borders of the EU. Could we not then say that, in a decisive way, immigrants into the EU are the *founders* of the external EU borders (and the European political community)?

## Origin and contributions to this book

This book is a compilation of the main contributions made at the joint initiative seminar by GRITIM-UPF (Research Interdisciplinary Group on Immigration, www-upf.edu/gritim) at the Universitat Pompeu Fabra (Barcelona, Spain) and the Migration Programme of the CIDOB Foundation (www.cidob.org) held on 10th September 2009 entitled "Migrations and Borders in the European Union". All the authors have revised and updated their original papers to fit into the main framework of the book. I would like to thank the help given at different stages of this manuscript of Tatiana Ticona from CIDOB and Núria Franco from GRITIM-UPF, and more especially to Gemma Pinyol, CIDOB migrations programme co-ordinator, who has always been there

from the beginning of this project. The final reading of the whole manuscript, with very pertinent comment was by Blanca Garcés, from GRITIM-UPF. The book is part of "Fronteras", a research project funded by the Spanish VI National Plan of Scientific Research, Development and Technological Innovation 2008-2011 (www.upf.edu/gritim, Ref: CSO2008-02181/CPOL).

The main question posed is: how can the particular case study, based on a particular dimension of migration policy, contribute to the definition of EU external border? The various contributions in this volume share this M-B framework and use different perspectives and case-studies to conclude their main theoretical findings. Taken as a whole, this M-B framework highlights at least two main challenges of the EU bordering process: The link between human rights protection and the EU border control policies, and the border's displacement dynamic vis-à-vis migratory flows.[8] It covers at least three main dimensions:

1. *Conceptual Dimension*: definition of migration policies, Europeanization of migration-related concepts such as: asylum, irregular migrants, human trafficking, human rights, security
2. *Practical Dimension*: migratory systems in Europe, organization of migration policies, analysis of bilateral relations, political, legal and social contexts, and analysis of Migrations/Borders-related conflicts such as: the Maghreb and Africa context, Immigrant Detention Camps
3. *Policy Dimension:* Informing wider scientific, social and policy debate by providing recommendations on how European regions are managing EU borders. Externalization of borders, Returns Directive.

This book is structured in three main parts. **Part I**, entitled *Context, theories and concepts* aims to contextualise the EU Border policies from an institutional and historical point of view, as well as to introduce the main theories and concepts related to basically security-related Border management. **Chapter 1** (*EU Border Policies beyond Lisbon*), written by **Sarah Wolff,** deals with the policy dimension of the Migration-Border framework proposed in this volume and looks in particular at EU Border management policies. Designed to improve EU's internal security, these policies also have a significant impact on the daily life of migrants living in third countries and hoping to reach the "European El Dorado". In that respect, Wolff's argument is that Border management policies are intrinsically linked to asylum and migratory policies, but also to development aid towards third countries. After having introduced the new institutional context brought by the Lisbon Treaty (2009), the chapter raises some issues that might be considered in the design of future EU border management policies. The main finding is that there is a discrepancy between policies and practice. First, the concept of integrated border management seems to be at odds with the multiplication of operational agreements by EU member states with third countries. Likewise, EU operational agreements (i.e. Frontex working arrangements) have raised many legal issues when it comes to the implementation of international human rights and sea conventions. While this might be translated into future EU common legislation, the multiplication of grey areas demonstrates that bilateral and ad hoc practices are sometimes at odds with EU policy. Second, it seems that from a policy perspective, border management is promoted with third countries via development aid. While this has so far led to a mainstreaming of JHA into development cooperation, it is time to consider how development needs have to be mainstreamed into JHA.

**8.** For the first challenge, see R. Zapata-Barrero and N. de Witte (2007); for the second, see the Euromesco paper written by G. Aubarell, R. Zapata-Barrero and X. Aragall (2009).

In **Chapter 2** (*The borders' maze: allowing in versus keeping away –
securitization policies as gatekeepers*)**, Nelson Mateus** looks at the
multifunctionality of borders and debates on the apparently para-
doxical roles that they currently play. The analysis is framed within
the Copenhagen's School theorization about securitization and aims
to understand how processes of securitization are used to establish
criteria for opening or closing the same border to different subjects.
Globalization processes imply a world of fast circulation of people,
goods and information, a process that also paves the way for a series
of threats that need to be addressed. The flexible nature of borders
plays an important role in face of these challenges. Borders mark lines
of rupture, block circulation, but at the same time they are areas of
contact, linking points – they might be walls, but they also might be
bridges. Looking at the processes of globalization, the paper argues
that the flexible nature of borders is used, through securitization poli-
cies, to shape them in different ways with regard to different subjects.
This makes them look like they play paradoxical roles, when in fact
that is just the result of securitization policies that act as gatekeep-
ers allowing desired subjects to cross the border and undesired ones
to stay aside. This becomes particularly clear in the way borders block
access to immigrants, while allowing the free circulation of goods,
capital and information. By focusing on migratory fluxes, Mateus' con-
tribution thereby analyses implicit and explicit securitization dynamics
and how these contribute to the (de)construction of borders in their
multi-dimensional roles.

In **Chapter 3** (*External border enforcement, public goods and bur-
den sharing mechanisms in the EU*), **Claus-Jochen Haake, Tim
Krieger** and **Steffen Minter**, consider that the ongoing process of
European integration has brought some fundamental changes to
border and migration policy in Europe, e.g. the abolition of internal
borders combined with the increasing relevance of the external EU
border. They argue that there is now plenty of evidence indicating a
lack of coordination in enforcing the external border, especially in the
Mediterranean Sea. The authors analyze the difficulties in building a
common migration framework which are related to the enforcement
of the external border, and argue that it is the public good character
of border enforcement which prevents the normative implications in
the area of border management from being met. In this constellation,
they also argue that it is individually rational for a Northern EU mem-
ber state without relevant external borders to not participate in sharing
the financial burden related to enforcing the external EU border, e.g. in
the Mediterranean Sea. At the same time, a member state situated at
the external border has no incentive to take positive effects of enforce-
ment for other EU member countries into account when deciding on
enforcement. Based on this reasoning, C.-J. Haake, T. Krieger and S.
Minter demonstrate that for positive rates of onward migration, the
enforcement of the external border is best provided at a central EU
level. Finally, assuming that no central EU governing body responsi-
ble for enforcement is likely to be established, the authors consider
options for resolving the public good problem with measures derived
from the field of mechanism design.

**Part II**, entitled *Instruments and case studies*, take the Spanish and
Italian returns directive aimed at irregular immigration, and the exter-
nalisation of migration control between Spain and Morocco as three
illustrative case studies of how border management is directly influenc-
ing the way EU define its external borders.

In **Chapter 4** (*Migrations and Borders in the European Union: The Implementation of the Returns Directive on Irregular Migrants in Spain and Italy*), **Diego Acosta** looks at the different ways in which Spain and Italy are dealing with irregular migration, especially through the implementation of Directive 2008/115 - the so-called Returns Directive. His premise is that control of the movement of people in the EU does not only take place at territorial borders, but also away from them, through "remote controls" and afterwards with "internal controls". As a result, the place where the EU border is physically found varies, and in other words, are those residing in a Member State. Diego Acosta deals with border management linked to internal control practices that aim to detect irregular migrants inside the EU in Italy and Spain.

In the Italian case, irregular immigration as a national security emergency has made the government opt for a much more restrictive implementation. By contrast, in Spain, there has been a more liberal transposition. The Italian government portrays the border as a shield against that alleged emergency, which can only be solved by criminalising and expelling irregular migrants. The Returns Directive legitimises that strong discourse, as a heterogeneous group (irregular migrants) is treated as a homogeneous one that has to remain outside the external territorial border. In that sense, the Directive has facilitated this EU bordering process, in which the "others" (poor, low-skilled migrants in the Italian case) are depicted as a security threat which has to be tackled through restrictive legislative measures. Nevertheless, the European Court of Justice will have to interpret some of the most restrictive provisions in the Directive. Finally, Diego Acosta argues that the European Commission will soon have to monitor its correct implementation.

In **Chapter 5** (*The externalization of migration control in Spain and its impact on Moroccan and Ecuadorian migration*) **Antía Pérez** analyses the evolution of migration control policies in Spain, focusing on the development of externalization strategies which have been called by Zolberg "remote control policies", and emphasizing the extension of surveillance beyond the State's territory. Anita Pérez firstly deals with the strategies, measures and instruments developed by the Spanish governments in order to move migratory control away from the State borders. These measures depend on the EU initiative, such as the visa requirement for third-country nationals and the "digitalization of border surveillance", but also include measures resulting from the intensification of the Spanish diplomatic activity with the main countries of transit and origin of migration flows. At this point, she highlights the particular characteristics of Spanish borders, where irregular migration takes place mainly across maritime borders. As a case study of this theoretical framework, the author analyzes the impact of externalization policies on the migratory behaviour of two immigrant communities in Spain: Ecuadorians and Moroccans. For Ecuadorian migration, she considers the influence of the visa requirement policy on the changes in number and sex-age composition of migratory flows. Regarding the Moroccan case, she reports the wanted and unwanted outcomes of these policies in the strategies and projects developed by Moroccan migrants, as well as the gradual transformation of Morocco into a buffer country for South-Saharan migrations towards the European continent.

Finally, **Part III** of this book looks in depth at a central point of this Migration-Border framework, namely the link between *Borders and Human Rights*. It includes thee illustrative works. **Chapter 6** (*Protection of migrants in irregular situation and EU border controls*) is written by

**Elisa Fornalé.** She highlights some of the key issues relating to the intersectionality between irregular migrants' human rights protection and EU border control policies, using the impact on Morocco as a case study. She first examines the current debate on the identification of irregular migrants and the definition of their status, linked to the prominent role of principle of sovereignty and how this might affect the full enjoyment of their rights. She then provides a brief introduction of the applicable legal framework for the protection of irregular migrants' rights. In particular, she outlines the general trends in worldwide human rights standards including international agreements, regional instruments and EU police cooperation agreements. At this point, she explains the characteristics of these instruments and, on that basis, she takes the assumption that these instruments must comply with those international human rights standards that are binding upon EU Member States as a starting point, and seeks to identify which restrictions these norms impose on States, and the challenges transit countries are facing in order to implement these agreements. Fornalé's paper addresses the question of to what extent Morocco has (not) successfully elevated the migration debate to a powerful level as a means to gain benefit from the European community. She thus balances specific protection that guarantees the basic human rights of migrants with purely materialist considerations aiming at maximizing financial and reputational benefits.

In **Chapter 7** (*Borders and Borderlands: A Common European Asylum Space*) **Monika Weissensteiner** begins by remembering that at a time when legal access to Europe has become increasingly difficult for certain groups of migrants due to restrictive admission policies, member states also have obligations under international and human rights law to receive and examine asylum applications of people claiming a need for protection. She then argues that the picture of "mixed flows" has emerged as a means of representing migration flows and it underlines the governmental task of identification and thus differentiation between diverse mobility. The contribution to the Border-Migration framework developed in this contribution seeks to link an analysis of border management with a theoretical perspective towards population management as proposed by scholars interested in government. A population to be regulated through policies that discern "who enters" and "how many" needs to be made intelligible, i.e. made into objects to be known. Likewise, she rightly argues that managing migration not only concerns border control, but assemblages of systems that filter mobility and which are spread through border-lands and networks of agents. She then goes on to highlight that such assemblages are also embodied in the camps and administrative procedures that have increasingly emerged in order to contain and distinguish between different categories of migrants. Based on an anthropological perspective, she then argues that the ways in which migration and borders are defined, individuals identified and movement managed (through policy development, legal categories and identification technologies) reflect specific historical and cultural epistemologies, as well as geopolitical and social realities. The Common European Asylum System (CEAS) development is taken as a case study. In examining policy development within CEAS, particularly regarding victim-survivors of past persecution and torture, Weissensteiner addresses the relations between human rights and security discourses in the challenge of current EU bordering processes.

Finally, the contribution of **Sílvia Morgades** in **Chapter 8** (*The Externalisation of the Asylum Function in the European Union*) relates how in their asylum procedures for admissibility, some EU States have

introduced concepts such as safe third country or first asylum country in order to refuse admission to their territory to many asylum seekers and to avoid taking responsibility for them. She argues that the Common European Asylum System has enhanced these strategies for the externalisation of the asylum function of states by adopting minimum standards for procedures for granting and withdrawing refugee status. She, then, goes on to argue that in the future, the European Asylum System will enhance this trend with the "external dimension of asylum" such as the implementation of EU Regional Protection Programs envisaged by the Commission, such as offering refugees some lasting solutions in their regions of origin and transit, and moving the examination of applications to the countries of origin. This strategy of externalisation would be followed by Protected Entry Procedures and by refugee resettlement programs agreed upon with the UNHCR. In this context, the aim of Silvia Morgades is to present the strategies used by EU Member states and those proposed by the EU for the Future Common European Asylum System which provides for the externalisation of the asylum function.

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# CONTEXT, THEORIES AND CONCEPTS

- EU BORDER POLICIES BEYOND LISBON

  *Sarah Wolff*

- THE BORDERS' MAZE: ALLOWING IN VERSUS KEEPING OUT – SECURITIZATION POLICIES AS GATEKEEPERS

  *Nelson Mateus*

- EXTERNAL BORDER ENFORCEMENT, PUBLIC GOODS AND BURDEN SHARING MECHANISMS IN THE EU

  *Claus-Jochen Haake, Tim Krieger and Steffen Minter*

# EU INTEGRATED BORDER MANAGEMENT BEYOND LISBON: CONTRASTING POLICIES AND PRACTICE

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## Introduction: Ensuring freedom of movement and managing the external borders

Following the second Irish referendum, the Lisbon Treaty entered into force on 1st December 2009, putting an end to a long constitutional debate over the future of EU institutions and decision-making. The new Treaty has been warmly welcomed by academics and practitioners working in the field of "Justice and Home Affairs" (JHA), since it is in theory, a step towards more communitisation. The extension of co-decision to the old third pillar as well as the extension of unanimity in the Council, in spite of some exceptions, is indeed a noteworthy development.

Historically, EU border management policy has been closely intertwined with the development of a Schengen zone, the creation of the single market and the enforcement of the concepts of freedom of movement of people, capital, services and goods. Combined with European integration and enlargement, this development defies the traditional notion of state borders. The creation of a JHA policy, which encompasses border management, is a by-product of the lifting of internal borders between the Schengen signatories and the need to propose "compensatory measures" to combat transnational crimes of all types. However, the Schengen zone has considerably expanded since the 1985 Convention, which was signed by France, Germany and the Benelux countries. The Schengen acquis was integrated within the *acquis* communautaire in 1997 with the Amsterdam Treaty, providing the European Union with shared competence over the external borders. Nonetheless, it remains a very fragmented zone, with different means of participation for countries like Ireland, the United Kingdom (UK) and Denmark. [1]

The development of a Schengen zone and of the internal market has had quite a significant impact upon EU citizens. It has given rise to intra-mobility within the EU territory and created new generations of Erasmus students and of European citizens travelling easily with Eurostar, Thalys, and other means of transport. This EU intra-mobility has naturally led to the development of cross-border rights, such as in the field of student exchange and labour migration. The practice nonetheless shows that there is still some way to go before this no-border space is materialised. Intra-mobility is still impaired by "the persistence of national 'cultural'

[1] Until Lisbon, the UK and Ireland had an opt-out arrangement from Schengen, and therefore from the Schengen external border control. As for Denmark, until Lisbon, it was involved in the old third pillar decisions, but did not participate in any decisions with a supranational implication, which involved the JHA areas transferred after Amsterdam to the first pillar, namely immigration, asylum, judicial cooperation in civil matters and border control.

barriers rooted in the preservation of welfare protections – especially in terms of child care, housing or retirement benefits" (Favell and Guiraudon, 2009; 563). It is also no surprise that in the aftermath of the 2004 and 2007 enlargements, labour migration was restricted with the imposition of transitional schemes on Eastern countries for up to seven years. While it is expected that all labour restrictions will be lifted for economic migrants from EU-8[2] by 30 April 2011, and for Bulgaria and Romania on 1st January 2014, freedom of movement is not yet a full reality within the EU.[3]

As well as the necessity to ease freedom of movement for EU citizens and immigrants within the EU, there is also the challenge of controlling the Schengen borders, which include 8,000 km of external land borders and nearly 43,000 km of external sea borders.[4] This is complicated by the fact that the EU has not yet been able to fully develop common asylum and migratory policies. Border management, asylum and migratory policies impact considerably on, and are fundamentally tied to, third countries, and the countries of transit and origin in particular. The Lisbon Treaty itself emphasises this paradox by underlining that the objective of the Union is to "ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, *which is fair towards third-country nationals*" (article 67).[5]

The development of border management policies by the EU and its member states is therefore historically embedded in the development of the internal market, and has acquired a security dimension over the years. It is intimately linked to the construction of an EU citizenship and to the flow of migrants, both within and from outside the EU (Zapata-Barrero, 2010). Individuals are at the heart of those policies, whether they are EU citizens or third-country nationals within the EU or crossing borders.

This double movement of strengthening freedom of movement and managing external borders will continue in a new institutional setting with the Lisbon Treaty, set out in the first part of this chapter. However in order to reflect upon those policies and to contribute to the debate on improving their design, this chapter shows that to date there has been a discrepancy between policies and practice. To start with, the concept of integrated border management is challenged by the proliferation of member states' agreements with third countries. This therefore leads to the multiplication of legal loopholes, and the difficulty in implementation of international conventions. This challenge is also identified when it comes to the impact of border management polices upon developing countries and third countries' nationals.

## The Lisbon Treaty: the new context for bordering processes

The Lisbon Treaty introduces important modifications, which will influence the EU's border management policies in the future. The most significant one is the removal of the pillar structure that was introduced with the Maastricht Treaty. While initially conceived as a third pillar policy, governed by intergovernmental decision-making, visa, asylum and border issues were subsequently transferred to the first pillar. This led to a fragmentation of the Area of Freedom, Security and Justice (AFSJ), which was then governed by various decision-making methods and log-

2. Malta and Cyprus were exempted from labour restrictions in 2004. This is why only eight out of ten countries were affected by those measures.
3. So far, Austria and Germany have declared their intention to leave those restrictions in place until 2011, while Belgium, Denmark, France, Luxembourg and the Netherlands gradually lifted those restrictions between 2006 and 2009. The other EU member states removed those restrictions earlier.
4. DG JLS
5. Emphasis added by the author.

ics. Following the Amsterdam Treaty and the end of the transition period on 1st May 2004, border management effectively became a shared competence between the EU and its member states. Other aspects related to integrated border management remained under the third pillar, such as police and judicial cooperation in criminal matters in particular. The abolition of the pillars raises the question as to whether it will lead to better designed border management policies and possibly to better "policy coherence" with migration and development policies.

The abolition of the pillars does not guarantee a full "communitisation" of JHA policies. Such a sensitive political integration, intertwined with the notions of citizenship, security and political community, will continue to be equally driven by member states' preferences as well as by a culture of "intensive intergovernmentalism".[6] Intergovernmentalism and supranationalism are a pre-requisite to each other, and essential elements of border management policies (Schout and Wolff, 2010). These features of JHA integration are likely to persist, since policies in the field of the AFSJ remain a shared competence of the EU and its member states, and a series of exceptions are enshrined in the Treaty.

JHA politics are being altered by the extension of the European Parliament's power. Co-decision, the so-called "ordinary legislative procedure" applies to new legislation in the field of police and judicial cooperation in criminal matters, which was the old third pillar previously governed by intergovernmental decision-making. However, this will apply only to new co-decided pieces of legislation, since the old third pillar acquis is subject to a five-year transition period. Article 10 of Protocol 35 of the Treaty on the Functioning of the European Union (TFEU) stipulates that the EU has until 1st December 2014 to convert its old third pillar legislative acquis to co-decided instruments. In particular, the European Parliament Committee on Civil Liberties (the Libe Committee) has beefed up its role in the field of JHA as illustrated by the institutional battle over the Passenger Name Records (PNR) or the SWIFT issues. The Council and the European Parliament are co-deciding on a series of JHA policies. Short-stay visas and residence permits,[7] legal immigration,[8] judicial cooperation in criminal matters,[9] and the rules governing Eurojust and Europol,[10] as well as civil protection[11] are now governed by the "ordinary legislative procedure".

Border checks as well as legal migration policies which were formerly decided by unanimity in the Council now fall under the ordinary legislative procedure.[12] This means that future rules concerning the conditions of entry and residence, standards on the issue by member states of long-term visas and residence permits, including those for the purpose of family reunification and the definition of the rights of third-country nationals residing legally in a member state, will be co-decided by the Council and the European Parliament.[13] However, member states retain the right to determine the volumes of admission of third country nationals coming to seek work on their territory. In that respect, both the Commission and the European Parliament cannot fully control legal migratory policies. In addition, other relevant measures are still partly governed by the "intergovernmental method". Measures such as passports, identity cards and residence permits continue to be decided by member states unanimously after consultation of the European Parliament.[14] Other important policies that remain subject to unanimity are family law with cross-border implications,[15] the establishment of a European Public Prosecutor's Office[16] and operational police cooperation.[17]

6. Intensive transgovernmentalism refers to a mode of governance that "underlines the prominent role of bureaucrats and state officials below the level of government representatives in establishing networks with their counterparts in other member states that develop a certain degree of autonomy in decision-making and implementation." (Wallace 2000 in Lavenex, 2007; 769).
7. Article 77, TFEU
8. Article 79, TFEU
9. Articles 82, 83 and 84, TFEU
10. Articles 85 and 88 TFEU, respectively.
11. Article 196, TFEU
12. Article 77§2, TFEU
13. Article 79, TFEU
14. Article 77§3, TFEU
15. Article 81, TFEU
16. Article 86, TFEU.
17. Article 87, TFEU

A study of the new governance of JHA decision-making leads to the conclusion that member states are decisive actors in migratory and bordering processes at EU level. This is not really surprising given that the "process of bordering" (Zapata-Barrero, 2010) is commonly associated with the construction of a national community. Social practices and policy design at EU level reflect this fundamental relationship between member states and the recent involvement of the supranational level in this bordering process. However, beyond a scale approach that opposes supranational and intergovernmental aspects of JHA governance, we have already shown elsewhere that both aspects of JHA governance are pre-requisite of each other (Schout and Wolff, 2010).

When it comes to external relations and border management, protocol 23 of the Treaty reaffirms that measures developed at EU level "shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements". In other words, member states continue to be competent in controlling their external borders, especially when managing their borders via bilateral agreements concluded with third countries. This is in line with current practices of EU member states that have concluded agreements with North African countries to perform border management activities, as shown in section 3.

EU border management policy continues to be uneven in its implementation, since the Lisbon Treaty provides the UK and Ireland with an opt-out on border management, asylum, immigration and cooperation in judicial civil matters, as was the case under the Nice Treaty.[18] An opt-in on individual legislative proposals is now also possible for Ireland and the UK.[19] This means that different immigration standards could continue to apply in the EU. As for Denmark, the Lisbon Treaty offers the possibility to opt-in to JHA policies after a public referendum, enabling Denmark to opt-in to each new legislative proposal.

A final noteworthy development for the future of the EU 'bordering process' is the legal value gained by the European Charter of Fundamental Rights and Freedoms. Article 19 of the Charter re-iterates the principle of *non-refoulement*. Similarly, the possibility opened by the Treaty to the accession of the EU to the European Convention on Human Rights would provide EU citizens with new juridical remedies if successful. Monitoring the relationship between the Luxembourg and Strasbourg Courts will be worthwhile over the coming years. In this respect, the recent case brought by a group of sub-Saharan migrants before the Strasbourg Court after having been returned to Libya by the Italian coastguard may be influential (Shenkel, 2010). However, as always, such an accession would retain an *à la carte* flavour, since the UK the Czech Republic and Poland have asked for a derogation. [20]

## Integrated border management: a concept at odds with practice?

Further to the evolving decision-making process, EU border management policies are also significantly shaped by the concept of "integrated border management". This policy concept is linked to the development of an EU internal security strategy, as well as strengthening of the mandate of Frontex. This section nonetheless shows that integrated border management is at odds with the reality of different member states' interests and priorities, as well as the multiplication of grey areas.

[18]. However it is important to note that in December 2004, the Council decided that the UK could start implementing Schengen cooperation elements related to police and judicial criminal matters, except the Schengen Information System. See the Council decision of 22 December 2004 on the implementation of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (2004/926/EC).

[19]. Protocol 19 of the Lisbon Treaty provides that the Council would then decide by unanimity of the rest of its members to allow the UK and Ireland to take part in the JHA acquis. Protocol 20 of the Treaty stipulates that both countries, which are not part of the Schengen area, can continue to control people entering their territories.

[20]. Protocol no.30, TFEU.

**The concept of integrated border management**

Integrated border management appears as a relatively straightforward concept to implement, supported by technologies and increased coordination, as if it was a "clean problem susceptible to bureaucratic, managerialist solutions" (Marenin, 2010; 8). The Stockholm Programme further pursues the materialization of this concept, linking it to the development of an EU internal security strategy and the strengthening of Frontex.

An internal security strategy, based on the model of the 2003 European Security Strategy, was adopted by the European Council in February 2010. The document highlights the need to further operationalise cooperation and the inter-operability of agencies like Frontex, Europol and Eurojust. It calls for further exploitation of synergies between the different law enforcement and border authorities, as well as with judicial authorities (Council, 2010a). The establishment of the Standing Committee on Internal Security (COSI)[21] supports such an integrated and horizontal approach. This committee covers law enforcement and border management authorities for the first time, as well as judicial authorities where appropriate, to provide assessment on EU and national security as well as priorities in the field of operational cooperation.

The strategy also highlights the "important role" that integrated border management can play for security. At the EU level, this concept implies a broad policy mix. Frontex is one of the many agents implementing this integrated border management concept, but policy packages regarding the entry/exit and crossing of borders by third country nationals are also included. For the Commission, which presented this policy mix in a Communication in 2008, integrated border management combines control mechanisms, measures at EU borders, cooperation with neighbouring countries to tackle illegal migration and the facilitation of border crossing for *bona fide* travellers (European Commission, 2008).[22] Surveillance and biometric technologies, which have been commented on elsewhere (Wolff, 2008; Bigo and Jeandesboz, 2009), play a central role in this process. The finalisation of Eurosur and the introduction of automated border controls are some of the future short-term steps to be taken. The full operationalisation of SIS II, which has been delayed for years, as well as the rollout of the VIS system, are other objectives of the Stockholm Programme that would support an IBM policy. The creation of an administration for large-scale IT systems will similarly play a fundamental role.

As shown by previous research, Frontex is an agency that arose from a compromise between the Commission's ambition to create a European Corps of Border Guards, and the reluctance of the member states to devolve too much of their sovereign competences to the supranational level (Carrera, 2007; Wolff, 2008). It is therefore not surprising that the impact assessment carried out to amend the Frontex regulation, concluded that operational cooperation in the field of border management was still "inefficient and insufficient, especially for operational solidarity" (European Commission, 2010). The impact assessment further raises the problem of voluntary contributions for Frontex equipment, the lack of human resources (the agency needs to make *ad hoc* requests to each member states when preparing an operation), insufficient coordination and follow-up of joint operations, and the exact role of Frontex in return operations. Two additional drawbacks are the absence of a mandate to evaluate or react on shortcomings in the implementation of EC law and fundamental rights, as well as the issue of granting Frontex the right to

collect and store personal data (European Commission, 2010; 2), which could entail the risk of duplication with Europol.

The amended draft regulation coincided with the adoption by the JHA Council of February 2010 of a list of '29 measures on reinforcing the protection of the external borders and combating illegal immigration'. Following a French initiative, the document bears a similar analysis to the one carried out by the Commission and insists on providing Frontex with a stronger mandate to organise joint returns flights, to develop an Erasmus-style programme for border authorities in order to lay down a "European culture of border guards of the Member States", and also to foster the use of technologies and the completion of Eurosur (Council of the EU, 2010b).

The M.A.D.R.I.D. report makes the assessment that there is a "growing risk of abuse of travel documents and false declarations about identity, nationality and routing with the aim of both evading border controls, and also frustrating return procedures" at the external borders. Risk assessment also highlights "the increasing risk of use of legal channels to enter the EU with the objective of overstaying" (Council of the EU, 2010c; 9).

Those policy proposals show that the EU and its member states are moving in the direction of further operationalisation of border management and JHA policies. While many developments have taken place over the years through 'intensive transgovernmentalism', on an informal and ad-hoc basis between law enforcement and border agents, it seems that the Lisbon and the Stockholm Programme will enable increased 'interoperability' and operational cooperation. Those are seen as solutions to palliate the problem of implementation and mutual trust that are intrinsic to JHA policies.

### Informal practices with third countries: the multiplication of grey areas?

It is precisely in this "operationalisation" that integrated border management faces a different reality. On the ground, member states' informal practices third countries have blossomed, leading to many uncertainties over the legal framework in which Frontex and member states' operations are taking place. Bordering processes are therefore the result of different member states and EU institutions' interests, as the concept of burden-sharing or solidarity has not yet become a reality within the Area of Freedom, Security and Justice (Thielemann, 2008; Wolff, 2008).

Apart from the principles of solidarity and burden-sharing, another important principle of border management is respect for the principle of *non-refoulement*.[23] With the intensification of patrolling in the Mediterranean and the emergence of Frontex as a new actor in border management, this principle of international law comes under strain: "supranational, national and local actors find themselves in a phase of legal insecurity and negotiation. The border-ocean between Europe and Africa has become a contested field of EU policy-making" (Klepp, 2008; 4). An additional grey area concerns the interception of migrants at sea and the implementation of international sea law. While it is clear that migrants have the right to apply for asylum reach the territorial waters of a state, the situation seems to be different when migrants are on the "high seas". In addition, member states have different interpretations of the principle of *non-refoulement* (European Commission, 2009).

21. Article 71, TFEU
22. The 2008 Communication also proposes a series of border management tools, such as an Electronic System of Travel Authorisation (ESTA), an entry/exit registration system and automated gates.
23. This principle is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees which reads as follows: ""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 multiplication of bilateral agreements between the EU, its member states and third countries to control immigration and co-operate on border management has opened a Pandora's box with many uncertainties regarding the legal, political and humanitarian aspects of those relationships. Countries like Italy, Spain or Malta are 'Europeanising' their immigration, asylum and border management concerns at EU level, while at the same time developing a complex network of bilateral relationships with North African and African countries. These practices, like the agreements between Italy and Libya signed in 2003 and 2007, contribute to the complexity of the EU migratory, asylum and border management policies. Southern EU member states "on different levels (…) are remodelling the EU-refugee regime through their 'frontline perspective', pressuring for their positions in European decision-making forums and formalizing informal practices established in the border regions" (Klepp, 2008; 19).

There are many who argue that the parallel conclusion of agreements is actually putting the international principles at risk. At the same time, it has been shown that "ad-hoc politics on an administrative level can be very productive, leaving the democratic decision process out or behind" (Klepp, 2008; 10). Intensive transgovernmentalism and operational cooperation are two elements in the construction of EU's internal security, and the cooperation took place in the well-established legal framework of the European Treaties. Meanwhile, the external dimension of migration and border management raises legal and political issues.

Several initiatives have been taken in order to palliate those uncertainties. Between 2007 and 2008, a group of experts consisting of member states' representatives, Frontex, the Office of the UN High Commissioner for Refugees as and IOM met regularly to produce draft guidelines for Frontex operations at sea. The guidelines were aimed at ensuring a uniform implementation of international law by EU member states when taking part in Frontex's missions, as well as creating a basis for EU law to enable one member state to carry out surveillance of maritime borders in another member state.[24]

However, the group of experts was at odds on the issues of human rights and refugee's rights, the role of Frontex as well as the prior identification of the places of disembarkation for the migrants (European Commission, 2009). The ability of the Commission to adopt border surveillance implementing measures as allowed by article 12 of the Schengen Borders Code was also challenged by the member states.[25] However, the Commission, based on a mandate of the JHA Council of June 2009, proceeded with the formulation of guidelines. Following the examination by the member states, the European Parliament decided that migrants rescued at sea could only be disembarked in the country hosting the mission and not in the nearest port, as was the practice previously. This would have meant that migrants with serious medical problems rescued at sea near Lampedusa would have had to travel further to Malta, the country hosting most of the Frontex's missions, in order to be disembarked.

As a consequence, the Maltese government decided that it would not host any future Frontex missions and it pulled out of the Nautilus mission, renamed "Chronos", which was planned in the Sicily-Malta-Libya strait. Frontex decided to cancel the €9M mission. Although there are strong suspicions that this is linked to the ruling on guidelines at sea, the Maltese government officially argued that it was due to the sharp decline in the arrival of illegal migrants on their shores following joint Italian-Libyan patrols. As a rseult, the

24. http://migrantsatsea.wordpress.com/2010/02/05/background-note-pertaining-to-proposed-guidelines-for-frontex-operations-at-sea/
25. Commonly known as the comitology procedure.

number of migrants coming from Libya to Malta halved between 2008 and 2009 (Agence Europe, 2010).

So far, this chapter has shown that the development of an operational integrated border management at a policy level was somewhat at odds with the reality of border management operations and practices of member states. Current policies are hindered by the reality of operations and the legal loopholes that are created by informal and ad-hoc cooperation with third countries.

A final feature that is nonetheless often overlooked is the interspersion of border management policies with development policies and their impact on the EU bordering process. While border management policies have been constructed with an internal objective and are based on practical cooperation with third countries, the global development perspective is sometimes overlooked by integrated border management. Further horizontal integration of border management policies with migration and asylum policies should be promoted, as should cooperation between the experts in the field and the authorities.

## Beyond the EU's borders: between security and development needs

EU border management cannot be circumscribed to the mere control of external borders, but needs to be considered in the broader context of the EU's external relations. The way the EU designs its border management policies with its neighbours mirrors the construction process of a European identity. "The emergence of a European policy is not simply the outcome of a collective decision of Europeans, but rather is rendered possible by acts of immigrants, who, paradoxically, constitute the borders of the European policy in the very process of crossing them" (Lindhal, 2009; 3). This "bordering process" is itself closely linked to relations with migrants and third countries. EU policies have so far favoured an external dimension of the JHA, whereby border management has acquired a pivotal role. While a global approach to migration has been promoted in partnership with Mediterranean and African countries, work still needs to be done to respond to the realities of development needs. Migration and bordering processes must not only be approached from a security perspective, but also be considered as vectors of development in themselves.

At policy level, the emergence of an Area of Freedom, Security and Justice has had an external impact on the EU's relationship with its neighbours. While the EU's Internal Security Strategy has only been adopted in 2010, the external dimension of the JHA has been developed since the late 1990s (Wolff et al., 2009), and now takes the form of a reasonable structured framework of cooperation with third countries. Action Oriented Papers, the European Neighbourhood Action Plan and Swift and PNR agreements have been developed. This is part of the phenomenon of blurring of internal and external security extensively described in the literature (Bigo, 2000; Lavenex, 2006; Wichmann, 2007; Wolff et al. 2009; Balzacq, 2008; Kurowska and Pawlak, 2009). EU neighbours have become vital partners in fighting transnational crime, which could spill over into the EU territory. At the same time, the EU has also been influenced by a global move to tackle terrorism following 9/11, and this has acted as a catalyst for fostering the development of EU police and judicial cooperation, both internally and externally.

What is relatively new is that this external dimension of JHA has had a significant impact on the EU's development policy. It has been mainstreamed into development cooperation and its funding instruments. A prime example of this mainstreaming is the Cotonou agreement which includes a readmission agreement clause in article 13: "each Member State of the European Union shall accept the return and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities; each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities".[26] This clause has not yet been fully implemented, since it needs to be based on bilateral agreements with each of the ACP states, which the EU is trying to actively pursue within the Global Approach on Migration (Council of the European Union, 2005).

External aid instruments such as AENEAS, the Thematic programme on Migration and Asylum, and projects and budget support to developing countries have focused increasingly on issues such as migration management, borders, or more comprehensively on "security sector reform," which often involves the reform of law enforcement agencies. Projects for the of promotion of the rule of law, which are focused on strengthening the independence of the judiciary, can also be considered as part of the external dimension of JHA since in the long run they are also a factor in increasing judicial cooperation with the EU (Wolff, 2009; Wichmann, 2009). This process has taken place in parallel with an international debate on the role of security sector reform within development aid. These policies help to foster good governance and the rule of law in developing countries, and in fragile states in particular, and especially by the Security Sector Reform agenda (Schroeder, 2009). However, the problem emerges when security is pursued via development cooperation, and because border management and control policies are being financed from EU aid that normally ought to pursue the Millennium Development Goals and the objective of reducing poverty.

In order to materialize such partnerships, border management has been incrementally introduced into EU development policy and even into ESDP missions. In the Eastern and Southern neighbourhood, the promotion and support of capacity-building in border management is a way of dealing with both illegal migration and all sorts of smuggling (arms, drugs, human beings, etc…). Support is provided to Ukraine and Moldova via an EU Border Assistance Mission. This mission aims to reform customs and border guards, and has a budget of €40M over the 2005-2009 period.

Central Asia has benefited from a Border Management Programme (BOMCA) which is actually the largest programme of EC assistance to the region, with a budget of around €25.6M from 2003 until 2010.[27] This programme, which was implemented in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, was focused on enhancing border security as well as legal trade and transit by promoting the adoption of modern border management methods. The programme involved advice to policy-makers on how to initiate legislation and reforms, the renovation and equipping of training centres for border agencies, including an integrated border management component in the national curricula of central Asian border guards, and also the provision of practical training and advice on the ground to border agency staff. [28]

26. Partnership Agreement between the members of the African, Caribbean and Pacific Countries of states and the European Community.2000. Available at http://ec.europa.eu/development/geographical/cotonou/cotonoudoc_en.cfm
27. The total budget is actually €27.7M, with participation by the UNDP.
28. Further information is available on the website of the project : http://bomca.eu-bomca.kg/

Strategic priority is nonetheless given to the countries from the Mediterranean rim, with whom "a stronger partnership with third countries of transit and origin is necessary, based on reciprocal requirements and operational support, including border control, fight against organised crime, return and readmission" (Council, 2009; 71). Two projects in Libya were adopted in 2008. A €2M project aimed at improving the Libyan authorities' capacity to prevent irregular immigration, while a second project of €3.5M focused on assisting them in managing "the registration, reception and treatment, in line with the international standards, of the irregular migrant apprehended nearby the Southern borders of the country, and to promote the establishment of a system of assisted voluntary return for stranded migrants willing to return, and of resettlement, for asylum seekers and migrants in need of international protection"[29] These micro-projects are illustrative of the acceleration of the EU's cooperation with Libya. The most recent JHA Council conclusions of February 2010 indeed reiterated the need to pursue dialogue on migration with Libya. The Council called for the establishment of "a cooperation agenda between the European Union and Libya with a view to including initiatives on maritime cooperation, border management (including possibilities for the development of an integrated surveillance system), international protection, effective return and readmission of irregular migrants and issues of mobility of persons" (Council, 2010b).

When dealing with its neighbours, and especially the southern neighbours with whom the EU has the mandate to negotiate readmission agreements, it is interesting to note that the most recent mid-term review of the aid given to Morocco stressed that in the event of negotiations on a readmission agreement being successful, then cooperation on migration would gain importance. In particular, the document discusses specific instruments that will accompany the return process, such as socio-economic integration.[30]

EU development aid is therefore used to support border and migration management projects in neighbouring countries. This evolution is linked to the framing of a "migration-development nexus" (Sorensen et al., 2003) that would balance the "migration-security nexus". Several documents testify to this gradual acknowledgement by the EU. Countries from the South have made their voice heard on the international stage when carrying this message. Compared to the 1990s, when talking about migration and border management was still taboo, in particular by the Southern partners which primarily saw themselves as countries of emigration, there is a global trend towards finding common policies for common challenges. The Global Approach to Migration, which deals with the external dimension of EU migration policy, is the main framework in which the EU has established a comprehensive dialogue with North Africa and African countries, and in particular on the need to promote a development angle.

Nevertheless, in spite of the gradual diffusion of a migration-development nexus, studies have shown that both policy frameworks remain quite strong and that "the main focus of recent initiatives is still on the aspect of immigration control and proposals for measures pertinent for development remain not only very vague but also non-committal and discretionary" (Lavenex and Kunz, 2008; 452). The new development framework co-exists with the pre-existing security framework, thereby mirroring hurdles in policy coordination. Future border management policies, apart from integrated border management, could strive to integrate more development needs of third countries. Third countries

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29. ec.europa.eu/europeaid/documents/aap/2009/af_aap_2009_dci-migr.pdf
30. Mid-Term Review p.5
http://ec.europa.eu/external_relations/morocco/docs/index_en.htm

do not need only to manage migrants but also trade flows, customs and sometimes conflicts on their borders. Border management policies should evolve from a control approach towards an approach that takes into account the need, in Southern countries in particular, to foster regional economic integration, free trade areas and human movement in general, by means of a more horizontal and comprehensive approach. In that respect, the Stockholm programme plans to ease the conditions for remittance flows and to work more closely with diaspora groups. There is also some hope in the fact that "the emphasis on external relations and the shift in focus toward the needs of European labor markets suggests that migration is no longer just simply a Justice, Liberty, and Security policy, but an integral part of foreign policy, employment and social affairs, and a host of other policy areas, such as trade, education, and finance." (Colett, 2010).

The creation of a European External Action Service (EEAS) constitutes a new window of opportunity that could trigger further coordination between development cooperation, security and the EU's foreign policy. As this chapter went to press, it was nonetheless difficult to come to any firm conclusion, since the structure of the EEAS is still unclear. It is nonetheless a decisive moment for rethinking the policy priorities of the EU in its external relations and therefore how this will impact upon the "bordering process". This bordering process is indeed not only the outcome of the EU's internal decisions (Zapata-Barrero, 2010), but is also the mirror of the EU's relations with its neighbours and migrants. The EU bordering process is as much driven by an inside-out mechanism as by an outside-in mechanism. In that sense, the link between border and migratory policies and EU development cooperation should be explored further, and approached on a comprehensive basis.

## Conclusion

As an investigation of the post-Lisbon decision-making process in the field of migration and border management, this chapter has shown that the development of integrated border management from a policy perspective is sometimes at odds with practice. First, member states have multiplied operational agreements with third countries. The latter, in conjunction with EU operational agreements (i.e. Frontex working arrangements) have raised a great deal of legal issues in terms of the implementation of international human rights and sea conventions. Second, the external dimension of border management and the conclusion of agreements with third countries has been pursued via development aid instruments. However, paradoxically it appears that migration and human movement is not yet fully understood from a development perspective. Policy thus seems once again not to match development needs and complex patterns of human movements.

This tendency is likely to continue in a post-Lisbon era, with a trend towards further operationalisation of border and JHA policies, as well as towards more policy coherence with the concept of integrated border management. The Stockholm programme and recent initiatives have started to address these grey areas, and to ensure that this bordering process remains in line with international norms. This chapter has shown that the EU bordering process is closely linked to EU development aid. This has led to competing frameworks between development and security needs. The redefinition of EU's external relations priorities with the creation of an embryo of European diplomacy, as well as the

attention given to citizenship and fundamental rights with the Charter of Fundamental Rights, the creation of a post of Commissioner for fundamental rights, justice and citizenship points to future windows of opportunities for re-conceptualising the relationship between borders, citizenship, migrants and external relations.

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# THE BORDERS' MAZE: ALLOWING IN VERSUS KEEPING OUT – SECURITIZATION POLICIES AS GATEKEEPERS

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## Introduction

The rapid acceleration of globalization processes in recent decades, and the emergence of innumerable contradictions associated with these processes in particular, have intensified the debate about how to respond to modern challenges. As a direct target of globalization processes, borders have necessarily been involved in the large-scale transforming processes witnessed at global level. Between the demand for further fluidity and the need to ensure territorial and individual protection, borders have been involved in a maze of challenges, to which the solutions found often seem to be incompatible. The obvious contradiction between expecting borders to block access while at the same time ensuring easy circulation reveals their 'schizophrenic' nature at first glance.

In this context, the responses that migrations demand from borders are particularly relevant, since among the threats that borders are nowadays expected to prevent are those commonly perceived as being associated with migrants' fluxes. This chapter aims to contribute to the discussion about the Migration-Border framework by looking at the challenges posed to borders by the Copenhagen School's securitization approach. It argues that the study of the securitization of certain areas enables a better understanding of this 'schizophrenic' approach to borders. This is illustrated by the study of the securitization process of migration flows in the Mediterranean area.

This proposal is tested in the complex area of the Mediterranean. This choice is prompted first by its geopolitical status as a contact area between Europe and Africa, and second because it represents a typical borderland of the global era: it is a North/South border zone. In order to understand the role played by securitization, the chapter studies the evolution of the Euro-Mediterranean Partnership[1], and the development of the European Union's (EU) common strategy for addressing migration issues. This analysis focuses on the impact of securitization in these political processes, in order to show the extent to which securitization determines how European borders are shaped. It thereby aims to contribute to discussion in this volume on how migrations influence the definition of the EU's external borders.

[1] The Euro-Mediterranean Partnership, initially designated as Barcelona Process, was re-launched in 2008 and henceforth known as the Union for the Mediterranean.

This chapter is organized in two main parts, with the first - sections 1 to 3 - related to borders, and the second - sections 4 and 5 - focused on the migration-border relationship. Accordingly, the chapter starts by presenting the most relevant topics on the debate concerning borders. It then highlights how borders and security are closely interlinked. Finally, the relevance of analysing borders through the securitization approach is discussed. This theoretical framework is then applied in the second part of the chapter: in section 4 with the analyses of the political development of EU's borders, and in section 5 by combining the EU's migration policy and the evolution of the Euro-Mediterranean Partnership, focusing on the impact of these policies on the definition of EU's external borders.

## Border: defining the concept

The border is defined by a binomial relation, where two apparently incompatible dimensions are present: it is a barrier but is also a crossing point; it both separates and brings into contact. A border is therefore characterized by a dual nature that allows it to play a twofold role: that of an obstacle and that of a channel of communication.

A territorial border is traditionally presented as a structural element for creating order in space. It works as a limit and by doing so, it organizes the territory and the state, making clear that without borders there is no territory (Newman, 2006a: 143). As a result, the role of borders is to draw the line between different political units, making them not only an instrument of political definition but first and foremost an instrument of movement control - one that is either more flexible and operative as a connection point, or less flexible and creates blockade points - ensuring different intensity levels in terms of flows of people, goods, services and ideas (Laitinen, 2001; 2003a: 18; Newman, 2001; Shields, 2006: 225). This capacity of borders is highlighted by Saskia Sassen, who points out that

"a growing consensus in the community of states to lift border controls to the flow of capital, information, and services, and more broadly, to further globalization (...) [but] when it comes to immigrants and refugees, whether in North America, Western Europe, or Japan, the national state claims all its old splendour in asserting its sovereign right to control its borders". (Sassen, 1996: 59)

By setting territorial limits, borders become a central element in state empowerment, as the established limits define the range of power exercised by each state and "serve to physically protect from outside threats, to enhance a range of economic objectives, and to preserve cultural autonomy" (Caporaso, 2000: 7). The ability to control its borders therefore becomes a clear sign of a state's power and a cornerstone in the defence of its sovereignty. Accordingly, the state is the legitimate holder of power and orders everything that happens in its territory and to that end, it necessarily needs to exercise power over whatever enters or leaves its territory, and thereby uses borders as an instrument for control. As stated by John Torpey, the "monopoly on the legitimate means of movement has been an essential corollary of the monopoly on the legitimate use of coercion in a world of states defined as nation-states" (Torpey, 2002: 35).

This is also reflected in one of the border definitions proposed by Thomas M. Wilson and Hastings Donnan: "Borders are the political

membranes through which people, goods, wealth and information must pass in order to be deemed acceptable or unacceptable by the state" (1998: 9). The main point is therefore what states consider as acceptable or unacceptable, or in other words, the political choice made regarding what should be allowed to have access, because it may be a benefit, and the political choice made regarding what should be excluded, because it may be a threat. It is the result of this evaluation that establishes the form to be assumed by the border, when working as a gateway to further development and ensuring protection from threats.

When analysing the bordering process, it is important to note that borders are also a social construction and they can thus change according to the way in which they are constructed. Even natural borders, created by geographical obstacles such as rivers, oceans, mountains or deserts, are the product of human intervention, and the result of a social construction process. They gain meaning depending on the role assigned to them by the entities entrusted with power over the territory, who use "natural features as convenient points of demarcation where it served their purposes, but avoid such features as and where political or economic preferences dictated" (Newman, 2006b: 174).

The political history of the Mediterranean Sea is an obvious example of this, since at the time of the Roman Empire, what is considered today a natural border between Europe and Northern Africa was the centre of an empire rather than a border zone. What has changed is the political framing and meaning of the border. Indeed, geographical references such as the Mediterranean Sea, the Alps, the Pyrenees or the Urals are relevant to the bordering process depending on the different narratives they are linked with over time. It is therefore the narrative rather than the geographical characteristics that determines border locations, making them "as variable as the stories with which they are constructed" (Eder, 2006: 266).

Another perspective on the bordering process is presented by David Newman, who considers that "the practices through which borders are demarcated or delimitated reflect the way in which borders are managed" (2006b: 172), showing the priorities of those who hold power and leaving others' interests aside. The use of such power to manage and control borders has often been translated into the creation of barriers to movement, and not on forging bridges and enabling contact. As such, the instruments through which borders could establish connection points become ineffective and are perceived as deviant realities, rather than the rule (Newman, 2006a: 150).

However, this situation has changed. The fact is that the intensification of commercial and capital flows at a global level, the development of information technologies and the need for rapid progress of the globalization process have encouraged, or even forced, the further opening of borders (Kolossov, 2005: 628). The novelty is that, from an era in which borders were perceived mainly by their role as blocking factors, we have moved to times in which borders are almost exclusively perceived by their other fundamental function, which is that of a contact point. The generalized idea is that, in a globalised world, borders should tend to disappear, because "the internationalization of production, the liberalization of trade, the mobility of finance, and advances in transportation and communication technology" (Andreas, 2003a: 82) create a context of continuous circulation in which everything needs to be fast and where borders lose their traditional importance.

Nevertheless, borders have not disappeared. They are being transformed, acting less as barriers and more as bridges. Time has refuted the premise of those who predicted the end of borders. As David Newman (2006b: 172) argues, "we woke up to our borderless world only to find that each and every one of us, individuals as well as groups or states with which we share affiliation, live in a world of borders which give order to our lives". This transformation has required that borders become more open and porous, especially in the light of the global economic acceleration (Anderson, 202: 230).

However, if globalization had the power to open circulation channels worldwide at a pace that crushed all obstacles and dismantled any capacity to control access to those channels, it also thereby increased the range and intensity of risk on a global scale (Mabee, 2007: 392). We face what we might call a globalization of opportunities that goes side by side with a globalization of threats. The challenge lies in enhancing the former while controlling the latter and there is a renewed focus on the role borders should play to that end.

Borders are therefore experiencing an important redefinition of their role in the global framework. The main challenge is to seek to understand the border in its entirety, taking into account that "the essence of a border is to separate the 'self' from the 'other'. As such, one of the major functions of a border is to act as a barrier", but at the same time, "borders are equally there to be crossed" (Newman, 2003: 14) and to put 'us' and 'them' in touch. This dialectic renders the border an appropriate instrument for maximizing opportunities while minimizing threats. Accordingly, in this globalised world, those who have the "monopoly on the legitimate means of movement" (Torpey, 2002: 35) take advantage of these borders' flexibility to shape them according to their political priorities and the needs of our time. Borders can therefore no longer be simply labelled opened or closed, but instead need to be recognized as being simultaneously open and closed.

## Borders and security: a multifaceted nexus

State and security are strongly connected. However, this connection has taken different forms at different times. Applying security policies at borders does not mean that borders will always assume identical characteristics. As with any other social construction, the border shaping process is also necessarily influenced and determined by the circumstances in which it occurs.

The traditional idea of the monopoly on the legitimate use of coercion is based on the assumption that the state uses its power to ensure the security of its citizens. Security is inseparable from control over the border that delimits the state's territory, since the creation of security within its territory depends on the insurance of protection from external threats (Biersteker, 2003: 153).

As a decisive element in establishing difference, when facing a threatening and feared difference, borders not only have to draw a separation line, but must also ensure protection. The perception of threat thus leads to a common desire to reduce the possibilities of contact with an undesired or dangerous neighbour. "If it is impossible to get rid of him, to subordinate, control, or resettle him, the

best solution will be to build a fence as a protection against him" (Kolossov, 2005: 619). At present, the idea that borders define the limit of civilization and that danger is hiding on the other side, which has always been present in the collective subconscious, is once again in the limelight (Shields, 2006: 226). Fear therefore leads to demands for harder borders in order to ensure more security.

The 9/11 events were a milestone in the way borders are perceived. The recognition of fragile security and protection of citizens led to a widespread demand for greater protection, creating the conditions for the imposition of more restrictive measures. In this securitized environment, borders attain a renewed importance, as they play a central role in ensuring territorial security (Laitinen, 2001; Mabee, 2007: 392), and are expected to act as protection barriers against external threats, eventually justifying the defence of policies that enable harder border control (Koff, 2006:1). As a result, borders are once again strongly controlled, and in some cases, almost sealed (Newman, 2006a: 149).

A border closed for security reasons is totally anachronistic, because if it ensures protection against terrorist attacks for example, it can also be the cause of irreparable economic damage. Jan Zielonka (2001: 519-524) argues that there is a great of prejudice in the idea that a hard border policy ensures protection against crime and undesired migrations, as he thinks that hard borders cannot be efficient. Eben Kaplan (2006) also criticizes hard border policies, and points out, when referring to the reinforcement of border security between the United States of America and Mexico, that the 9/11 terrorists did not have to cross Rio Grande or the Arizona Desert to enter the country: they arrived by plane and with a visa. The point is that terrorists share exactly the same communication and transportation networks as the global economy, clearly showing that the strategy adopted at the border between the United States of America and Mexico puts economic integration and security imperatives on a collision course (Andreas, 2003b: 19).

The option for hard border policies that block access to the territory is a solution that has not always proven to be itself efficient and has sometimes had undesired results. One of the consequences of imposed barriers to migration has been the empowering of illegal networks responsible for irregular migration. These criminal organizations have invested in more sophisticated operations in order to fight the more efficient border controls, and as a result have had to look for new sources of income, such as drugs, guns, stolen products and human trafficking. The irregular migrants that seek these organizations' support when crossing borders have also been exposed to higher risks, as shown by the expansion of the fences on the border between the United States of America and Mexico (Andreas, 2003b: 5; Koff, 2006: 13), or the reinforcement of surveillance in the Mediterranean.

Reality shows that borders were not indefinitely closed after 9/11 or similar attacks elsewhere. Instead, borders began to adapt to a new reality and became essential not only in resolving misunderstandings and contradictions between states, but also in enabling the existence of a contradictory world system where goods, capital and information can now freely cross borders, while certain people cannot (Anderson, 2002: 231).

## Securitization and the bordering process

Border management can be seen as a result of paradoxical measures, incoherent policies and fuzzy decisions. However, analysis of border policies using the Copenhagen School[2] securitization theory can help us to understand the criteria used to take such decisions. The different levels of border blocking or opening are often a result of the securitization of policies connected with the border, which means that securitization has a strong influence on the bordering process.

Nowadays, the greatest challenge faced by borders is perhaps presented by the acceleration of circulation at a global level - the globalization of movement. However, movement does not represent a threat, but what is moved can be seen as potentially dangerous. Flows are therefore an essential item on the new security agenda: the flows of threats, or the threat of the lack of flows. In this context, control over flows is a key element in ensuring security, and the border is the main place for efficient control of flows. In fact, given the different interests of those who have the power of management, borders will assume different functions in a process that can be described as a continuum of opening and closing borders (Newman, 2006b: 180).

As a result of political options assumed in the face of different kinds of flows, borders play different roles, and are sometimes channels to facilitate circulation, and at other times act as barriers to block crossing. If this process is concerned with political options, it also concerns the legitimacy of such options. If politicians are legitimised to take decisions in the political domain, they can face a lack of legitimacy to make choices that go beyond it and belong to the domain of security. Consequently, a need for a new legitimacy emerges, which can only be provided by the securitization process.

When analysing this process, it is important to understand which criteria enable distinction between what is a threat and what is not. The Copenhagen School considers that by a "speech act" (Buzan et al. 1998: 26), i.e. by the simple act of saying it, an issue can be presented as an existential threat to a given object: a state, a nation, a religion or the survival of a species. As a result, securitization begins with the act of saying that there is a threat to security. A securitizing attempt therefore takes place with the presentation of an issue as requiring extraordinary measures of protection, which are no longer within the domain of normal politics, but on a higher level at which they have higher priority. Securitization is thereby the result of a discursive construction process of the threat, which leads to the adoption of extraordinary security measures to ensure the protection of a given object.

The securitization process needs to present something as a threat, but most of all to create the perception of the threat's existence, regardless of whether it is real or not. In this process, the main role is played by the securitization actor, an individual with enough power to declare that a given object is existentially threatened. This only succeeds when the audience accepts the idea that an existential threat really exists (Buzan et al., 1998: 27). It is only then, after conquering the audience, that it is possible to use extraordinary measures of protection. These measures are accepted because they are perceived as necessary in view of a security problem, which means that they involve something that cannot be solved at the political level where normal matters are solved, but instead involve an issue that is located at an exceptional level. The exceptional-

2. The so called Copenhagen School brings a new critical approach to security studies, which has emerged from the work done by Barry Buzan and Ole Waever, in the last two decades, with a number of collaborators at the Copenhagen Peace Research Institute (Copri). The securitization theory is one of the results of this work, as is the concept of societal security, or the development of the regional security complex theory (Buzan and Hensen, 2009: 212-217). See Buzan et al., 1998, and Buzan and Waever, 2003.

ity of the answer is hence a result of the exceptionality of the problem. Securitization is thus present, for example, when political leaders present immigrants as a threat to job security. By doing so, they try to construct the perception of a threat that leads the population to agree with tougher immigration policies. The threat is therefore an essential element in the security analysis.

Security is thus constructed in response to the threat, and aims to draw a border line that establishes a protection perimeter surrounding what must be protected, keeping the threat out of this 'territory'. The attempt to control flows is often made by means of securitization policies that shape borders in order to respond to different types of flows, according to the previous political options assumed by the political power, which decides what does or does not represent an existential threat to a specific territory. Through this lens of analysis, it can be seen that borders often play an apparently 'schizophrenic' role by simultaneously acting as free crossing channels for certain kinds of flows, while being impenetrable barriers to others.

Securitization policies play an essential role in shaping borders, since they are often the gatekeepers that determine what is and what is not allowed to cross the border. Borders currently tend to be as open as possible in the presence of desired flows, while they tend to be as insurmountable as possible in the face of undesired ones.

Globalization makes state security or personal security more complex, since its new realities accelerate people's movement.

"The distinction between desirable, lawful and safe movement of people, and dangerous, illegal and criminal movement becomes unfathomable, [so] states face difficult choices between resorting to more severe control over a wide range of civil life, or living with some danger as best you can." (Ogata, 2002: 10)

The individualization of danger led to a new level of demand for the capacity of borders to protect, as exemplified by the threat directly associated with the migration phenomenon.

The massive flows of people to the borders of the developed countries and the increasing difficulty of states in controlling their own borders placed border management policies to regain priority on the political agenda (Bertozzi, 2008: 1), not only to avoid terrorist attacks but also, and in many cases mainly, to protect a given standard of welfare (Geddes, 2005: 790). In this new context, border controls must be more efficient, but also need to be faster, and although they become more complex they also must be easily manageable in order to be flexible enough to respond to unpredictable situations. The border is therefore confronted with dual challenges to which it must find balanced solutions, even if sometimes the solutions requested may seem apparently incompatible (Bertozzi, 2008: 1-2).

## The EU bordering process

Europe is one of the regions in the world where the border concept has evolved in a most unusual way. The European Union became a zone of free circulation of people and goods - a huge area with a clearly delimited external border. Inside this border, however, there is no sovereign state

over the whole territory, but instead a group of states that retain a certain level of sovereignty over their own territories, while sharing other levels of sovereignty over the whole area.

Uncontrolled migrations, weapons and drugs trafficking and terrorism are the main threats to security currently identified by the EU, but it is on irregular migration that border controls are focused, as the other problems are commonly related to the uncontrolled flows of migrants (Hills, 2006: 77). The EU identifies major problems in its response to irregular migration, since it not only poses a potential threat to physical security but also represents a problem for EU citizens' employment and welfare standards. The intense external pressure from migrants at European borders is considered a problem common to all the member states, as all of them are affected as origin, transit or destination countries (Geddes, 2005: 790).

Fighting irregular migration is at the top of the EU's priorities and the Union adopted a set of measures in order to increase its control over migration, such as using better security procedures on travel documents, improving the communications network of member states, and reinforcing cooperation with migrants' origin countries (Bertozzi, 2008: 7; Koff, 2006: 12). These policies are a consequence of the idea that a stronger external border is the best response to irregular migration, due to the fact that irregular migration is considered a major threat. According to EU leaders, "the best place to stop illegal immigration, therefore, is at the EU's external borders. These have become doubly important since the abolition of internal frontiers - and frontier controls - within the EU" (European Commission, 2009: 11-12). Talking about hard borders does not mean that these are something that must necessarily take the form of a physical blocking structure. Even where there are no walls or fences, there can be invisible borders as insurmountable as the border between two countries fighting each other (Newman, 2006b: 177).

Furthermore, borders do not have to play their role as barriers exclusively at the borderline. There is an increasing tendency towards the remote control of borders, in which the instruments for fighting irregular migration are not only at physical territorial borders but are more expansive and efficient, involving the action of various actors, as "supranational actors, third countries, and private actors such as truck drivers, ferry operators and airlines" (Geddes, 2005: 789). Technological evolution and in particular, the use of military technology for border controls, leads Peter Andreas to foresee that

"the border fence of the future may include invisible fencing ("virtual fencing") using nonlethal microwave technology developed by the Pentagon that creates burning sensations without actually burning the skin, and some border patrol duties may be carried out by video-equipped (and potentially armed) unmanned dirigibles and robot dune buggies. And at ports of entry, new biometric technologies, such as retinal scanning, will be increasingly utilized to identify unwanted entrants." (Andreas, 2003a: 91)

The European borders development process has generated a 'network Europe' that is open and free, but which goes side by side with a process of external border reinforcement without which internal free circulation would hardly be possible. As Alice Hills (2006: 67) has noted, "the EU's political vision of a borderless Europe depends on effective border management". There is a 'network Europe', an area of freedom, which gains its legitimacy from European citizens due to representing a promise of

"project and promote peacefulness, prosperity and stability" (Laitinen, 2003b: 21). However, this commitment can only be achieved if security from external threats is ensured. The image of a 'free Europe' develops alongside the image of a 'Fortress Europe', as external borders became impenetrable in order to avoid potential external threats, and particularly migration flows and cross-border crime (Rumford, 2007: 330).

The need to rebalance what a border should block and what it should allow access to is felt particularly keenly in the border zones that delimit the contact area between the two major blocs of the global age: the North and the South. The Mediterranean is one of the world's regions where the North/South encounter is most relevant, and it is also an area under major pressure from various contradictions in securitization policies.

## The Mediterranean and migration

In the 1970s, in the wake of the decolonization process, the European Community defined a global approach to the relations with the Mediterranean Basin States. Realizing that "with the creation of European Communities, all Member States became coastal to the Mediterranean" (Commission, 1972: 1) was the starting point to developing a new approach that aims at creating stability and economic development conditions based on cooperation, and also at establishing an area of approximation and connection between the European Community and the African countries.

A decade later, however, the conclusion was that the 'global approach' to the Mediterranean had not reached the initial proposed goals. The new orientation highlighted the importance of affirming Europe as a preferential market for Mediterranean countries, where the conditions for establishing strong links between the two parts would be created, as well as allowing Mediterranean countries to maintain a certain level of economical vitality that would not affect their internal social stability (Commission, 1982: 10).

With the Single European Act and the 'Single Market' establishment process, member states felt the need to reassure their world partners, and at the Rhodes European Council, Europe reinforced its commitment on cooperation, refusing to become a closed club (European Council, 1988: 11). It is in this context that the Community opened a new chapter in its relations with Mediterranean countries in order to "support them in their efforts towards cooperation with Europe, regional integration and economic development" (European Council, 1989: 13). Once again, the need to change the policies towards the Mediterranean was stressed, as the Community realised that "stability and prosperity in the Mediterranean non-member countries are key factors in the stability and prosperity of the Community itself […] What is at issue is its security in the broadest sense" (Commission, 1990: 2).

The perception is always that "threats travel more easily over short distances than over long ones" (Buzan and Waever, 2003: 45) and as a result, the immediate challenges to security are posed by threats at regional level. Europe necessarily has a higher level of interaction with Mediterranean countries than with other countries. The existing contact between the two sides naturally leads to the creation of common

interests, to exploring potential advantages and also to sharing common burdens. Such closeness often makes the threats faced by one state common to its neighbours. Moreover, proximity itself can be a source of threat, which makes states fear their neighbours more than other distant states (Buzan et al., 1998: 11).

This perspective was translated into policy when in 1992, the Lisbon European Council, foreseeing the future developments of the Common Foreign and Security Policy, pointed to the Maghreb and the Middle East as preferential regions for future joint action. A strategy that was justified by the EU's

"strong interests both in terms of security and social stability (...) [as] the Maghreb is the Union's southern frontier. Its stability is of important common interest to the Union. Population growth, recurrent social crises, large-scale migration, and the growth of religious fundamentalism and integralism are problems which threaten that stability." (European Council, 1992: 20-21)

On the foundations launched at Lisbon, the Euro-Mediterranean Partnership project started taking shape in 1994, when the Corfu European Council launched the idea of convening a conference to be attended by European countries and Mediterranean partners (European Council, 1994: 13). Since the beginning of the process, the EU has expressed the purpose of focusing the partnership on three main aspects: a political and security aspect; an economic and financial dimension; and a social and human element (European Council, 1995: 22-23).

Initially known as the Barcelona Process, and re-launched in 2008 as the Union for the Mediterranean, the process was founded at the Barcelona Conference in 1995, which defined a new strategy of close cooperation between the EU and the Mediterranean partners, a group that included the countries of North Africa and the Middle East. The conference's conclusions were almost identical to the EU's previously stated position at the Cannes European Council (European Council, 1995). The three main objectives were to establish an area of peace and stability; to create a zone of prosperity; and to develop human resources, promote dialogue between cultures and exchanges between civil societies (European Commission, 1995).

The European policy for the Mediterranean began a process of successive revisions with the presentation of the Common Strategy for the Mediterranean (European Council, 2000), the Valencia Action Plan (Valencia Action Plan, 2002), and a new set of recommendations according to the framework established by the "Wider Europe" approach (Commission, 2003). The succession of new proposals is the result of the difficulty in the first few years regarding the practical implementation of the measures agreed at the Barcelona Conference.

The Barcelona Process evolution developed simultaneously with the opening of internal borders in the EU, and the creation of a common area of freedom, security and justice. Among the general objectives established at the Tampere European Council is that of creating an open and secure European Union to European citizens, while reserving a place "to those whose circumstances lead them justifiably to seek access to our territory" (European Council, 1999). The viability of a Europe that wants to reach such an objective is dependent on

"a consistent control of external borders" (European Council, 1999) allowing efficient management of migration flows, and the fight against irregular migration, human trafficking and other forms of transboundary crime.

The 9/11 attacks led the EU to realize that the previous "consistent control of external borders" (European Council, 1999) was no longer sufficient, and it was now necessary to "strengthen controls at external borders [and] exercise the utmost vigilance when issuing identity documents and residence permits" (Council, 2001). At an emergency meeting after the 9/11 attacks, European Justice and Home Affairs ministers asked for reinforcement of the control of identification documents and for further efforts on cooperation between member states, particularly concerning fast and efficient information exchange, as well as the coordination of activities. In order to achieve more efficient cooperation, a new set of measures was proposed, including the creation of a shared and integrated information system about people and goods, able to ensure more security inside the common area of free circulation (Bertozzi, 2008: 5-8). Realizing that a "better management of Union's external border controls will help in the fight against terrorism, illegal immigration networks and traffic in human being" (European Council, 2001: 12), the Laeken European Council paved the way for the creation of Frontex,[3] the common instrument for management of external borders.

This reinforcement of border controls emerged amidst generalized shock in western society, as it realized the vulnerability to which it was exposed. In this context, political leaders did not have to explain to the population the threats that menaced their way of life, as those threats had revealed themselves tragically and unquestionably. The shock caused by the 9/11 events is in itself a new chapter in a broader narrative construction process related with migrations. This narrative stresses the threat presented by migrants to their destination communities' welfare, in terms of criminality and competition in the labour market, for example.There was therefore no need to securitize the threats associated to 9/11, since this was already in motion, through an institutionalization trend that was only reinforced by the terrorist attacks (Buzan et al., 1998: 27).

Such securitization has been recognized by European leaders, on the analysis done of EU's development, recalling the "frequent public calls for a greater EU role in justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones" (European Council, 2001: 20). The European Commissioner for Justice and Home Affairs statement is even more explicit, justifying the need for an integrated management policy of the common border to the ministers of member states:

"Border controls and surveillance have increasingly become one of the top priorities of the Union, not only in view of the future enlargement of the EU, but also in view of an expected capability to react effectively, in common and at all levels, to the activities of criminal networks in general and, last but not least, terrorism. We have to create a feeling of mutual trust among Member States and to ensure public confidence among citizens." (Vitorino, 2002)

The need to create trust among citizens mentioned above is based on the political elite's assumption that it must work towards "a true

3. Frontex is a European agency created in 2005 to coordinate the management of European Union's external borders. Its main tasks include risk analysis, providing assistance to member states on different operations related to external borders, including training national border guards, and following up relevant developments on border surveillance (Council, 2004: 4). The creation of this agency can be seen as a natural consequence of the development of the common area of freedom, security and justice, but the events of 9/11 and border vulnerabilities detected afterwards had a decisive impact on the creation of Frontex (European Council, 2001: 12).

single European area of justice, security and freedom for all the residents of the Union. That is what our citizens demand, that is what third country nationals living in the EU demand and this is what our conscience demands" (Vitorino, 2004: 8). The ability to take decisions that answer to a lack of feeling of security or to the citizens' requirement of security is precisely the objective of a securitization process. By institutionalizing the securitization of certain issues – such as irregular migration, transboundary trafficking and terrorism - the proper environment for the legitimization of a set of measures was created, with a clear reinforcement of borders as barriers, and by increasingly blocking the access of migrants to the European area.

However, events ended up showing European political leaders that a strategy of blocking external access to Europe was not the best option for dealing with migration-related problems. On the contrary, the political integration of a set of issues and closer cooperation with neighbour countries should be options at the table. The repeated reports of confrontations between migrants and border authorities, as happened at Ceuta and Melilla, and the succession of news stories about migrants' deaths while trying to enter European territory, were some of the factors that contributed to the development of public awareness regarding, in the words of the European commissioner, the "humanitarian tragedy which happens on the Mediterranean on a daily basis" (Vitorino, 2004: 6).

The European speech and practical inconsistency in terms of border management became increasingly clear. In an editorial, the *Wall Street Journal*, for example, openly criticized the Spanish prime minister Jose Luis Zapatero, accusing him of hypocrisy, as "while Spain and much Europe condemn Israel for building a security fence on disputed territory, the Socialist government in Madrid - which talks grandly of an 'Alliance of Civilizations' - does exactly the same" (*Wall Street Journal*, 2005). The main argument of the newspaper's critics is the fence surrounding Melilla, a barrier that the Madrid government decided to double in height, from three to six meters, in order to stop irregular migrants from entering. The need for a political reorientation on migration-related issues is also highlighted by an International Amnesty representative, who states that "the EU and its Member States must abandon the illusion that it is possible to stop people with ever tougher controls" (euobserver.com, 2006).

The EU therefore faces an extremely complex challenge. First of all, because it is becoming almost impossible to establish criteria that are both secure and fair in terms of migration flows management, as it is impossible to know the intentions of everyone trying to cross the border. The fact is that among the same group of migrants, there may be refugees trying to escape human rights violations or people that are just looking for a better life, but there may also be members of international criminal organizations (European Commission, 2009: 3).

This difficulty is acknowledged by European leaders who assume the need for a new orientation. The commissioner Louis Michel says that "the only long term and sustainable response to migration pressure is not putting more barriers in place, sending people back or selective migration policies. The true response is investing massively in development" (euobserver.com, 2006). The Global Approach to Migration, presented in 2005, is based on the recognition of the "increasing importance of migration issues for the EU and its Member States and the fact

that recent developments have led to mounting public concern in some Member States" (European Council, 2005: 2). The relevance of securitization of issues related to migration in the political decision-making process is assumed by European leaders when they reflect on the need to redirect policies on irregular migration. While establishing these new policy guidelines, the European Commission states that

"it is important not to create false or disproportionate expectations in the public opinion: The reasons that push third-countries nationals to seek to immigrate illegally are so wide and complex that it would be unrealistic to believe that illegal immigration flows can be completely stopped. Public perception which tends to establish a link between some societal problems and illegal immigration should also be taken into account." (Commission, 2006: 4)

"Constant and growing expectations from citizens, who wish to see concrete results in matters such as cross-border crime and terrorism as well as migration" (European Council, 2006: 10) are once again the supporting assumptions that precede the presentation of a comprehensive European Migration Policy guidelines in 2006, at the Brussels European Council.

Migration policy is thus defined by successive steps leading to the integration of various policies and partners, and stressing the central role to be played by neighbouring countries and the EU's responsibility to financially support those countries. This support ranges from sponsoring direct migration control policies to sustain a development aid network, which seeks to attack the root causes of migration. This comprehensive approach does not mean, however, that border controls should be lifted but that they are part of a wider strategy in which "the EU needs to have its policy in place to react, to take advantages of the opportunities mobility can bring while minimising the disadvantages that can result" (Vitorino, 2004: 5). By developing Frontex and investing in the use of new technologies, the EU wants to improve the management of border controls (European Council, 2006: 12) in order "to protect citizens and infrastructures and reduce our vulnerability to attack, including through improved security of borders, transport and critical infrastructure" (Council, 2005c: 7). As a reaction to successive incidents involving migrants while crossing the Mediterranean, the region and the whole African continent are defined as priority areas for the development of the new EU's migration policy (European Council, 2005: 9-14).

The tenth anniversary of the Euro-Mediterranean Partnership in 2005 occurred at a time when the EU was trying to integrate a range of issues in a coherent manner. The perception is that the ability to ensure a common free and safe circulation area depends on efficient border controls, able to manage migration flows and to protect the territory from the various forms of cross-border crime. However, this objective cannot only be attained by the efficiency of European border controls alone, but depends on the cooperation of the migrants' origin and transit countries, and particularly the countries of North Africa. It is in this context that the EU demands a common commitment by Mediterranean countries to a Code of Conduct on Countering Terrorism, and advocates the establishment of a fourth pillar of the Euro-Mediterranean Partnership: "An area of mutual cooperation on migration, social integration, justice, and security" (Council, 2005a: 4).

Both sides' common interests are invariably presented as the guiding criteria of the agreed Five Year Work Programme (Council, 2005a). In order to reach the common interest objectives, the document argues for borders to be opened to some issues, while for other issues it stresses the need for increased and more efficient control of border flows. The document demonstrates how securitization policies act as essential elements in the political leaders' decision-making process. It is the securitization of different issues that works as the gatekeeper, determining what can or cannot cross European borders. The objective of establishing a free trade area, which means a total openness of borders to trade, is a clear example of the role played by securitization. The free trade area project is just an embodiment of the ever-present idea in the cooperation process between the EU and the Mediterranean countries that trade is the best means to overcome the imbalances between the two Mediterranean shores. Besides the free trade area, the document presents other projects pointing to the same goal, such as the development of a regional transport infrastructure network to boost regional trade, and the promotion of an Euro-Mediterranean energy-market (Council, 2005b: 5-7).

When it comes to migrations, however, there is no project for creating an area of free circulation of people. On the contrary, the objective is to improve border controls in order to ensure opportunities for legal migration, and at the same time fight illegal migration and cross-border crime (Council, 2005b: 10-11). The EU and Mediterranean countries border control cooperation has been developed and structured by means of a series of meetings and partnership agreements based on the recognition that "illegal or irregular migration cannot be addressed by security considerations only but should be based on broader development frameworks and on mainstreaming migration in development strategies" (European Union, 2006).

Stressing the importance of an agreement between the two parties on these matters has also highlighted the potential threat to security that uncontrolled migration flows pose not only to the EU, but also to the migration's origin and transit countries. Migration-related problems thus become a key topic in the EU's relations with its Mediterranean partners, as these issues are perceived by the European side as crucial to its security. By giving migration a prominent position on its security and Mediterranean political agenda, the EU is therefore granting migration a central role in the definition of its external borders, as analyzed above.

## Conclusion

The challenges faced by borders today seem almost insurmountable, since they are requested to play one role and, at the same time, its opposite. The fact is that borders appear to be able to meet this challenge, due to two main factors: first, borders are a social construction, and second, they can be easily shaped by securitization policies because of their dual nature.

Considering that the apparently more stable and immutable aspect of borders - their demarcation - is the result of a social construction process, it must be acknowledged their more mutable characteristics - the functions they may play - can also arise from a social construc-

tion process. History, particularly in the last few decades, shows how their functions assigned to borders can vary. Assuming different functions is a task that they have revealed shown their ability to perform. This ability capacity is also a result of the dual nature of borders that makes them particularly suitable for responding to diverse challenges. By being simultaneously blocking elements and communication channels, borders are naturally predisposed to act as a barrier or a connection point.

The challenge faced by borders becomes more complex when they are required to simultaneously act as a wall and as a bridge. However, this complexity does not come from the incapacity of borders to answer to such challenge, but from the paradoxical appearance that borders assume in the eyes of those who face them. The fact is that a border that is perceived as being incoherent is easily contested.

Securitization policies also play a dual role In this process. For instance it is by the securitization of migration that the request for tougher border controls on migration flows can be explained, whereas in other issues, border controls tend to be as flexible as possible. However, this makes the paradoxical appearance of borders mentioned above clearer. It is in response to this situation that securitization policies play another important role, as they give such borders a coherent appearance.

As a result, the securitization of a certain issue - migrations in our analysis - leads public opinion to request extraordinary measures to respond to the perceived threat. These extraordinary measures include the request of border blocks on a specific border flow, while for flows in general, borders are requested to be as open as possible. The European approach to external borders therefore lies in the capacity to manage the ability of borders to simultaneously respond in different ways to various requests, which in practice leads to different degrees of closure or openness, according to the various flows and the perception of threats posed by them. Border policies are thus tools to respond to these threats, and migrations are one of them. Migrations thus play a central role in the definition of European external borders, as the securitization of migrations has a direct and decisive impact on shaping such borders.

The fact is that, as mentioned above, borders ended up by presenting themselves as inconsistent and almost 'schizophrenic'. Through securitization, however, this perception is mitigated in the eyes of public opinion, which accepts it as a consequence of an extraordinary response to a threat, and as such a necessary condition for ensuring security.

Securitization policies therefore play a decisive role in the EU bordering process. The securitization of an issue allows the normal acceptance of the different and apparently incompatible roles borders can perform, when they would be perceived as strange and abnormal outside a securitization context. Securitization policies thus enable political leaders to draw different borders for different border flows, a task protected from any type of response by the securitization process. When it comes to deciding what should or should not cross the border, in securitization political leaders have a decisive instrument that ultimately acts as a gatekeeper.

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# EXTERNAL BORDER ENFORCEMENT, PUBLIC GOODS AND BURDEN SHARING MECHANISMS IN THE EU

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## Introduction

The ongoing process of European integration has brought some fundamental changes to border and migration policy in Europe. An important step towards the European Single Market was the introduction of the Schengen Agreement in 1985, which led to a redefinition of European borders in several ways. The most prominent was the abolition of internal borders between participating member states. However, the aim of creating a common market with unrestricted internal mobility of labor not only affected EU citizens but also immigrants arriving from outside the EU. Immigrants – both regular and irregular– found it much easier to move onward from the country of first arrival to anywhere else in the EU. The decline in the importance of internal borders therefore simultaneously marked the beginning of a new era with respect to the external borders of the EU, i.e. those frontiers separating the EU from the rest of the world.[1] In fact, as Rigo (2005: 7) puts it, the lifting of internal borders widened the Range of individuals able to enjoy the transnational freedom of movement and so repositioned "national borders at the external frontier of the Union".

One consequence of this development is the increasing relevance of irregular immigration in political and public debate in many EU member states. In particular, countries along the Mediterranean border such as Italy, Spain and Malta face numerous attempts to illegally enter these countries, and substantial inflows can be observed despite efforts to keep borders closed. However, due to the openness of internal borders, which also reduced the barriers for migrants to move on to more Northern (welfare) states,[2] irregular migration also affects the remaining EU member states. In fact, recent evidence shows that a reasonable proportion of irregular migrants coming to Italy are actually planning to head for Germany or Great Britain as their final destination (Chiuri et al., 2007).

Surprisingly, there is plenty of evidence indicating a lack of coordination in enforcing the external border, especially in the Mediterranean Sea. One prominent example is the Nautilus initiative coordinated

[1]. This is a very simple definition of external border, to which we refer for the rest of this chapter. For a more elaborate discussion of the term 'external border' in the EU see Ceriani, et al. (2008).

[2]. We consider these Northern member states to be those countries in the EU which are not directly situated at the Mediterranean frontier of the EU, meaning that irregular migrants have to pass through another EU country first when moving to these countries. Examples include Germany, Austria, the Netherlands and most of the Scandinavian countries.

by the EU border agency FRONTEX.[3] Initially considered a common operation to control the inflow of irregular migrants coming across the Mediterranean Sea, it had to be abandoned due to a lack of financial solidarity from member states (Lutterbeck, 2008). The lack of coordination in border management is one example of the EU′s difficulties in building a common migration framework. The reasons for these difficulties are still open to debate. For instance, Lahav (2004) relates the problems to a lack of a normative foundation, which is related to the conflict between the building processes of a common EU policy on the one hand, and the loss of state sovereignty on the other.

In this article, we analyze the problems in the building process which are related to the enforcement of the external border. We argue that it is the public good character of border enforcement which prevents meeting the normative implications in the area of border management. In this constellation, it is individually rational for a (Northern) EU member state without relevant external borders to not participate in sharing the financial burden related to enforcing the external EU border, e.g. at the Mediterranean Sea. Likewise, a member state situated at the external border has no incentive to take into account positive effects of enforcement for other EU member countries when deciding on enforcement. Based on this reasoning, we are in a position to answer the normative question of whether the responsibility to enforce the external EU border should lie in the hands of the countries at the external border, or be in the hands of the EU in a common effort (Zapata-Barrero and de Witte, 2007).

Furthermore, we search for policy options to resolve the coordination problems of commonly enforcing the external border. Here, we resort to the field of mechanism design, which allows us to characterize the conditions under which member states voluntarily behave in a welfare-optimizing way, despite the existence of strong incentives to act strategically in a decentralized setting. With a socially optimal border design, we come closer to a normative definition of external borders in the European Union, and we also move towards the European Commission's call for an introduction of a financial burden-sharing mechanism for enforcement of the external EU border (European Commission, 2002).

The remainder of this chapter is organized as follows. We start by introducing a normative benchmark for financing external border enforcement from an economist's perspective in Section 2, arguing that in particular strong positive externalities may lead to a sub-optimal level of border enforcement from a European point of view. In Section 3, we turn to the institutional setting of border enforcement in the EU, showing that for positive rates of onward migration in the Schengen Area, border enforcement may be characterized as a public good which is best provided on a central EU level. Assuming that no central EU governing body responsible for enforcement is likely to be established, we consider options for resolving the public good problem with measures derived from the field of mechanism design in Section 4. Finally, Section 5 concludes the main results of this chapter, i.e. a lack of direct control of border enforcement through an EU governing body, meaning that alternative measures for dealing with the public good problem of enforcing the external borders are needed, such as the establishment of a mechanism that encourages member states to voluntarily contribute to border enforcement.

[3.] The FRONTEX agency was introduced in 2005 to coordinate the cooperation between EU member states in the field of border security. For a detailed overview of FRONTEX see Carrera (2007), Jorry (2007) and http://www.frontex.europa.eu/.

## A normative benchmark for financing external border enforcement

From an economist's perspective, the ultimate goal of any market transaction and potential government intervention is to maximize *welfare*, which is to be understood as the broadest measure of well-being of an individual. Since economic science is rooted in *methodological individualism*, the individual is the central object of interest, and society is merely the aggregation of individuals. A country's welfare is thereby at its highest possible level if any change in the status quo would ultimately lead to a reduction of the well-being of at least one citizen. This state of the world is called *efficient* or *pareto-optimal*.[4]

According to the First Fundamental Theorem of Welfare Economics, markets lead to an efficient allocation of goods, i.e. each citizen consumes her most preferred bundle of consumption goods, given her budget constraint. At the same time, firms produce just the right amount and combination of consumption goods (given available resources) that help citizens to maximize their welfare. Then, prices are perfect signals indicating scarcities and abundance of goods and factors of production. However, in order to achieve this efficient state of the world, markets must be complete and perfectly competitive, i.e. markets must be able to work without restrictions such as externalities, public goods and transaction costs. Since these restrictions are particularly relevant when discussing the questions related to (financing) external border enforcement, we will turn to them in detail in the following subsections.

### Borders as welfare-reducing transaction costs

Let us first consider the case of transaction costs. Efficiency requires that as soon prices indicate a scarcity, for example of the production factor "labour" in a place, workers immediately move to this place, enter the production process and thus create additional production that reduces scarcity. Because scarcity follows from consumers' demands for a certain good, additional production makes consumers better off. Although the price of labour is reduced on a global scale, society as a whole benefits through increased welfare. When a border constitutes a major obstacle to labour migration, i.e. when transaction costs are high, this welfare-improving process is interrupted. Instead of using labour where it is most productive, it is used in a place where it turns out to be relatively abundant. Efficiency is not achieved.

More specifically, if we consider the world to be one single (labour) market, borders lead to an inefficient outcome in the sense that the highest global welfare level is not achieved. Under these premises, the human rights approach to migration should in fact become irrelevant, because it is in the *economic* self-interest of all agents to keep borders open and not to infringe the human rights of the – highly welcomed - immigrants. Out-migration from, say, Sub-Saharan Africa to the EU will improve welfare in both regions of the world. However, if this is the case, why do we observe the existence of borders and indeed, costly border enforcement? Zapata-Barrero (2010), in the first chapter of this volume, provides a comprehensive account of several explanations. Certainly, the Hobbesian approach comes closest to an economist's reasoning. In particular, it appears that it is in the narrow self-interest of people to join a group and enjoy the benefits from it which come mainly from a more peaceful

[4] A fundamental work in the field of migration and allocative efficiency is Sjaastad (1962). An overview of this subject can be found in Borjas (1994, 1995).

living and working, thereby – among other things – providing security against a potentially anarchic world outside the group.

Economically speaking, excluding others by setting up borders has a second major advantage, namely the preservation of the status quo, or rather status quo income distribution.[5] While migration improves overall welfare, subgroups in society may nevertheless be harmed because the income distribution changes (Borjas, 1999). If on the one hand, the immigrants turn out to be substitutes for some individuals in the labour market, these individuals will have to accept lower incomes or job losses due to fiercer competition. If on the other hand, the immigrants complement factors of production (such as capital owners or high-skilled workers when immigrants have a low skill level), these factors benefit. In sum, the income distribution is likely to become more unequal. In a strict sense, pareto-optimality is no longer achieved because some citizens lose. Having a border is therefore probably preferable to not having a border, although aggregate welfare is lower without a border. Only the introduction of a mechanism which redistributes from the beneficiaries to those who are harmed by migration may lead to unanimous support for open borders. While according to the Second Fundamental Theorem of Welfare Economics this type of redistribution is a feasible option (under certain conditions), from a practical point of view it is uncertain that sufficient political support for this measure will be gained.

This leads us to the following conclusion: Standard economic theory suggests avoiding raising transaction costs by setting up – costly to enforce – borders. At the same time, preserving the status quo in income distribution is presumably in the narrow self-interest of a majority of citizens, as they are potentially harmed (or perceive themselves to be harmed) by immigration. Since it is quite difficult to assess whether in fact a majority of citizens are harmed by immigration, we *deduce* from the existence of substantial efforts to curb an illegal influx that there is at least a strong general interest in (effectively enforced) borders. Obviously, the positive (or politico-economic) outcome with respect to border policy interferes with the optimal policy from a normative perspective. However, since our main interest is in European border policy, in the remainder of this paper we will accept that an external EU border exists and will continue to exist. We will then consider the question of whether this border is enforced in a way that meets a (purely) European normative benchmark. This benchmark relates to the welfare-optimal level of enforcement, i.e. the question of whether a single EU member state chooses to enforce its external border so as to maximize the welfare of the entire EU. By arguing that border enforcement resembles a public good and that deviations from the welfare optimum are the rule for this reason, the following discussion indicates that this is rather unlikely.

## Onward migration as externality and border enforcement as public good

*Externalities* and *public goods* are the best-known 'classical' cases of market failure. Again, markets no longer work smoothly. An externality occurs when the action of one agent (that is, a single person, a national country's government or an EU institution) positively or negatively affects third parties, which are not directly involved in the transaction. Because this effect has no pecuniary effects on the agent, she/he does not take it into account when choosing the optimal level of the action. A public good is an extreme case of a positive externality, because here the externality is non-excludable

[5.] Note that this approach is not limited to effects on income distributions. It can also be argued on several other grounds, such as effects on cultural or religious identity and the homogeneity of the domestic population. What matters is only that citizens perceive a reduction in their personal well-being. Facchini and Mayda (2008) find that across countries of different income levels, a majority of citizens indeed perceive a reduction of well-being with immigration.

in the sense that it positively affects all other agents in the economy without the possibility of excluding some agents. Again, the agent causing this externality, i.e. providing the public good, does not take into account the effect on other agents. The agent therefore only compares private costs and private benefits when choosing the optimal amount of the public good. Given that benefits should clearly be higher at a social level but are ignored, we expect an under-provision of the public good. This is because from a private perspective, benefits appear relatively low at a given cost level such that only a relatively low level of the public good is provided. If the social benefit is instead considered for an identical cost situation, the socially optimal – and higher – level of the public good is provided.

Let us now consider the case of two countries that are members of a federation. One country is assumed to undertake an action which leads to some spill-over effect on the other country. More specifically, we may assume that one country increases efforts to enforce its external border. This reduces the number of (illegal) immigrants in this country. Let us also assume that some illegal immigrants always move on ('spill over') to the second country, which is possible because the internal border between the two countries is not enforced. Due to additional enforcement efforts, the number of onward migrants is reduced which benefits the second country, although this country did not contribute to enforcement in the first country. We thus have a typical public-good scenario following from a strong positive externality caused by the first country. However, the problem is that the first country considers national costs and benefits only when choosing the optimal level of enforcement. The effect on the second country is completely ignored because no financial compensation from the second country is assumed. Social benefits (that is, benefits accruing to the entire federation) thus exceed national benefits, leading to a level of enforcement that is too low from the federation's point of view. The allocation of resources is not efficient under these circumstances.[6]

One may ask why the second country does not simply contribute to financing the public good of 'border enforcement'. While the country may feel some obligation to do so for reasons beyond pure cost-benefit comparisons, standard economic theory provides a baseline argument assuming purely rational behaviour in the short run. We will discuss the public-good arguments related to the institutional setting of the EU in more detail below. Here, we resort to the standard argument first, and identify two main problems. First, since no country can be excluded from the benefits of additional enforcement (because onward migration is reduced anyway) it is rational from a single country's perspective to enjoy the benefits without contributing a financing share. This is typical *free-rider* behaviour, or as Samuelson (1954: 388) puts it, "it is in the selfish interest of each person to give false signals, to pretend to have less interest in a given collective activity than he really has." Second, the resulting level of public-good provision is too low from a global, i.e. European, point of view. This outcome may be characterized as a conflict between individual and collective rationality.

In the following sections, it will be our main task to investigate whether the EU bordering process fulfils the assumptions of the economic standard model. It should be borne in mind that we take the existence of (enforced) borders for granted (although we will discuss the validity of this claim in the following as well), and as such our main focus will be to judge whether the EU's external borders are enforced as to maximize the welfare of all EU citizens.[7] As we will find that this is not the case, we will discuss the possible solutions in some detail.

6. Our concept of border enforcement can also be interpreted in a more general way, to include those irregular immigrants which did not cross the external border illegally but overstayed their visas. In this case we interpret border enforcement as a general policy of deterrence which also includes measures like repatriation flights, or *internal* enforcement efforts such as workplace raids.

7. There are some limitations to this argument, as we assume it is possible to aggregate individual welfare levels of all EU citizens. According to Arrow (1951), this would imply unanimous support of these policy measures by all 500 million citizens.

## Borders, enforcement, public goods and the EU institutional setting

After having introduced some basic concepts from the field of economics to identify situations in which markets fail to achieve a welfare maximizing outcome in the previous section, we now turn to the concrete scenario of border enforcement in the EU. In this section, we therefore focus on the institutional details of the EU bordering process, i.e. immigration policy and especially external border management in the EU, and analyze how this situation can be characterized with the concepts introduced in section 2, i.e. transaction costs, externalities, and public goods.

### The Schengen Agreement and its consequences for external border policy

The concept of borders in the European Union has seen a dramatic change over the last 25 years. One cornerstone of the European Single Market was the introduction of the Schengen Agreement in 1985, which paved the way for free movement of people across EU's internal borders. As argued in Section 2, next to general political goals, an important aim of this measure was to improve allocative efficiency and thus increase welfare within the EU.[8] For the Mediterranean countries, controls at the internal borders to the more Northern member states such as Germany were eliminated in 1995; and in 1999 the Schengen Acquis was finally integrated in the EU framework by the Treaty of Amsterdam.[9]

This political step resulted in a redefinition of borders in the EU, because the Schengen Agreement not only abolished restrictions to movement at internal borders but at the same time meant the genesis of the concept of a common external border (Ceriani et al., 2008). While originally designed to facilitate the circulation of EU workers and citizens in the common market, this policy had important consequences for regular as well as irregular migrants, with the latter being the focus of our analysis. Through the abolition of checks and surveillances at the internal borders, the obstacles for onward migration of people who illegally entered at the external border decreased as a by-product (Krieger and Minter, 2007; Mayr et al., 2009).

Shortly afterwards, it became obvious that the rules and resources devoted to controlling the external border were insufficient to guarantee "a homogenous level of security at all the external frontiers" (European Commission, 2002: 4) because of differing national implementation strategies. The EU's Mediterranean border in particular seemed vulnerable. For instance, in 2006 the Maltese president Adami addressed the European Parliament, remarking that "Europe urgently needs an immigration policy that can deliver a response that offers Europe's trademark solidarity with [...] the countries of first arrival in Europe that are unable to deal with this problem on their own." (Cuschieri, 2007: 9). Due to its location, Malta is especially prone to irregular migration because of the short distance to Libya, where migrants embark when crossing the Mediterranean Sea. Hardly surprisingly, Maltese officials were very frustrated by the halt of the Nautilus initiative in 2007.[10] This maritime operation, coordinated by the common EU border agency FRONTEX, aimed at reducing the inflow of migrants by controlling the waters between Libya and Malta. However, this operation had to be abandoned due to a lack of contributions from fellow EU member states

8. http://ec.europa.eu/internal_market/10years/background_en.htm
9. http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm
10. For more information on Nautilus, see the FRONTEX website at http://www.frontex.europa.eu/examples_of_accomplished_operati/art6.html

(Lutterbeck, 2008), leading to the European Commission's (2008: 4) statement that "the participation of Member States remains limited in operations involving maritime patrols".

While the Schengen Agreement aims at facilitating internal regular migration within the EU, this option is limited to citizens of EU member states. The situation is different for non-EU foreigners who are not automatically granted the right to reside in any member state, Usually, their residence and work permit – if legal – is restricted to one member state only, although they might be allowed to freely travel within the EU. Asylum seekers and refugees are formally not even allowed to move between member states. However, this remains largely a formal restriction, since surveillance at the internal borders is generally low. With the Schengen Agreement and the opening of internal borders, migrants – regular or irregular - entering the EU no longer face hardly any obstacles in moving to their preferred final destination. The consequences of the Schengen Agreement are thus far-reaching. Potential irregular migrants now have the option to move onward from a Mediterranean member country, which most often serves as the port of first arrival, to more Northern member states at considerably lower (transaction) costs than before the Schengen Agreement.

In practical terms, this situation creates strong incentives for potential migrants to optimize their transit route to Europe. No longer is it necessary to head directly for the preferred country of final destination, such as a Northern welfare state, at the risk of being effectively deterred at its external border. Instead, migrants behaving rationally would choose the transit route to Europe with the highest probability of success in reaching the shores of the EU. For instance, the Central Mediterranean route, starting from Libya, then crossing the Mediterranean Sea and entering the EU in Malta or Italy, has recently appeared to be very popular.[11] Once having entered the EU there, migrants may move on to countries like Germany, France or Great Britain. In fact, Chiuri et al. (2007) provide evidence – based on a survey of a group of 920 illegal migrants in Italy in 2003 – that a considerable proportion of them are indeed planning to move onward. When asked about their intended final destination, 75 percent of the illegal migrants named Italy, 10 percent Germany and 5 percent France.

Not only migrants face different incentives under these premises, as both Mediterranean and Northern member states' policy may be affected. According to Article 6 of the Schengen Convention,[12] the right to control the external borders lies "within the scope of national powers and national law", which implies that the individual member state is almost entirely free to decide on how to enforce checks and surveillance at the border. When making this decision, governments are mainly concerned about their own citizens' welfare (regardless of whether the government is assumed to be a benevolent social planner or a selfish vote maximizer), thereby neglecting the effects of enforcement in fellow member states. As a result, when the level of enforcement is decided upon nationally (or decentrally), it is presumably too low from the perspective of the entire union. In addition, border countries might act strategically, by choosing a lower level of enforcement in order to increase the pressure on Northern states such Germany or Austria to assume their share of border enforcement financing.

At the same time, because Northern EU member states benefit from the enforcement activities of the Mediterranean countries at the external

border in the form of reduced onward migration pressure, they become more and more reluctant to contribute to enforcement costs. By putting the pieces together, it is easy to identify the inherent coordination problem which arises from decentralized decision-making within the EU: border countries tend to ignore benefits accruing to other member states, and non-border countries have incentives to free-ride on border countries' actions. Together, this leads to a sub-optimally low level of border enforcement from the EU perspective. This coordination problem, which is ultimately the result of the existence of a strong positive externality from unilateral border enforcement efforts, is well-known, yet is difficult to solve because both types of countries have to agree upon a change of the current situation despite very strong incentives for contrary behaviour.

**Identifying border enforcement as a public good**

In Section 2, we highlighted the possibility that border enforcement may be interpreted as a public good. In the previous subsection, we also provided information about the specific institutional setting of the EU bordering process, thereby identifying an important coordination problem which will typically result from the public good character of some policy intervention. However, this argument rests on an important assumption which needs to be investigated in more detail - namely our (implicit) assumption that border enforcement is a public *good* (and not a *bad*). This distinction relates to the question of whether additional border enforcement by reducing the number irregular immigrants in fact *benefits* domestic population in that it removes potential burdens of immigration on native population (which should in turn improve domestic welfare). We analyze below whether it is justified to hypothesize that border enforcement in fact benefits domestic population.

The *good* character of border enforcement is not immediately clear as one has to weigh up – if they exist – both the negative and positive effects of irregular immigration on the native population, as well as from a global perspective. The reader should be aware that –we restrict the focus of our analysis to the perspective of EU citizens for the reasons discussed in Section 2. Nevertheless, it is important to note that at least from a global perspective, enforcing the EU border raises some profound human rights concerns (Weinzierl and Lisson, 2007) which may ultimately lead to a reduction in global welfare due to substantial individual utility losses of non-EU residents unsuccessfully trying to enter the EU. The situation on the Southern EU shores in particular has turned public attention towards the fate of migrants, desperately trying to climb the fences at Ceuta and Melilla or crossing the Atlantic to the Canary Islands in dugout canoes, and thereby risking their lives. Although these humanitarian concerns are truly justified in the debate concerning EU migration policy, it is however reasonable to assume that welfare losses outside the EU are on average regarded as less important than potential welfare losses within the EU. The EU bordering process can therefore be readily considered by analyzing to what extent domestic welfare in the EU is affected by irregular immigration, and how border enforcement in fact relates to this.

The relevant literature in this field provides ambiguous evidence concerning the welfare consequences of irregular migration. Some studies, of a mostly theoretical nature, (e.g., Hazari and Sgro, 2003; Moy and Yip, 2006; Palivos, 2009) indicate a positive effect of illegal immigra-

tion on domestic welfare in cases where labour markets are flexible and wages can adjust to the influx of irregular migrants as workers. This argument is mainly driven by the fact that irregular workers are paid a lower wage than regular migrants and native workers, thereby creating economic rents for the native population. However, this positive result is reversed if labour markets are rigid, for instance, due to the existence of a minimum wage. In this case, additional (irregular) workers lead to an increase in the unemployment rate among natives (Epstein and Heizler, 2008). Unfortunately the data situation on illegal immigration in the EU is dense, in that there is no empirical work based on large and reliable data sets confirming or rejecting the hypothesis that border enforcement increases domestic welfare. Most evidence is anecdotal or relates to specific local or regional phenomena.

As mentioned above, this forces us to resort to an alternative approach. In Section 2, we concluded that open borders lead to a minimization of transaction costs, thereby maximizing global welfare. At the same time, free movements of factors of production including workers may harm some countries' populations, or at least relevant groups in society. In this case, it is a rational strategy for a country to create borders in order to maintain the existing welfare level. This implies that observing the existence of a border is an indication of how free factor mobility is valued by a country. This reasoning goes back to the *revealed preferences* approach by Samuelson (1938) which uses the observed behaviour of economic agents such as consumers or voters to deduce the agents' underlying preferences. In our setting, we can obviously conclude from observing the restrictions on legal immigration and the efforts to curb an illegal influx that – costly – border enforcement does indeed create a net benefit for the European host countries.[13]

This net benefit of enforcement results from the negative and positive consequences of irregular immigration for the host country's society. Regarding the effect on wage rates and employment opportunities of natives, empirical studies for the United States find negative, albeit small, wage effects of irregular immigration indicating that migrants are substitutes for native labour (Winegarden and Khor, 1991; Hanson et al., 2002). It appears reasonably justified to transfer these results to the context of EU labour markets, especially in view of the fact that wage rigidities are generally more relevant here compared to the US. However, there are also some studies which come to contrary conclusions (Chiswick, 1988a,b; Card, 1990; Friedberg and Hunt, 1995). This is mainly explained by the fact that irregular immigrants tend to work in different labour markets than natives, and particularly in (low-skilled) services sectors such as catering or cleaning.

Further welfare effects from irregular immigration arise from the impact on the public budget. If irregular immigrants pay less in taxes than they consume in public services and transfers, they create a net burden for domestic taxpayers. In the EU, irregular immigrants often have access to public health care and the education system, thereby using resources without contributing the same financing share as natives. Since irregular immigrants are employed clandestinely, they generally do not pay income taxes or social security contributions. For the United States, Camarota (2004) finds that irregular immigrants are a net drain on the public purse by contributing $16 billion in taxes to the budget in 2002 while at the same time imposing a cost of $26.3 billion on the federal budget. The only comparable studies for the EU are for regular immigration. Here, Chand and Paldam (2004) and Sinn (2002) point in the same

13. In a broader sense we can also argue from the perspective of political economics where politicians aim to get reelected. In this case it suffices that border policy is only a symbolic policy (Van der Leun, 2003) whose main objective is to assure the majority in a representative democracy.

direction as Camarota.[14] Besides the impact of irregular immigration on the labour market and on the public budget further effects might occur, such as on social stability in the host country. This is because irregular immigrants are often perceived as having a higher probability of becoming involved in crime as victims or as felons (Epstein and Weiss, 2010). In sum, all these aspects strongly support the hypothesis that border enforcement, and thus the reduction of irregular immigration, creates a net benefit for the host country's society. Border enforcement may therefore in fact be considered a public good.[15]

**Two potential scenarios: Decentralized vs. centralized border enforcement policy**

We argued above that active border enforcement policy by a single country may be seen as providing a public good for the entire EU due to imposing a very strong positive externality through reducing onward migration. As public goods and externalities are considered as classical types of market failure in the sense of an under-provision of the good 'border enforcement', government intervention may be justified and leads to a better allocation (assuming that potential government failure is not too large). In fact, a well conducted intervention by the state may entirely offset the market failure and re-establish Pareto efficiency (Pigou, 1932). The question to be answered below is what an optimal government intervention would look like.

Let us consider two possible scenarios which will then be compared. The first scenario – known as 'decentralized enforcement policy' – most closely resembles the situation in the EU. Here, as mentioned above, border enforcement is a national responsibility, i.e. each country independently decides the level of border enforcement, taking into account national costs and benefits.[16] The second scenario – called 'centralized enforcement policy' – involves a decision on enforcement policy by a central EU governing body which takes into account the interests of all EU citizens, i.e. the EU government decides on enforcement spending based on the costs and benefits for the entire EU population.

Each country is assumed to have its individual (that is, national) valuation of the good 'border enforcement'. This valuation of enforcement comes from the potential net benefit of border enforcement given that enforcement serves to limit the influx of irregular migrants.[17] Obviously, valuations differ between countries and – recalling that Chiuri et al. (2007) find that the majority of irregular migrants in Italy intend to stay in the country – border countries tend to have a higher valuation than interior countries without relevant external borders (and a relatively lower influx of migrants through onward migration). This is because the net gain from enforcement is likely to be relatively higher in the border country. If there is a priori no coordination between countries and no central government exists, the typical under-supply problem is likely to arise because the border country ignores benefits to the interior country when deciding on the level of external border enforcement based on national costs and benefits. Because the chosen level of border enforcement is relatively high due to the border country's high valuation, the interior country will not contribute to financing border enforcement at all. From the latter country's perspective, the level of enforcement is sufficiently high to meet its needs given the costs of co-financing enforcement. However, the total level of enforcement effort remains low due to the free-rider behaviour of this country.

**14.** A peculiarity of the US situation is that many irregular immigrants are employed with an invalid social security number, thereby making contributions without receiving comparable benefits (Hanson, 2007). This mitigates the negative fiscal impact of irregular migrants in the US.

**15.** Another argument for border policy as a public good can be derived from the so-called securitization of border policy approach in the EU, which sees immigration policy mainly as security-motivated (Huysmans, 2000). In this case border enforcement is also a public good as it reduces the security threat to the EU.

**16.** The terms 'costs' and 'benefits' are somewhat imprecise as economists usually argue based on a marginal concept, i.e. the optimal allocation is achieved whenever marginal costs and marginal benefits equalize. This means that the additional costs and additional benefits from one additional unit of enforcement spending should equalize. If marginal benefits exceed (fall short of) marginal costs, an additional unit of spending leads to a net gain (loss) of welfare. In order to keep our argument simple, we refrain from using the term 'marginal' and merely mention cost-benefit comparisons.

The picture changes when a centralized decision on border enforcement is considered. Recall from Section 2 that a public good is merely an extreme case of a positive externality. This implies that positive benefits to other countries are not at all internalized in a decentralized decision on border enforcement. There are therefore potential welfare gains, which may be reaped when the interior country is taken into account. It becomes immediately clear that a central government will internalize all benefits, by considering all countries' and all citizens' interests. In this sense, the outcome must be welfare maximizing from the entire Union's perspective. Compared to the decentralized solution, the welfare optimum yields a higher provision of the public good 'border enforcement'. This is because when the costs and benefits of total border enforcement are balanced, i.e. those of a social nature, the benefits exceed national benefits for a given cost situation. Clearly, when benefits per cost unit increase, it is reasonable to increase the level of public good provision (at the margin).

This reasoning leads to a simple conclusion: *From a welfare perspective the centralized (or central-planner) solution is preferable to a decentralized solution because total welfare is higher*. The reason is that with decentralized decision-making, an under-provision of enforcement occurs which is a consequence of the public good character of border enforcement. This allows us to answer the normative question of who should be responsible for enforcement of the external EU border. Based on our normative benchmark, the efficiency point of view, it is clearly a central governing body at the EU level. It is important to note that this central government has to be completely free of any national interests and preferences; its only policy goal must be to maximize the joint welfare of all EU citizens, measured by the sum of all EU citizens' utilities. Today, the EU does not meet the criterion of being entirely devoid of national interests with respect to its bordering process. Although border policy is decided upon under the 'double majority rule', national influence and the EU member states' specific interests in this policy field are still strong, and it appears rather unlikely that this will change in the future. Given the differing interests of the involved countries, EU member states will not fully shift responsibility for border policy to the EU. And even if they did, whether the central EU governing body would in fact refrain from considering some countries' specific interests remains an open question.

In terms of our main argument, this implies that we expect that suboptimal border policy will not be overcome under the existing institutional rules of the EU in the foreseeable future. If that is the case, it seems justified to search for alternative solutions to overcome the potential deadlock in the European Council by leaving EU member states national discretion over border policy, but nevertheless leading to an optimal border policy in the sense that externalities are fully internalized and the public good 'border enforcement' is provided at an efficient level. The following section provides an example for this type of solution.

## An alternative measure for a better joint border management

If a central (EU) government in the sense stated above does not exist, one wonders whether an outcome which mimics the central-planner solution may be achieved by other means. The solution we propose rests

on the rather complex economic concept of *mechanism design*, and will be developed step by step below. In a first step, we will investigate whether direct *transfer payments* (so-called *side payments*) between member states help to solve the problem of under-provision. We show that from a theoretical perspective this is possible, but from a practical point of view the concept does not appear to be implementable, because of a lack of voluntary participation, particularly by member states who turn out to be net payers. Nevertheless, the idea of achieving an optimal solution through transfer payments is an important starting point for setting up – in our second step – a more demanding scheme (or mechanism) which then induces member states to even voluntarily pay their share in enforcement costs.

### The role of transfer payments in achieving efficient border enforcement

Let us first consider first an interior country, such as Germany, and a border country, say Italy, between which some onward migration takes place. Let us further assume that the interior country makes a payment to the border country which is conditional upon onward migration: if few illegal migrants enter Germany, Italy will receive a high payment and vice versa. This transfer payment will immediately change the decision of the border country. From the border country's perspective, tightening costly border controls will increase national welfare due to the transfer received. Ceteris paribus, a higher level of border enforcement will be chosen because Italy now internalizes – partly or fully (depending on the transfer level) – the external effect on Germany.

If the transfer payment is chosen appropriately, the welfare optimal level of enforcement from both countries' (and thus the federation's) perspective may in fact be achieved. There is therefore an alternative to centralized decision-making that allows national sovereignty in migration policy and border management to be retained. However, a successful implementation of a transfer system does not appear to be very likely. This is because transfer payments are optimal only when they are based on each country's valuation of irregular migration. For instance, given the costs of illegal migration, a country like Germany should be willing to spend on securing the Italian external border just up to this cost level, and as a result, the maximum transfer from the interior to the border country is determined by the cost of illegal migration in the interior country[18]. However, there is clearly a strategic aspect involved in this argument. Transfer payments are costly to interior countries, which ceteris paribus implies a welfare loss. It may therefore be a reasonable strategy to save on transfers and free-ride on the border countries' enforcement efforts by not revealing true preferences and the true *willingness to pay*. Since most illegal migrants stay in the country, Italy prefers rather strict border enforcement anyway, which is possibly acceptable for Germany when the country can substantially save on transfers to Italy. Germany then simply claims not to have any interest in border enforcement at all (the announced willingness to pay is technically zero), leaving Italy financing border enforcement alone. The sub-optimal under-provision of the public good 'border enforcement' continues to exist because the interior country does not contribute to border enforcement.

17. Whether border enforcement really decreases the inflow of irregular migrants is to some degree open to debate (for an overview, see Gathman, 2008). However, Gathman empirically finds that enforcement of the US-Mexican border increases the costs and duration of crossing illegally the border.

18. Assume that border enforcement (via a transfer to the border country) exceeds (at the margin) the perceived cost in the interior country. It is thus 'cheaper' to have some illegal immigrants in the country than to give a high transfer to the border country than to drive down illegal (onward) migration further towards zero.

**A simple mechanism for implementing voluntary optimal transfers**

*The general idea of mechanism design and its application to the EU*

It appears that – except for the strategic aspect involved – transfer payments may be an appropriate solution to resolve the coordination failure discussed above. Under these premises, it remains to be clarified whether it may also be possible to circumvent the problem of strategic behaviour as well. More specifically, one may ask whether it would be possible to induce all countries to truthfully reveal their preferences for border enforcement. Transfer payments would then be conditioned on the willingness to pay of each country and the welfare optimum would be re-established. In other words, given national cost-benefit considerations, a border country like Germany would then not only come up with a 'correct' and truthfully stated transfer payment to Italy, but Germany would also effectively transfer the money without hesitation. As a consequence, Italy would choose the optimal level of border enforcement which guarantees the welfare-maximizing number of illegal immigrants to the Union.

In order to deal with the challenge of inducing individuals or countries to behave optimally, although they have a strong incentive not to do so, economists have put forward the idea of *mechanism design*. Mechanism design "provides an analytical framework for the design of institutions with emphasis on the problem of incentives" (Maskin and Sjöström, 2002), where a *mechanism* is defined as "an institution with rules governing the procedure for making a collective choice" (Mas-Colell et al., 1995: 866). Consequently, in our case a mechanism is simply a set of rules interior and border countries follow when it comes to enforcing the external EU border. Ideally, the mechanism is set up in a way that any problematic incentives, such as understating national preferences to free-ride on some other country's actions, do not play any role in border policy. In fact, the rules should even be designed such as to have countries behave in this way completely voluntarily. It should be obvious from the start that setting up a mechanism which fulfils all these desirable properties may not be a simple task, and that there may even be situations in which it turns out to be impossible to find a functioning set of rules. Nevertheless, mechanism design appears to be a fruitful avenue for thinking about directions where future policy-making with respect to the EU bordering process could head.

Given that neither a social-planner solution at the (supranational) EU level nor policy coordination or harmonization (in the European Council) appears to be feasible in the foreseeable future, we are in search of a new, alternative institutional setting for border management at the EU level. We will show below that – from a theoretical perspective – mechanism design will in fact ultimately lead to such an alternative institutional setting. In this framework, the EU will act as a moderator rather than an active player. Its only task will be to introduce and supervise a mechanism in which all member states truthfully state their preferences for external border enforcement, because untruthful behaviour will be punished through the mechanism itself, thereby leading to a reduced welfare level. Such a well-specified mechanism is superior to all solutions discussed above, in particular given that most countries are very reluctant to transfer responsibilities in the field of border policy entirely to the EU level.

A moderating role of the EU is clearly not an entirely new concept. When it comes to Council decisions, the Commission has already tried to act as a moderator in the past, bringing together member states' differing interests, but the role of the Commission in Council decisions should not be overestimated. The Council is the decision-making body of the member states in the first instance. A more appropriate forum for EU's involvement as a moderator has been the so called "open method of co-ordination" (OMC) which is part of the Lisbon strategy. The OMC is a 'soft law' framework for cooperation between the member states with the Commission's role being limited to surveillance and moderation. Its main goal is to direct national policies towards certain common objectives, which also include immigration policy (Caviedes, 2004). Its measures are binding on the member states in varying degrees, but never take the form of directives, regulations or decisions.[19] We will investigate below which moderating role the EU has to play precisely under the OMC framework or some other institutional framework, which would have to be reintroduced in order to serve the purpose of running a mechanism for border policy.

Our discussion of mechanism design in the context of EU immigration policy is not a purely academic exercise. The relevance of mechanism design is underlined by several statements from official EU bodies which call for the introduction of mechanisms in the field of immigration policy and especially border management. For instance, in a communication in the aftermath of the EU Council meeting in Laeken in 2001, the EU Commission proposed the introduction of a "financial burden-sharing mechanism between the Member States" (European Commission, 2002: 19). This idea was taken up again by the European Council which asked for an "assessment of the different options concerning burden-sharing for the Member States" (Council of the European Union, 2002: 27) which points into the same direction.

*Designing a mechanism for a common border management*

The economic literature on 'mechanism design' has suggested many different mechanisms for implementing the optimal level of a public good. From a researcher's perspective, the main and most difficult task is to choose an appropriate mechanism from among all those available. Since explaining the selection procedure is beyond the scope of this chapter, we refer to Haake et al. (2010a, 2010b) for detailed information and for the specific results of the selection process. Here, we only provide a rather general discussion of the consequences of the implementation and the working of a mechanism in the EU bordering process. To simplify matters, we resort to the two most general and most accessible (but still theoretically and practically demanding) mechanisms available, the *Vickrey-Clarke-Groves* (VCG) *mechanism* (Vickrey, 1961; Clarke, 1971; Groves, 1973) and the *expected externality mechanism* (Arrow, 1979; d'Aspremont and Gerard-Varet, 1979), of which the latter most closely resembles the situation in the EU. Most importantly, however, both mechanisms ensure an efficient provision of the public good, i.e. the level of the public good maximizes welfare in the federation.

Whether a country is severely harmed, slightly harmed or even positively affected by illegal immigration is in general hard to judge for a fellow member country of a federation. This allows a country to understate (or overstate, respectively) its preference for external border enforcement. In fact, it is a rational strategy to understate the preference (that is, to report untruthfully a low preference) if otherwise a country has to contribute to

19. http://europa.eu/scadplus/glossary/open_method_coordination_en.htm

financing border enforcement when it would be more cost efficient to free-ride on some other country's enforcement spending. The central idea of the VCG mechanism is now to induce the single member countries to voluntarily truthfully report their preferences for enforcement spending, irrespective of the reports or announcements of all other countries. A successful mechanism achieves this goal by modifying the incentive structure for each member state, by introducing transfer payments between the member states conditional on their reports of preferences to the moderator of the mechanism (which is a central EU institution, e.g. within the OMC process). The incentive structure is thereby revised and – although countries act selfishly by only maximizing individual welfare– the structure of transfer payments leads to a socially optimal result from the perspective of the entire union.

More specifically, this goal may be achieved when the VCG mechanism is applied to EU border management as follows. At the outset, member countries such as Germany, Austria, Italy or Spain are aware of their own preferences or valuations with respect to enforcement, but they do not know how their fellow member countries' value irregular immigration and enforcement efforts (we say that this information is 'private' for each single country). Furthermore, even the central EU moderator does not have complete information on this. In order to implement the new mechanism the EU moderator then sets a certain cost sharing rule for the direct costs of enforcement. For instance, given the existing information problems, the moderator could suggest having an equal cost sharing rule, with every member state paying the same amount of money to a *central border enforcement fund*.

In the next step, it is assumed that the moderator asks the member states to report their willingness to contribute to (that is, their preference for) enforcement. The moderator may also implement additional (transfer) payments or transfers, respectively, for each country conditional on the country's report. In the final stage, the moderator chooses – based on the countries' reports – the amount of resources devoted to enforcement, and countries make their payments according to the mechanism. Obviously, the most relevant part here is the proper design of the conditional payments, which we will now investigate in more detail. Consider for a moment that there are no such additional payments and transfers. Each country thus compares its contribution share to the central border enforcement fund with its valuation of illegal migration and border enforcement. If the former exceeds (falls short of) the latter, it is perfectly rational to understate (overstate) the country's valuation, because reporting a low (high) valuation may help to keep total spending of the federation on border enforcement at a low (high) level. Given a certain cost-sharing rule, a country consequently understates the valuation in order to keep total spending, and thus its own contribution, low. This is the free-rider behaviour one might expect to occur, at least in some interior countries such as Germany or Austria. Overstating preferences is a reasonable strategy if there is a strong interest in enforcement efforts and if the cost-sharing rule helps to shift substantial parts of the financial burden to other countries.

### How the VCG mechanism affects the payment and incentive structure of a single country

We can now finally turn to the question of how the VCG mechanism is able to affect the incentives of all member states in the desired fashion. In general, the existence of the additional payments and transfers in the

VCG mechanism just balances the incentives to behave strategically. Knowing the structure of the mechanism in advance, the countries perfectly internalize the spill-over effects of border enforcement through reduced onward migration. Only through the additional payments and transfers truthful reports by all countries are therefore guaranteed. The total payments of each country then compromise two components: first, a cost share on border enforcement (for instance, an equal share for each country); second, a payment or transfer which only affects the incentive structure for each country and guarantees that each country reports truthfully its preferences on enforcement.

This leads us to the interesting question of how the VCG mechanism manages to set-up an efficient incentive structure. The starting point for our argument is to consider a (hypothetical) situation in which all countries except one have already reported their preferences for enforcement to the EU moderator. Some countries report a positive willingness to pay, while others may state – possibly untruthfully –a zero preference. Based on these reports, the moderator does a simple counting exercise to calculate the sum of (marginal) benefits to this group of countries and compares it to the (marginal) costs of border enforcement. This comparison (known in the literature as the *Samuelson Rule*) yields the welfare maximum for the group of countries. However, one country's willingness to pay has not yet been considered, and we would like to see what happens if the final country enters the stage and announces its willingness to pay.

Obviously, an additional report changes the sum of benefits for the federation, making it necessary to revise the calculations based on the Samuelson Rule. The welfare optimal level of enforcement has to be adjusted. Adding the last country now has two consequences: first, spending on border enforcement will increase.[20] However, the increase per country is likely to have a small welfare impact because additional resources spend on enforcement are less effective when a major enforcement system already exists.[21] Second, the higher optimal overall level of enforcement is to be financed by all countries due to the implemented cost-sharing rule. One can easily show in a fully-fledged economic model that – in sum – the additional costs exceed the additional benefits, such that adding the last country imposes a welfare loss on all other countries. The VCG mechanism then imposes a simple rule for the additional payments: *the payments of the last country must precisely equal the additional costs inflicted on all other countries*. This implies that when reporting its preferences, the last country has to internalize the costs it imposes on all other countries. It is important to note that the VCG mechanism assumes that all countries report simultaneously and that the necessary calculation for the 'last' country can thus be conducted for each single member state of the federation. A respective additional payment which covers the additional costs can therefore be determined for each country.

Having clarified the payment structure of the mechanism, we can now turn to the incentive structure of the mechanism and ask whether a country will truthfully report its preferences knowing the structure of the mechanism. This is indeed the case, because under- or over-reporting of preferences directly interferes with a country's welfare optimum. For instance, the in case of under-stating preferences, the last country will simply experience a lower net benefit. This is because the under-reporting country will immediately be punished through the mechanism. Total enforcement spending is too low at given costs due to the untruthfully reported low willingness to pay. This inflicts additional costs on the remaining member states, and according to the mechanism the

20. At least it will not decrease (when the country reports a zero willingness to pay nothing will change).
21. This follows from the standard assumption of decreasing marginal benefits in economics. When few resources have been spent on enforcement the effect of additional spending is substantial, e.g., setting up maritime control system for the first time leads to a large improvement in surveillance. If there are already 30 coastguard vessels cruising in the Street of Gibraltar, the 31st vessel will hardly improve surveillance successes further.

under-reporting country has to come up with these costs. An analogous argument holds for the case of over-reporting, such that an untruthful report is in any case not in a country's self-interest.

While a gratifying feature of the VCG mechanism is the characteristic that countries report truthfully *regardless* of the behaviour of all other countries (a so-called 'implementation in dominant strategies'), this comes at the cost that only a few mechanisms, i.e. combinations of efficient enforcement levels and payments, can be implemented. More specifically, it can be shown that only mechanisms which do not balance the budget can be implemented. This means that either some outside source of financing is needed, or that an amount of money is left over which needs to be distributed among the member countries at the risk of affecting the incentive structure indirectly. It is this shortcoming of the VCG mechanism which leads us to turn to the expected externality mechanism in the following section, as it avoids this problem.

### The expected externality mechanism as a more appropriate alternative to the VCG mechanism

The main advantage of the *expected externality mechanism* is the fact that this mechanism uses a less demanding equilibrium concept compared to the VCG mechanism. As mentioned above, the latter mechanism assumes truth-telling to be a dominant strategy for each country, i.e. a country's report is completely independent of any other country's report. For instance, Germany (and any other EU member state) announces its true willingness to pay regardless of whether, say, Austria reports its preference truthfully or not. Without turning to the details, we can say that technically it is rather difficult to achieve this outcome in a theoretical model. While otherwise being very similar to the VCG mechanism (and as such we do not present any details here), the expected externality mechanism assumes a much simpler equilibrium concept. Here, it suffices that countries tell the truth whenever the other countries also report honestly. This means that –again assuming incomplete information about other countries' preferences – each country then has to form an expectation about the characteristic of its fellow member states.[22] For instance, Germany might assume that Austria has either a high or low preference for enforcement spending, with a probability of 50 percent each.

How do VCG and expected externality mechanism compare, and why is the latter more appropriate for describing the situation in the EU? Loosely speaking, the expected externality mechanism demands somewhat more complex computing in practical implementation. At the same time, it offers a larger number of efficient and implementable mechanisms compared to the VCG mechanism, i.e. there is more chance of actually finding an applicable and workable set of rules for governing the EU bordering process. Furthermore, the expected externality mechanism succeeds in balancing the budget of all transfer payments, i.e. neither is an outside source of financing needed, nor does the mechanism leave a surplus of money of which the distribution may bias incentives. In practical terms, this is a major advantage, because a fund set up at central EU level for collecting financial means for border enforcement runs neither a deficit nor a surplus.

The payments of the mechanism are specified as to internalize the expected externality that a country inflicts on all other countries by

22. For this reason, the process is called 'implementation in Bayes-Nash equilibrium'.

reporting its preferences, or as Emons (1994: 485) puts it: "each agent is essentially paid the expected value of the other agents' net surpluses conditional on her own report". The mechanism therefore induces each country to help maximise joint welfare by its decision on what to report, thereby having no incentive to misreport its preferences. As well as these positive properties, the expected externality mechanism has a potentially severe shortcoming, as it does not under all circumstances guarantee that all agents have an incentive to participate voluntarily. One or more countries may thus be worse off when participating in the mechanism compared to not participating. This may be due to a relatively high transfer payment or preferences for the public good which diverge significantly from the commonly chosen level. In this case, the central moderator would in fact need coercive power to force every agent to participate. However, this would lead us back to a centralized EU immigration policy with a strong supranational governing body - something that we actually tried to avoid in our argument. Nevertheless, mechanism design appears as a promising research topic because as well as the VCG and the expected externality mechanism, there are several other classes of mechanisms which may not only guarantee the efficient provision of enforcement but also the voluntary participation of all the affected member countries. It will be the main task of future research to single out the best fitting mechanism for the EU bordering process,

## Conclusions

Despite years of discussion, the difficulties in introducing a comprehensive and integrated border management policy in the European Union persist. This volume and the Migration-Border framework see the lack of a normative foundation as being at the roots of this problem. In this chapter, we have contributed to this discussion by setting up an economists' framework with a focus on border policy aiming at maximizing social welfare from an EU perspective. The revealed preferences approach suggests that the existence of external borders with a relevant level of enforcement may be seen as a consequence of a country's or society's (possibly the EU's) interest in avoiding welfare losses through immigration, e.g. through changes of the status quo (income distribution). However, border enforcement appears to be relatively unsuccessful in light of the current debate on immigration and there seems – given the continuing quarrel about these questions – to be little interest in changing this situation. This is even more surprising as, effectively, "immigrants reconstruct the EU as a political community by entering irregularly and travelling within the borderless Schengen territory" (Zapata-Barrero and de Witte, 2007: 90), but member states tend to follow their narrow self-interest rather than developing a European border policy.

The deeper reason for this situation brings us back to the important normative question arising from the introduction of the issue of who should be responsible for enforcement activities at the frontier: each member state with an external border, or the entire EU?

Throughout this chapter, we have argued that enforcement of external borders may be characterized as a public good. Since the introduction of the Schengen Agreement reduced internal barriers to mobility, onward migration of irregular migrants has become a more significant problem. At the same time, this implies an increasing relevance of the external border, with positive effects of enforcement spilling over to interior EU countries through reduced onward migration. In this constellation, a coordination

problem arises because countries situated directly at the external frontier do not take into account the positive effects for fellow member countries when deciding on the level of enforcement. The interior countries such as Germany, Austria and the Netherlands benefit from enforcement activities even if they do not contribute a financing share. In consequence, the level of border enforcement may turn out to be sub-optimal from the perspective of the entire union. We therefore argue that the responsibility for enforcement of the external EU border should lie in the hands of the entire EU, in order to guarantee a coordinated policy on enforcement.

Since we do not expect that the supranational EU level will be granted the right of direct control of border policy by the member states, we considered alternative frameworks potentially allowing for welfare optimal enforcement efforts. The field of mechanism design turns out to offer interesting solutions to the pending problems of non-coordinated policies on border enforcement, thereby suggesting institutional settings that render the need for coercion in EU border management redundant. In an environment of incomplete information about preferences for border enforcement these measures serve to elicit the true preferences of each member state, based on which a welfare optimal level of enforcement for the entire Union may be determined. This feature makes the mechanism especially attractive in the light of the reluctance of non-Mediterranean EU member states to contribute to enforcing the Mediterranean border. Based on this idea of the mechanism, a balanced EU enforcement fund may be introduced with payments and transfers that internalize possible externalities. Here, the EU will play the role of a moderator, setting up the mechanism and helping to determine the optimal payment structure to and from the fund.

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# INSTRUMENTS AND CASE STUDIES

- MIGRATIONS AND BORDERS IN THE EUROPEAN UNION: THE IMPLEMENTATION OF THE RETURNS DIRECTIVE ON IRREGULAR MIGRANTS IN SPAIN AND ITALY

  *Diego Acosta*

- THE EXTERNALIZATION OF MIGRATION CONTROL IN SPAIN AND ITS IMPACT ON MOROCCAN AND ECUADORIAN MIGRATION

  *Antía Pérez*

# MIGRATIONS AND BORDERS IN THE EUROPEAN UNION: THE IMPLEMENTATION OF THE RETURNS DIRECTIVE ON IRREGULAR MIGRANTS IN SPAIN AND ITALY

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## Introduction

This chapter looks at the different ways in which Spain and Italy are dealing with irregular migration, especially by means of the implementation of Directive 2008/115, the so-called Returns Directive, which was adopted by the European Parliament and Council at the end of 2008.[1]

There is an obvious link between the management of irregular immigration and the border. In fact, the subject matter of the Directive, according to its first Article, is to set out common standards and procedures in order to return illegally staying third-country nationals,[2] which are those who do not fulfil, or no longer fulfil the conditions to cross the European Union's (EU) border.[3]

The control of the movement of people in the EU does not only take place at what we may label as territorial borders (Geddes, 2005), which have seen their significance reduced, but also away from those territorial borders through "remote controls" and afterwards with "internal controls" (Guiraudon, 2003; 191; Anderson and Bigo, 2003; 19; Crowley, 2003). The place where the border is physically located therefore varies (Guild, 2001). This has a relationship with irregular migration, as the intensification of the EU's territorial borders has been proven not to lead to a decrease in the number of undocumented migrants (Spijkerboer, 2007). That is why the EU considers that the effective control of the external borders includes the return of third-country nationals who are irregularly present in a Member State.[4] In other words, "border management is tightly linked to internal control practices that aim to detect irregular migrants who reside in the country" (Clandestino, 2009; 124). As a consequence, the surveillance of migration includes "remote controls" through visa regimes and carrier sanctions (Guild, 2003; Guiraudon, 2003) and as mentioned above, internal ones (Bigo, 2004). In this paper, I am interested in this latter kind of controls once the third-country national is already inside the EU.

According to Groenendijk and Guild, "borders define territories within which identities and orders are described and delineated" (Groenendijk and Guild, 2003; 1). Member States use entry controls to establish a difference between those who may cross the border and have a right

1.  Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98. The United Kingdom, Ireland and Denmark are not bound by this Directive or subject to its application.

2.  The Directive uses the term illegal migration when referring to third-country nationals who do not have a right to stay in the European Union. I prefer to label it irregular or undocumented migration, in line with other international organizations such as the Council of Europe. This terminology has also been encouraged by the European Parliament. See European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (P6_TA-PROV(2009)0019).

3.  These conditions are enshrined in Article 5 of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1.

4.  See for example Recital 5 of Council Regulation (EC) No 2007/2004 of 26 October 2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) of the Member States of the European Union, OJ 2004 L 349/1.

to enter, and those who do not (Schuster and Solomos, 2002; 48) and, in fact, they have considered the need to strengthen their external border in the absence of an internal one (Van Selm, 2005; 13, Zapata-Barrero, 2010). Once the controls at the territorial border have failed and an irregular migrant population is present within the State, there are two main options for a country.[5] On the one hand, it may use regularization procedures (Regine, 2009). On the other, it may resort to deportation, which is sometimes considered to be a demonstration of what is alleged to be effective governance (Vollmer, 2009; 2).

The Returns Directive is the subject of this chapter, as it harmonizes this latter step when the territorial border controls have failed or have been circumvented, by establishing common standards and procedures for expelling irregularly staying third-country nationals. The way in which Member States implement the Directive sends a clear signal of their understanding of the relationship between the border, understood broadly as the place where controls take place (Guild, 2001), and the rights of undocumented migrants.

In order to get a clear picture of this complex issue, this chapter proposes the following. First, in section 2, I will briefly analyze the background to the adoption of the Returns Directive, paying special attention to how the EU has understood the issue since it obtained a competence to regulate immigration and borders with the entry into force of the Treaty of Amsterdam in 1999. Second, in section 3, I will scrutinize the content of the Returns Directive, paying special attention to three key provisions: the period of voluntary return, the imposition of a re-entry ban and the possibility of detention. Following this, section 4 looks at the way in which two Member States, namely Spain and Italy, are implementing these provisions. Member States have until December 2010 to implement the Directive within their national legislation. These two countries have been chosen because despite their similarities, they have taken a very different approach in the implementation of the Directive, as will be seen below in Section 4. This different approach is a clear example of their divergent understanding of the relationship between the border and irregular immigration. Finally, section 5 of the chapter offers some conclusions related to the Migration-Border framework of this volume, and tries to discuss how the Directive can contribute to the definition of the approach to building the EU's external border.

## The adoption of the Returns Directive

Irregular or undocumented migration in the EU is a multifaceted phenomenon. Its complexity arises from the fact that irregular migrants are a amazingly heterogeneous category (Guild, 2004) which raises questions about the adequacy of measures to deal with it without addressing its various intricacies (Düvell, 2009). Irregular migration has also been highly politicized, both at a national and EU level, with recurrent rhetoric depicting it as an invasion (Mitsilegas, 2004; 28). This politicization has in some cases led to its criminalization (Cholewinsky, 2007), as in the Italian case which will be analyzed below (Merlino, 2009; Urrutia Arestizábal, 2009). This politicization does not correspond to the importance in the number of irregular migrants since, according to the most reliable statistics, there were only between 1.9 and 3.8 million in 2008, which only represented between 0.39 and 0.77% of the total population of the EU (Kovacheva and Vogel, 2009; 10).

5. A third option that a country might have is to tolerate or not enforce the expulsion of an undocumented third-country national (Guild, 2004).

The EU's territorial border is linked to irregular immigration in two contradictory ways. On the one hand, irregularity only exists until the person crosses the border. As a result, a third-country national whose tourist permit is about to expire and who does not need a visa in order to enter into the EU may cross the border and come back into the Schengen area for a further three-month period. The border becomes the solution to the prospect of irregularity. However, on the other hand, the border may also become a prison for the irregular migrant who cannot leave, as it would be very difficult to cross the border back again into the EU. In fact, most irregular migrants enter legally and then overstay their visa permits (Düvell, 2006; 234).

The EU only obtained a clear-cut competence to regulate immigration issues in 1999 with the entry into force of the Amsterdam Treaty. Before that, immigration was mainly dealt individually by the Member States, or in a coordinated fashion at an inter-governmental level. The Amsterdam Treaty also gave the Community competence on the management of the external borders and on their crossing by persons, which was usually a domain of state sovereignty (Groenendijk and Guild, 2003). That border control system was a legacy of the Schengen Agreements of 1985, when 5 countries (Belgium, France, Germany, Luxembourg and the Netherlands) decided to abolish their internal border controls (Ilies, 2009). The Schengen acquis became part of the acquis communautaire when it was allocated to Article 62(2) (a) of the Amsterdam Treaty (Peers, 2003; 50).[6]

The existence of two main options in dealing with irregular immigrants present in EU territory of the EU, regularization and deportation, is mentioned above. The Union has no competence to deal with the former. As a result, since the inception of a common immigration policy in 1999, the latter has been stressed. In effect, addressing irregular immigration, including the repatriation of undocumented migrants, was a central part of the EU's common immigration policy. Irregular migration constitutes an administrative offence which profoundly challenges the Member State's capacity to effectively manage mobility (Carrera and Merlino, 2009; 13) and undermines the credibility of a common immigration policy (European Commision, 2006; 2). For this reason, the EU has always advocated the idea that an effective return policy is vital in ensuring public support for phenomena such as legal migration and asylum (European Commision, 2006; 10). It was understood that third-country nationals who did not have a legal status enabling them to stay in the EU, either on a temporary or permanent basis, should leave. A credible threat of a forced return, the Commission argued, would send a clear message to potential irregular migrants that irregular entry into the EU would not lead to a stable form of residence (European Commission, 2002; 8). However, this demonstration of "effective governance" which focuses on deportations runs the risk of shifting "the debate on irregular immigration into the sphere of criminal activity" with the consequent criminalization of irregular migrants, as has been argued before (Clandestino, 2009; 17).

With that background in mind, it is not surprising that starting in 2000, the EU adopted different legal instruments concerning irregular immigration (Acosta, 2009a; 22-23). However, none was comprehensive enough to take into account all the elements present in the repatriation of a migrant, such as removal, detention or the possibility of prohibiting re-entry. To that end, the European Commission proposed a Directive on the return of irregular migrants to the European Parliament and the

6. It was allocated by a Council Decision (OJ 1999 L 176/17) which was published in September 2000 (OJ 2000 L 239).

Council in 2005. After a long negotiation process, the Returns Directive was finally officially published in December 2008. Member States have a period of two years to transpose the Directive into their national legislations.

The Directive stipulates common standards and procedures in Member States for the return of irregularly staying third-country nationals. Among the measures that may be taken are the detention of irregular migrants for up to 18 months, the expulsion of unaccompanied minors, and the imposition of a re-entry ban for five years. This has led to a tremendous amount of criticism, from different actors including the UN High Commissioner on Human Rights, international organizations,[7] NGOs[8] and Governments, especially those in Latin America (Acosta, 2009b).

The harsher critiques were mostly addressed at the European Parliament and its approval of the Directive negotiated with the Council without introducing a single amendment. To some extent, these critiques were also directed at the Spanish government, as it supported the Directive in both the Council and in the European Parliament. This latter issue was particularly contentious, since the Party of European Socialists in the Parliament, of which the Spanish Socialist Party is a member, largely voted against the Directive. It appeared that the Spanish government was backtracking on formerly progressive policies in dealing with irregular immigration (Acosta, 2009c). Consequently, both the Spanish government and the European Parliament took a leading role in trying to explain the Directive to other Governments outside the EU, and to those in Latin America in particular (Acosta, 2009b).

The two most important items which were the focus of criticism are the possibility of detention for a period of up to 18 months, and the likelihood of imposing a re-entry ban for 5 years. These two issues are intrinsically linked to the option that Member States have of giving the irregular migrant a voluntary departure period, as analyzed below. The study of these controversial provisions will help to recognise how the EU, and Spain and Italy in particular, understand internal controls in order to expel third-country nationals, and hence the border considered, in a wider spatial sense, "as the place where 'border controls' are enacted" (Clandestino, 2009; 124).

## The content of the Returns Directive

The Returns Directive was adopted by the European Parliament and the Council in 2008, after a 2005 proposal from the Commission.[9] This was the first important instrument on immigration that was adopted by the EU by co-decision.

Traditionally, the European Parliament has been considered as having a more open position towards the rights of migrants in the EU (Papagianni, 2006; 252). In contrast, the Council has always been described as an actor which purported to have a restrictive policy towards immigration and migrant's rights, as Member States considered immigration to be a core part of their sovereignty (Melis, 2001; 11). That is the reason why it could have been expected that the involvement of an institution such as the European Parliament would produce a Directive with a higher standard of protection for irregular migrants than if the same Directive had been adopted by the Council alone.

7. Including the Council of Europe, the Organization of American States and MERCOSUR.
8. Including Amnesty International and ECRE.
9. Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391 final.

However, the negotiations between the Parliament and the Council showed how co-decision in practice cannot be considered as a procedure in which the Council and the Parliament act on an equal footing. In fact, during the discussions, the Council managed to introduce many restrictive provisions which were not contemplated in the Commission proposal or in the Parliament's initial position (Acosta, 2009a). The final Directive adopted was the target of the severe criticisms already referred to above. In order to quell those criticisms, the Council adopted a final political statement declaring that the implementation of the Directive should not in itself be used as a reason to justify the adoption of provisions less favourable to those third-country nationals to whom it applies. However, the implementation by some Member States is contrary to this statement, as will be seen below in the Spanish and, most notably, in the Italian case.

The Returns Directive establishes the standards and procedures for returning an irregularly staying third-country national (Article 1). In turn, return is understood as the process of a third-country national going back - whether by voluntary compliance with an obligation to return, or enforced - to his o her country of origin, a country of transit or to any other third country "to which the third-country national concerned voluntary decides to return and in which he or she will be accepted" (Article 3(3)). The final objective of the Directive is thus clearly defined as the expulsion of undocumented migrants. However, in Article 6(4), the Directive stipulates that Member States may grant a residence permit to an irregular migrant for humanitarian, compassionate or other reasons. This therefore opens up the possibility of regularising undocumented migrants based on the assessment of individual cases.

In order to measure how the Directive understands the relation of irregular immigration with the border, it is necessary to look at three important aspects which establish how an irregular migrant could be expelled. Interestingly enough, two of these provisions (re-entry ban and detention) coincide with the harsher critiques received by the Directive, which have been mentioned above. The third (voluntary departure) is vital in understanding the other two. I will limit myself here to the scrutiny of these three provisions, as other authors have undertaken a concise analysis of the whole Directive (Baldaccini, 2009; Ecre, 2009).

Let us imagine the case of a migrant staying irregularly in the EU. In short, if that migrant is granted a voluntary departure period, he/she could not be detained unless he/she did not leave within the established period of time. Moreover, if he/she left the country during that period for voluntary return, a re-entry ban could be imposed on him or her, but there would be no obligation for the Member State to do so. On the contrary, if that irregular migrant was not granted a voluntary departure period, he/she would be subject to an EU re-entry ban. He or she would most probably also be detained in order to prepare his/her expulsion. Let us take a closer look at these three provisions:

*Voluntary departure***:** The notion of voluntary departure means that when an irregular migrant faces an expulsion decision, he or she can leave the country of his/her own accord. For that matter, Article 7 of the Directive provides that irregular migrants are granted a period of between 7 and 30 days for voluntary departure. The Directive allows Member States to grant the period for voluntary departure only after the request by the third-country national. However, in that case, they have to inform the migrant of that possibility. This is certainly a short

period to properly prepare for one's return, if we consider that an irregular migrant might have been residing in the host country for years. The positive aspect is that EU Member States, when appropriate, can always extend that period, taking into consideration specific circumstances such as the length of stay, the existence of children attending school or the existence of other family and social links. In contrast, the downside is that this period for voluntary departure may not be granted in three situations: when there is a risk of absconding by the irregular migrant, when the person concerned poses a risk to public policy, public security or national security, or when the irregular migrant made an application for a legal stay that has been dismissed as manifestly unfounded or fraudulent. The concept of absconding merits further consideration, as its definition is vague. According to Article 3(7) of the Directive, risk of absconding means 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'. An extensive interpretation of this provision could have negative consequences for many migrants in an undocumented situation. The positive side is that these concepts will have to be interpreted according to well-established principles of Community law such as proportionality (Carrera, 2009).

*Re-entry ban*: When a Member State expels an irregular migrant the decision has to be accompanied, according to Article 11, by an entry ban if there was no period for voluntary departure granted or if the irregular migrant did not comply with the obligation to return. As a result, here we can see the importance of the scope of the previous provision regarding the concession of a voluntary departure period or otherwise.

The length of the re-entry ban shall not in principle exceed 5 years, except in cases of a serious threat posed by the migrant, in which case it may be extended. Finally, Member States may refrain from issuing or may withdraw or suspend an entry ban in individual cases for humanitarian reasons, among other grounds.

*Detention*: According to Article 15, detention can occur, in particular, when there is a risk of absconding by the irregular migrant or when he or she avoids or hampers the preparation of return or the removal process. The inclusion of the words "in particular" suggests that these two cases are not exhaustive. Nonetheless, detention is not possible when other less coercive measures can be applied effectively in a specific case. Furthermore, it has to be for as short a period as possible, and only maintained as long as removal arrangements are in progress and executed with due diligence.

The length of detention cannot exceed a period of 6 months. However, this period can be extended for 12 more months in two circumstances: if there is a lack of cooperation by the migrant concerned or if there are delays in obtaining the necessary documentation from the third countries. The inclusion of a clause allowing for detention up to 18 months, while it is not in the migrant's hands to obtain the documentation from his country of origin, has encountered fierce opposition.

As mentioned above, a Directive has to be implemented into national legislations by the 24 EU Member States bound by it. Member States have a certain leeway while implementing a Directive, and this is why it is necessary to look at its transposition into the national legal order.

In the following section, I am going to analyze the way in which the Directive is being implemented in Spain and Italy. This will include information on how these two countries understand the border, understood in a broader sense as the place where border controls are performed, and its relationship with the rights of irregular migrants.

## The implementation of the Directive in Spain and Italy

This section of the paper will look at the way in which Spain and Italy are implementing the Returns Directive. These two countries have been chosen for various reasons. First, they are the most important in the EU in terms of the number of migrants received in recent years (González-Enríquez, 2009b; 140). Second, they have an important number of migrants in an undocumented situation (Gonzalez Enríquez, 2009a; Fasani 2008). Third, they have a sea border with less developed countries as well as segmented labour markets with some low productivity economic sectors. Fourth, there are other conditions such as the incorporation of women in the labour market in the recent decades, the lack of experience in migration management and the scarcity of public resources to deal with this issue, the tolerance towards irregularity and the positive attitude of trade unions towards immigration (González-Enríquez and Triandafyllidou, 2009; 111-114). Finally, both countries have launched several regularization campaigns in the last years (Arango and Finotelli, 2009; Recaño, J. and Domingo, A, 2005; Finotelli and Sciortino, 2009).

Despite the similarities, these two countries are taking a different approach to the implementation of the Returns Directive. Spain has made some positive modifications from the point of view of the rights of irregular migrants, such as the introduction of a period for voluntary departure. In clear contrast, it has toughened other provisions, such as the possibility of detention, but not in a particularly harsh way. In turn, Italy seems to have used the Directive as the excuse to make the life of irregular migrants as hard as possible by incorrectly implementing it.

### Spain

According to the most reliable estimates, there were 2,562,032 migrants in Spain on 31 December 2009, not including European citizens and family members of European citizens who have a right of entry and residence, and to whom immigration law does not apply (Ministerio de trabajo e Inmigración, 2010; 6). The three largest communities are Ecuadorians, Moroccans and Colombians (Ibid; 5). The majority of migrants present regularly in Spain went through a period of irregularity in the country at some point in the past (González-Enríquez, 2006; 329). The number of irregular migrants is difficult to verify. Some estimates consider this number to be between 280.000 and 354.000 (Vogel, 2009; 5). Latin Americans would be the largest community of irregular migrants, as they also represent the biggest community of those in a regular situation (González-Enríquez, 2009a; 38). This irregularity is due to several factors such as geography, in the case of migrants arriving from African countries, coupled with a large informal economy which demands workers, and restrictive regulations (Arango, 2005). Spain was one of the last countries in Europe to adopt a large-scale regularization process in 2005, which affected 550,000 irregular migrants (González-Enríquez, 2009b; 149).

In Spain, the rights of foreign nationals are regulated by Constitutional Law 4/2000[10] with its subsequent amendments. This law established a maximum detention period of 40 days. It also provided for a possible re-entry ban for a period of up to 10 years, and no voluntary departure period was offered.

Constitutional Law 4/2000 has been recently modified by the newly approved Constitutional Law 2/2009[11] which among other European Directives, implements the Returns Directive. This new modification brings positive and negative elements from the point of view of the rights of irregular migrants present in Spain. Several items are worthy of mention with regard to the three elements analyzed in this paper.

As far as the period for voluntary departure is concerned, there is the introduction of the new Article 63 (bis), which establishes a new procedure for expulsion known as the "procedimiento ordinario". This formula includes a voluntary departure period of between 7 and 30 days, which may be extended taking into account the personal circumstances of the migrant in an irregular situation (Article 63 (bis)(2)). Moreover, this process excludes the possibility of detention (Article 63 (bis)(3)). The procedure will not apply when there is the risk of absconding by the migrant, or when he or she obstructs the expulsion or when the migrant represents a threat to public order, public security or national security (Article 63 (1)).

As regards the re-entry ban, the new Spanish legislation introduces a modification in order to comply with the Directive. The re-entry ban can only be extended for up to 5 years, except in cases of a threat to public order, public or national security, where it can be extended for up to 10 years (Article 58). In addition, the new wording of the law explicitly forbids the imposition of a re-entry ban when the migrant has complied with the obligation to leave the country during the period for voluntary departure (Article 58(2)).

On the negative side, the new legislation extends the maximum detention period to 60 days from the previous 40 (Article 62(2)).

In sum, the implementation of the Directive establishes a period for voluntary departure which is privileged over a forced expulsion. This is in line with the Directive[12] and with the guidelines established in the most recent multi-annual programme in the area of Justice and Home Affairs adopted in December 2009 (the Stockholm Programme).[13] The Spanish reform tries to reinforce the measures against irregular migration[14] but at the same time acknowledges the need to respect the rights of migrants by granting them a period for voluntary departure. The final result is the same (expulsion), but the management of irregular immigration as an element in border control is balanced with respect for human rights (ZAPATA-BARRERO, 2009; 30).

### Italy

According to the most reliable estimates, there were 2,987,489 third-country nationals residing regularly in Italy on 1 January 2009 (Istat, 2010; 6). The three largest groups by nationality are Moroccans, Albanians and Chinese. The number of irregular migrants is again difficult to determine, and is considered by some estimates to be between 279,000 and 461,000 (Vogel, 2009; 5). Of these, the biggest group

10. Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración Social.
11. Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.
12. See Recital 10 of Directive 2008/115.
13. See Stockholm programme, Brussels, 2 December 2009, 17024/09.
14. It is important to note that the Spanish Law itself uses the terminology irregular and not illegal immigration.

comes from Eastern Europe, followed by North Africa (Fasani, 2009; 50). Various studies have shown how irregular migrants have no problems in finding a job in the Italian economy (Sciortino, 2009; 12). As is common in these cases, most irregular migrants in Italy - around 70% - are 'over-stayers' (Fasani, 2009; 60).

The entry, residence and deportation of immigrants in Italy was regulated by the 'Turco-Napolitano' Act[15], which was modified by the 'Bosi-Fini' Law.[16] The latter has been recently adjusted by new legislation which entered into force on 8 August 2009.[17] This new legislation is part of a broader package of legislative measures known as the "security package" (pacchetto sicurezza) which deals with the fight against terrorism and mafia activities, among other areas (Merlino, 2009). Immigration is therefore clearly securitized and criminalized.

Article 13 of the Bossi-Fini Act provided for the expulsion of irregular migrants. According to Article 13(14), it was possible to impose a re-entry of up to 10 years, which could be decreased to not less than 5 years. The irregular migrant could be detained for period of 60 days (Article 14(5)). Voluntary departure was not mentioned.

The new legislation only partly implements some elements of the Returns Directive. First, there is no voluntary departure period which as has seen above, is privileged under the Directive. Second, the re-entry ban provision has not been modified and it can still be imposed for a period from 5 to 10 years. Both elements are in breach of the Directive. Third, the legislation lengthens the amount of time irregular migrants can spend in detention from 2 months to 6 months.[18] However, this provision is also in breach of the Directive. In fact, the Directive stipulates that a migrant may be detained for a maximum period of 6 months in two cases: risk of absconding or when he avoids or hampers the preparation of return or the removal process. As it has been explained, that period might be extended for a period of 12 more months in two cases: if there is a lack of cooperation by the migrant concerned or if there are delays in obtaining the necessary documentation from the third countries. The Italian legislation states that the period of detention can be extended up to 6 months in these last two cases which are contemplated in the Directive only for the extension of 6 to 18 months, and not for the detention during the first 6 months (Bonetti, 2009). It can therefore be affirmed that Italy has only partially and incorrectly implemented the Directive, and consequently the European Commission should be vigilant in order to bring infringement proceedings against it once the period for implementation expires in December 2010.[19]

Another striking element in the recent Italian legislation, which clearly highlights the criminalization that migrants at present suffer in the country, is the newly introduced Article 10 bis. This Article establishes that entering or staying in Italy without permission constitutes a crime punishable by a fine of 5,000 to 10,000 Euros**.** Leaving aside the various constitutional issues that this provision raises (di Bari, 2010) it also has very important consequences regarding the implementation of the Returns Directive. In fact, the Directive states in Article 2(b) that 'Member States may decide not to apply this Directive to third-country nationals who…(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law…'. It would appear as if Italy was trying to avoid its obligations under the Directive by declaring all irregular migrants as criminals, as the government itself has sometimes declared (Bonetti, 2009; 125). Criminal law,

**15.** It was adopted with the Legislative Decree no. 286/1998.

**16.** Law no. 189/2002.

**17.** Law 15 July 2009, no. 94, Disposizioni in materia di sicurezza publica.

**18.** See Article 14(5) as amended.

**19.** As seen above, each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission is responsible for ensuring that Community law is correctly applied. Consequently, in cases where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and where necessary, may refer the case to the Court of Justice of the European Union. The Court of Justice of the European Union has also declared that when implementing a Directive, Member States have 'to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed'. See Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne*, paragraph 50.

in that sense, would be subject to use as another tool of internal border control in the management of irregular immigration (Renoldi, 2009; 55). It is not very difficult to see that this implementation is also in breach of the Directive (Bonetti, 2009; 125-126).

Immigration is hence criminalized, and the controls within the border are expanded in order to make the life of irregular migrants more precarious. This falls within the framework of strong anti-immigrant rhetoric on the part of the Government. Interestingly enough, the same government which puts forward this rationale has also recently launched another large-scale sector-based regularization process, through which around 300.000 irregular migrants applied for a work and residence permit. [20] This procedure took place in September 2009. Families which had hired an irregular migrant as a domestic employee since at least the 1st of April 2009 were able to apply for their regularization. There is therefore a transition process for this group of migrants from irregular, into criminals, into legal.

## Conclusion

As Zapata-Barrero has argued, "migration policy is generally premised on the assumption that borders are the main expression of the existence of an independent political community" (Zapata-Barrero, 2009; 15). As an element of that immigration policy, irregular immigration is intrinsically linked to internal border management controls.

The Returns Directive harmonizes those internal border management controls in order to provide for how undocumented third-country nationals have to be expelled from the EU. The Schengen aim of strengthening the EU's external border (Zapata-Barrero, 2010; 1) is hence reinforced with the Directive.

This chapter has shown how the implementation of the Directive in Spain and Italy differs tremendously despite the commonalities in the challenges they face. Whereas the Spanish implementation brings positive news with regard to the rights of irregular migrants (as well as some negative ones), the new Italian legislation reflects the consistent and dangerous rhetoric of criminalizing immigration, mainly instigated by the Lega Nord, on which the Italian government has embarked (Merlino, 2009; 1, Urrutia Arestizábal, 2009). This rhetoric is based on the fears spread by the government of the country being under invasion (Pepino, 2009; 13) and the "claim that Italy is facing an exceptional 'national security emergency'" caused by irregular migrants (Merlino, 2009; 1). The Italian government depicts the border as a shield against that alleged national security emergency, which can only be solved by criminalizing and expelling irregular migrants. The Returns Directive legitimizes that strong discourse, as a heterogeneous group (irregular migrants) is treated as a whole that has to remain outside the external border. It also facilitates this EU bordering process, where the "others" (poor, low skilled migrants in the Italian case) are depicted as a security threat which has to be tackled by restrictive legislative measures. This might be effective among certain voters, but does not reflect the needs of the Italian economy and society, as the latest regularization process has very clearly shown. In fact, Italy continues to have a strong demand for foreign workers in various sectors (Fasani, 2009). By contrast, in Spain, the more sensible approach of the government on these issues anticipated a less restrictive implementation of the Directive, as has been finally the case.

[20] See Article 1 (ter) of Law 3 August 2009, no 102. The final results of the regularization are not yet available, as examination of the applications is still ongoing. For more information see Italian Home Affairs Ministry's final report. Retrievable at: http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0033_Report_Conclusivo__Dichiarazione_di_Emersione.pdf

The degree of fairness and openness in the implementation of the Directive all over the EU will confirm whether expulsion as a last mechanism of border control is severely enforced without taking into account the rights of irregular migrants. Unfortunately, the implementation of legislation in countries like Italy is not very promising. Spain, on the contrary, has put forward a more respectful implementation. It will also be important to see the national practices as well as the interpretation of the law. Here, on a more positive note, the Court of Justice of the European Union will have to interpret some of the most restrictive provisions in the Directive and their transposition by Member States.[21] The European Commission will also monitor the correct implementation of this legislation, and there are many practices in Italy which might be soon the object of infringement procedures.

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21. See Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov),* ECR 2009 I-00000.

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# CHAPTER 5 - THE EXTERNALIZATION OF MIGRATION CONTROL IN SPAIN AND ITS IMPACT ON MOROCCAN AND ECUADORIAN MIGRATION

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## Introduction

In this chapter, we present an analysis of the recent evolution of migration-control policies in Spain within the broader framework of the EU. Besides the theoretical review, this research also focuses on the impact these policies have had on the migratory behaviour of two of the biggest communities of foreign origin in Spain: Moroccans and Ecuadorians.[1]

The methodological approach was based on bibliographical review, analysis of legal texts and documents, the results of a survey targeting Moroccan and Ecuadorian migrants[2] and qualitative fieldwork (life histories of Moroccan and Ecuadorian migrants and in-depth interviews with experts.[3]

In the first section of the chapter, *The evolution of migration-control policies: evidence from the European case*, we will introduce the reader to the political framework in which the EU develops and re-creates its border regime.

A brief historical overview on the institutional and legal development of EU's migration-control policy is provided, as well as a critical review of the main theoretical approaches describing the strategies, measures and tools implemented by EU's Member States for the enforcement of border-control regulations.

The second section, entitled *An overview on the recent irregular migration in Spain and an approach to Moroccan and Ecuadorian migration*, looks at the patterns of irregular migration in these two migrant communities. Moroccan migrants are generally much more affected by policy measures intended to be implemented at the physical border; whereas Ecuadorian migration, which is mainly legal in their choice of entry channels, is more concerned with internal controls and control mechanisms operating far from the border.

The choice of these two communities is thus based both on their different pathways to becoming irregular migrants, as well as on the contrasting impact that migration-control policies have on their behaviour.

The comparison of these two migrant groups could therefore be conceived as a way of testing the effects of "traditional" border-control policies focusing on the geographical perimeter of the border, and the more modern initiatives in this field that seek to expand control far away from the boundaries of the State and beyond migrants' entry, in order to tackle irregular migration linked to the phenomenon of "overstaying" – i.e. staying in the country after the expiry date of the corresponding permit or visa.

The third section, *Recent developments of control policies for migratory flows in Spain*, deals with the measures, strategies and actions implemented by different Spanish governments to address the phenomenon of irregular migration.

Particular emphasis is placed on polices based on reinforcing cooperation with countries of transit and origin, particularly African countries, and the special role recently played by Morocco as a buffer country.

The section entitled The Triple-U (unwanted, unintended, unexpected) and their antonyms presents the consequences of border control policies and the outcomes of the enforcement of recent border control policies on the patterns and pathways of irregular migration.

The analysis will look at changes in the socio-demographic profile of irregular migrants (sex, age, country of citizenship), choices of new routes and the development of means of transportation, both as outcomes and as counter-strategies to the tightening of borders.

We will finally draw some *conclusions* and make some reflections on the degree of effectiveness that these recent developments on border-control policies have had on the decline of irregular migration flows.

## The evolution of migration-control policies: evidence from the European case

The arrival in recent years of boatloads of immigrants from Africa to the coast of Spain has unleashed a humanitarian crisis and media frenzy. These vessels have also landed at other points along the Mediterranean coastlines of Italy and Greece, thereby alarming a number of European governments and reigniting the debate over the possibility that these migratory flows are causing Western states to lose control of their borders (Sassen, 2001).

Insofar as the migrant threat works as a "glue," binding together political concerns and the citizens of EU Member States, the attention to border control is really about building a genuinely European public consensus. The details of the design and application of community policy measures and initiatives for migration control are found in the various summits and meetings that have taken place since the initial signing of the Schengen Agreement by Germany, France, and the Benelux countries in 1985. Despite this agreement incubating at the margins of the EU's formal structures (Illamola Dausà, 2004), Member States quickly embraced it as an essential document for understanding the process of securing the community's external borders. The Schengen Implementation Agreement was signed in 1990 (it was ratified in 1993 and went into force in 1994). Spain signed it in 1991, motivated by a desire to participate in the EU's formal structures and the single

market. According to Geddes (2003), the early 1990s were characterized by an Europeanization of migration control, based on informal intergovernmentalism, in which the Ad Hoc Working Group on Immigration[4] made the principal decisions. The working group, in turn, was responsible for drafting the "Palma Document,"[5] which details the actions to be taken regarding the European Union's external borders, and especially regarding entry into EU territory.

After the Schengen Agreement, perhaps the most important milestone in terms of putting the migration issue on the European policy agenda was the signing of the Maastricht Treaty in 1992, since it laid the groundwork for the development of a common visa policy (Huntoon, 1998; 425), and it led to the approval of community directives[6] specifying the countries on which a visa requirement would be imposed.

Regarding jurisdiction over migration issues, a growing Europeanization was apparent in the passage of the Amsterdam Treaty (1997), which, according to Broeders (2007; 77), contemplates addressing the question of undocumented immigration in a more comprehensive manner. That treaty coined the mantra "the fight against undocumented immigration." From that point onwards, it regularly appeared among the objectives in every EU agreement (Broeders, 2007). The conclusions of the European Council held in the Finnish city of Tampere in 1999 would be vital in the reorientation of EU migration policy objectives toward the countries of origin and the transit countries (Samers, 2004), and it defined a five-year plan for adopting policy measures. The Laeken European Council (2001) established a new community action plan in matters of migration policy, which would be the principal axes for the policy on visas, the exchange and analysis of information relating to undocumented immigration, economic support for actions that non-member countries should carry out, and the development of a shared policy on matters of admission and deportation (Samers, 2004). Following the Laeken Council action plan, the Union began to develop the European Neighborhood Policy,[7] linking it to European programs connecting migration and development — such as TACIS, MEDA, EUROMED, CARDS, PHARE, ASEM and INTERREG[8] — in order to encourage cooperation with non-member countries (Lannon, 2005). After the Thessaloniki European Council (2003), an open credit line financed those programs.

The Seville European Council in 2002 produced further finishing touches for cooperation policies with non-member countries on migration issues, initiating a policy line that was more aggressive for those countries that did not cooperate in combating undocumented migration (Lannon, 2005; 68). From this perspective, a decision was made to increase security along the borders, harmonizing the measures to combat undocumented immigration (visa requirements, readmission, deportation, and repatriation) and promoting integrated and coordinated actions along the borders (Koff, 2005; 402). This was the seed for the creation of FRONTEX in 2005.

Two of the more recent developments in the area of community-level migration-control policy are the revision of the Dublin Convention (or Dublin I, signed in 1990), through the Regulation of Dublin II (adopted at a meeting of the Union's Council of Ministers in February 2003). This sought to determine the Member State responsible for each asylum request. The Prüm Accord, or Schengen II (2005), attempts to have more influence over Member States' trans-border cooperation

4. See, for example, Geddes (2003), p. 132.
5. See Boixareu Carrera (1989).
6. Such as the EC Regulation 453/2003 setting up a list of third countries whose nationals are requested for a visa before entering the EU. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:069:0010:0011:ES:PDF)
7. The reader can find more information on the objectives, initiatives and programs developed under this program on the webpage of the European Neighbourhood Policy, http://ec.europa.eu/world/enp/index_en.htm,.
8. TACIS: Technical Assistance to the Commonwealth of Independent States. MEDA: Mesures d'accompagnement (principal tool of the EU in relation Mediterranean countries); (EUROMED PACTE: Partnership, Action, Cooperation, and Transfer of Experience for the Development of the Mediterranean and Europe; CARDS: Community Assistance for Reconstruction, Development and Stabilization; PHARE: Poland and Hungary Assistance for the Restructuring of the Economy; ASEM: Asia-Europe Meeting; and INTERREG: Interregional cooperation (a community initiative, which aims to stimulate interregional cooperation).

with the prosecution of undocumented migration, among other objectives. Like the 1985 Schengen accord, it incubated on the margins of formal community institutions, but it is now in force in Spain (Illamola Dausà, 2004).

This brief history of the Europeanization of migration-control policies can also analyzed from a perspective that considers the strategies implemented at both the Community level and in each Member State, at national level (see diagram 3.1). Three principal processes are redefining the Community border regime. One is the idea that the meaning of the physical border is becoming *denser* as it takes on greater symbolic significance as a mechanism for sealing a country off socially and politically (López Sala, 2006; 79). Another is *deterritorialization* (Bigo, 2005), since the places where migration control occurs are increasingly physically distant from the territorial borders of the Member States. And, finally, there is *virtualism* (Samers, 2004), in which the States create and produce undocumented immigration by defining what constitutes unauthorized entry into a country's territory and who shall be considered "illegal" or not, based on how they entered the country, as well as by previously defined parameters that would "authorize" an individual to reside and to work.

Based on this triple re-creation of the border regime, a whole series of strategies for migration control unfold, which are generally characterized by their ever-greater emphasis on instruments and measures that are applied far away from or outside the border. First, there is a growing tendency to employ technological and computer tools for the detection, identification, and control of undocumented migrants, which some authors have christened the "computerization of border monitoring" (Broeders, 2007; Broeders and Engbersen, 2007). The EU has created various databases in the hope of obtaining information about the three ways in which an undocumented immigrant can enter our country. The most obvious way is an unauthorized entry into a Member State's territory. If the unauthorized entry ends in an apprehension, police in any Member State can enter information about the detained person into the Schengen Information System (SIS I; SIS II is currently under development). This should help reduce the instances of recidivism, because agents will be able to enter a potential entrant's name into the system, and if it turns out that this person has made an earlier attempt to enter illegally, anywhere in Europe, that will become apparent. The agents can then carry out a more exhaustive check on the person's papers to verify that they are valid. A community-level register, the European System for the Comparison of the Dactyloscopic Records of Asylum Seekers (EURODAC), tracks asylum seekers whose applications have been rejected in case they decide to remain in the country without authorization. The Visa Information System (VIS) database is currently under development to track "fake tourists"— i.e. immigrants entering the country using a tourist visa and who decide to stay on once the visa has expired.

A second EU strategy to halt undocumented immigration consists of what Zolberg has called "remote control" (2002): the deployment of migration controls beyond a Member State's boundaries. It is increasingly being deployed in the countries of origin and transit for migrants. One of its tools is a policy requiring travellers to apply for visas at embassies and consulates prior to their departure, and setting restrictive requirements for granting those visas. This tool has been enormously effective in reducing the annual volume of immigrant arrivals.

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A third tool relates to our discussion below: a trend towards the externalization or subcontracting of migration control. This involves exporting the control agenda to non-member countries that emit migrants or have migrants crossing their territory (Samers, 2004). One of the most immediate consequences of this policy is the conversion of origin and transit countries into "buffer" countries[9] for those migrants whose aspiration of reaching the European El Dorado is frustrated. Externalization operates by using several mechanisms that run the gamut from trans-border police cooperation, to the establishment of migrant detention centres in transit countries, to sending immigration liaison officers to those countries.

The trans-nationalization and internationalization of policy and government action is not only a strategy but also a sine qua non for the development of this new immigration-control policy. The last ten years have been characterized by dynamism in terms of signing bilateral and multilateral agreements (especially concerning readmission) and strengthening intergovernmental activity in the Community context (Guiraudon, 2000).
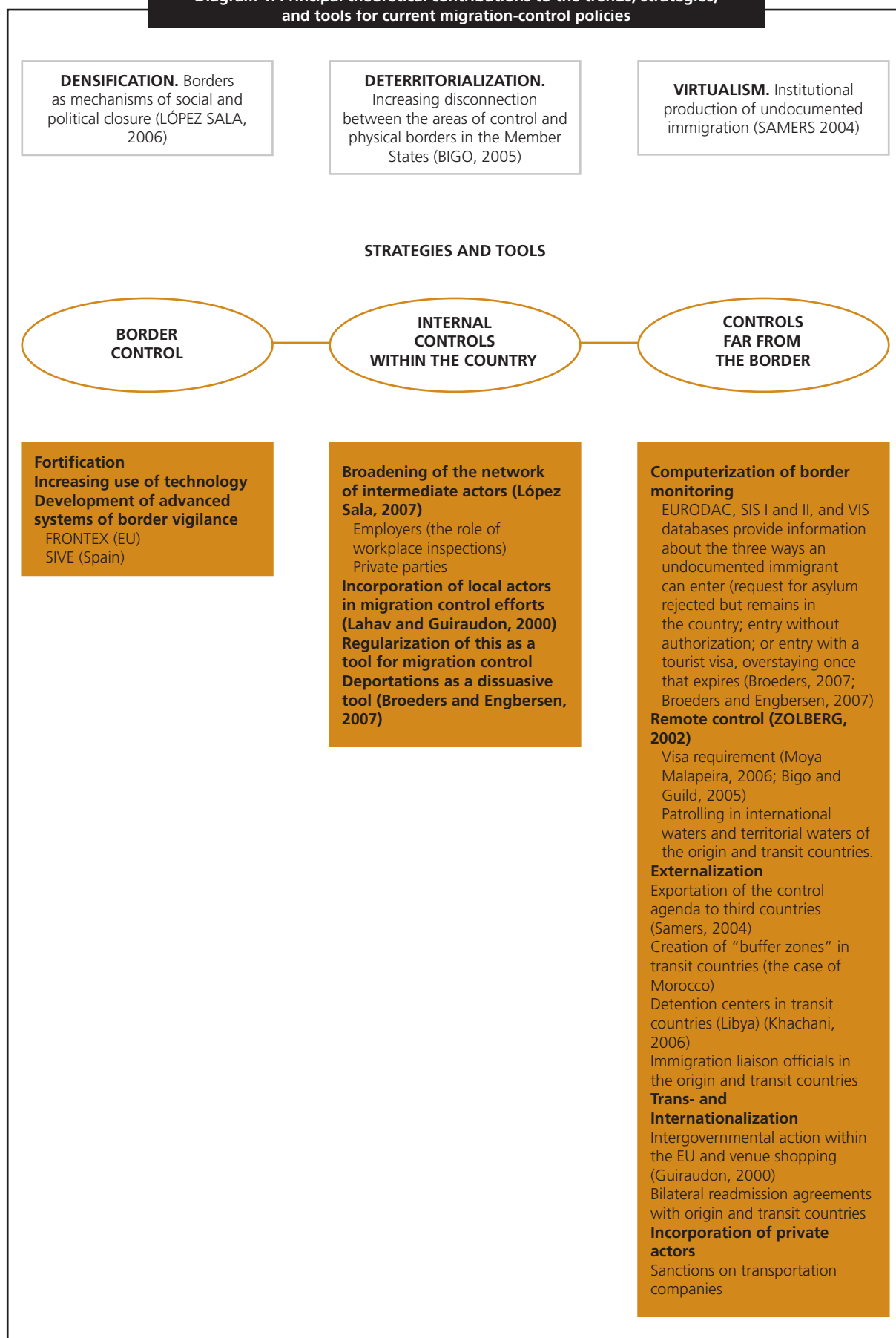
Finally, the strategies for expanding migration control beyond the Member States' territorial borders also include measures for economic sanctions against transportation companies. These measures introduce an element of privatization in the management of migration control by trusting transportation companies to screen for unauthorized travellers.

Although the governments of Member States have made enormous efforts to send migration control abroad, it is also evident that there is interest in bringing certain tools for control back inside Member States. As a result, countries are deploying migration control inside their territories and extending monitoring beyond the moment that immigrant enters the country. Some authors mention the role played by regularization as an instrument of internal control (Izquierdo Escribano, 2005; Recaño and Domingo, 2005). However, in terms of managing migration internally, we should not overlook the expansion of a network of involved actors that includes business owners and employers of immigrant labour (principally through the establishment of procedures to punish them for hiring undocumented workers) to intrastate agencies.

It is also important not to forget the reinforcement of control measures and instruments at the borders themselves. The EU is developing increasingly sophisticated fortification mechanisms, which it combines with the use of cutting-edge technology for detecting entry by undocumented immigrants. The role played by FRONTEX, the European external-border-control agency, focuses on assisting Member States. As we will analyze below, in the Spanish case, the development and implementation of Integrated External Surveillance System (Sistema Integrado de Vigilancia Exterior, SIVE) plays a fundamental role in the reinforcement of border monitoring.

9. The expression "buffer country" –or "buffer State"- has been applied to migration contexts in order to describe the role played by transit countries, but also emigration countries, in order to stop or deter migration through its borders. The term has been applied to Eastern and Central European Countries (see, for example, Divinský, 2004) but also to Morocco towards Spain or the EU in general (Khachani, 2006).

**Diagram 1. Principal theoretical contributions to the trends, strategies, and tools for current migration-control policies**

**DENSIFICATION.** Borders as mechanisms of social and political closure (LÓPEZ SALA, 2006)

**DETERRITORIALIZATION.** Increasing disconnection between the areas of control and physical borders in the Member States (BIGO, 2005)

**VIRTUALISM.** Institutional production of undocumented immigration (SAMERS 2004)

**STRATEGIES AND TOOLS**

BORDER CONTROL

INTERNAL CONTROLS WITHIN THE COUNTRY

CONTROLS FAR FROM THE BORDER

**Fortification**
**Increasing use of technology**
**Development of advanced systems of border vigilance**
  FRONTEX (EU)
  SIVE (Spain)

**Broadening of the network of intermediate actors (López Sala, 2007)**
  Employers (the role of workplace inspections)
  Private parties
**Incorporation of local actors in migration control efforts (Lahav and Guiraudon, 2000)**
**Regularization of this as a tool for migration control**
**Deportations as a dissuasive tool (Broeders and Engbersen, 2007)**

**Computerization of border monitoring**
  EURODAC, SIS I and II, and VIS databases provide information about the three ways an undocumented immigrant can enter (request for asylum rejected but remains in the country; entry without authorization; or entry with a tourist visa, overstaying once that expires (Broeders, 2007; Broeders and Engbersen, 2007)
**Remote control (ZOLBERG, 2002)**
  Visa requirement (Moya Malapeira, 2006; Bigo and Guild, 2005)
  Patrolling in international waters and territorial waters of the origin and transit countries.
**Externalization**
Exportation of the control agenda to third countries (Samers, 2004)
Creation of "buffer zones" in transit countries (the case of Morocco)
Detention centers in transit countries (Libya) (Khachani, 2006)
Immigration liaison officials in the origin and transit countries
**Trans- and Internationalization**
Intergovernmental action within the EU and venue shopping (Guiraudon, 2000)
Bilateral readmission agreements with origin and transit countries
**Incorporation of private actors**
Sanctions on transportation companies

It is undeniable that the European agency that monitors the Union's external borders, FRONTEX, has thrown its support behind the Spanish government ever since the so-called "canoe crisis" (Izquierdo Escribano and Fernández Suárez, 2007). It has been collaborating intensively with the Spanish police on border-control matters, and coordinating actions in parallel with the development of the SIVE.

## An overview of recent irregular migration in Spain and an approach to Moroccan and Ecuadorian migration

We now turn to a detailed look at the size and characteristics of undocumented migration in Spain, focusing on the two groups that are the object of our research, Moroccans and Ecuadorians. The core of our analysis will look at undocumented immigrants entering Spain. We will emphasize the different border profiles (air versus maritime). The higher levels of undocumented Moroccan immigration that — although very small in relationship to the overall number of annual arrivals of Moroccans — is a very large component of Spain's total undocumented population is attributable to the way they enter the country. In contrast, prior to the implementation of the visa requirement in 2003, Ecuadorian immigrants took advantage of the lax controls to emigrate under the guise of being tourists. Particular emphasis will be placed on the evolution of unauthorized entry, based on data on detentions and interceptions of immigrants and vessels. We will also look at developments in the crossing points and the principal routes taken when immigrants set out from Africa for the European El Dorado.

According to a vast number of our Ecuadorian interviewees, prior to the imposition of the visa requirement in 2003, the most common way to enter Spain was to obtain a tourist visa issued by the Spanish authorities upon the person's arrival at his or her destination. This migration strategy required a large amount of money; approximately €1,700 to finance the trip because the "tourist" had to prove that he or she had a certain amount of money for each day of their "visit" to Spain. Ecuadorian immigration to Spain before 2003 was therefore not potentially risky, but it was expensive. For this reason, many Ecuadorian immigrants we interviewed talked about relying on loan sharks in Ecuador, and going into debt to fund their migration.

When the tourist visa expired three months later, the person lapsed into undocumented status. However, he or she could then take part in one of the three regularization processes (2000, 2001, and 2005). In all probability, the imposition of a visa requirement in 2003 only served to accelerate family reunification because in only two years, the flows changed from being dominated by women to a balance in the composition of the sexes.

In the case of Moroccan immigration, we should begin by dismantling the media myth of the *patera* (little boat). Unauthorized immigrants have never been the majority of the Moroccan flows, regardless of the year of arrival. Among our interviewees, only 20 percent had entered Spain without papers or with false papers. Of that 20 percent, most came by boat, but some travelled by hiding in the compartments of trucks or buses. The Moroccan community has consolidated its presence not only in Spain but in other EU countries, and with the presence of family and social networks; there are now more ways for Moroccans to enter Spain. Indeed, among unauthorized Moroccans who obtained help in migration, 47 percent claimed that they had relied on an organized group (usually traffickers), and 43 percent had used a family or social network. The employment of informal networks is largely a consequence of the lack of formal and legal channels for becoming an economic migrant in Spain.

Looking at the flows, the residency permits, and the labour quotas for Moroccan and Ecuadorian immigrants (figure 1), it is apparent that a person who wishes to enter to work legally has few opportunities. In practice, the number is limited to the annual quota that is negotiated with each government in the primary sending countries. Those quotas account for only about 15 percent of all foreign workers, regardless of the legal mechanism a person uses to enter the Spanish labour market (Izquierdo Escribano, 2008; 651–52).

**Figure 1. Development of the immigration flows, residency visas issued, and Moroccan and Ecuadorian labor quotas, 2000-2006.**
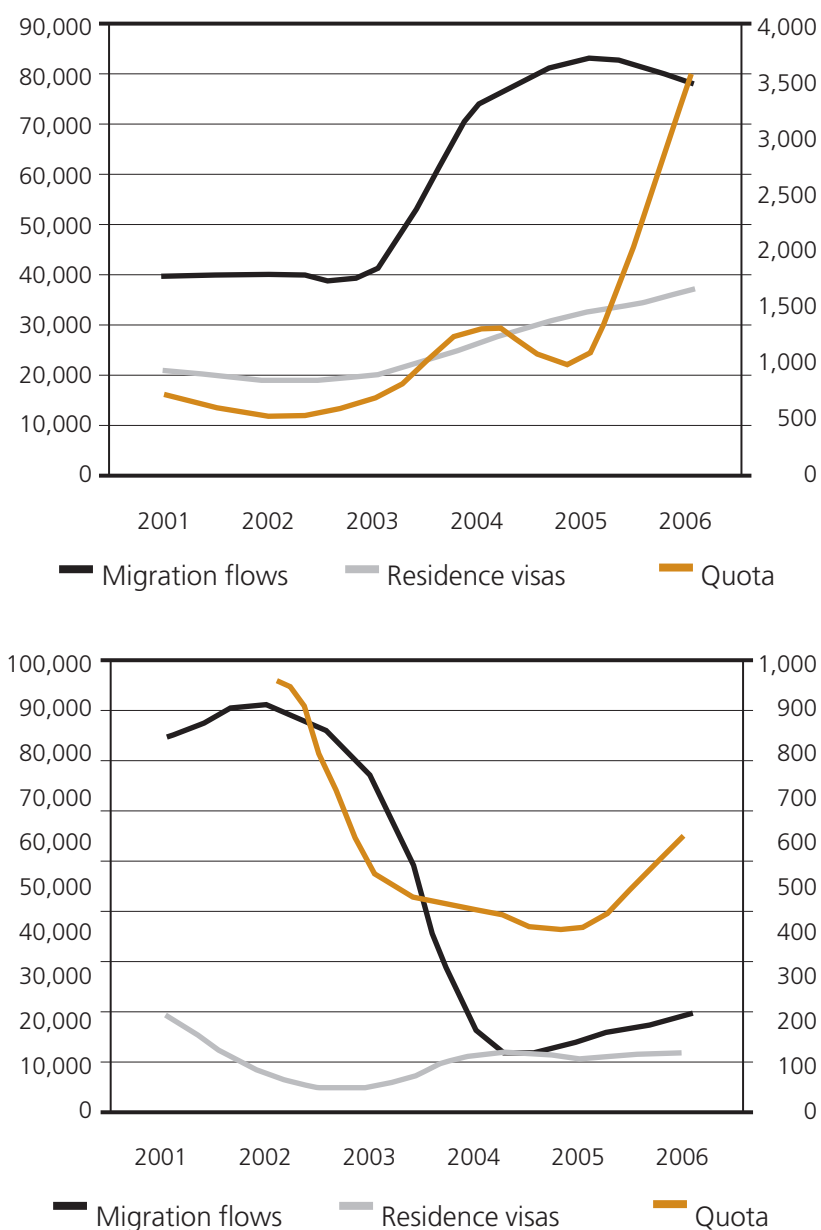


Source: Data on the labour quota for foreign workers from the Secretaría de Estado de Inmigración y Emigración, Ministerio de Trabajo y Asuntos Sociales (MTAS); on residency visas, from the Dirección General de Asuntos y Asistencias Consulares, Ministerio de Asuntos Exteriores y de Cooperación (MAEC); on migratory flows from the Estadística de Variaciones Residenciales (EVR), Instituto Nacional de Estadística (INE), for various years. The data on the labour quotas are on the right-hand side of the graph.

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Despite the media image, recent data from the Office of Internal Security Studies (Gabinete de Estudios de Seguridad Interior, GESI) indicate that the number of refusals of entry at airport checkpoints is as much as four times higher than at coastal borders and that the number of denials at land borders is almost insignificant. Between 2004 and 2007, 70,240 foreigners were refused entry, of which more than 76 percent occurred at airport checkpoints, compared to a little more than 20 percent along the coasts, and only 3.5 percent at border checkpoints on land. These data also corroborate that pressure from clandestine immigration is not focused exclusively on the Strait of Gibraltar or the Canary Islands.

Because the coastal-monitoring strategy is not based on denial of entry but rather on the combined objectives of interception and rescue, the denial-of-entry statistics do not clearly depict clandestine maritime immigration.

Another statistical category, interceptions of boats with undocumented migrants, can help us understand the numerical realities associated with the pressures on Spain's maritime borders. The numbers have fluctuated during the past decade, with some years' intercepted-migrant figure being around 20,000 people, whereas at other points, it was much lower. Despite the unevenness of the numbers, a clearly identifiable pattern corroborates a change in the routes in response to border-control efforts. There has been a decline in interceptions in the Strait, beginning in 2002, and an increase in interceptions along the Atlantic route to the Canary Islands, beginning in 2006 (although interceptions in the Strait also ticked upward that year). Interestingly, there was a notable reduction in the number of immigrants detained in 2007 and 2008, a trend confirmed in 2009 (see MIR, 2010), a fact that indicates the relative effectiveness of Spain's various strategies to control undocumented immigration.

**Table 1. Intercepted ships and immigrants from 1999 to 2008, by place of interception**

| Location | Province/ Island/ Autonomous city | 1999 | | 2000 | | 2001 | | 2002 | | 2003 | | 2004 | | 2005 | | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detected ships | Detained immigrants | Detained immigrants | Detained immigrants | Detained immigrants |
| **Strait of Gibraltar** | Almeria | 71 | | 129 | | 134 | | 126 | | 101 | | 89 | | 124 | | | | |
| | Cadiz | 162 | | 378 | | 589 | | 157 | | 130 | | 75 | | 56 | | | | |
| | Malaga | 42 | | 32 | | 28 | | 19 | | 25 | | 32 | | 31 | | | | |
| | Granada | 6 | 2,694 | 12 | 12,785 | 10 | 14,405 | 58 | 6,795 | 99 | 9,788 | 103 | 7,245 | 70 | 7,066 | 7,025 | 5,580 | 4,423 |
| | Murcia | -- | | -- | | -- | | -- | | 1 | | -- | | 0 | | | | |
| | Ceuta | 112 | | 76 | | 20 | | 15 | | 5 | | 143 | | 49 | | | | |
| | Melilla | 7 | | 1 | | 2 | | 2 | | 1 | | 2 | | 18 | | | | |
| **Canary Islands** | Las Palmas | | | | | | | 11 | | 32 | | 36 | | 107 | | | | |
| | Lanzarote | 75 | 875 | 179 | 2,410 | 277 | 4,112 | 162 | 9,875 | 145 | 9,388 | 17 | 8,426 | 26 | 4,715 | 31,678 | 12,476 | 9,181 |
| | Fuerteventura | | | | | | | 470 | | 390 | | 239 | | 69 | | | | |
| | Tenerife | | | | | | | -- | | 13 | | 2 | | 17 | | | | |
| **Balearic Islands** | Ibiza | -- | -- | -- | | -- | -- | -- | | -- | -- | 1 | 4 | 0 | 0 | 0 | -- | -- |
| **Total** | | 475 | 3,569 | 807 | 15,195 | 1,060 | 18,517 | 1,020 | 16,670 | 942 | 19,176 | 739 | 15,675 | 567 | 11,781 | 38,703 | 18,056 | 13,604 |

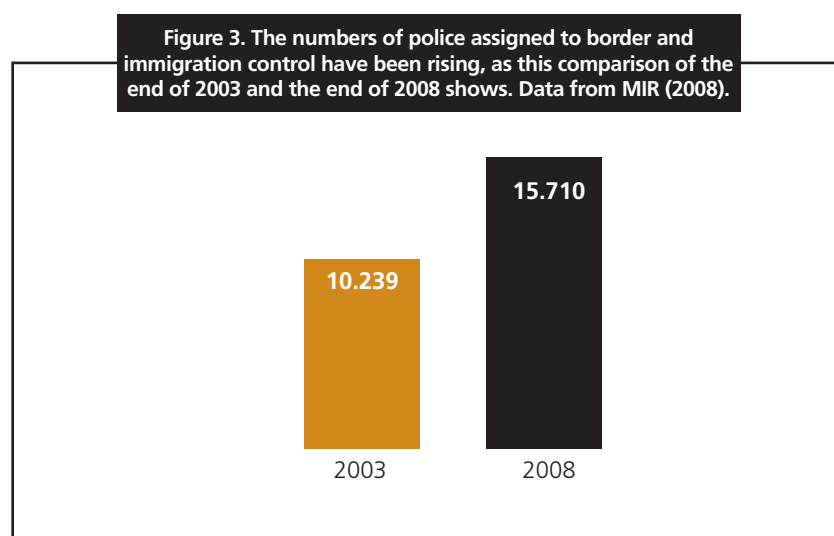Source: For 1999-2005, the MTAS (2006). For 2006-2008, the MIR (various years).
Note: Disaggregated data for intercepted ships is unavailable for 2006, 2007, and 2008.

This change in migratory routes corresponds with a change in the profile of potential clandestine migrants. Although they remain predominantly Moroccan, the flows have diversified to include other sub-Saharan countries. The reasons for migrating to Spain are not just these countries' socioeconomic conditions. There has also been a strategic adaptation to the Spanish government's actions, principally the diplomatic effort to sign bilateral readmission agreements with numerous African nations, as we will see in the next section. This has increasingly closed more doors to potential migrants from this region. We can summarize this change by the recent evolution of refusals of entry by foreigners' nationalities (figure 2).

**Figure 2. Refusals of entry by nationalities**
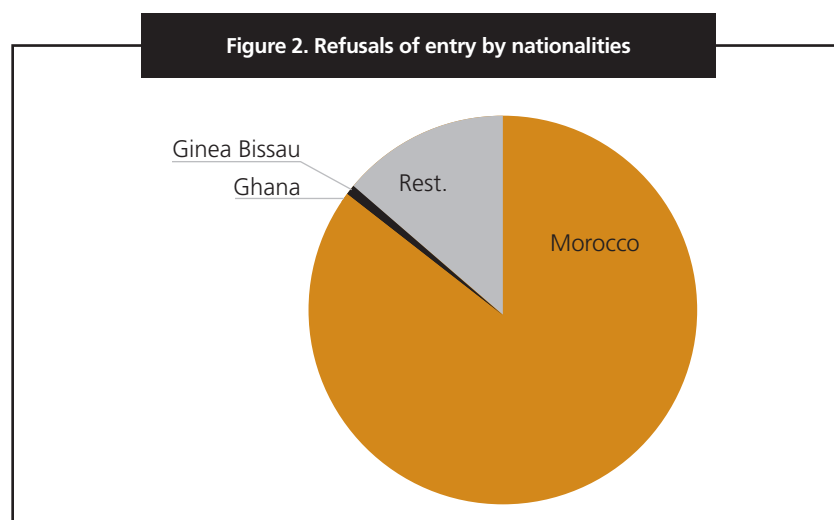


Source: Data obtained by a personal communication with the Gabinete de Estudios de Seguridad Interior (GESI), Ministerio del Interior.

We can also point to the increase in the number of agents assigned to border control and immigration, which rose from a little more than 10,000 at the end of 2003 to somewhere around 16,000 by the end of 2008 (figure 3). This is evidence of the substantially increased funding that is going into combating unauthorized immigration.

**Figure 3. The numbers of police assigned to border and immigration control have been rising, as this comparison of the end of 2003 and the end of 2008 shows. Data from MIR (2008).**



Source: "Balance de la lucha contra la inmigración ilegal 2008". Ministerio del Interior (MIR).

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**Map 1. Evolution of unauthorized entrance by immigrants coming to Spain through maritime borders.**
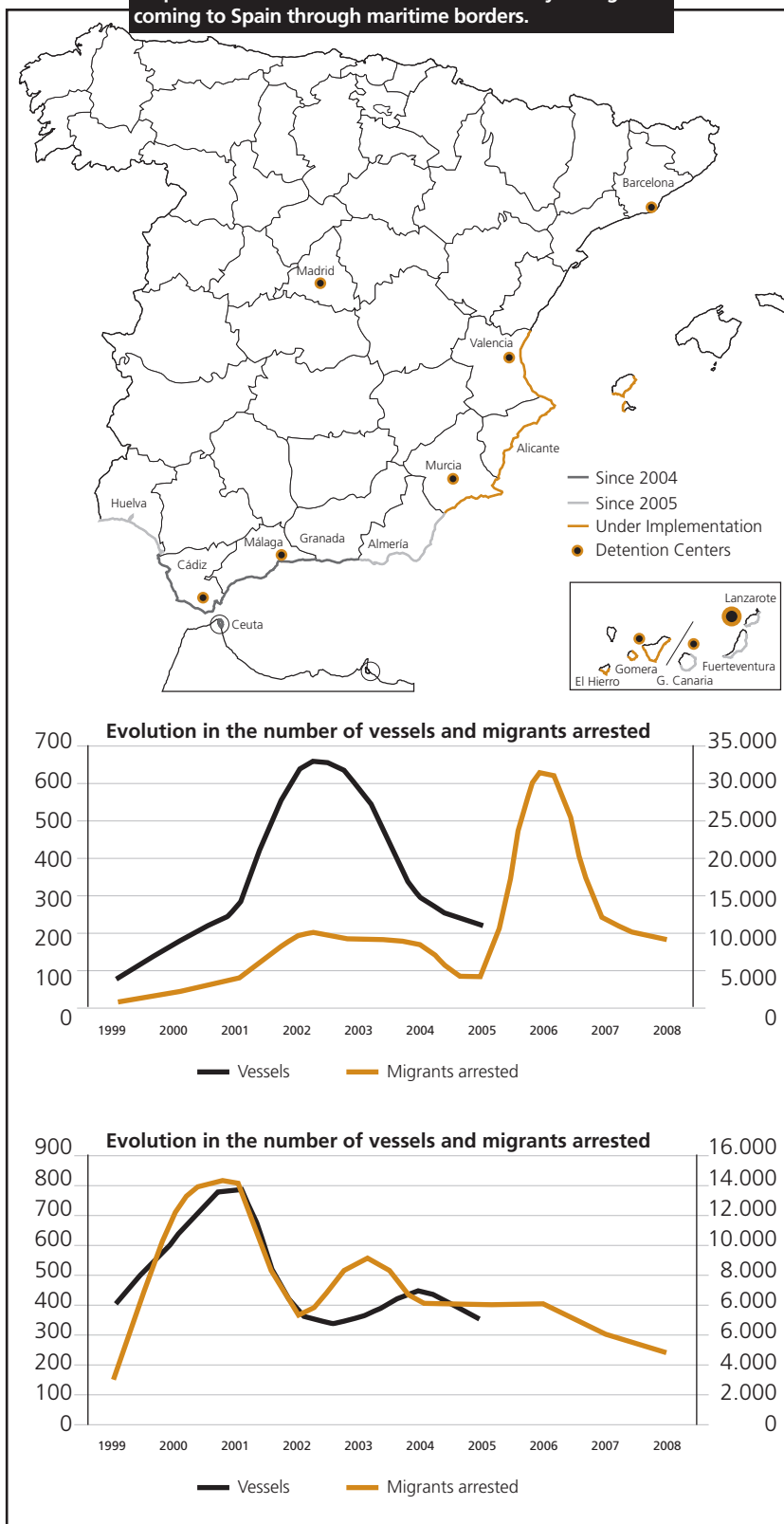
Source: The data relating to ships is on the left-hand side of the graphs. Source: For the data on intercepted vessels and ships, see table 3.5. For information on SIVE, see MIR (2008). The information on the detention centres comes from an interview with the personnel of the Unidad Central de Expulsiones y Repatriaciones (Central Deportation and Repatriation Unit, UCER), a subagency of the Comisaría General de Extranjería y Documentación (Commissariat-General for Aliens and Documentation).

The number of repatriations is also a good indicator of the more restrictive migration control policies (figure 4). Clearly, the efforts made especially during the mandate of the first PSOE government to win the cooperation of sending and transit countries, i.e. in seeking to share co-responsibility for combating undocumented immigration, is apparent. A quarter of a million repatriations occurred between 2000 and 2003, and in the next four years, that figure reached just over 370,000.



Figure 4. Number of repatriations in 2000–2003 and 2004–2007

258,049

15.710
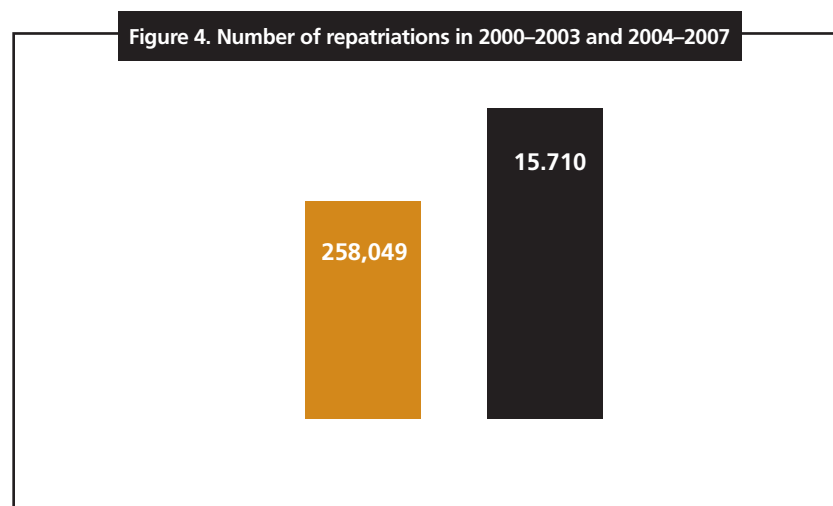
Source: Prepared by the author based on data from the Gabinete de Estudios de Seguridad Interior (GESI), Ministerio del Interior (MIR) for the corresponding years.

A process of action-reaction has developed between Spain's strategic policies and the counterstrategies of the immigrants, as can be seen in the data on interceptions of ships and immigrants, the timeframe in which SIVI was implemented, and the number and capacity of the immigrant detention centres (see map 1).

In the next section, we will present the policy mechanisms implemented in order to tackle this phenomenon of irregular migration.

## Recent developments of control policies for migratory flows in Spain

Since the beginning of the 1990s, the Spanish government has increased its efforts, by increasing actions and measures to halt the entrance of undocumented migrants through Spanish maritime borders, which are some of the most porous in Europe, as we will see below.

The border that unauthorized immigration most "threatens" is a maritime one, which has led to a deployment of countless control strategies that go beyond the perimeter of the country itself, because in the case of Spain, officials must monitor an area and not a line (Carling, 2007a). The strategies now include the migration control actions of the countries of origin and transit, as well as the strategies deployed within Spain, with measures of extraordinary scope, such as extraordinary regularizations.

Since Spain signed the Schengen Agreement in 1991, the development of a shared visa policy has meant that the countries with the highest migrant flows to Spain have been gradually added to the list of countries in which people are required to obtain a visa in advance from Spain's

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embassies and consulates abroad. Despite the diplomatic inconvenience created by the creeping visa requirement for ever more countries, especially those in Latin America ones (Kreienbrink, 2008), this obligation will soon become the first filter that immigrants must pass through before entering Spain.

In 1991, Spain thus began to require Moroccan citizens to apply for visas to travel to Spain prior to making the trip. This had an enormous influence on the number and composition of migratory flows from that country, even though the effects were more limited than the visa requirements applied to other countries. On one hand, before the visa requirement, the Moroccan government was already cooperating with Spain by reducing the number of passports issued to its citizens (Huntoon, 1998). On the other hand, the visa requirement has supposedly unleashed what López García (2004) calls Morocco's "migratory breakdown," encouraged a broad informal economy connected to trafficking in migrants (Carling, 2007b), resulted in the blockading of embassies and consulates, and led to the emergence of corrupt practices (Moya Malapeira, 2006).

In short, the visa policy has become a useful and effective instrument for managing migratory flows because it transfers the denial of entry to the embassies and consulates in the countries of origin, far from Spain's national territory and from the scrutiny of Spanish public opinion. An interviewee from the Ecuadorian consulate in Murcia commented on the Spain's strict visa requirements:

"In the case of Ecuador, in addition to border controls, other mechanisms have been established to impede [Ecuadorian] citizens from entering [Spain], as the Spanish Consulate's daily practices prove. It is not determined nor stipulated [in law], but [the visa requirement] is a mechanism that has served to impede entrance in a draconian way, because in many cases it does not extend to even situations of a humanitarian nature, and in many cases, it also implies not knowing the administrative decisions taken in Spain. There is a legal subterfuge that makes it possible to review the documents in the Consulate, and then they frequently use that power." (Interview in the Ecuadorian Consulate in Murcia)

Another of the strategies for moving migratory control beyond Spain's borders is through strengthened cooperation with the countries of origin and transit, to monitor maritime borders using patrols in their territorial waters and in international waters (López Sala, 2006). From Spain's perspective, this cooperation has been very successful, especially in the case of Mauritania, one of the principal departure points for undocumented migrants arriving by boat (Hernando and Planet, 2009).

One of most developed border-control measures during the last ten years in Spain has undoubtedly been the externalization of control. This was possible largely thanks to the intensification of Spanish diplomatic activity, mainly after the elections of March 2004, when the Spanish Socialist Party – the PSOE - became the governing party. Samers (2004) labels this policy an exportation of the migration-control agenda to non-EU member countries. Indeed, the threat of undocumented immigration is planned ever farther from the Spanish coastline and closer to African waters, thanks to the deployment of border-control strategies and measures exported to migrants' countries of origin. Those countries are in turn becoming transit countries, and may even become immigration-receiving countries at some point.

For the Spanish case, the most evident example of a country that has been converted into an "buffer zone" is Morocco. As it deals with foreigners who cross Moroccan territory with the hope of reaching Europe as well as potential migrants from the Moroccan population itself, it is increasingly seeing the issue of migrant control moving ever closer to its own borders. Migratory pressure and the "border mentality" are increasingly evident in the discourse of Moroccan officials:

"I want to make one thing very clear, okay? It is not only the Canary Islands, as the southern border of Europe, which is suffering from immigration, but also our own country, Morocco. We are suffering just like the Canary Islands or even worse, because we have a land border of 3,500 km with Algeria, and Mauritania. Most of this border is a great, uninhabited desert and those two countries don't control, they don't control their own territory very well . . . They cannot put their armies everywhere. . . . Morocco is suffering more than Spain from immigration, with the difference that Morocco does not have means within its reach. . . . We're doing everything that we possibly can to stop the flows from Morocco. When we have stopped it, some 80 percent [of the flows] moved to the south and this area suffers from all the cruelties of life." (Interview in the Moroccan Consulate in Las Palmas in 2008. )

The diplomatic relationship between Spain and Morocco has a long history that is not exclusively tied to the migration issue. Other issues that have influenced the relationship include Spanish boats fishing in Moroccan fisheries and the delicate question of the Western Sahara, which Morocco claims as its own territory. Nevertheless, since the beginning of the twenty-first century, Spain has made diplomatic efforts with Morocco, focusing especially on the management of migratory flows and the control of undocumented immigration. In addition to the Spanish initiatives are those by the EU, such as the European Neighborhood Policy or the Euro-African Interministerial Conference on migration and development (held in Rabat on July 10 and 11, 2006; see MAEC, 2006).

Spanish diplomacy has also had a number of successes. In 1992, Spain and Morocco signed a readmission agreement for nationals from third countries who had travelled across Moroccan territory on their way to Spain. However, in reality, Morocco refused to readmit third-country nationals, under the argument that there was no proof that these people had actually been on Moroccan soil. Since 2003, Morocco has allowed the return of third-country nationals if the captain of the vessel in which the clandestine migrants had travelled is a Moroccan national (Carling, 2007a; Moreno Fuentes, 2005). Faced with an increase in the arrival of Moroccan minors unaccompanied by an adult, Spain and Morocco signed a 2003 agreement to address that problem. In additional to its agreements with Spain, the Moroccan kingdom has also signed readmission protocols with Germany, Italy, and France; an identification protocol with Belgium; and a memorandum of understanding with the Netherlands (Lannon, 2005).

Another of Spain's sweeping strategy measures related to sending and transit countries in African was the 2006 passage of the Action Plan for Sub-Saharan Africa (Plan de Acción para el África Subsahariana), or the Africa Plan. The Plan is clearly in sync with the recommendations made at the Euro-Africa Interministerial Conference, and its objectives include the encouragement of a culture of peace and democracy, promotion of

socioeconomic development, and cooperation in managing migratory flows through strengthened border controls and combating migrant trafficking organizations (Esteban and López Sala, 2007; MAEC, 2006). One of the plan's most important aspects is intensified cooperation on clandestine immigration, as a result of Spain's diplomatic activities in Africa. Spain has signed cooperation (and some readmission) agreements to manage migratory flows with Senegal, Mali, Ghana, Ivory Coast, Cape Verde, Guinea-Conakry, Gambia, Nigeria, and Guinea-Bissau. Moreover, this plan has led to what has been christened as a "diplomatic redeployment" (MAEC, 2006; 12) throughout the region, with the opening of Spanish embassies in Mali, the Sudan, and Cape Verde, as well as those that Spain already had in Angola, Cameroon, Ivory Coast, Ethiopia, Gabon, Ghana, Equatorial Guinea, Kenya, Mauritania, Mozambique, Namibia, Nigeria, the Democratic Republic of the Congo, Senegal, South Africa, Tanzania, and Zimbabwe.

Morocco, meanwhile, has taken pains to stop migrants on its soil, including its own nationals as well as those in transit from the sub-Saharan region. It has increased its cooperation with the EU and has tried to encourage interregional African cooperation. Nevertheless, given its geographical position, Morocco's new role as guardian of Fortress Europe has made that difficult. Khalid Zerouali, Director of Migration and Border Monitoring in Morocco, Khachani (2006; 44) summarised the main components of the Moroccan migration-control strategy as follows: to establish a legal framework to penalize trafficking in migrants, to create an Immigration Observatory, to gather as much information as possible about undocumented immigration, to abort unauthorized immigration attempts at their point of origin, and to dismantle migrant-trafficking networks.

The Moroccan government passed Law 02-03 in 2003[10] to regulate foreigners wishing to enter and stay in the Kingdom of Morocco, and to address emigration and unauthorized immigration. In some ways, this foundational text is reminiscent of the first of the alien laws passed in Spain in 1985, in the sense that it is a response more to outside pressures from the European Community (Khachani, 2006) than to a level-headed analysis of the short-term consequences of blocking the sub-Saharan migrant flows crossing Morocco. Indeed, it is already turning into an immigrant-receiving country. Law 02-03 organizes and unifies various laws — scattered across several pieces of sometimes obsolete legislation that once regulated the conditions for foreigners to enter and stay in the kingdom. It also updates a regime of punishments for crimes related to emigration and aiding and abetting clandestine emigration, without making any mention of a regime for social and political rights that foreigners would enjoy once they have settled in Morocco.

Additionally, Morocco has increased the number of its border-control personnel. By the end of 2004, the government had added another 1,500 Auxiliary Forces agents to the approximately 3,000 in 1992 (Elmadmad, 2007).

10. Law 02-03 regulating the entry and stay of foreigners in the Kingdom of Morocco, emigration and irregular migration. For a Spanish version of this legal text, see Kachani (2006).

The Moroccan government's involvement in the management and control of undocumented migrant flows is beginning to bear fruit. In 2006 alone, agents aborted 16,000 attempts at clandestine migration (in which 9,000 people were sub-Saharan immigrants), the number of Moroccans attempting to migrate clandestinely dropped by 9 percent and the numbers of people from other countries by 62 percent, and 352 illegal trafficking networks were dismantled (Elmadmad, 2007).

As can be seen in the diagram presented in the first section of this chapter, one of the main characteristics of the recent border control policies is the expansion of the network of actors playing a role in migration control. This process includes not just institutional figures, but also transportation companies, principally airlines, which manage the subcontracting of migration control, a practice tending towards privatization. The Community Directive relating to the obligations that transportation agencies must fulfil in their interactions with passengers from other countries thus became national law, as Law 14/2003.[11] These companies must guarantee that all travellers have the required documents and that they are in order, and that the travellers have sufficient economic means to enter the country to which they are travelling. The companies must take responsibility for returning the foreigner to his/her country of origin, including assuming the costs of housing and feeding the person in the event that entry is refused. This subcontracting of control leaves the foreigner completely unprotected. In order not to avoid a risk that a traveller will be denied entry — which would entail economic costs and perhaps other sanctions for the airline — the company will deny travellers access to their means of transportation (Moya Malapeira, 2006).

Migration control has not only been increasingly delegated and privatized, but it is also exercised through mechanisms that distort the initial objectives of incorporating and legalizing the immigrant population. Instead, these mechanisms, the regularization programs for immigrants, strongly control flows. Spain has assiduously implemented these in 1986, 1991, 1996, 2000, 2001, and 2005. According to Recaño and Domingo (2005), regularizations have increased the permanency of the immigrant population in Spain (thus impeding temporary or even circular migrations), anticipated nonexistent or latent migrations — an issue that is apparent in the increase in family reunification after each regularization process — and have attracted undocumented immigrants residing in other EU countries.

Mention must be made within this group of strategies for migration control inside the country of the role that deportations play; they are conceived principally as a highly deterrent symbolic instrument (Broeders and Engbersen, 2007). Spain has a variety of legal principles enabling the government to return an alien to his country of origin. These returns and refusals of entry take place at the border at the moment of an unauthorized entry. As can be seen in the light of the data collected (table 3), the evolution of both sets of figures is uneven. Denial of entry — rejecting people who try to enter Spain at border crossings — basically increased between 2000 and 2007 (a change was seen in 2008). Returns — rejections of people who try to enter Spanish territory at places other than checkpoints — declined notably, from a little more than 22,000 initially, to barely 13,000 in 2004. That figure then began to grow again until 2006, when it reached a size that was similar to what had been seen at the beginning of the period. In the past two years, the figure has declined once again.

11. Law 14/2003, of the 20th November, reforming Law 4/2000, of the 11th January, on rights and freedoms of foreigners in Spain and their social integration.

| Table 2. Rise in Number of Repatriations, 2000-2008 | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** | **2008** |
| Entry denied | 6,181 | 8,881 | 11,698 | 14,750 | 11,280 | 15,258 | 19,332 | 24,355 | 17,317 |
| Readmissions | 9,249 | 11,311 | 38,993 | 51,413 | 83,431 | 52,017 | 48,117 | 6,248 | 6,178 |
| Deportations | 1,226 | 3,817 | 12,159 | 14,104 | 13,296 | 11,002 | 11,373 | 9,467 | 10,616 |
| Returns | 22,716 | 22,984 | 14,275 | 13,684 | 13,136 | 14,466 | 21,652 | 15,868 | 12,315 |
| **Total** | **39,372** | **46,993** | **77,125** | **93,951** | **121,143** | **92,743** | **100,474** | **55,938** | **46,426** |

Source: 2000–2006 data obtained through a personal communication with personnel of the Gabinete de Estudios de Seguridad Interior (GESI), Ministerio del Interior (MIR). Data for 2007 and 2008, MIR (2008).[12]

Readmission refers to people returned to their countries of origin by virtue of the existence of bilateral readmission agreements. The figure for readmissions increased until 2004, reaching more than 80,000, but it began to fall in the next two years, and in 2007 in 2008, it fell even more sharply despite Spain having signed a very significant number of bilateral readmission agreements in recent years.

Finally, deportation figures are an indicator of the control exercised inside Spanish territory, because it requires the opening of a deportation file before the return of the foreigner, who is usually removed because he or she was caught living in Spain without valid documents. Notably, throughout the entire period (2000–2008), the number of deportations was very small, at least if compared to the estimated figures for the number of immigrants living illegally in Spain (often calculated as the difference between the number of foreigners listed in the local population register and the actual number of valid residency permits). The evolution of this figure is very similar to that for readmissions, with an increase continuing until 2004 and a decrease after that date, although the decline is considerably weaker compared to readmissions.

Since 2004, the fact that returns and refusals of entry have increased while the number of deportations and readmissions has declined may reflect the concentration of control activity abroad compared to control within Spain itself.

Finally, with regard to border control measures and strategies, Spain has focused on reinforcing the border perimeter around the cities of Ceuta and Melilla, which have a land border with Morocco. This even involved importing U.S. technology for building walls (López Sala, 2007). In the coastal areas of the Strait of Gibraltar and the Canary Islands, Spain has introduced an advanced monitoring system, the Integrated External Surveillance System (Sistema Integrado de Vigilancia Exterior, or SIVE).

The SIVE began at the end of the 1990s as a technological operating system that provides information obtained through detection stations that identify ships at a long distance, of up to 10 km, and which transmit a televised signal to a command-and-control centre. Two centres are currently operating: one in Algeciras, monitoring the Strait of Gibraltar, and one in Fuerteventura, monitoring the coasts of the Canary Islands. They coordinate interception and rescue operations. Until 2004, SIVE covered primarily the Strait, Algeciras, Málaga, Ceuta, Granada, Fuerteventura, and to a certain extent, Cádiz. By the end of 2008, the SIVE had been completely installed in the entire Strait, and it covered all the coastlines of Andalucía, Murcia, and the Canary Islands. Plans were in place to extend its capacities to the Levant and the Balearic Islands in 2009.

**12.** According to the Alien Law, *refusal of entry* includes those people rejected at formal border checkpoints, usually ports or airports. *Readmissions* refers to those expelled from Spain, by virtue of readmissions agreements with third countries. *Deportations* are those repatriated by virtue of causes recognized in the Alien Law through administrative proceedings based on an illegal stay in Spain. Finally, *returns* refer to people refused entry into Spain at points that are not formal checkpoints.

Not only have the technical means increased, but Spain has also invested considerable human resources, including increasing the number border and immigration police by more than 5,000 agents since 2003 (there were 10,239 agents in 2003, but by the end of 2008, there were 15,710) (MIR, 2009).

All these transformations in migration-control policies have had an impact on irregular migration flows; not only in the direction intended by policy-makers, i.e. the decline in the number of irregular migrants, but also in some unexpected ways, which could be seen both as outcomes of these new control policies and as counter-strategies developed by migrants in order to avoid being arrested, as will be seen in the next section.

## Conclusions

The evolution of Spain's border-control policy cannot be understood unless the context of EU policies and measures is examined. Today, the Member States are sharply aware of the importance of external borders, especially maritime borders, in combating undocumented migration. Since the end of the 1980s, the appearance of a migratory regime with specific characteristics in the Southern European countries (Spain, Portugal, Greece, and Italy) has revived the debate on immigration throughout the EU. The pressure of maritime undocumented migration all along the coastlines of those countries has undoubtedly contributed to the development of a European border mentality. This was the context for the establishment of FRONTEX, the European border agency, and its principal operations have focused precisely on monitoring the maritime borders. Nevertheless, as we have shown above, the results are not very effective considering the large amount of money invested.

Spain's policies have undergone a series of changes that principally consist of measures to distance migration control farther from the border perimeter and to involve origin and transit countries in managing immigrant flows. Spain's strong diplomatic efforts and its bargaining chip of socioeconomic aid led to Morocco changing its policies so that it would act as a primary filter in reducing undocumented migration. However, with the thwarting of the departures of many potential Moroccan and third-country migrants, other migrants are developing new and longer routes and alternative and riskier strategies for their clandestine migration. Morocco is also slowly turning into an immigration-receiving country. How it politically manages those dual roles — buffer and supplier of labour — is one of the most fruitful topics for future research in the area of international migrations.

In the case of Ecuadorian migration, the effectiveness of strengthening the requirements needed in order to obtain a visa, a measure developed far away from the State's border, has clearly impacted on the annual inflow of Ecuadorians, which has fallen dramatically since 2004.

Leaving aside the undesired consequences of the Spanish policy and migrants' counterstrategies, the overall result of Spain's efforts has been success in reducing in the number of migrants detained when attempting unauthorized entrance into Spanish territory. This has entailed an attempt to dissuade them from making the trip before they depart. If that downward trend is confirmed in coming years, we will be able to get a sense of Spain's relative success in containing undocumented

migration. Community support — principally through FRONTEX, the new role that Morocco plays in the sub-Saharan migration system and cooperation with other emitting and transit countries — are the pillars on which Spain has built a more effective migration control.

Although the flows are lighter, undocumented migration to Spain has not stopped. The borders are being monitored intensely and thoroughly, but Spain has paid little attention to the attraction of its informal economy and whether the efforts to provide development assistance have been sufficient to palliate the factors in the countries of origin that drive emigration. Tightly knit migrant networks in Spain and many other EU countries, and the emitting societies' assessment of immigration to Spain as a viable long-term strategy for upward mobility, will reinforce Spain's situation as receiving country for labour migrants, although this may temporarily decrease during the current economic recession.

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# BORDERS AND HUMAN RIGHTS

- PROTECTION OF MIGRANTS IN IRREGULAR
  SITUATIONS AND EU BORDER CONTROLS

  Elisa Fornalé

- BORDERS AND BORDERLANDS:
  A COMMON EUROPEAN ASYLUM SPACE

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- THE EXTERNALISATION OF THE ASYLUM FUNCTION
  IN THE EUROPEAN UNION

  Sílvia Morgades

## CHAPTER 6 - PROTECTION OF MIGRANTS IN IRREGULAR SITUATIONS AND EU BORDER CONTROLS

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## Introduction

Irregular migration is emerging as one of the most critical social and economic issues of this decade; it is also a phenomenon that is becoming a global crisis. It is now a subject of concern for many countries, due to their geographical position and the role they play in the migration process.

The nexus between human rights and migration is not new. Most of the doctrine[1] affirms the application of international human rights standards to migrants, regardless of their status. Nevertheless, the legal situation of migrants in relation to their enjoyment of human rights is complex, and is characterized by overlapping layers of norm-creation and norm-application which are difficult to reconcile. In fact, the concrete application of international standards in a case-by-case perspective is far from satisfactory. These layers include national, regional, and international regulations and forums, as well as binding and non-binding regulations and forums.

The chapter aims to highlight some of the key issues pertinent to the relationship between the protection of migrants in irregular situations and the EU border controls policies, using the case of Morocco as an example. In particular, it aims to analyze how ensuring respect for human rights law is necessary for the legitimacy of EU border policies, bearing in mind the principle that each member state also has an obligation to ensure protection beyond its borders.

Morocco, as a transit country, is implicated because many people arrive there and they are unable to leave because of their status as irregular migrants. If they can move, they are often refused entry and returned. This transit country therefore ends up having to manage part of this irregular migration problem on its own territory, not only as a transit country, but also as one that has to deal with the problem regardless of the wishes of the individuals concerned, who may not wish to stay there.

This chapter begins with a review of the normative framework for protecting migrants' rights, focusing on international human rights standards. This study will argue that a human rights approach to migration law serves the purpose of grounding the legal analysis of migrant rights and corresponding State duties in international law. By recognizing

1.  Goodwill-Gill, G. S. (2000) "Migration: International Law and Human Rights". In: B. Ghosh (ed.) *Managing Migration. Time for a New International regime?* Oxford: Oxford University Press. 160-189.

that states have a responsibility to manage their borders, it is accepted that States have a sovereign responsibility to uphold voluntarily assumed obligations, including the duty to promote, protect and respect human rights. In particular, states have specific responsibilities to provide protection to everyone falling within their jurisdiction, including irregular migrants. In fact, there is no lack of international instruments, but the main challenge is to enforce them and ensure compliance by States.

The chapter then discusses to what extent the implementation of these standards at national level might interact with the European migration policies, because the EU is legally obliged to be concerned with the other countries that EU member states deal with.[2] The first point is the introduction of the current situation in Morocco, and particularly the evolution of the migration process, considering that Morocco has changed its status becoming a host country, a country of origin and a transit country. The second is the role played in this scenario by the influence exercised by the externalization of migration control policies of the European Union, and the implication of readmission agreements at national level. Starting from the discussion of these agreements, the aim is to suggest that the principle of sovereignty seems to prevail over the guarantee of the basic human rights of migrants in irregular situations. By introducing arguments which support the failure of the state in protecting the rights of migrants, readmission agreements leave room for the introduction of new international standards using a restrictive approach.

The chapter concludes that these international obligations have been implemented in an *ad hoc* manner, necessitating a more systematic approach to the protection of migrant rights at national level. This case study highlights that even if the EU professed adherence to human rights in different agreements concluded with third States in defining the EU external borders, it is important to put those engagements into practice. The prevalent risk is to avoid the basic human rights of migrants in irregular status by prioritizing the security concerns of EU member States.

## Definitions

Definitions are important because the determination of status dictates whether or not an individual is eligible to claim certain rights associated with status and, at the same time, shows the difficulties in applying legal distinctions to the real experience of migrants.

This chapter adopts the terms "irregular migrant" and "migrant in irregular status", because they are sufficiently comprehensive to include the different aspects of irregular movements. These terms are preferable because they include a wide range of situations: in general, irregular migrants are persons who contravene migration regulations in their host country (Fargues, 2009). They may be a migrant who entered the country unlawfully; a migrant who entered without any documents; a migrant who entered with documents from his country of origin which did not comply with the entry conditions of the receiving country, a migrant who entered legally but is working without express permission, a migrant who entered lawfully and worked legally on a temporary basis but failed to maintain his/her lawful status, and a person who is born to irregular migrants and becomes an irregular immigrant him or herself by birth even without ever having crossed an international border (Duvell, 2006). In some instances, irregular migration flows are intertwined with

2. See the interesting analysis by Gil-Bazo, M. T. (2006) in "The practice of Mediterranean States in the context of the European Union's Justice and Home affairs external dimension. The safe third country concept revisited". *International Journal of Refugee Law,* 18. 571 -600. This study is important in underlining the development of European Union external border control policies and the influence on national policies developed by third countries such as Morocco.

refugee movements, such as those from sub-Saharan Africa, in which since the legal status of asylum seekers and refugees is not well-defined they are often considered in an irregular situation.

Migration semantics have evolved at the international level. Terms such as "illegal" and "clandestine" migrants were often used, and now the terms "undocumented" and "irregular situation" are being used, to refer not to individuals, but to the situation at hand. This was expressly stated by the General Assembly Resolution (3449 (XXX), 1975, "Measures to ensure the human rights and dignity of all migrant workers") in article 2, which *"Requests the United Nations organs and specialized agencies concerned to utilize in all official documents the term "non-documented" or irregular migrant workers, to define those workers that illegally and/or surreptitiously enter another country to obtain work".*[3]

Regional bodies have also expressed their preference for terminology that does not refer to "illegality". Despite this declaration, the European Commission and European member governments consistently use the term "illegal migrant" to describe the category of migration, with an increasing association with criminal law.

Avoiding the use of the expression "illegal" to refer to migrants reflects the importance of avoiding the creation of a situation of inferiority with regard to their protection required by human rights principles, as in fact even unlawful residence of a human being in a the territory of a State cannot justify a lessening of these fundamental rights. The denial in practice that such rights even exist or are applicable to some human beings is the clearest display of the absence of respect for fundamental human rights of migrants, more than the failure to adopt or implement human rights standards (Bogusz et al., 2004). As states by Groenendijk, this is a paradox, considering that "most undocumented persons have some place in the world where they live lawfully". As a result, this categorization, which renders such human beings outside the protection and applicability of the law, contradicts the fundamental human rights affirmed in article 6 of the Universal Declaration of Human Rights, which states that "Every human being has a right to recognition before the law'.

## International human rights framework related to irregular migrants

In principle, regardless of their status, migrants enjoy the protection of international law.[4] International law is well-developed, and there are international standards that deal directly with migrants and those that deal with wider human rights questions that affect migrants.

The most important international human rights instruments, such as the 1948 Universal Declaration of Human Rights[5] and the two Covenants - the 1966 International Covenant on Civil and Political rights (ICCPR)[6] and the International Covenant on Economic, Social and Cultural rights (ICESCR),[7] introduced the concept of basic human rights of all human beings, including migrants in regular or irregular situations. In fact, the International Covenant on Civil and Political rights recognizes a number of rights with respect to aliens as well as nationals and similarly, the International Covenant on Economic, Social, and Cultural Rights establishes that the Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone.

3. UN General Assembly, *Measures to improve the situation and ensure the human rights and dignity of all migrant workers*, 16 December 1977, A/RES/32/120, available at: http://www.unhcr.org/refworld/docid/3b00f1b638.html. At regional level, other bodies have expressed their intention to not refer to "illegality"; see for instance the Council of Europe resolution of 2006, which states that it "prefers to use the term 'irregular migrants'", Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), *Human Rights of Irregular Migrants,* point 7. The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers similarly refers to "migrant workers who, through no fault of their own, have subsequently become undocumented." Association of South East Asian Nations, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 13 January 2007.

4. In this regard, The Inter-American Court on Human Rights in 17 September 2003 issued a sweeping advisory ruling that clearly reinforces the application of international human rights standards to non-nationals, particularly those in irregular status. The Court stated unanimously that "the migratory status of a person cannot constitute justification to deprive him of the enjoyment and exercise of human rights". I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18. Available at: http://www.corteidh.or.cr/opiniones.cfm?&CFID=102313&CFTOKEN=36392228.

5. http://www2.ohchr.org/english/law/ccpr.htm.

6. http://www2.ohchr.org/english/law/ccpr.htm.

7. http://www2.ohchr.org/english/law/cescr.htm.

8. In its general comment No. 15 the Human Rights Committee explained that "the rights set forth in the International Covenant on Civil and Political Rights apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness … [T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens".

9. UN Human Rights Committee (1986) "General Comment No. 15: The position of aliens under the Covenant". [on line]. Geneva: CCPR. [See: 11 April 1986].

10. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes a number of provisions applicable to migrant women: the elimination of sex role stereotyping (art. 5), suppression of traffic in women and exploitation of prostitutes (art 6), and an end to discrimination in the field of employment and citizenship (art. 3, 9 and 11).

11. The situation of children born to non-citizen parents is addressed in the Convention on the Rights of the Child. Under article 7 of that Convention, a child "shall be registered immediately after birth and shall have the right from birth to a name, [and] the right to acquire a nationality … States parties shall ensure the implementation of these rights … in particular where the child would otherwise be stateless". In view of the near-universal ratification of the Convention on the Rights of the Child, the principle of jus soli (citizenship based on the place of birth) has emerged as the overriding international norm governing the nationality of children born to non-citizen parents. This right must be enforced without discrimination as to the gender of the parent. Furthermore, article 7 of the Convention requires transmittal of citizenship from a parent to his or her adopted child. Article 7 should be read in conjunction with article 8 (preservation of identity, including nationality, name, and family relations), article 9 (avoiding separation from parents), article 10 (family reunification), and article 20 (continuity of upbringing of children deprived of their family environment). Within the holistic approach recommended by the Committee on the Rights of the Child for the interpretation of the Convention, those articles should be understood according to the general principles of the Convention as reflected in articles 2 (right to non-discrimination), 3 (principle of the best interests of the child), 6 (right to life and development) and 12 (right to respect for the child's views in all matters affecting the child and opportunity to be heard in any judicial or administrative proceedings affecting the child). In any case, children of non-citizens without legal status should not be excluded from schools.

This equal protection of all persons is the cornerstone of all human rights provisions, and in specific terms, Article 2 of the Universal Declaration of Human Rights states *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty"*. Articles 2 of the ICCPR and of the ICESCR also affirm that each State party undertakes to respect and ensure to all individuals within its jurisdiction the rights recognized in the Covenant *"without distinction of any kind"*. In this regard, the General Comment no. 15, made by the Human Rights Committee, highlighted the need to guarantee all the rights listed in the Covenant without discrimination between citizens and aliens.[8]

In addition to the general protection that derives from these instruments, migrants enjoy the implicit protection of several other human rights instruments. Of particular note are the Convention on the Elimination of all forms of Racial Discrimination (CERD, 1965),[9] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979),[10] the UN Convention against Torture (CAT 1985), and the Convention on the Rights of the Child (CRC, 1989).[11]

The principle of non-discrimination is also included in article 3 of the Conventions against torture and other cruel, inhuman or degrading treatment or punishment[12] and in article 2 of the Convention on the rights of the Child,[13] which applies *"the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".*[14]

## The protection of migrant workers with irregular status

In addition, a number of relevant provisions related to the protection of migrants in irregular status can be found into the international instrument, specifically addressing migrant workers.

A migrant worker is currently defined as *"a person who is to engaged, is engaged or has been engaged in remunerated activity in a State of which he or she is not a national."* They may easily be subject to exploitation, and it is mainly for this reason that international law started to look into the status and the conditions of migrants workers. The Preamble of the Constitution of the International Labour Organization includes *"the protection of the interests of workers when employed in countries other than their own"* among the aims of the Organization, and the International Labour Organization has created a number of conventions and recommendations which are today the most important international instruments for the protection of migrant workers.[15]

The ILO Migrant Workers (Supplementary Provisions) Convention (n.143) of 1975,[16] concerning migration in abusive conditions and the promotion of equality of opportunity and treatment of migrants' workers, was the first international attempt to address the situation of irregular

migrants. The Convention requires the adoption of all necessary measures at national and international levels (1) to suppress clandestine movements of migrants and their illegal employment, and (2) to take action against the organizers, wherever they are, of illicit or clandestine movements of migrants for employment and against those who employ workers who have immigrated irregularly. The Convention consists of two parts. Part I covers all migrant workers and in particular those non-nationals who are in an irregular situation as regards their entry, stay or economic activity. Part II applies to regular workers. The Convention defines limited rights for migrant workers in irregular situations. In particular, they enjoy "equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits" (art. 9. 1 ). Moreover, they have rights to due process in respect of disputes regarding these claims and in the case of expulsion, the cost of expulsion should not be borne by the worker (Wickramasekara, 2007).

The most important instrument is the International Convention on the protection of the rights of all migrant workers and members of their families (ICRMW), which entered into force on July 1, 2003,[17] and is the only international human rights instrument that explicitly addresses the rights of specific groups of migrants.

The 1990 International Convention was the first comprehensive instrument to define basic, universal human rights and to address the protection of all migrant workers, including those with irregular and regular status. The main idea was to recognize that all human beings are entitled to the basic human rights found in other general human rights instruments, regardless of their legal status, and to include a category of migrants not covered by previous treaties. For the purposes of the Convention Article 5 of the Convention recognizes as migrant workers those who are considered to be documented as well as those who are considered non-documented. Article 7 affirms that the rights enumerated in the Convention are to be respected without any distinction of any kind, and Part III of the Convention, from article 8 to article 35, enumerates a comprehensive set of rights applicable to all migrant workers and members of their families.[18] Undocumented migrants enjoy access to legal treatment, emergency medical care, freedom of thought and religion, respect of cultural identity, protection from arbitrary interference with privacy, education of children.

The Committee on the Protection of the rights of All Migrant Workers and Members of their families, in charge of the supervision mechanisms for monitoring compliance with the provisions, has substantively examined the implementation and the application of the provisions to the irregular migrant workers. In this context, the CMW's Communications are important because they provide guidance in applying the rights in practice, and show how the rights have been interpreted in annual reports of States.

In particular, in a recent opinion on the report submitted by the Syrian Arab Republic (CMW/C/SYR/CO/1, 2 May 2008), the Committee recalled that *"in accordance with the definition of "migrant workers" in article 2, paragraph 1, of the Convention, Part III of the Convention is to be applied to all non-nationals engaged in remunerated activity, including those in an irregular situation"*. In fact, in the light of the State party's position, asylum seekers, considered as irregular migrants, were excluded from the scope of the Convention under article 3 (d). In this case, the

12. http://www2.ohchr.org/english/law/cat.htm.

13. http://www2.ohchr.org/english/law/crc.htm.

14. For an analysis of the protection on unaccompanied children see the Report of the Special Rapporteur on the human rights of migrants on the protection of children in the context of migration, 14 May 2009, A/HRC/11/7, available at http://ap.ohchr.org/documents/dpage_e.aspx?m=97.

15. The normative action for the realization of the constitutional objectives follows three roads: 1) Provisions on Migrants Workers in Conventions of universal application (e.g ILO Convention No.2 on Unemployment); 2) Thematic conventions with specific provisions related to migrant workers (ILO Convention No. 21 on Inspection of Emigrants); 3) Two General Conventions on Migrant Workers (No. 97 of 1949 and No. 143 of 1975).

16. http://www.ilo.org/ilolex/english/convdisp1.htm.

17. http://www2.ohchr.org/english/law/cmw.htm.

18. The Migrant Workers' Convention protects all migrant workers and their families, but does not generally include employees of international organizations, foreign development staff, refugees, stateless persons, students and trainees (arts. 1, 3). The Convention provides for: non-discrimination (art. 7); freedom to leave any country and to enter the country of origin (art. 8); the right to life (art. 9); freedom from torture and ill-treatment (art. 10); freedom from slavery or forced labour (art. 11); freedom of thought, conscience, and religion (art. 12); freedom of opinion and expression (art. 13); freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, or other communications (art. 14); property rights (art. 15); liberty and security of person (art. 16); the right of migrants deprived of their liberty to be treated with humanity (art. 17); a fair and public hearing by a competent, independent and impartial tribunal (art. 18); prohibition of retroactive application of criminal laws (art. 19); no imprisonment for failure to fulfill a contract (art. 20); no destruction of travel or identity documents (art. 21); no expulsion on a collective basis or without fair procedures (art. 22); the right to consular or diplomatic assistance (art. 23); the right to recognition as a person before the law (art. 24); equality of treatment between nationals and migrant workers as to work conditions and pay (art. 25); the right to participate in trade unions (art. 26); equal access to social security (art. 27); the right to emergency medical care (art. 28); the right of a child to a name, birth registration and nationality (art. 29); and equality of access to public education (art. 30). In addition,

Committee encourages the States party to recognize the rights provided for in Part III of the Convention to all workers in an irregular situation, to the greatest extent possible.

## The state sovereignty principle and border controls

After considering the international human rights framework, the vulnerability of migrants stems from the subject of state sovereignty.

The main issue is related to the link between the concept of sovereignty of a State and the basic human rights of irregular immigrants. In fact, it seems more relevant to determine what the basic human rights of irregular migrants are and to decide how far the protection might be extended by sovereign States. In particular, this point raises concerns about the organizational capability within society, questions about costs and questions about balancing the aims of an immigration policy with the needs of individuals seeking to enter (Pecoud and Guchteneire, 2006).

Any attempt to formulate rights for irregular migrants comes up against the concept of state sovereignty. At the national level, each State develops "laws" that govern its own migration policies as well as protecting the rights of migrants. In addition, States possess broad authority to regulate some aspects of the movement of forcing nationals across their borders. Despite limitations on these authorities, States exercise their sovereign powers to determine who will be admitted and for how long. In support of these powers, States enact "laws" and "regulations" governing the issuance of passports, admissions, the exclusion and removal of aliens, and border security rules including customs and practices. These apply within a defined national territory and may be "hard law" that is legally enforceable through courts, or "soft law" that operates as policy guidelines. States vary in the types of laws and regulations adopted, with some being more restrictive than others.

There is no general right to enter a country, with the exception of nationals of that country, and arguably non-citizens who have acquired a long-term or secure residence status in their adopted State (Martin, 2005; Bogusz, 2004). In fact, state authority is frequently limited by international legal norms, and in many situations there is a gap between the rights which migrants, both regular and irregular, enjoy under international law, and the difficulties they experience in the countries where they live, work, and travel. The gap between the principles agreed by governments and the reality of individuals' lives, underscores the vulnerability of migrants in terms of human rights. In fact, as affirmed by the Special Rapporteur on the human rights of migrants, "*This power to manage admission and expulsion has, however, to be exercised in full respect for the fundamental human rights and freedoms of non-nationals, which are granted under a wide range of international human rights instruments and customary international law*" (A/HRC/7/12, 25 February 2008). The UN Committee on the Elimination of Discrimination Against Women also stated recently that "While states are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to".[19]

While some migrants might be able to obtain legal entry to another state, those migrants that are or would be denied legal entry may

States parties must ensure respect for migrants' cultural identity (art. 31); the right to repatriate earnings, savings, and belongings (art. 32); and information about rights under the Convention (art. 33).

19. CEDAW, General Recommendation no. 26 on Women Migrant Workers, 2008, P.1.

attempt illegal entry as frequently as they like. The right to leave continues to contradict the fact that there is no general right to enter other States for most of the world's migrants. In an increasingly "interconnected world", in which states generally support the free movement of goods, services, and capital, it is recognized by many scholars that there is a lack of consensus on the part of states with regard to liberalizing their policies on the free movement of migrants (Martin, 2005).

The decision to admit migrant remains within the discretionary power of State authorities, and countries where immigration is common normally require a visa before entry into the country is granted. Despite the possession of a visa granted by diplomatic or consular missions, entry is subject to the discretion of immigration officials or internal regulations. In most countries, there is no legal remedy against the refusal to grant a visa.

The basic guidelines to be considered in this matter were set out by the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). In 1999, the Committee adopted General Comment no. 27 on the right of freedom of movement, which provided detailed principles to guide states on the position of aliens.

According to this interpretation *"the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide whom it will admit into its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise"*.[20] This is in line with its previous General Comment no. 15, 1986, which as mentioned above, stated that each State party must ensure the rights in the Covenant to *"all individuals within its territory and subjects to its jurisdiction"*.

The right of freedom of movement is more than just the right to cross the border; it is also the right to normal living and working conditions in the country of residence.

## Irregular transit migration in Morocco

Having outlined the main international legal framework and obligations that bind EU member States on migrant issues, this section highlights the current development of EU border migration policy and the relationship with third countries, using the case of Morocco as a case study. The main point is to identify the key issues that arise as a point of contention in the definition of EU external border control policies.

After a brief overview of the current situation in Morocco, this section will first address the existing relations between EU and Morocco, analyzing the main instruments and measure adopted to reinforce this relationship, with a particular focus on the relevant role played by the adoption of readmission agreements to define the EU border control policy. A specific attention will also be devoted to ascertaining whether the national legal background has been affected by the implementation of this strong relationship, with a review of the implementation of international standards by Morocco and the current legal framework for immigration.

[20] UN Human Right Committee (1999) "General Comment No. 27. Freedom of Movement (art. 12)". Geneva: CCPR, P.1.

Morocco is considered as a traditional "country of origin" in relation to the countries of the European Union, North America and Middle East. In recent years, Morocco has become a destination country while remaining primarily a country of origin. Part of the migration it receives originates in sub-Saharan Africa. The main countries of origin of migrants in irregular status today are Guinea-Bissau, Mali, Liberia, Sierra Leone, Nigeria, Guinea, Senegal and Algeria (Cholewinski and Touzenis, 2009).

Since the beginning of the 1990s, Morocco, like all major countries of emigration in North Africa, has changed its status at the international level and become a host country, country of origin and transition country, which poses a threefold challenge (Lalhou, 2002). The irregular migrants who come to Morocco have two options: (1) to use the country as a stepping stone to reach Europe, or, (2) if they are unable to cross the Strait of Gibraltar, to stay in Morocco, because in most cases the situation in Morocco is better than the one they left behind in their country of origin. In fact, the cause of their departure is in most cases related to the social, economic and the political situation in their home countries (OHCHR, E/CN.4/2004/76/Add.3). As a consequence, a growing number of would-be migrants in these areas are unable to reach their intended destination and remain trapped in unstable situations as irregular migrants.

In each case, "transit migrants" are considered as "unwanted newcomers", because they represent different concerns: at social levels (they may become an additional vulnerable group); administrative levels (Morocco, as a traditional country of origin, has been confronted with a lack of institutions and normative instruments for dealing with the entry and the residence of foreigners); and at economic levels (considering the critical situation of the labour market in Morocco) (SRHM, Gabriela Pizarro, 2004).

In particular, the Government of Morocco has been affected by new legal and administrative challenges, as analyzed in more depth in the next section. In fact, as a traditional country of origin, the Government has had to adapt legislations and regulations to new situations of countries of destination, and to address the gap in the legal framework governing the entry and settlement of aliens. This gap has contributed to prolonging the stay in transit of migrants unable to regularize their status (Bensaab, 2005) and to abuses and violations of basic human rights of migrants and abuses by Moroccan officials in the absence of a coherent national legal framework. In addition, the influence of restrictive policies adopted to limit irregular migration by traditional countries of destination exacerbated the complex phenomenon.

In an official response to the concerns raised by the Special Rapporteur (Jorge Bustamante), Morocco stated that it was aware of the existence of the difficulties to be faced with the influx of "clandestine" migrants. It mentioned specific legislative and administrative instructions to provide irregular migrants with all guarantees, including deportation to their countries of origin. Morocco added that investigations had been carried out, and that deportation processes were being undertaken in a normal manner (OHCHR; E/CN.4/2006/73/Add.1).

The situation of migrants, particularly sub-Saharan migrants in irregular status, is the subject of deep concern, as stated by the Special Rapporteur on the human rights of migrants (Special Rapporteur of Human Rights, Jorge Bustamante, 2008), In particular, the Special Rapporteur high-

lighted several violations perpetrated against irregular migrants, and the Special Rapporteur invited Morocco to ensure that the national provisions reflect compliance with international human rights standards (OHCHR; E/CN.4/2006/73/Add.1). As stated by Bustamante (2002), states do not always manage to reconcile the "nationals versus non-nationals" distinction with respect to universal human rights standards.

Moreover, the vulnerability of the situation of irregular migrants in Morocco has been addressed repeatedly by international organizations concerned with the protection of migrants' rights (Amnesty International, 2009, UNHCR, 2008). In their public statements, these organizations document abuses including unlawful expulsion, excessive use of force, lack of due process, collective expulsion and deportation to Algeria and Mauritania, and lack of access to health care, education or decent food. As described in the Amnesty International report 2009, *"Thousands of people suspected of being irregular migrants were arrested and collectively expelled, mostly without any consideration of their protection needs and their rights. Some migrants were reported to have been subjected to excessive force or ill-treatment at the time of arrest or during their detention or expulsion; some have been dumped at the border with Algeria or Mauritania without adequate food and water"* (Amnesty International 2009; 232).

In this context, especially with the ongoing abuse of irregular migrants throughout the migration process, it is important to highlight the relationship existing between some of the violations against irregular migrants and the State's responsibility to take measures to prevent such violations. In particular, another element of concern is the role played in this scenario by the influence exercised by the externalization of migration control policies of European Union, and the implications of readmission agreements on Euro-Mediterranean relations.

## Relations between Morocco and the European Union

The fact that Morocco could be identified as a country of origin for migrants into the European Union as well as a country of transit from other African countries, has influenced and oriented the strong relationship established between the EU and Morocco in adopting and finalizing the necessary measures to "combat" irregular migration. In fact this relation is *a long standing one*, as analyzed in detail by Gil-Bazo (Gil-Bazo, 2006), evolving since 1960.

I would like to review the principal features which have characterized the last few years in order to conduct an analysis on the unrecorded consequences and the restrictions that these provisions impose on the country of transit, such as Morocco, and the next challenges that transit countries will face in implementing these agreements.

In particular, EU-Morocco relations were inspired by the Euro-Mediterranean Partnership established at the Barcelona Conference in 1995, and more details in this context were added by the 1996 Euro-Mediterranean Partnership between the EU and Morocco. Art. 2 of the Partnership states that *"respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and shall constitute an essential element of this agreement"*.[21]

**21.** The EU-Morocco Association Agreement was signed in Brussels on 26 February 1996, and following its ratification by the Parliaments of the EU Member States, the European Parliament and the Moroccan Parliament, entered into force on 1 March, 2000. It replaced the 1976 Co-operation Agreement [2000] OJ L70/2. Available at: http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_070/l_07020000318en00020190.pdf.

Over the years, this statement on respect for human rights has been invoked and repeated, but in practice it seems to lack substance. In fact, the process of consultation and coordination undertaken was oriented first of all at controlling or managing movements from countries of origin. As stated by Gil-Bazo, "one of the main relevant results of the inclusion of migration matters into the EU external relations has been the export of restrictive EU migration control policies to third countries with the adoption of more restrictive legislative response to EU's demands" (Gil-Bazo, 2006; P.17). In this regard, the adoption by Morocco of the National Act 02/2003 is illustrative of this trend, as will be explained below.

In October 1999, the European Council endorsed the Action Plan for Morocco prepared by the High Level Working Group on Asylum and Migration, which drafted several measures in order to address the root causes of migration from that country. Later, within the framework of the European Neighbourhood Policy,[22] Morocco was also selected as one of the first countries for the development of Action Plans (SEC (2004) 569).[23] Among its objectives, the prevention and the control of illegal migration to and via Morocco was stated, in addition to the development of legislation in line with international standards. In this context, another element of interest is the relevance on the adoption of readmission agreements in order to strengthen and develop cooperation between Morocco and EU. In particular, in point 5.2., the Commission highlighted that *"Morocco displays a positive attitude in discussions with the EU. Morocco's significant progress in improving migration management to date should be noted and Morocco's open attitude to regional cooperation should be recognized. At the same time, the importance of further efforts to stem the flow of illegal migration across the Mediterranean – with its high humanitarian cost – must be stressed. Morocco should work closely with the EU to implement the European Neighbourhood Policy Action Plan and to reach final agreement on and adoption of an EC readmission agreement in the near future"* (COM (2005)352)[24]. Furthermore, point 26 of the Declaration made by the European Union in Luxembourg, at the meeting of the EU-Morocco Association Council, on 13 October 2008, stated the importance it attaches to the conclusion of a readmission agreement, which will make it possible to begin a dialogue on migration and on visa facilitation.[25]

**Readmission agreements and their impact in Morocco**

Since the 1990s, readmission agreements have been part of the immigration control policies at both bilateral and multilateral level (Barros et al., 2002; Belguedouz, 2009), particularly in the framework of bilateral cooperation between the European countries and Morocco. The readmission agreements are a key element of the mechanism set up by the European Union to address the phenomenon of irregular migration. Many destination countries have shown a keen interest in signing readmission agreements, because these instruments are an opportunity to go beyond the general principles affirmed under international law. In fact, all these provisions use promises of aid, supplying training to prevent irregular migration, infrastructure, including naval infrastructure, radar systems for reinforcing their border controls and interception of migrants, financing of detention centres, and training programmes for police officers. This training is conducted in order to transform Morocco into a so-called "buffer zone" (Cholewinski, 1999) to reduce migratory pressures on receiving countries (Hein de Haas, 2007). The main concern is that these policies, while addressing irregular migration, contribute to

22. The European Neighbourhood Policy (ENP) was developed in 2004, with the objective of avoiding the emergence of new dividing lines between the enlarged EU and our neighbours and instead strengthening the prosperity, stability and security of all. The ENP framework is offered to the EU's 16 closest neighbours – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. http://ec.europa.eu/world/enp/policy_en.htm.

23. European Union: European Commission, *European Neighbourhood Policy: Country Report, Morocco*, 12 May 2004,SEC(2004) 569, available at: http://www.unhcr.org/refworld/docid/4153e5954.html.

24. http://eulex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,de&lng2=cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,sk,sl,sv,&val=405492:cs&page=.

25. Available at: www.statuavance.com

the criminalization of irregular migration, because they treat migrants as criminals without including proper guarantees to protect their rights and prevent abuses or other cases of violations in the process (Amnesty International, 2006).

The main purpose of concluding a readmission agreement is to expedite the deportation of "persons who do not, or not longer fulfill the conditions of entry to, presence in or residence in the requesting states" (COM (2002) 504 final: 206) to their home State or a State through which they en route to the State which seeks to return them (IOM, 2004). It is possible to identify different kinds of readmission agreements: a first generation readmission agreement signed in the 1950s, to cope with the irregular movement of persons among Member States; a second generation developed since the early 1990s as instruments to directly address the issue of illegal migration; and a third generation according the provisions of article 63 (3), paragraph (B) TEC ,which highlights the need for a comprehensive approach to migration and asylum, addressing political, human rights and development issues in countries of origin and transit (Bouttellet-Paquet, 2003).

Customary law obliges countries of origin to facilitate the return of their nationals or of those persons identified as being nationals of these countries. Unlike the right to leave, as introduced above, at the traditional level of State to State relations, the State's obligation to admit its nationals is correlative to other States' right of expulsion. "Adopting another perspective, the State's right of protection over its citizens abroad is matched by its duty to receive those of its citizens who are not allowed to remain on the territory of other States" (Goodwill-Gill, 2000). At the same time, States are not formally obliged under international law to accept non-citizens in their territory, and in relation to this, there is no international obligation of States to readmit third country nationals who have passed through the requested State to their territory. Likewise, it is not possible to send back third countries' nationals, unless the State agrees by signing a readmission agreement. For these reasons, considering the practical difficulties in removing irregular migrants for the EU Member States, these instruments could be considered a privileged instrument of their return policies, especially because they include both nationals and third country nationals, and support the implementation of new international standards (Kruse, 2006).

The reference document for national policies is the standard bilateral agreement between a Member State and a third country, adopted by the EU Working Group on immigration, created by the Secretary General of the Council, by a recommendation in 1996 (Ojec, n. C 274). The principle is that both contracting parties undertake to respect the obligations enumerated in the text. This arrangement sets out administrative and operational procedures which are jointly defined by the contracting parties with regard to the means of identification of unauthorized migrants and ensuring delivery of travel documents. The national authorities responsible for cooperation on the removal of the foreigners are clearly stated in the agreements, and the border control points which may be used for readmission purposes are listed. In article 2, entitled "Readmission in the case of third-country nationals entering via an external Frontier", the obligation to readmit is extended to the States of transit *"whose external frontier a person can be proved"* to have crossed. As regards the issue of protection and respect for the human rights of irregular migrants, only a generic provision is included, in article 11, stating that *"these agreements shall not affect the Contracting*

*Parties' obligations"* arising from international agreements/conventions. In particular, all procedures have to respect the obligations established by international human rights instruments, including the protection of refugees, according to the 1951 Geneva Convention relating to status and its 1967 protocol.

As broadly stated by Cassarino, "the reciprocity of obligations does not mean that the contracting parties benefit equally from the conclusion and the implementation of the readmission agreement. The perceived costs and benefits attached to the conclusion and to the implementation of a readmission agreements differ substantially between both contracting parties". In this regard, the conclusion of a readmission agreement involves different considerations of the expected benefits, which are not perceived equally by the contracting parties, and these aspects irreparably affect the resulting implementation, as shown below. This means that the effectiveness of those agreements cannot be guaranteed purely by the established reciprocal obligations, but that other elements also need to be taken into consideration (Cassarino, 2007).

It is important to stress this aspect. Some European countries, and recently the European Union, have started negotiations to conclude agreements with their Moroccan counterpart "aiming" at readmitting or repatriating its nationals, as well as third country non-nationals who are caught in an irregular situation, in return for certain benefits.[26]

When considering the effectiveness of this readmission policy, we can take into consideration the readmission agreements concluded at a bilateral level. For instance, Morocco reached a bilateral agreement with Spain, on 13 February 1992,[27] on the circulation of persons, transit, and readmission of illegal immigrants. However, enforcement has not been very successful. Morocco has only accepted 65 out of 600 identified irregular immigrants,[28] and rejected all the others on the grounds that documentary evidence showing that they have passed through Morocco was lacking (Cholewinski, 1999). The main reason for this is linked with the unwillingness of Moroccan authorities to accept third nation persons, originating from sub-Saharan Africa, on the grounds that they transited through Algeria and not Morocco before being intercepted in Spain. The issues regarding the readmission of non-nationals and the form of evidence to prove that they transited through Morocco remain the main obstacles to reaching a readmission agreement between the EU and Morocco, which under discussion since 2000. The limited implementation in this case has been determined by changing circumstances, and in particular by the increasing migration of sub-Saharan nationals transiting through Morocco and the consequently unexpected costs of the concrete implementation of the agreement, which influenced the balance between costs and benefits of the contracting parties (Cassarino, 2007).

As confirmed, the Morocco perception of the practice of readmission agreements is not based on any specific human rights considerations. Morocco considers it to be just one out of many instruments aimed at the country acquiring a special position with the European Union. It would be misleading to assume that Morocco government did not obtain anything in return for signing the agreement.[29] Specifically, Morocco recognizes that "some compensation for its efforts to alleviate the impact of illegal immigration on European countries is legitimate" and parallel financial provisions in favour of Morocco are provided. This is also in return for Morocco refraining from taking any measure that would be contrary to

26. For an inventory of all bilateral readmission agreements concluded between EU countries and Morocco, see http://www.mirem.eu/donnees/accords//maroc..

27 Acuerdo entre España y Marruecos, relativo a la circulación de personas, el tránsito y la readmisión de extranjeros entrados ilegalmente, firmado en Madrid el 13 de febrero de 1992 y publicado en el B.O.E. del 25 de abril y 30 de mayo de 1992. Agreement between Spain and Morocco on the circulation of people, transit and the readmission of foreigners entering illegally, signed in Madrid on 13 February 1992 and published in the Official State Gazette of 25 April and 30 Mat 1992. http://extranjeros.mtin.es/es/NormativaJurisprudencia/Internacional/ConveniosBilaterales/ConveniosReadmision/documentos/Readmision_Marruecos.pdf.

28. http://www.migrationanddevelopment.net/popular-press-news/les-illusions-d2019un-codeveloppement-sans-moyens.

29. At European level, financial and technical assistance to third countries for migration and asylum was governed by the Aeneas Programme (2004-06), with a total budget of € 120 m. In particular, Morocco received financing approximately € 18 m under this budget line. In addition, from 1995 to 2006, EU cooperation with Morocco took place within the framework of the MEDA programme, which was the main operational and financial instrument of the Euro-Mediterranean Partnership. Over this period, Morocco received more than €1.6 billion in funding, making it the leading beneficiary for EU assistance among all the Mediterranean partners.

European interests, with special emphasis on maintaining and improving existing economic relations with Europe (El Arbi, 2003).

Finally, it is possible to state that there are no specific considerations according to international human rights standards on the protection of persons whose State can decide to readmit, or the implementation of those standards by the law of the readmitting State, regardless of their legal status.

## Implementation of international standards at national level: failure in protecting migrant rights

At international level, Morocco is party to the most important international human rights instruments.[30]

By applying the provisions of international conventions, Moroccan courts have confirmed the primacy of international human rights law in a number of judicial decisions. The Supreme Court has endorsed the primacy of international norms in several decisions such as Judgement no. 426 of 22 March 2003, and with its Judgement no. 143 of 23 May 2007, the Casablanca Appeal Court cited the Supreme Court Judgement in support of its ruling, noting *"that the international convention constitutes a special norm that as primacy over national law"* (A/HRC/WG.6/1./MAR/1, P.5)*.*

In particular, Morocco ratified the International Convention on the Protection of the rights of all migrants' workers and members of their families (ICRMW) on 21 June 1993, with a Declaration on article 92 (1). Morocco was an initiator of the Convention, the first country to ratify the Convention and Moroccan delegates, with those of Mexico, were the only ones involved during the entire time span of the negotiating process (11 years) until the adoption of the Convention, and played an important role throughout the entire process.

Initially, Morocco as a source country was interested by the articles contained in part VI of the Convention, concerning the promotion of sound, equitable, human and lawful conditions in connection with international migration of workers and members of their families, to guarantee the protection of its emigrants. However, Morocco has become a transit country for migratory flows to Europe, and this situation has led to the presence of migrants in irregular status in this country. This new perspective, and the practical consequences of it, have influenced the implementation of the ICRMW and it is no coincidence that the initial report on implementation of the Convention, due in 2004, is long behind schedule.

I would like to stress the relevance of this instrument, and the position of irregular migrants with regard to access to human rights, and in particular to equal working conditions and social rights, because the ICRMW explicitly grants rights to undocumented migrants or irregular migrant workers. In official responses to the communications sent out by the Special Rapporteur, the Government of Morocco stated the non-applicability without exception of the provisions of the Convention to migrants in irregular situation, considering that they are not covered by the specific provisions of the ICRMW.[31]

This attitude is also confirmed by Cholewinski and Touzenis, who recognize that a number of sub-Saharan migrants in transit through Europe

**30.** Morocco has ratified the following in full: the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against women, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Childs on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the involvement of children in armed conflict.

**31.** "En ce qui concerne l'allégation de violation des dispositions de la Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille, le gouvernement a signalé que le Maroc a ratifié ladite Convention en vertu du dahir chérifien n° 4 93-5 en date du 14 juin 1994. La Convention protégerait les droits des travailleurs migrants et des membres de leur famille qui se trouvent en situation régulière et légale dans le pays d'accueil. Elle ne s'appliquerait pas aux immigrants clandestins qui pénètrent illégalement sur le territoire national pour essayer de passer en Europe.» (E/CN.4/2005/85/Add.1).

fulfill the conditions of the ICRMW for protection, but they are without any form of safeguards and subject to sanctions and expulsion. In fact, in excluding the application of the ICRMW *"certain migration officials in Morocco declared, on the basis of interviews, sub-Saharans transiting the country are not migrant workers, and that they only seek to access to Europe in order to work there and that they have no interest in contacting the Moroccan authorities"*. (Cholewinski and Touzenis, 2009; 33).

This information, even if not comprehensive, could be an "alarm bell" in demonstrating that the level of implementation is not satisfactory and that a substantial gap exists between the commitments made by Morocco and their application to migrants in irregular status. In particular, the level and the content of actual implementation and interpretation of international standards need more attention and deeper analysis.

**Harmonization of domestic legislation with international instruments**

It is important to emphasize that ratification of international instruments represents a first step, but their effective implementation could guarantee the implementation of provisions at a national level. In this context, a brief overview of the legal background in Morocco regarding the entry into the territory of foreigners and their residence could contribute to assessing the level of implementation and focusing on how Morocco has incorporated international standards into its domestic legislation.

A new immigration law was adopted in November 2003, act no. 02-03 on aliens' entry to and stay in its territory. According to several scholars, it contains articles that do not follow the spirit of the ICRMW, which recognizes that the protection and guarantees included are less analytical than those expected by the Convention (Pecoud and Guchteneire, 2006). This new legal provision tried to introduce an instrument capable of balancing the need to protect the basic human rights of migrants on one hand, and on the other to introduce specific measures for controlling the migratory flow, as solicited by the growing pressure from the EU.

The purpose of the new law is to unify the existing texts, established between 1914 and 1950, to bring the law into line with the provisions of the Criminal Code as part of the process of updating the existing legal framework, and to establish and define precise categories of offences relating to illegal emigration and trafficking in migrants, through effective oversight. In particular, the Act incorporates the hierarchy of laws of basic principle, in as much as all its provisions are to be applied subject to International Conventions ratified by Morocco (art.1).

With regard to the specific provisions, the right to legal remedies at the jurisdiction level and the existing obligation for administrative authorities to justify their decisions is not efficient, as exhaustively described by Rbii. Access to medical services is also only available to regular migrants, and the right to family reunification is not regulated (Rbii, 2007). In this light, the content of the national provision envisages a potential conflict with international treaties, and it is relevant to consider which rules will eventually be followed, according to the predominant jurisprudence. In view of this, the Human Rights Committee, examining the fifth periodic report presented by Morocco on the implementation of the International

Covenant on Civil and Political rights, has also raised several questions concerning the adoption of act no. 02-03 (CCPR/C/MAR/2004/5). The experts of the Human Rights Committee specifically voiced their concern on the current situation of migrants, and particularly those in an irregular situation, asking about the legal status of migrants, including irregular migrants granted by this new legal provision.[32] Unfortunately, no further measures have been formulated by the Government of Morocco.

However, little information is available on how these measures are actually enforced. Finally, with regard to sanctions, the Act includes a severe regime of fines and imprisonment for migrants for irregular entry and stay, and for any persons facilitating illegal entry or exit. This contributes to the general trend towards criminalizing irregular migration.

## Conclusion

The measures adopted mentioned above demonstrate that there is no common and accepted legal definition of the phenomenon of irregular migration. The European Union in particular appears to be promoting the rhetoric of "illegality" in migration and policy, and this has led to an increase in the association of foreigners with criminal law. In this context, much more attention needs to be paid to the discriminatory effect of labeling migrants as "illegal" and how this leads to a greater likelihood of their human rights being violated.

This article has addressed a number of issues related to the protection of human rights of migrants in irregular situations. The aim was to retain a focus on the existing relationship between the violations perpetrated against vulnerable groups of irregular migrants, such as those in the context of transit migration, and the restrictive measures adopted in order to address national security and to foster border control at European level.

It is generally accepted that there is no lack of international instruments and standards, but the main challenge of the international human rights framework is to enforce them in order to ensure compliance by States. Indeed, this is particularly true with regard to the ICRMW, which explicitly protects undocumented migrant workers and members of their families. The need to reinforce the capacity to increase national legislative provisions for implementing and properly interpreting the ICRMW seems particularly urgent. The need to promote respect for legal standards and rights of migrants, irrespective of their status, must be acknowledged by States. There must be adequate dissemination of information on migrant rights to make national authorities aware of human rights of migrants and the existence and the interpretation of related provisions. In particular, undertaking research to highlight how legal distinctions made between groups of people are applied in practice by border or migration officials could be useful.

Second, in the context of Morocco, the existing relationship with the European Union has played a key role in the formulation and application of the Moroccan national legal framework and in developing EU external migration policies. What seems to prevail is the affirmation of the principle of sovereignty of the States concerned, instead of a guarantee of the needs and basic human rights of migrants in irregular status. The instruments adopted by the European Union are clearly focused on keeping the migrants in their countries of origin, but the legality of this system can be

**32.** *«Quel est le statut juridique des étrangers et immigrés, y compris les immigrés clandestins nombreux notamment à venir d'Afrique subsaharienne et à transiter au Maroc dans l'espoir de rallier l'Europe»* (CCR/C/SR.2237).

called into question, particularly bearing in mind the fact that readmission of third country nationals is not regulated by international law. Even if the EU has called for respect for international human rights standards on several occasions, the agreements adopted or under consideration with Morocco do not seem to implement this view in practice. Instead, EU border control policy tries to support a State practice by introducing new international standards by readmitting third country nationals and provoking violations of their basic human rights. It is clear that the prevailing approach of EU in this context is aimed at responding to security issues rather than to addressing the abuses and violations perpetrated against migrants in irregular status in Morocco, without considering the negative consequences that this could generate. This short analysis of the practice of readmission agreements provides clear conclusions regarding the absence of a human rights perspective in their application, since they are motivated by the expected benefits of the contracting parties.

Finally, as regards a question as sensitive as the movement of persons between States, strong cooperation among origin, destination and transit countries is required, but this should not be based on a restrictive approach. All measures should be taken to ensure the full protection of human rights and fundamental freedoms, as stipulated by international law.

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# BORDERS AND BORDERLANDS: A COMMON EUROPEAN ASYLUM SYSTEM

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## Introduction: EU Bordering Processes and CEAS Policy Development regarding Victims/Survivors of Torture and Violence

The construction of Europe as a space of "freedom, security and justice" and the goal of "free" and "secure" movement within Europe implied and legitimized the shift of control from internal towards external borders (Illamola Dausa, 2008). At a time when legal access to Europe has become increasingly difficult for certain "undesired" groups of migrants, member States still need to enable family reunification and have obligations under (inter)national and human rights law to receive and examine asylum applications of people claiming a need for protection. In order to find "common solutions" to the identified challenge of a major "flow of persons seeking international protection in the EU" since the 1990s,[1] the establishment of a *Common European Asylum System* (CEAS) has emerged as part of communitarized policy simultaneously addressing asylum, migration management and security measurements. According to the *Hague Programme* (2005-2010) shared (minimum) standards should guarantee protection to those who require it, and deal fairly and efficiently with those without protection requirements.

However, it has been pointed out that so called "mixed flows" render the identification of asylum seekers and recognition of "genuine refugees" difficult. Camps and administrative procedures have emerged to contain, differentiate and redistribute different "categories of migrants", and to filter mobility - measurements which the EU aims to externalize. Enforced border controls and accelerated procedures endanger access to asylum and to a fair procedure. The European Council for Refugees and Exiles denounced the ongoing returns of migrants who were possibly refugees in need of protection to Libya, claiming that "Member States' obligations under international and European refugee and human rights law do not stop at the physical boundaries of the EU" (ECRE, 2009).

These examples show that the crossing and controlling of borders does not only involve physical territorial borders, but also concerns legal categories. This requires consideration of the practices and procedures of legal border crossing as well as border guarding, which aim to differentiate between categories of migrants. They extend deep into the

1. http://ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm

borderlands, the institutional and conceptual landscape of the asylum-immigration apparatus. The examples also highlight that responsibilities, obligations and rights are enacted between different stakeholders: individuals, "state" actors, the EU as a "supranational" entity and "non-state" organizations of civil society.

In the first section of this chapter, I will briefly outline the theoretical and methodological approach to border and migration. I will then discuss EU bordering processes, according to the three fields of inquiry – the conceptual, institutional and policy dimension of the Migration-Border nexus – followed in this volume. In order to describe the Europeanization of concepts such as "protection" and "asylum" - through the regional development of a *Common European Asylum System* - I will first discuss the definition of a (political) refugee in international refugee law arising from the *Geneva Convention* (1951, as amended in 1967) and the principle of *non-refoulement*. I will then draw on anthropological approaches by tracing the development of CEAS policy as a social practice and a historical process, as cultural epistemology and as political technology. Special focus will be given to how victim-survivors of torture and violence have gained categorical visibility as traumatized persons with special needs.

Tracing the beginning of this particular policy development enbles us to address relations between human rights and security discourses in the challenge of current EU bordering processes, but also the power relations between different stakeholders debating legitimate inclusion/exclusion.

## Borders and Borderlands: Theory and Methodological Approach

The contribution to the Border-Migration framework developed in this chapter, seeks to link an analysis of *border management* in border studies with a perspective on *population management* as proposed by scholars interested in governmentality (Inda, 2006). A population to be regulated through policies that discern "who enters" and "how many" (Zapata-Barrero, 2010) - and thus made amenable to control through particular programmes - first needs to be made intelligible, i.e. made into objects to be known. Managing migration not only concerns border control, but assemblages of systems that filter mobility (Maguire and Murphy, 2009) and which are spread throughout the borderlands: the asylum system is one of these. From an anthropological perspective, I argue here that the ways in which migration and borders are defined, individuals identified and movement managed (through policy development, legal categories and identification technologies) reflect specific historical and cultural epistemologies, as well as geopolitical and social realities.[2]

Border management concerns the "procedures by which the crossing of borders is eased or becomes restrictive" (Newman, 2006). Recent scholarship on borders has pointed out the selective permeability of borders: circulation and crossing is eased for some categories, such as tourists and certain members of the workforce within the global economy, while access for categories of the "unwanted" and "undesired" others is restricted. The increased securitization of borders and the related ubiquity of bordering processes have also attracted attention (Andreas, 2003). "Remote control" and "internal control" (Guiraudon,

2002) have emerged as "delocalized" EU border concepts trying to encapsulate the complexities of a world presented both as "borderless" in globalist discourse, and contemporaneously as subject to a "security threat"/"invasion of undocumented migrants", thereby justifying expenditure and implementation of surveillance, identification and information technology on local level.

At this point, I would like to briefly clarify the concepts used in this paper.[3] "Borderland"/"border landscape" is initially designated in geography as a transit zone, the area close to a border on both of its sides. Social scientists proposed extending borderland phenomena to the "frontier zones" which separate different groups and categories, as well as to those zones that separate concepts; or, as argued in cultural studies, to the interstitial zones of "hybridity". In history, borderland studies have increasingly come to analyze the active, rather than peripherical and passive, role of inhabitants of geographical border landscapes. The anthropologists Donnan and Wilson (1999) see "borders" as being constituted by: "[1] the legal borderline, which joins and separates states, [2] the physical structures, the agents and institutions of the state, who demarcate and sustain the border, and who are found most often in border areas but also often penetrate deeply into the territory of the state, [3] frontiers, territorial zones of varying width which stretch across and away from the state border, within which people negotiate a variety of behaviours and meanings" (Donnan and Wilson, 1999). In order to address the political power that discerns who is entitled to belong (Zapata-Barrero, 2010), it is necessary to explore practices within the territory, but also "beyond the state" (Rose and Miller, 1992) through multi-sited research into the borderlands: the conceptual and institutional landscapes of the migration-asylum-apparatus. I will therefore draw on, and further elaborate on the second element of the border mentioned by Donnan and Wilson, which has received less attention within anthropology. However, I argue that this will be important for exploring the historical conditions that render particular border and migration management provisions possible.

"It is a question of knowing how to transform and improve the law, and of knowing if this improvement is possible within a historical space which takes place *between* the Law of an unconditional hospitality, offered *a priori* to every other, to all newcomers, *whoever they may be*, and *the* conditional laws of a right to hospitality, without which the unconditional Law of hospitality would be in danger of remaining a pious and irresponsible desire, without form and without potency, and of even being perverted at any moment". *Experience and experimentation thus.*" (Derrida, 2001; 22-23)

## Asylum: International, Regional and Historical Contexts of Protection

The term "asylum" derives from the Greek *ásŷlon* and *asylos*, which means "secure" and refers to a refuge, a sanctuary, or an inviolable place of protection. Today, in the "national order of things" (Malkki, 1995) on which international law is based, it is the state that acts in the role of protector through its obligations under international refugee law, namely the *Geneva Convention Relating to the Status of Refugees 1951* (Refugee Convention) as modified by the *Protocol relating to the Status of Refugees 1967,* as well as through the principle *of non-refoulement*, according to which

[3.] For a review of different disciplinary approaches and terminology please consult Donnan and Wilson (1999) and Newman (2006).

"[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." (UNCAT, Art. 3.1)

The principle of *non-refoulement* forms an essential part of various human rights treaties which are based on the *jus cogens* principle of the absolute prohibition of torture and ill-treatment, such as Article 3 of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* (United Nations, 1984), Article 7 of the *International Covenant on Civil and Political Rights* (United Nations, 1966) and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 1950) as interpreted through the jurisdiction of the European Court of Human Rights (ECtHR).[4] What distinguishes the UNCAT principle of non-refoulement from that in the *Refugee Convention* is the critical exception clause regarding "criminality" and "security threat" applying to refugees (Art. 33. 2).

"Asylum," defined as "the protection accorded by a state to an individual who comes to seek it" (Gil-Bazo, 2007) is therefore an institution that not only applies to persons recognized under the category of "refugees". The establishment of a *Common European Asylum System* should be seen as a supranational instrument with regional scope, which is applying these international treaties regionally by individuating locally perceived priorities and values. Other regional instruments are the (legally binding) *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (Organization of Africa Unity, 1969) and the (not legally binding) *Cartagena Declaration on Refugees* adopted by Latin American States (Inter-American Commission on Human Rights, 1984). We shall see how human rights principles are susceptible to ideological, historical and geographical changes and differences (Wilson et al., 2003). According to the Convention (1951) a refugee is a 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; or who, not having a nationality but being outside the country of his former habitual residence as a result of such events, is unable or, owing such fear, is unwilling to return to it."

Initially, this applied only to a geographically (Europe) and temporally (pre-1951) limited target of displaced population. It was extended though the *1967 Protocol Relating to the Status of Refugees* to international phenomena of displacement. Violations of civil or political rights were established as grounds for protection, excluding violations of social, economic and cultural rights; the definition also does not cover the situation of so-called "internally displaced persons" (IDPs). The UNHCR recently argued that

"[t]oday people do not just flee persecution and war but also injustice, exclusion, environmental pressures, competition for scarce resources and all the miserable human consequences of dysfunctional states." (UNHCR 2006)

The regional instruments in Africa and Latin America have established a definition of "refugee" that is more inclusive, with external aggression,

4. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (ECHR, Art. 3). The landmark decision of the ECtHR in *Soering v. United Kingdom* (Judgment of 7 July 1989, Series A no. 161), established the extraterritorial application of this article, extending its meaning to imply Article 3 of UNCAT, 1984.

occupation, foreign domination, events disturbing public order, man-made disasters and massive violations of human rights listed as causes for forced migration. The procedural recognition of "prima facie refugees" was introduced, benefiting eligible candidates with more minor benefits then "convention refugees". The trend in industrialized countries has increasingly been to introduce "complementary protection" categories for those who fall outside a narrow interpretation of the "convention refugee" definition, but are unable to be deported. This fragmentation has been legitimized by the argument that being granted refugee status in an industrialized asylum country implies access to more rights and services. Most refugees remain within their regions due to a policy of mobility. European states only participate in the world-wide "burden sharing" of refugees to a limited extent through resettlement programmes and by receiving asylum seekers. The year 2006 marked a 20 year low-point in asylum applications in Europe, while the statistical data for 2007-2008 showed a slight rise.[5]

The *Policy Plan on Asylum* of 2008 (European Commission, 2008b) confirmed that an "ever growing percentage" of asylum applicants in the EU are granted subsidiary protection or other forms of protection status (point 1.2.). To date[6] there have been different sets of rights and benefits between different legal protection statuses: temporary or subsidiary protection statuses require constant renewal and imply restrictions/exclusions in terms of entitlements for family reunification or access to citizenship. In any case, the so-called "refugee problem" in contemporary European discourse is represented through the image of "mixed flows". As outlined in the *Green Paper on the future Common European Asylum System* (European Commission, 2007a) a

"core element of the external dimension of asylum is the need to address mixed flows, whereby the migratory flows arriving at a Member States external border include both illegal immigrants as well as persons in need of protection." (5.3.)

This criminalizing dichotomous image of "*illegal* immigration vs. *legitimate* protection *needs*" can serve as justification for policy (for both internal and external control) in the tension between a rights-based refugee regime and a control-based immigration policy. A look at domestic asylum policy in EU member states since the 1990s confirms the trend to portray asylum as an "abused" entry system for those identified as mere "economic migrants" – although the reality of such categorical differentiations is much more subtle. This serves as justification for restrictive access to work and welfare entitlements. This is found, for example, in the justification for restrictive amendments *(Ley N° 9/1994)* aimed at "modernizing" the Spanish law on "Regulating the Right to Asylum and Refugee Status" (Ley 5/1984). It states that the asylum regulations had the effect of "attracting economic immigrants towards the asylum system", and making it "in practice into the principal way of irregular migration into our country". The wording of the Irish justification for not giving asylum seekers the right to seek employment is similar.

The modern institution of asylum, as a legal formulation and techniques for managing mass displacement, emerged in the context of post-World War II Europe,[7] although both movements of people and war have much longer histories. According to Malkki, this was a "historical moment of reconfiguration" (1995; 497) because refugees were no longer a military problem, but gained visibility as a social and humanitarian problem. Since protection categories and administrative procedures are

5. According to the UNHCR, at the end of 2008 there were some 42 million forcibly displaced people worldwide, of which 15.2 million were refugees, 827,000 asylum-seekers (pending cases) and 26 million IDPs. The majority of refugees are hosted by their neighbouring countries and only about 16% are living outside their region of origin. Europe, with a total of 333,000 asylum claims registered during the year 2008, remained the primary (continental) destination for individual asylum-seekers, ahead of Africa and America. However, while the number of positive decisions issued to asylum-seekers increased in 2008 across all major regions, Europe is the exception.

6. However, there is a recent proposal for relevant amendments in the asylum legislation (EUROPEAN COMMISSION, 2009a).

7. The terms "refugee" initially referred to the "victims of Nantes": expelled Protestants in XVII. Only with the third edition of the *Encyclopaedia Britannica* (1796) was the term extended to all those forced to leave their homes at times of calamity, including some specific groups. After 1880, the distinct perception of persons fleeing and persons migrating was not so clear. However, before the First World War, European states did not make any attempt to control or regulate those flows. Migration movements did not greatly influence the relationship between states.

informed by particular historical contexts, social practices and cultural epistemologies, it may be useful to ask whether we are not witnessing a subsequent reconfiguration today.

## Europe as a Space of "Freedom, Security and Justice"

The Treaty of the European Union (TEU, 1993, as amended through the Amsterdam Treaty 1999) defined the overall political rationality of governmentality that shapes current border politics (also as amended through the Lisbon Treaty 2009). The TEU established the "free" and "secure" movement of persons within the EU as its goal, while ensuring movement through security measures.

"The Union shall set itself the following objectives: […] to maintain and develop the Union as an area of freedom, security and justice, *in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*." (Emphasis added; TEU, 1993 as amended through the Amsterdam Treaty 1999, Title I, art. 2)[8]

This agenda implied and legitimized the shift of control from internal to external borders (Illamola Dausa, 2008) and the transposition from the inter-governmental third pillar cooperation of Justice and Home Affairs – for issues such as asylum and immigration - to communitarized first pillar policy (Lavernex, 2001). The Amsterdam Treaty (1999) brought the construction of Europe as a space of "freedom, security and justice" onto the European agenda and incorporated the *Schengen Aquis*[9] into the framework of the EU. This resulted in amendments to the *Treaty of the European Union* (TEU) and the *Treaty of the European Communities* (TEC). Asylum and immigration did not fall under the competence of the European Economic Community (EEC) established by the *Rome Treaty* (1958), whereas the *Treaty of Maastricht* (1993) referred to asylum and immigration policy as "matters of common interest" for the European Community, and left them to intergovernmental third pillar cooperation. The aim of creating an internal market space and economic integration has played a significant role in placing migration management on the agenda of the community, and thus making population a focus of governmental concern. With the liberalization and free movement of goods and capital came the liberalization of factors of production, such as the free movement of persons and of services. This brought the need to limit border checks within member states, but the question also emerged of how to regulate the circulation and entry of so-called "third country nationals"[10]. Asylum regulations are now part of a communitarized policy addressing citizenship, terrorism, migration management, visa policies, asylum, integration, privacy and security, the fight against organized crime, criminal justice and last but not least, shared responsibility and solidarity between the members (Hague Programme, 2004). The most recent frame of reference is the *Stockholm Programme* which was agreed upon by the European Council in December 2009 and represents the new 5-year (2010 – 2014) EU programme for Justice and Home Affairs. Chapter VI is entitled "A Europe of responsibility, solidarity and partnership in Migration and Asylum" and addresses the construction of a Europe of asylum through solidarity among member states and through partnership with third countries (external dimension of asylum). Chapter V covers access to the EU and border management, and relates back to chapter IV - "A Europe that protects" - which concerns protection for its citizens through security and (border) control measurements.

8. Ex Article 2 TEU, as amended through the Lisbon Treaty, now reads as Article 3.2.: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured…"

9. The UK and Ireland (see TEC Protocol 3 and 4) are not within the Schengen Agreement, and together with Denmark did not agree on communitarizing third pillar policy. They reserved their right to opt in on particular provisions.

10. The (Post-Amsterdam) Title IV of TEC (Art. 61-69) covers "visas, asylum, immigration and other policies related to free movement of persons" and follows the previously existing Title III: "free movement of persons, services and capital".

Foucault once stated in his 1977–78 lectures on *Security, Territory, Population* (2007) that when the problem is posed as that of "allowing circulations to take place, of controlling them, sifting the good and the bad […]" (2007: 65) - which is central to an ideology of the freedom of circulation, the problem of how things and people should or should not circulate – then there emerges a population and its security as an object of government and management. Recontextualized into contemporary immigration control, the problem of circulation is posed as one of differentiating between the legitimate and illegitimate *desire* for protection and security – of both hosts and guests, within a hierarchy of *fears.* The differentiation is ultimately achieved by the establishment of criteria for qualification and procedural rules which underlie the refugee status determination (RSD). It will therefore be important to look closely at the developments of current CEAS directives. In the same way as a regime of truth, the asylum system has the effect of using particular forms of verification to establish who is judged to be "truly" a legitimate receiver of protection and who becomes a deportable "failed asylum seeker".

Because the management of population depends on particular epistemological regimes of intelligibility, the practices of government are intertwined with regimes of truth and expertise (Rose and Miller, 1992; Inda, 2006). The question therefore emerges of how the border between "state", "EU" "civil society" and "non-state" institutions is drawn by different agents. This is indicative for existing power relations which sustain and legitimize the control *and* the controlling entity of conceptual and territorial borders. Rumford, answering his question of "who borders?" argued that "borderwork is no longer the exclusive preserve of the nation-state" (2006).

## CEAS Policy Development

The realization of a Common European Asylum System in order to achieve a "single protection area" was envisaged by means of a two-phase development to be started after the Treaty of Amsterdam entered into force (May 1999), based on the Tampere Conclusions (phase I: 1999-2005). Following a five-year plan outlined in the Hague Programme (phase II), it should have been consolidated by 2010, but this deadline was extended to 2012. The European Council had to adopt measurements regarding asylum within five years (TEC IV art. 63). The first legislative instruments adopted were the Dublin II Regulation regarding the determination of the state responsible for examining an application, and the directive on minimum standards of reception conditions (European Council, 2003b), both in 2003, the directive regarding the qualification to grant protection status (European Council, 2004) in 2004, and finally, in 2005, the long-debated and contested directive on asylum procedures (European Council, 2005). These are formulated in concordance with the Geneva Convention, the Protocol 1967 and "other relevant treaties" (art. 63.1), i.e. the ECHR, ICCPR, UNCAT. The four legal instruments had to be transposed into national legislation and the transposition (of minimum standards) then evaluated in order for proposals for the second phase to be developed. The Commission has funded or commissioned (European Refugee Fund, ERF) various projects and studies. Through common procedures, uniform protection status and similar standards in reception throughout the EU, CEAS aims to create the conditions that would reduce so-called "secondary movements" and "asylum shopping" by applicants. Individuals are now required to make their application in the first member State of their arrival.

According to Dublin II, applicants will be returned to that country (or where they first had their fingerprints "taken") by fingerprint comparison (the EURODAC system).

The first-phase evaluation acknowledged that harmonization of reception conditions had not been achieved. There are also differences throughout the EU on whether to reject or recognize asylum requests of applicants from the same countries of origin (European Commission, 2008b). For example, Dublin II was occasionally suspended for returning asylum seekers to Greece. The overall goal of diminishing secondary movements a priori limits the active choice of applicants to apply for status in the state that seems most suitable for them (in terms of language abilities, social networks, etc.) or to subsequently move. Europe was imagined as a community composed of interchangeable nation-states, regardless of the heterogeneity within Europe.

The adopted policy measurements, however, have had the effect of introducing restrictive elements (Lavernex, 2001), such as limited access to the territory through visa policies, carrier sanctions and "reception in the region" programmes, as well as limited access to procedures due to the first country rule, Schengen and Dublin provisions and the concept of the "safe third country". The provisions also lead to a downgrading of procedural safeguards through accelerated procedures that enable the non-admission of an application for a proper assessment, by applying the concept of a "manifestly unfounded" claim and the applicant's "safe country of origin". Return facilities through readmission agreements, "reception in the region programmes" and "protected entry procedures" are part of the currently pursued "neighbourhood policy" (Rumford, 2006) regarding the external dimension of asylum policy.

In 2007, the European Commission published the *Green Paper on the future Common European Asylum System* (2007a), which it outlined current issues at stake and invited stakeholders to give feedback in order to enable the design of the *Policy Plan on Asylum* (2008b). According to Xenia Messarenti of the Asylum Unit of the European Commission (Parcours d'Exil, 2008), national NGOs and trans-national non-governmental networks were "extremely important" in the implementation and monitoring of EU directives. This is an example of how governing a sphere requires the production of knowledge that is outside the strictly "political" realm. Among other issues, the *Green Paper* asked how the identification of vulnerable persons and their needs could be prescribed in more depth and detail, since *identification* is considered an inadequately pursued core element (point 2.4.1). Among the responses, a topic that has emerged as critical is the identification and recognition(s) of victims of torture, with, as I see it, two main questions. The first argument concerns the *means employed in identifying torture victims* in order to guarantee what are identified as their rights of access to proper treatment (UNCAT, Art. 20) and to contribute to the fact-finding process in the asylum procedure (IRCT, 2007a; Care Full, 2007). The other topic concerns the *legal status of recognition for victims-survivors of torture*: is it possible to talk about a right to be granted asylum, either by meeting the criteria for the recognition of refugee status or otherwise through subsidiary protection? What benefits, obligations and rights do the respective statuses imply? I will discuss the content of the directives on reception, qualification and procedural standards with focus of how victim-survivors of torture and violence have been included/excluded and problematized as targets of government action.[11] In order to do so, I will refer to publications of various (non-governmental) stakeholders, EU reports[12] and EU-commissioned or funded studies.[13]

11. It is not my purpose to touch on other key issues arising from these directives.
12. Green Paper (EUROPEAN COMMISSION, 2007a), Policy Plan on Asylum (EUROPEAN COMMISSION, 2008b), and (EUROPEAN COMMISSION, 2008a; P6_TA(2009)0376).
13. ODYSSEUS (2006); IBVS (2006); PARCOURS D'EXIL (2008).

Tracing the historical development of particular aspects of asylum policy helps to give visibility to the structures, processes, institutions, agents and concepts through which policy is developed and operates, and shows how current EU asylum policy and border politics conditions and is conditioned by disciplinary knowledge production. Policy consists of the identification and definition of a problem, the elaboration of a solution, and the establishment of implementation and evaluation mechanisms (Shore and Wright, 2007). Migration policies are thus part of governmental practices, as they formulate phenomena and processes as problems to be solved through particular programmes and technologies. However, policy can also be re-problematized as both a cultural category and political technology. Policies name objects of government and thus hold the power of definition over the subjects of policy (ibid).

*The Landscape of Reception*

The *Reception Directive* (European Council, 2003b) was the first of the four legal instruments to employ the classification of "vulnerable persons"[14] in Chapter IV, which addresses "provisions for persons with special needs". This directive has given special visibility to victims-survivors of violence and torture (Art. 17.1; 17.2; 20). However, an evaluation of the application of the directive named those provisions as main deficiencies (COM (2007) 745, point 3.5.2).[15] In contrast to the other groups listed under the section of vulnerable persons with special needs, survivors of violence are least visible. "Survivors of torture and ill-treatment – highly traumatised by their experiences – prove very difficult to identify" (IRCT, 2007b). The lack of identification mechanisms make it dependent on self-disclosure. There are a variety of reasons why a person may prefer not to speak about humiliating experiences in the context of asylum procedures, which also do not respect individual time and readiness (Care Full, 2006).

Hyndman, discussing a UNHCR project (*Women Victims of Political Violence Project)*, argues that in the production of categories of difference, unexpected or unintended practical implications may arise, and that it is important to examine how difference among displaced people is managed (2000). By making this critique, she does not question the consideration of vulnerabilities, but the essentialization of "identified" identities through a-priori categorization. Here the differentiation does refer to persons who have experienced violence: vulnerability is represented as need for treatment.

This is consistent with humanitarian logic of care and European values of charity. However, increasingly, humanitarian and public health groups worldwide invoke human rights (UNCAT, ICCPR) to advocate necessary interventions in order to prevent violence and to respond to its effects. In the European context, Syndhoff argues that "there is no harmonised picture and no harmonised policy regarding torture victims seeking asylum" (BIVS, 2006) despite obligations arising from the *Reception Directive*. Mental health welfare provision and governmental financial support of specialized care differs greatly between member States,[16] and in most countries deficiencies are compensated for by NGOs or the Red Cross (Watters and Inglebly, 2004). Specialized rehabilitation centres for survivors of torture and violence are seen as important providers of holistic and multi-disciplinary healthcare (ODYSSEUS, 2006) - in 2006, centres provided services to an average of 400 people per year in 15 member states (IRCT, 2007b). The International Rehabilitation Council

14. Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
15. See ODYSSEUS (2006).
16. Financial support is foreseen through the national allocation of the ERF fund. The "European Instrument for Democracy and Human Rights" (EIDHR) with 2010 has shifted its funding to centres outside the EU, impacting on local services.

for Victims of Torture (IRCT) states that 20% of asylum seekers can be expected to have undergone torture or ill-treatment[17]; that lack of care can have long lasting impact on integration capacity and (public) health. However, according to Siltove (2006), in an "optimal recovery environment" which addresses the "primary needs" - *safety* (in the form of permanent residence permit) and *social security* (the possibility of family reunification) - the number of survivors experiencing ongoing disabling stress reactions may be lower than is commonly estimated. Clinicians stress that prolonged waiting periods and detention can lead to chronification. and that prevention of (further) symptoms must be provided.

Organizations have not only addressed the shortcomings of the *Reception Directive,* but have pointed out that the *Qualification Directive* and *Directive on Procedures* did not take into account the special situation of victims of violence and "traumatized refugees". (IRCT, 2007a, Care-Full, 2007a) In 2006, an "expert meeting" with participants from more than twenty organizations (eleven countries) providing legal/medical support, expressed its concern that asylum procedures left little room for survivors of ill-treatment to be properly *heard*. Early identification - through a medico-legal assessment – is seen to be important in two ways:

1. To access care – "better protection of the health of the asylum seeker";
2. To improve the quality of the decision-making process "based on increased and more professional information" (Care Full, 2007b).

The IRCT and the Care-full Initiative[18] lobby for the implementation of the Istanbul Protocol (IP) in the identification of torture victims during first reception as well as within the asylum procedure. However, "questioning" asylum seekers about past events with a view to treatment, and questioning them in order to gather information for the procedure, are two very distinct functions. The IP (1999) is the first international guideline for the documentation of torture and its consequences (published by OHCHR in 2004).[19] Although initially developed to counter impunity in the context of criminal prosecutions – which requires a lower level of proof - the IP has been adapted to the context of asylum as a result of initiatives by health and rights activists in different national contexts. At the same time, there have been initiatives to standardize and professionalize medical and psychological reports in a number of EU countries. This testifies to the growing importance these documents have acquired throughout the EU, due to pressure on applicants to provide evidence of "well-founded fear". The position of those who argue for the implementation of the IP is best formulated in the book *CARE FULL. Medico-legal reports and the Istanbul Protocol in asylum procedures* (BRUIN et al., 2006): "Medical examinations and reports can and should play an important role in establishing whether an asylum application is genuine". Haagensen – head of the international department of the Danish Rehabilitation and Research Centre for Torture Victims - explained in his review of the book "why it is now required to use medical-legal reports in asylum procedures":

"The organisations are trying to rectify today's fundamentally unfair system […]. It is about giving torture survivors a decent change. However, it can also be seen as making minor technical corrections (by ensuring more valid information) to a system that is reflecting global injustices. To focus on a refinement of the asylum system is an acceptance of the overall policy framework intended to keep as many refugees out of Europe as possible" (2007).

17. Overall EU statistics in this regard do not exist and most of the few existing prevalence studies worldwide have small samples, so there are huge variables (prevalence 2,74 to 100%) depending on the composition of the sample.

18. Amnesty International (Dutch Section), Dutch Council for Refugees and Pharos Centre of Knowledge on Refugees and Health.

19. The *Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OHCHR 2004), drafted by 75 experts on law, health and human rights from 40 organisations in 1999, was adopted by the UN in 2000. It is not internationally legally binding.

Whether reports are perceived as procedural safeguards and a victim's "right" or as rectification of an unfair system, the diagnosis of health is made in a politically charged environment. Medical or psychological evidence could corroborate an asylum application in three instances:

1. To establish whether a medical condition of an asylum seeker permits an interview by assessing the impact of torture and trauma on recall, consistency and coherence;
2. To substantiate the asylum claim and to contribute to the fact-finding process by documenting past torture/violence by stating the degree of "consistency" (the IP established five levels) between findings from physical and mental examination and the testimony of alleged abuses;
3. To address a medical condition (physical or mental) for which expulsion would result in a violation of ECHR art. 3 due to being a form of ill-treatment and infliction of serious harm.

It should be added that there is debate over the provision of certificates. Among various problems[20], some organizations emphasize that the ability to "prove" torture is a dangerous myth (Agrali and Henrique, 2005). There are many "clean" torture techniques that do not leave any lasting marks on the body. At the concluding conference of a ERF funded project titled *Traumatised Refugees in the EU,* Elise Bittenbinder pointed out that the relationship between NGOs and governments in regard to medical or psychological reports and training for government interviewers constitutes a "conflicting issue" for experts and NGOs throughout the EU (in BIVS, 2006).

### *Who enters? Who borders? How? - On Qualifications and Procedures*

I will now discuss the *Qualification Directive* (European Council, 2004) and the *Directive on Procedures* (European Council, 2005), focusing on the "recognition(s) of torture victims"[21] and on safeguards for "traumatised refugees".[22]

The *Qualification Directive* established eligibility criteria for "refugee status" and "subsidiary protection" and defined their respective content in terms of rights and obligations. The EU is currently considering whether or not to opt for a single uniform status (European Commission, 2007; point 2.3); leaving protection status for "humanitarian reasons" to the discretion of member states, however. The exclusion clauses of the *Refugee Convention* were reproduced: the proposal of this directive was adopted on the 12th September 2001 in the aftermath of 9/11 and shows the incorporation of security concerns into the asylum system. This highlights the historical and geographical situatedness, the values and priorities that inform human rights and international law. The qualification criteria are those of the *Convention*, although they do not apply to any "person", but to "third country nationals". This differentiation is of symbolic value; *de facto* member States have the obligation to accept applications from everyone (Gil-Bazo, 2007).

States have the obligation to investigate torture and ill-treatment, including - due to the principle of *non-refoulement* - acts committed outside their territory. According to the directive

"[t]he *fact* that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is

20. See Fassin and d'Halluin (2005) on France.
21. Conference, October 2008 (PARCOURS D'EXIL, 2008).
22. ERF funded research project 2003-2005 (BIVS, 2006).

a *serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm*, unless there are good reasons to consider that such persecution or serious harm will *not be repeated.*" (Emphasis added; Chapter II, Art. 4.4.).

The qualification criteria for subsidiary protection - "limited in scope" (Gil-Bazo, 2007) - are based on the principle of *non-refoulement* which applies to persons who would face future "serious harm", defined here as the death penalty or execution; torture, inhuman treatment or punishment; serious *individual* threat by reason of indiscriminate violence (Chapter V, Art. 15). The Office of the Commissioner for Human Rights and the Committee Against Torture considers past violations to be significant evidence of a future risk. However, besides the importance of past persecution, article 4.4. indicates the *primacy of a future risk assessment.* The UNHCR suggested adding in the domestic implementation of this directive that "[c]ompelling reasons arising out of *previous persecution or serious harm alone* may nevertheless warrant the grant of asylum": protection status should be given *despite* the absence of future risk of repeated persecution (emphasis added; UNHCR, 2005).

All these provisions highlight the importance of disclosing past persecution in an asylum application and establish it as a "serious indication" for "well-founded fear" or "real risk". Nevertheless, they also attest to the decrease in legitimate grounds for protection and restrictive qualification criteria.

However, the legal issue is how the allegation of past torture which the directive alludes to is established as "fact". In legal reasoning, "facts" are established after being proved to the required standard (Good, 2004). While criminal courts require the establishment of facts "beyond reasonable doubt" and aim to determine the guilt of an accused persecutor, asylum applicants only need to establish facts to a "reasonable degree of likelihood" (UK case law). Authors lobbying for implementation of the IP point out that one of the big differences in its application is the low standard of proof formally required in asylum proceedings.

The directive (Chapter II, Art. 4) considers that amongst the relevant elements of an application are "statements and documentation" on whether a person "has been or may be subject to persecution or severe harm". It is the duty of the applicant to submit statements and relevant documentation, and the duty of the state to assess these elements. Accordingly, the absence of documentary evidence of statements should *not* be considered as weakening the application, and allow torture, for example, to be established as fact by *oral testimony* alone. However, this applies only to cases where the applicant satisfies five cumulative conditions:

a) A genuine effort has been made to substantiate his application,
b) All elements at the applicant's disposal have been submitted,
c) The statements are found to be coherent, plausible,
d) The application was made in the earliest time possible,
e) The general credibility of the applicant has been established (4.5).

The conditions (a, c, e) resemble the UNHCR standard regarding "credibility"[23] (UNHCR, 1992). Indeed, the directive establishes important documentary and evidential deadlines, according to which late application, late disclosure of an event or late submission of evidence have a bearing on the credibility of the applicant. This is an important shift towards procedural – as well as qualification - requirements! The judge-

**23.** "Credibility is established where the applicant has presented a claim which is *coherent and plausible, not contradicting generally known facts*, and therefore is, on balance, capable of being believed." See Good (2004) for a challenge of the assumption of "generally known facts".

ment of the applicant's positive "credibility" constitutes the necessary condition for applying a "low standard of proof" and the "benefit of the doubt" in the absence of documentary evidence (UNHCR). However, it seems to me that in this directive, the five requirements are constitutive to the condition in which adjudicators may apply the "benefit of the doubt". Since those five criteria may often not be fulfilled, corroborative documentation will indeed be necessary. Even a lack of documentation may then induce negative credibility findings.

Of particular importance is the *Directive on Procedures*, which establishes how information is assessed and decisions made. Refugee protection lies at the intersection between domestic and international human rights and refugee law. The *Refugee Convention* and *UNHCR Handbook* (Art. 189) have been reluctant to develop clear evidentiary principles for the assessment of testimonial and documentary evidence. NGOs demand the inclusion of medical/psychological evidence because of deficits in the directive on procedural standards, despite the fact that the *Refugee Convention* does not require a torture survivor seeking asylum to corroborate his/her past persecution through documentary evidence (Medical Foundation, 2009). In answer to the *Green Paper*, the IRCT said that they were

"particularly concerned that individuals had to recollect their traumatic experience in the context of accelerated procedure lacking essential safeguards […which] may fail to recognise torture survivors" (2007a).

The directive is quite explicit in establishing reasons for accelerated procedures of "manifestly unfounded" applications (Art. 28), such as "inconsistent, contradictory, improbable or insufficient representations, which make his/her claim clearly unconvincing" (4.g), or when "the applicant has failed without reasonable cause to make his/her application earlier, having had the opportunity to do so" (4.f).

Many studies state that applications are increasingly dismissed due to presumed "incredibility" of the testimony or a "lack of evidence" and testimonies of persecution are met with "disbelief", "suspicion" or "denial" (Rousseau et al., 2002). The four "traditional" criteria for the assessment of credibility are problematic in asylum cases (Byrne, 2007): *corroboration* is in many cases absent (and is not necessarily required in asylum cases, according to the UNHCR), *demeanour* could be viewed as potentially misleading for linguistic, cultural and psychological reasons, while *consistency* (giving the same information over a period of time) and *accuracy* (agreement between memory and event) are problematic due to *trauma*. In this context, research on "memory" and "trauma" has entered the debate, together with a critique on accelerated asylum procedures, focus on consistency, and poorly conducted interviews.

The growing request for certificates within the context of a decline of asylum legitimacy shows that while suffering and trauma may be recognized "in general", the individual truth is doubted. The IRCT responded to the *Reception Directive* (sic), that

"[t]he handling of expert evidence is of great concern, as medical reports are frequently downplayed, ignored or even disputed by authorities lacking relevant medical training. We observe a decreasing return on cases for asylum, with the proportion of successful cases dwindling steadily over the past 20 years, despite the fact that medical expertise is more and more requested" (IRCT 2007a).

There is a lack of studies on the evidentiary weight of medical evidence and related standards (Rousseau et al, 2002). However, one study on the evidentiary impact of MLRs in Sweden (Forsman and Edson, 2000) stated that "*There was no statistically significant association between the motivations given by the authorities and the formulations (supportive or informative) in the medicolegal certificate*".

In 2008, the European Commission, together with UNHCR and EURASIL (the European Union Network for asylum practitioners) invited NGOs and immigration authorities from various member States to participate in a workshop addressing "asylum seekers with special needs" and "victims of torture and persons suffering from PTSD". Objections made by member State representatives concerned the misuse of the instrument of medical examination - *what if the asylum seeker fakes a bad psychological condition?* – and the assumption that doctors might not be impartial – *they do not question the asylum seeker's story*! (Care-Full newsletter). Despite the lobby's effort to "harmonize" the implementation and evidentiary weight of the IP in asylum procedures through the EU directive, neither the *Policy Plan* (2008) nor the recast of the *Reception Directive* (European Commission, 2008a; P6_TA (2009)0376) took this particular suggestion up[24]. However, they reiterated that identifying the special needs of vulnerable persons – and in particular those of traumatised refugees and victims of torture – should enable access to treatment and affect the quality of the decision-making. Finally, in the recast of the *Qualification Directive* (European Commission, 2009a)[25] the exception to cessation of protection status "for compelling reasons arising from previous persecution" mentioned above was proposed, as well as an approximation of entitlements for subsidiary protection and refugee status. Of particular importance is the recast proposal of the *Directive on Procedures* (European Commission, 2009b): the need to introduce special procedural guarantees for vulnerable persons was highlighted, and it was suggested that national procedures dealing with the identification and documentation of torture and other serious acts of violence should follow the IP. A special article concerning medico-legal reports – to identify and document torture or in cases of PTSD - was also introduced.

During the drafting of the initial Directive on *Procedures* and *Reception* the issue of medical evidence of torture and ill-treatment was apparently "discussed at length," but no consensus could be reached due to a number of "controversial" issues:[26] *Who should provide for such reports? What value would they have? Could an asylum seeker refuse the assessment and what would the consequences of that be...*?

These "controversial" issues are meaningful in many ways, and are particularly salient and delicate in national contexts[27]. They address the evidentiary weight of reports, the reliability and objectivity of experts, the structural position of the report provider, the agency of the asylum seeker and the consequences that obligatory medical screening for torture might have. I believe that what is also at stake in these negotiations is the boundary between the responsibilities of the "state", "civil society" and "experts" on an important *border guarding issue*.

## Final Reflections: Defining the (external) borders of the EU

In this chapter, I have discussed the development of CEAS as a supra-national instrument with regional scope, which is applying international

24. Other suggestions indeed were included. For further information regarding the recast of the three directives (2008a, P6_TA (2009) 0376, 2009a, 2009b), contact the author or consult the documents.

25. With the entry into force of the Amsterdam Treaty (2005) the EU decision-making procedure of asylum legislation (the first pillar policy) states that the European Council has to vote by qualified majority voting and in co-decision with the European Parliament on a proposal made by the Commission and the Parliament.

26. E-mail communication between European Commission and Wijnkoop (in BRUIN et al. 2006).

27. See *International Journal of Refugee Studies* Vol. 16 (2004) for relevant contributions from the UK.

treaties regionally by individuating locally perceived priorities and values. One aim has been to examine the interplay between CEAS policy answers to a migratory system that is represented as "mixed flows" into Europe, and the emergence of a definition of the EU's external borders.

1. By naming "third country nationals" as subjects entitled to apply for asylum, the EU represented itself as a community in which not only on paper, but de facto, and in the future, no form of persecution will occur. This presumed characteristic can be seen as a definitional aspect of the external borders, which is seen to separate the EU and its citizens from "third country nationals" and their potentially abusive states. This production of difference within a world of interconnected space (Gupta and Fergeson, 1992) in which compliance with "human rights standards" and "democracy" establishes membership in the international community, is indicative. The CEAS directives also imagined Europe as a community composed of interchangeable nation-states, regardless of its heterogeneity.

2. Within the fragmentation of protection statuses, the potential (but not effective) protection that could be granted to victims-survivors of torture within the establishment of CEAS hides the narrow focus given in the subsidiary protection category, and it will be important to follow the relevant jurisdiction. Focus on physical violence and political-civic rights leaves to one side broader concerns for "private" forms of violence, for socio-economic human rights and structural violence – forms of violence recognized as persecution in the African or Latin-American regional protection instruments. Requesting proof of past persecution diminishes the meaning of the *Refugee Convention*. It must be reiterated that the level of proof required in asylum proceedings - and for evidence of torture - is low. Importantly, the Istanbul Protocol emphasizes that the absence of scars or mental distress should not be taken as proof of the non-veracity of a claim. When alleged incidents have occurred years backing the past, the signs have faded. Furthermore, many "clean" torture techniques do not leave marks.

3. I have analyzed how victims-survivors of violence have become targeted in the policy development of European CEAS directives. Within the task of differentiating between various reception needs and rights, as well as protection needs and rights, the notion of "traumatic memory" has become meaningful in rendering the aftermath of violence intelligible to administrative regulation and control. However this locates the problem, truth and possible solution in the memory system and body-minds of individual asylum applicants, who in order not to fail the procedural requirements need to conform to the available medicalization of memory. The latter represents a particular epistemological regime of intelligibility (Weissensteiner, 2009). Asylum proceedings should respect individual rhythms and manners, particularly concerning the narration of pain, and acknowledge that testimonies are contextualized, dialogic reconstructions. Nevertheless, the use of "coherence", "linearity" and "textual consistency" as criteria for truth to "legitimately" reject asylum applicants must also be challenged. They have political implications, are culturally and socially specific and reflect local ideologies of literacy, language and communication (Blommaert, 2001).

4. Medical and psychological expertise on trauma has emerged in recent years, alongside increasingly institutionalized practices of knowing and reading the body and words of refugees. In the European context of asylum, characterized by increased pressure on applicants to provide evidence of "well founded fear" and of past perse-

cution, such regimes of truth (Fassin and D'halluin, 2005) should be seen as part of broader bio-scientific forms of verification – such as EURODAC-fingerprinting or DNA-testing – which are nowadays used as forms of flow-management (Maguire and Murphy, 2009). However, they are simultaneously also an expression of a human rights discourse that challenges enhanced security measurements and inhuman reception conditions.

5. I have aimed to show that it is of analytical and practical value to examine practices related to legal border guarding and crossing. This does not constitute a metaphorical extension of the border, but considers "internal control" mechanisms. Sovereignty is not only felt on external borders, but like checkpoints within the territory, interactions with the healthcare services may also produce state effects on the lives of those crossing the territorial borderline and waiting to cross into the territory of legal recognition. Medical/psychological expertise has been proposed by non-state ("NGO") agents as a possible solution to the states' obligation to provide care, investigate torture committed outside the territory of the state (due to the principle of *non-refoulement*) and assign protection status. However, it is also an expression of a human rights discourse employed by a health and human rights movement which challenges enhanced security measurements and inhuman reception conditions throughout Europe. Wilson and Mitchell ask: "How are rights applied – and what are they applied *for* – in everyday legal processes?" (Wilson et al., 2003). A technology developed to hold states accountable for their abuses is seemingly acquiring a new meaning in the political context of restrictive asylum procedures, such as bio-political technology in migration management. Borders are "human artefacts" (Zapata-Barrero, 2010) and migration management is concerned with the management of diversity through the construction of difference: moving beyond physical borders or border-communities shows that bordering occurs in the negotiation and implementation of historically situated legal categories and social practices.

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## Introduction. Forced migration and external EU border

It is widely accepted that asylum, considered as durable territorial protection in a foreign country in the case of persecution or risk of breach of fundamental rights is not a subjective right of individuals in International Law. However, there is a right to recognition as a refugee in the event of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" if the person 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" (1951 Geneva Convention relating to the Status of Refugees, article 1) and also a right to be protected in the event of a serious risk to the individual's life or the risk of being subjected to torture or other violations of fundamental rights, at least on a temporary basis.

These rights arise from international conventional norms including the 1951 Geneva Convention and the 1967 New York Protocol relating to the Status of Refugees, the 1984 United Nations Convention against Torture, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950 ECHR), the 1967 International Covenants, and despite its formal non compulsory status, the 1948 Universal Declaration on Human Rights. Some of these norms have attained the *ius cogens* status, such as the *non-refoulement* principle, or the ban on torture.[1] The prohibition of states from sending or expelling to another country anyone who might there be subjected to any serious risk of treatment that amounts to torture, with a non-derogative character, stems from those norms, at least in the European countries which belong to the 1950 European Convention on Human Rights.

Conventional and non-conventional norms concerning refuge and asylum and those related to them, as well as with a series of principles, rules, procedures and international standards, are based on the International Refugee and Asylum Regime, which is the basis for the idea that the states in the international community have an asylum function. These norms, principles, rules, procedures and standards lead to the existence of a function of asylum for states which cannot refuse entry, return or immediately expel asylum seekers who are in fact on their territory or in their jurisdiction.

[1] The *non-refoulement* norm is included in article 33 of the 1951 Geneva Convention relating to the Status of Refugees, and establishes that "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". It is generally acknowledged that this norm has attained *ius cogens* status, which means that countries can not exclude or make exceptions to its fulfilment, at least when *refoulement* would lead to the person being subjected to torture.

The aim of this chapter is to identify and assess the main items in the strategy followed by the EU and its member states which lead to the externalisation of their asylum function.[2] For the purposes of this chapter, the externalisation of the function of asylum is understood to be the design and application of policies by European Union countries (individually or collectively, by means of cooperation or participation in the Immigration and Asylum EU Policy), which aim to or result in the movement of the asylum function to third countries. By means of some of these policies, the effective responsibility for taking charge of refugees and other people needing protection is transferred elsewhere to transit and origin countries, in spite of the fact that these people initially applied for asylum in a European Union country. The externalisation of the asylum function can be the result of some forms of immigration control, such as remote control of borders, especially maritime borders; subcontracting this control (sometimes to private agents); and of the extraterritorialisation of control by means of the withdrawal of the act of controlling beyond the European line (e.g. visa requirements and controls before loading) (López Sala, 2009; 33-35). However, the externalisation of the asylum function of the states may also be the result of strategies focusing on refugees. This chapter aims to examine the instruments and strategies implemented by the European Union and its member states (through the instruments of the EU or applying them) focusing on refugees which lead to the externalisation of the asylum function of the EU countries. Examples concerning Spain will be given when the activity of the EU member states is to a certain extent most autonomous. Spain has a large maritime frontier in the South of Europe and for this reason is potentially a privileged way of entry of migrants and asylum seekers to the EU.

This contribution will show that with the development of strategies that lead to an externalisation of the asylum function of the EU Member States, the borders of the European area concerning forced migration of refugees and asylum seekers move to countries with lower standards of protection of Human Rights. These countries are nevertheless considered safe third countries and maintain particular relations with the European Union or have concluded agreements on readmission of migrants with the EU or with its member states. For asylum seekers, the borders of the "European" area of protection against persecution and Human Rights violations should not correspond with the frontiers of the EU. The borders of this safe European area shall include non-European countries with particular relations with the EU, which will be obliged to keep forced migrants outside the EU countries. As Alejandro Valle Gálvez has pointed out, in border issues "the legal system of the EU lacks theoretical and conceptual autonomy" and this fact makes easier the construction of different functional frontiers (Valle Gálvez, 2007; 43).

The structure of the chapter is as following: In section two, there is an introductory explanation concerning the asylum function of states and the general policies on asylum of the European Union countries. The European harmonisation of the return to *safe third countries* and to *countries of first asylum,* which is carried out by means of readmission agreements, will then be studied, in the third section. In the fourth section an analysis will be made of the strategies defined by the Hague and the Stockholm programs concerning the *External Aspects of the European Union Asylum Policy*, on the detention centres for illegal immigrants abroad, and on the proposals for delocalisation of asylum applications processing centres beyond the European Union borders. In section five, some conclusions will be suggested.

2. The asylum function belongs to the State, because the EU is not part of the main instruments which form the International Refugee and Asylum Regime, and because sovereignty over the territory in which it is possible to provide asylum belongs to the member states.

The chapter also considers whether the strategy of externalisation of the function of asylum of the European Union member states sometimes lacks legitimacy, and whether there is or not a fair balance between the interests of the states and the protection of the human rights of refuges and asylum seekers.

## The asylum function of states and the general context of policies concerning asylum in the European Union countries

### The asylum function of states

A refugee situation arises when the normal relationship between states and citizens breaks down, and when people are compelled to flee and seek protection abroad. Refugees and asylum seekers are then alone in facing the international community, in which nobody – within the international system in its strictest sense– is obliged to take them in as citizens or aliens. It has been suggested that refugees "are not the consequence of a breakdown in the system of separate states, rather they are an inevitable if unanticipated part of international society. As long as there are political borders constructing separate states and creating clear definitions of insiders and outsiders, there will be refugees" (Haddad, 2008; 7). In this context, states have a moral duty to receive people in search of protection and, from a strictly legal point of view, an obligation to not refuse, return or immediately expel aliens arriving in their jurisdiction without giving them the opportunity to show that they need protection. This latter obligation entails a right for asylum seekers entering the territory or present in the jurisdiction of a state not to be refused, returned or expelled. This right entails some form of interim protection and therefore some form of *asylum*.

Interim or provisional asylum until a decision by the competent authorities on asylum applications is an unavoidable corollary of the interdiction of *refoulement*, or expulsion which encompasses a serious risk of torture or attempts on the most fundamental rights. This also constitutes the essential body of the function of asylum of the state in the international community.

### General context of policies concerning asylum in the European Union countries.

In the last decades of the twentieth century, the European Union countries started to implement strategies of deterrence towards potential asylum seekers, aimed at avoiding the use of *non-refoulement* as a privileged way of entering the territory and settling in the country as migrants for economic reasons. In a context where economic migration has been almost proscribed, applying for asylum and family reunification are the only ways of entering the European Union (EU) zone. As people considered them as a "migrant individual" instead of "at risk of persecution or serious violations of fundamental rights", asylum seekers are perceived as defrauding the European welfare state and as a threat to states' homeland security. As Volker Türk says, this "fear of the other" is the basis for a distressing aspect of contemporary public debate on asylum: "asylum-seekers and refugees, though victims and particularly vulnerable to physical security threats, are increasingly perceived themselves as a threat" (Türk, 2003; 114).

The first steps in the Common European Asylum System (CEAS) were taken after the Amsterdam Treaty (1999), which awarded competence to the European Community and adopted some common rules on asylum in the context of the construction of an Area of Freedom, Security and Justice (EUAFSJ). Before the Amsterdam Treaty, migration and asylum issues were included in the EU Treaties for the first time in the Third Pillar of Cooperation in Justice and Home Affairs created by the Maastricht Treaty (1993). The Third Pillar was created in order to try to include the free movement of persons and measures of cooperation in the fields of police and justice cooperation, migration and asylum in the Schengen Area (the Treaties of 1985 and 1990, in which the EU Member States excluding the United Kingdom and Ireland, and other European States such as Norway or Iceland, participated) in the framework of the European Union. The Amsterdam Treaty included the principle of differentiation in the European Union (European Member States are not obliged to implement EU objectives at the same time), which allowed the United Kingdom, Ireland and Denmark to benefit from Protocols establishing opt-out and opt-in clauses concerning measures adopted in the common EU areas (migration, asylum) of Justice and Home Affairs. Finally, the Lisbon Treaty (in force since December 2009) eliminates the structure of Pillars of the EU and places policies and instruments linked to the creation of a EUAFSJ within the Treaty on the functioning of the European Union (Part Three, Title V).

The EUAFSJ was included in the Amsterdam Treaty as a new objective of the European Union, according to which the free movement of individuals must be assured, in conjunction with measures concerning external border controls, asylum, migration and the prevention and combating of crime, terrorism and drug trafficking. The first five-year period (1999-2004) for the implementation of this new objective of the EU was guided by the Tampere Programme. The main European Union norms adopted during this period, which was the first development period of the EUAFSJ, are based on security considerations and the refugee and asylum policy is restrictive. In general, the norms adopted according to the Tampere Programme concern strategies for containing and deterring refugee and asylum flows arising from the legislations of the European Union countries, instead of dealing with the *race to the bottom* in the devaluation of asylum systems by those states in order to reduce migratory pressure. The devaluation strategies of asylum systems of the European Union states operate in various ways: (a) preventing departure from the country of origin (increased visa requirements; sanctions on carriers); (b) preventing entrance into the territory of the potential country of asylum (international zones at borders; admissibility procedures which define legal admittance into the country, notwithstanding that the applicant could be in fact on the territory of the state or under its authority); and (c) discouraging applications for asylum or staying in the country (detention measures; poor reception conditions).[3]

After the Tampere programme, the Hague programme, for the period 2005-2009 (the second development period of the EUAFSJ) stressed the need to develop external aspects of asylum policy. This direction was deepened and diversified in the Stockholm programme adopted by the European Council on 10-11 December 2009, in order to move towards the third development period of the EUAFSJ. The Stockholm Programme intends to incorporate to the EUAFSJ a proactive approach, an innovation in the Justice and Home Affairs fields in the European Union which "has taken the form of a *reaction* to current events or to secular trends, *or at least has been presented in these terms*" (Walker, 2004; 11).

**3.** The main EU norms adopted under the Tampere programme which affect the personal situation of asylum seekers are: the 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 (OJ L 50, 25.2.2003); the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless people as refugees or as people who otherwise would need international protection and the content of the protection granted (OJ L 304, 30.9.2004); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005) [Fernández Sánchez, 2006, 51-154].

## The return of asylum seekers to safe third countries

Destination countries usually reject asylum applications filed by people who, before arriving, have passed through countries deemed to be safe and where, not in the absence of a fear of persecution or serious violations of their human rights, applicants were in fact (or in law) protected, or could have obtained protection. Since the 1951 Geneva Convention does not forbid them from doing so by the *non-refoulement* rule of article 33[4], countries which did not want to be forced to receive any kind of unexpected migrants, which asylum seekers are by definition, introduce clauses in their legislation to allow them to return those migrants to other countries in which they enjoy some form of protection (*first countries of asylum*), or should have applied for protection (*safe third countries*).

The Spanish Law on Asylum establishes the following grounds governing inadmissibility: "the applicant is recognised as a refugee and has the right to stay or to obtain effective international protection in a third country" and "the applicant comes from a safe third country (…) where it is possible to apply for refugee status and, if he/she is a refugee, to obtain protection in accordance with the Geneva Convention". In both cases, it is formally required by law that asylum seekers would be readmitted, and their life or freedom would not be in danger in the third country, and would not be subject to tortures or inhuman or degrading treatments. A further requirement is that refugees would be effectively protected against a return to the country where the persecution is carried out according to the Geneva Convention.[5]

Although the two concepts are quite different, in one case, asylum seekers *actually* received protection and in the other, asylum seekers *could* have been granted protection. At present, the difference in practice "can best be envisioned as one of degree" (Legomsky, 2003; 571).

Returning asylum seekers who apply for refuge or asylum in European Union countries but who have not arrived directly in third countries from the country where persecution is feared create the externalisation of the asylum function. This assumes the responsibility for asylum for people who have not arrived directly in European Union countries is transferred to other countries where asylum seekers have not usually applied for protection. Countries may expel or refuse entry to refugees as long as this is not forbidden by the 1951 Geneva Convention, but the legitimacy of this strategy is controversial in view of: first, the differences in the standards of protection between the European Union countries and the countries of the main regions of origin and transit; and second, the fact that the International Asylum and Refugee regime does not have a burden sharing system. A burden sharing system based on solidarity should ensure financial aid to countries receiving asylum seekers and refugees and if necessary, the resettlement of asylum seekers and refugees in other countries in order to prevent the economic and social structure of the countries receiving large numbers of people in need of protection from collapsing (Thielemann, 2005; 2008). A way to relieve pressure on the countries of the region of origin of refugees is to respect the choices of asylum seekers. According to authors, there is a *complicity principle* which states that "no country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obliged to respect" (Legomski, 2003; 573-574). However, the legitimacy of returning asylum seekers to *safe third countries* depends on questions including assessment that in that country, asylum seekers

**4.** According to this article (text included in footnote number 1), it could be possible to expel or return a refugee to the frontiers of a country where his life or freedom would not be threatened, thus to a *first country of asylum* or to a *safe third country*. A narrow interpretation of Article 33 of the 1951 Geneva Convention says that there is nothing compelling countries to analyse an asylum application completely based on the refugee's condition, if the applicant cannot prove that he/she landed directly from his country of origin, where he/she fears persecution.

**5.** Article 20.1§ c-d) *Ley 12/2009, de 30 de octubre, reguladora de del derecho de asilo y de la protección subsidiaria*, *BOE* 31 October 2009, no. 263, 90860-90884. Between 2000 and 2002, these were the third grounds for inadmissibility of asylum applications in the decisions taken by the Spanish Asylum and Refugee Office (*Oficina de Asilo y Refugio*, OAR), according to the statistical yearbook of the Homeland Ministry http://www.mir.es/MIR/PublicacionesArchivo/publicaciones/catalogo/index.html. After that date, the statistical publications only give the over numbers of rulings of inadmissibility. In 2008, out of 5171 applications, 2557 (49%) were not admitted, 2455 (47%) admitted, and the remainder, 159 (3%), deserted. *Anuario Estadístico del Ministerio del Interior* 2008, Secretaria General Técnica, July 2009 NIPO 126-09-054-3 [See 11 February 2010] http://www.mir.es/MIR/PublicacionesArchivo/publicaciones/catalogo/anuarios/Anuario_Estadxstico2008.pdf

will have an *effective protection*; the link between the asylum seeker and the third country; and the procedure followed to return the person (Legomski, 2003).

The use of the notions of *third safe country* or *first asylum countries* for excluding responsibility for refugees and asylum seekers reveals the approach of European Union countries to asylum seekers as if they were economic migrants trying to breach restricted means of entry to the EUAFSJ. Asylum is considered by the European Union as an issue linked to migration, and control of external borders and internal security, rather than an issue principally linked to the protection of Human Rights, as shown for instance in the *European Pact on Immigration and Asylum* adopted by the European Council in September 2008. This Pact reaffirms the *Global Approach* to Migration, which states that migration issues are a central element in the European Union's external relations, and establishes five basic commitments, which will continue to be developed by means of the Stockholm Programme (organising legal immigration; controlling illegal immigration; making border controls more effective; constructing a Europe of asylum; creating a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development).[6]

**Externalisation by a harmonised notion of safe third country.**

In the European Union, the Council Directive 2005/85/EC of 1 December 2005 on minimum standards in procedures in Member States for granting and withdrawing refugee status harmonises the notions of *first countries of asylum* and *safe third countries*. The Directive also regulates the notion of *European safe third countries*. What the Directive does not precisely determine is the scope of the possible use of those notions by European Union countries, and the guarantees to be extended to the asylum seekers in order to refuse them, or expel them to a safe country.

Both notions, the *first country of asylum* and the *safe third country*, can justify the inadmissibility of asylum claims at first instance, which means the denial of entry to the territory, especially if the applications have been made at the border. The inadmissibility of an application for refugee status, asylum, or subsidiary protection means that it will not be examined on substantive grounds.

According to the Article 26 of the Directive 85/5005/EC, "a country can be considered as a first country of asylum for a particular applicant for asylum if: (a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or (b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*; provided that he/she will be re-admitted to that country".

Article 27 of the Directive establishes the requirements for considering a state as a *safe third country* and how this notion may be used by EU Member States. *Safe third countries* are those in which a person who seeks asylum will be treated in accordance with the following principles:

"(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) the principle of *non-refoulement* in accordance with the Geneva Convention is respected; (c) the prohibition of removal, in violation of the right to free-

**6.** *Global Approach to Migration*, European Union Council 15/16.12.2006 and *European Pact on Immigration and Asylum*. European Council. Brussels, 24.9.2008. Doc. 13440/08 LIMITE ASIM 72.

dom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection according to the Geneva Convention".

While those principles can be considered as meeting the international standards of protection, the Directive does not state when and how the *safe third country* concept can be appropriately used at the same level. According to the second paragraph of article 27, the application of the *safe third country* concept "shall be subject to rules laid down in national legislation". That means that there is no real harmonisation on this issue, and no uniform guarantee for asylum seekers that the *safe third country* concept will be applied to them according to the same standard of safety. National legislation of EU Member States must include:

"(a) rules which require a connection between the person in search of asylum and the third country concerned on the basis of whether it would be *reasonable* for that person to go to that country; (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe; (c) rules in accordance with international law which allow an individual examination to check whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment"[7] (emphasis added).

Asylum seekers have no guarantee of similar treatment in all EU Member States since the "connection" between the asylum seeker and the third country on the basis of whether it would be "reasonable" to expel the person back to that country can be decided at national level. For instance, it is not clear whether transit for a brief period of time in one country before legal admittance to the territory, perhaps in an international zone, could be considered a sufficient connection. Issues such as what length of stay in a safe country is long enough to consider that it is "reasonable" for an asylum seeker to go to a safe country are not yet clear, because the term "reasonable" is by nature vague. Furthermore, asylum seekers in similar situations could be treated differently because there is no harmonisation concerning the guarantees that they must have in order to challenge their deportation from one country due to the application of the *safe third country* concept. The Council Directive 2005/85/EC on minimum standards on procedures does not require European Union Member states to provide for a legal remedy against decisions taken in asylum procedures, and nor does it prescribe that asylum seekers must benefit from a remedy with *automatic suspensive effect* of the return. According to the jurisprudence of the European Court of Human Rights, in order to comply with the requirements of the article 13 of the ECHR concerning the right to an effective remedy, asylum seekers must benefit from a remedy with *automatic suspensive effect* if a risk exists that the person may be submitted to torture or inhuman or degrading treatment.[8]

As mentioned above, the 2005/85/EC Directive creates a new category of safe country; the *European safe third countries* (article 36). EU Member

7. The Proposal for a new Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, presented by the European Commission on October 2009, amends the final paragraph of this article: "on the grounds that the third country is not safe in his/her particular circumstances". There is also a proposal to finish the article with the following statement "The applicant shall also be allowed to challenge the existence of a connection between him/her and the third country in accordance with point a".

8. Judgement of 26 April 2007 in the case *Gebremedhin versus France*, no. 25389/05, § 66-67. The Proposal for a new Directive on minimum standards on procedures presented by the European Commission seeks to improve the situation stipulating that Member States shall ensure that applicants for international protection have the right to an effective remedy before a court or tribunal which "shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome", at least in border procedures (art. 41 § 4-5 of the Proposal).

States applying this concept may decide that no, or no full examination of the asylum application shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally its territory from a *safe third country* (article 36).[9] The only *European safe third countries* that can be considered are those which (a) have ratified and observe the provisions of the 1951 Geneva Convention without any geographical limitations; (b) have an established asylum procedure prescribed by law; (c) have ratified the 1950 ECHR and observe its provisions, including the standards relating to effective remedies; (d) have been designated by the Council.[10]

Furthermore, the 2005/85/EC Directive on minimum standards in procedures in Member States for granting and withdrawing refugee status does not resolve the fundamental question of border procedure which normally determines admission into the territory of states. Considering the diversity of practices and the lack of consensus, article 35 states that EU Member States can maintain "procedures derogating from the *basic principles and guarantees* described in Chapter II in order to decide at the border or in transit zones whether applicants for asylum who have arrived and made an application for asylum at such locations may enter their territory" (emphasis added). EU countries are authorized to apply a lower level of principles and guarantees at their borders than those ones considered *basic* guarantees. They therefore employ the *safe third country* concept in accelerated procedures, which do not ensure that asylum seekers are not sent to countries where their life or freedom may be threatened.[11]

As the Procedures Directive provides for a lot of differences between Member States in several areas such as the application of the *safe third country* concept in admissibility, accelerated (article 23) and border procedures, "it lacks the substantive effectiveness needed to curb secondary movements of refugees and *refoulement* of asylum seekers" (John-Hopkins, 2009; 250). What is even more worrying, as it has been pointed out by Michael John Hopkins in the case of the UK, with a statement that is also valid for other countries, is that "the Procedures Directive allows fairness to be sacrificed on the altar of speed and convenience because the third country and Non Suspensive Appeal segments, in particular, are not conducive to the type of individualized return and substantive determinations that can adequately take complex factual and legal issues into account, and do not provide asylum seekers with the opportunity to challenge safe country designations. The risk of erroneous decisions making lead to *refoulement* is thus unacceptably high" (*Ibídem*, 251).[12]

The Dublin II Regulation N° 343/2003, which *establishes 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* endorses the applicability of the *safe third country* concept, because article 3§3 allows states to apply this notion both before and after the implementation of the Dublin system. An asylum seeker can be refused by the state in which he/she has applied for asylum due to coming from a *safe third country*, or by the responsible country, even if the admissibility procedure takes place after the transfer of the asylum seeker to the responsible country. The commitment of the EU as regards all the applications for refugee or asylum of third country nationals being examined by at least one Member State (article 3 of the Dublin II Regulation N° 343/2003) therefore vanishes.

9. Various categories of asylum applications can be refused according to the Directive: *unexaminable* applications (applicants from a *European safe third country*, from an EU country to which the Dublin II Regulation is applicable); *inadmissible* applications (article 25 of the 2005/85/EC Directive); *unfounded* applications (article 28 of the 2005/85/EC Directive).

10. The 2005/85/EC Directive established secondary legal bases which allowed the Council to adopt a common list of *European safe third countries* and a common list of *safe third countries of origin*, which has been annulled by the European Court of Justice because it violates the European Parliament prerogatives and therefore infringes article 67 EC, which stipulates the co-decision procedure. Judgment of 6 May 2008, case *European Parliament v. Council of the European Union*, no. C-133/06. The Proposal of new Directive on procedures removes the paragraphs concerning these lists (art. 38).

11. The Proposal for a new Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, presented by the European Commission on October 2009, proposes the elimination of those procedures derogating from the *basic principles and guarantees* at the borders (art. 37), and the possibility of using the *safe third country* concept in accelerated procedures (art. 27).

12. Until the entry into force of the Treaty of Lisbon, the UK and Ireland benefited from a Protocol which excluded them from the implementation of the measures concerning migration and asylum issues, and allowed them to opt-in, case by case. Both countries "opted in" in order to participate in the adoption of the 2005/85/EC Directive on procedures (paragraph 32-33 of the introduction of the Directive).

Concerning the harmonisation of the *safe third country* concept in the European Union, it is possible to conclude that this harmonisation does not ensure a fair balance between the interests of states aiming to avoid receiving migrants, even if they are forced migrants such as asylum seekers, and the protection of Human Rights. Asylum seekers do not have the same possibility of remaining on EU territory in all European Union countries, because of the differences concerning the *safe third country concept*, their implementation, and the guarantees for asylum seekers preventing their removal to third countries.

**Externalisation by readmission agreements.**

The main purpose of readmission agreements is to guarantee the return of illegal immigrants to their country of origin and, in some cases, to transit countries. Asylum seekers who have already received a decision that rejects their applications in the admissibility procedure, or after a substantive examination of the grounds, are no longer considered as such, and are considered immigrants in an illegal situation from then on. This means that readmission agreements make the externalisation of the asylum function easier when it is used to ensure the return to transit countries of people whose asylum application have been rejected during the admissibility procedure on *third safe country* grounds.

EU Member States and the European Union have implemented a network of readmission agreements or agreements that include readmission clauses (Fernández Sánchez, 2007; 491-495). This operates as a *contention barrier* or as an external protection fence for the EU (Denöel, 1993; Guardiola, 1992).

At first, EU Member States concluded a system of bilateral readmission agreements with Central and Eastern European States which as Sandra Lavenex says, regarding the effects on refugees, "is less an expression of an emerging pan-European system of cooperation and burden-sharing, in which states cooperate on an equal basis — than an attempt of major Western refugee receiving countries to relieve their domestic asylum procedures by transferring their legal and humanitarian responsibilities to other, usually less wealthy states" (Lavenex, 1998; 144).

With the Amsterdam Treaty, the European Community gained competence on asylum and migration and – in the framework of this anticipated common policy – on readmission of illegal migrants (Article 63§3 *b* ECT [European Community Treaty]). At that point, the purpose of the European Union strategy on readmission was to expand and generalise readmission agreements and readmission clauses.[13]

In December 1999, the Council of the European Union decided to update and adapt the *model clause* of readmission (adopted in 1994) to be included in future EC agreements with third countries and between the EC, EU Member States and third countries.[14] One of the most important applications of this model was the *Partnership agreement between the members of the African, Caribbean and Pacific Group of States on one hand, and the European Community and its Member States, on the other hand*, signed in Cotonou on 23 June 2000.[15] Before the Amsterdam Treaty, readmission clauses were included in various kinds of agreements, mainly related to trade, cooperation and partnership. Many of those agreements include countries' obligation to readmit their own nationals and to negotiate further treaties concerning third country

13. Council of the European Union (JAI), Action plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice — Text adopted by the Justice and Home Affairs Council of 3 December 1998, (1999/C 19/01), OJ 23.1.1999, No. C 19/1-15 §36.c) *ii)*; European Council, Tampere, Presidency Conclusions, 15-16 October 1999, doc. 200/99, § 24-25, 27.

14. Council of the European Union (JAI) 2 December 1999, session no. 2229, doc. 13409/99 MIGR 69 [Press 386-Nr: 13461/99] §A8.

15. OJ 15 December 2000, No. L 317/3-286. The clause included in this agreement (article 13 *Migration* §5 *c)*) establishes the obligation of EU Member States to readmit and accept the return of any of their nationals residing illegally in an ACP State, and the obligation of ACP States to readmit and accept the return of any of their nationals residing illegally in EU Member States. Negotiations must be conducted "in order to conclude in good faith and with due regard for the relevant rules of international law, bilateral agreements governing specific obligations for the readmission and return of their nationals". These "agreements will also cover, if deemed necessary by one of the Parties, arrangements for the readmission of third country nationals and stateless people". "Adequate assistance to implement these agreements will be provided to the ACP States".

16. European Council, Seville, Presidency Conclusions, 21-22 June 2002, doc. 13463/02 POLGEN 52, § 33.

17. The list of countries to be examined by the group was: Afghanistan/ Pakistan; Albania and the neighbouring region; Morocco; Somalia and Sri Lanka. Council of the European Union (General Affairs and External Relations), session 2158, 25 January 1999 [Press: 21-Nr: 5455/99] §A 26.

18. Docs. 11450/99 JAI 79 AG 34, 11424/99 JAI 73 AG 28 + COR 1, 11425/99 JAI 74 AG 29, 11426/99 JAI 75 AG 30, 11427/99 JAI 76 AG 31, 11428/99 JAI 77 AG 32, 11429/99 JAI 78 AG 33 + ADD1. Council of the European Union (General Affairs and External Relations), session 2206, 11 October 1999 [Press: 296-Nr: 11651/99] § A 9. After that date, subsequent action plans were approved regarding Albania and the neighbouring zone, for instance.

19. European Council, Tampere, Presidency Conclusions, 15-16 October 1999, doc. 200/99, § 12.

20. European Parliament, *Report on asylum-seekers and migrants – action plans for countries of origin or transit. High Level Working Group (C5-0159/1999, C5-0160/1999 - C5-0161/1999 - C5-0162/1999 - C5-0163/1999 - C5-0164/1999 - C5-0165/1999 - C4-0133/1999 - 1999/2096 (COS)*, Jorge Salvador Hernández Mollar (rapporteur) final A5-0057/2000, PE 285.869, 29 February 2000. Resolution approved on 30 March 2000.

21. *Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of people residing without authorisation*, concluded on 17 December 2003, OJ 24.1.2004 No. L 17/23-39. Entry into force: 1 May 2004 (OJ 2.3.2004 No. L 64/38).

22. *Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of people residing without authorisation*, concluded on 21 April 2004, OJ 30.4.2004, No. L 143/97-115. Entry into force: 1 June 2004 (OJ 5.8.2004, No. L 258/17).

23. *Agreement between the European Community and the Republic of Albania on the readmission of people residing without authorisation*, concluded on 7 November 2005, OJ 23.11.2005 No. L 304/14-15 [text of the agreement: OJ 17.5.2005 No. L 124/22-40]. Entry into force: 1 May 2006 (OJ 5.4.2006 No. L 96/9).

24. *Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of people residing*

nationals, and included agreements with Algeria, Armenia, Azerbaijan, Chile, Croatia, Egypt, Georgia, Lebanon, Macedonia and Uzbekistan (Commission of the EC, COM (2002) 175; Peers, 2003; 3).

After that date, the European Council hold in Seville on June 2002, urged "that any future cooperation, association or equivalent agreement which the European Union or the European Community concluded with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration" in order to materialise Tampere's objectives.[16] This was one of the firmest expressions of EU's desire for a general inclusion of readmission in its external policy, in order to manage illegal immigration. All these clauses do not constitute final readmission agreements, but facilitate and prepare future negotiations in this direction. According to the Commission, these clauses are *enabling clauses* "intended to commit the contracting parties to readmit own nationals, third-country nationals and stateless people", but "the actual operational arrangements and procedural modalities are left to implementing agreements to be concluded bilaterally by the Community or by individual Member States" (Commission of the EC, COM (2002) 175, 24/26).

The European Strategy on readmission was developed at the end of 1998, when the European Union Council established the High Level Working Group on Asylum and Immigration, with a mandate to prepare *Action Plans* including various aims:

1. The analysis of causes of influx of migrants and asylum seekers;
2. Suggestions aimed at strengthening the common strategy for development with the involved country;
3. The identification of humanitarian needs and proposals to this end;
4. Indications on readmission clauses and agreements;
5. Indications on the possibilities of reception and protection at the origin, safe return, repatriation, as well as on the cooperation with UNHCR.[17]

In October 1999, the Council adopted the Final Report of the Group, with action plans for four main countries of origin and transit (Afghanistan and the neighbouring zone, Iraq, Morocco, Somalia, Sri Lanka) and an Interim Report on Albania and the neighbouring zone.[18] The European Council approved the continuation of the mandate of the High Level Working Group in October 1999 in order to prepare new action plans.[19] The Action Plans were considered by the Commission and the Council as the first attempts by the European Union to define a comprehensive and coherent approach targeted at the situation in a number of important countries of origin or transit of asylum-seekers and migrants. However, the European Parliament considered the creation of the High Level Group and the followed procedure as showing a marked tendency to use an intergovernmental approach, and stressed as well "the lack of political realism inherent in the view that readmission agreements are the only instrument for counteracting the phenomenon of illegal immigration and the difficulty of concluding such agreements with the involved countries because of their political instability"[20]. The action plans do not sufficiently assess the issue of human rights and do not establish a coherent distinction between immigration and asylum.

So far, the European Community has concluded readmission agreements with the following countries or regions: Hong Kong;[21] Macao;[22] Albania;[23] Sri Lanka;[24] the Russian Federation;[25] Ukraine;[26] the Yugoslav Republic of

Macedonia;[27] Montenegro;[28] Serbia;[29] Bosnia-Herzegovina;[30] Moldova;[31] Pakistan;[32] and Georgia.[33] The Commission has so far been authorised to negotiate Community readmission agreements with Morocco;[34] Algeria, Turkey and China,[35] and has recommended the conclusion of readmission agreements with Libya, and Cape Verde.

These agreements complete operationally bilateral readmission agreements concluded by the EU Member States[36] and make return procedures more effective by means of technical assistance and norms related to all issues concerning the return. Spain, for instance, has concluded four readmission agreements (among other instruments for managing migration), with African countries: Morocco, Algeria, Guinea-Bissau and Mauritania (Asín Cabrera, 2008; 172-179).

All those readmission agreements concluded by the European Community establish the obligation of the parties to readmit their own and former own nationals, people from another jurisdiction (in cases of Macao and Hong Kong), third country nationals, or stateless people. The Preamble of the eight readmission agreements concluded with European countries emphasizes that the agreements are "without prejudice to the rights, obligations and responsibilities of the Community, the Member States of the European Union" and the country concerned "arising from International Law, in particular from the European Convention of 4 November 1950 for the Protection of Human Rights, the Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees" (in some cases other instruments are also mentioned). This reservation does not appear in the agreements with Hong Kong, Macao and Sri Lanka (the latter is not even a party to the Geneva Convention, and is therefore not a *safe third country* in the sense of article 27 of the 2005/85/EC Directive on minimum standards of procedures). A reservation of this type certainly does not create additional obligations for countries already obliged by international instruments to which they are party. However, it provides a reminder of the normative context in which readmission agreements are reached, or at least those concerning the EU Member States.

None of the readmission agreements concluded by the EC makes a distinction between the readmission of economic migrants in an illegal situation in the requesting country and asylum seekers whose application has been rejected in the admissibility procedure on the grounds of the *third safe country* concept. The EU approach to the readmission policy of illegal immigrants aims at *efficacy* and leaves the priority of *protection* in cases of vulnerable people to one side.[37] In this respect, readmission agreements contribute, with the application of the safe third country notion, to the aim of preserving homeland security and to containing immigration, which is perceived as a threat rather than an opportunity for the EU. The borders of the European Union extend beyond the EU countries to accomplish their task of protection from aliens, even if they are forced migrants, like asylum seekers and refugees.

## The External Aspects of the European Union Asylum Policy

The key idea in the Hague programme and other related documents was that as well as the improvement of a Common European Asylum System (CEAS), it was necessary to develop the *external dimension of asylum and migration*. At a first stage, following the recommendations of the

*without authorisation*, concluded on 3 March 2005, OJ 17.5.2005 No. L 124/41-60. Entry into force: 1 May 2005 (OJ 1.6.2005 No. L 138/17).

25. *Agreement between the European Community and the Russian Federation on readmission*, concluded on 19 April 2007, OJ 17.5.2007 No. L 129/38-60. Entry into force: 1 June 2007 (OJ 16.6.2007 No. L 156/37).

26. *Agreement between the European Community and Ukraine on the readmission of people*, concluded on 29 November 2007, OJ 18.12.2007 No. L 332/46-65. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/52).

27. *Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of people residing without authorisation*, concluded on 8 November 2007, OJ 19.12.2007 No. L 334/1-24. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/51).

28. *Agreement between the European Community and the Republic of Montenegro on the readmission of people residing without authorisation*, concluded on 8 November 2007, OJ 19.12.2007 No. L 334/25-44. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/51).

29. *Agreement between the European Community and the Republic of Serbia on the readmission of people residing without authorisation*, concluded on 8 November 2007, OJ 19.12.2007 No. L 334/45-64. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/51).

30. *Agreement between the European Community and Bosnia and Herzegovina on the readmission of people residing without authorisation*, concluded on 8 November 2007, OJ 19.12.2007 No. L 334/65-83. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/52).

31. *Agreement between the European Community and the Republic of Moldova on the readmission of people residing without authorisation*, concluded on 22 November 2007, OJ 19.12.2007 No. L 334/148. Entry into force: 1 January 2008 (OJ 29.1.2008 No. L 24/51).

32. Agreement signed in Brussels on 26 October 2009. http://www.german-info.com/press_shownews.php?pid=2257 [See: 25 March 2010]

33. Agreement reached on 25 November 2009. According to the Information given in the Provisional Agendas for Council Meetings prepared by COREPER. Doc. 11512/09; and http://www.embassy.mfa.gov.ge/index.php?lang_id=ENG&sec_id=313&info_id=5331 [See: 25 March 2010]

34. The *Euro-Mediterranean Agreement establishing an association between*

European Commission, The Hague programme stressed the aim and advisability "of assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return". With a "spirit of shared responsibility" the emphasis was placed on cooperation with third countries and countries in the regions of origin, in order "to provide access to protection and durable solutions at the earliest possible stage" (*The Hague Programme*, 2005, section 1.6).

Until recently, the strategy of the EU since this first stage has focussed on three main issues: establishing Regional Programmes of Protection in third countries; the need to provide the EU with a system of resettlement of protected people; and having ordered and managed arrivals of people in need of protection by means of Protected Entry Procedures (PEP) (COM (2008) 360 final §5.2).

The following elements will be now examined: the strategies adopted in order to try to improve protection in third countries (section 4.1); the proposals for joint processing of asylum applications outside the EU territory (section 4.2 *a*); and, PEP and the situation concerning the attempts to provide the EU with a resettlement system (section 4.2 *c*). The enhancement of protection in origin and transit regions is intended to legitimize a non-restrictive implementation of return based on the concepts of *safe third country* and *first asylum country*, either unilaterally or through readmission agreements. The existence of detention centres for immigrants outside the EU will also be assessed (section 4.2 *b*). All these topics are directly or indirectly useful for the externalisation of the asylum function of the EU Member States. Sometimes, as in the case of detention centres, there is a risk of being on the fringes of real respect for the principles, norms and standards of International Law concerning asylum, refugees and even Human Rights.

## Strategies for improving protection in third countries

At first, the EU intended to establish Regional Protection Programmes and to enhance the reception capacity and asylum systems of third countries through financial programmes like AENEAS. AENEAS was a programme for financial assistance to third countries in the areas of migration and asylum.[38] In recent years, after the approval of the *Global Approach to Migration* and the *European Pact on Immigration and Asylum*, the external dimension of European asylum policy seems to be more involved with EU External Relations and structured by means of a thematic approach.[39]

Following the priorities established for the implementation of The Hague programme (enhancement of capacities of protection of origin regions and transit countries; management of resettlement on an EU scale), the European Commission presented a proposal regarding the implementation of *Regional Protection Programmes* (RPP) in September 2005. The proposal was based on the idea of establishing links between aid projects and resettlement commitments of EU Member States on a voluntary basis, to support the credibility of the EU initiative with a *partnership element* (COM (2005) 388, section 7).

the European Communities and their Member States, on one hand, and the Kingdom of Morocco, on the other hand concluded on 24 January 2000, OJ 18.3.2000 No. L 70/1-204 [Entry into force: 1.3.2000, OJ 18.3.2000 No. L 70/228] includes only a "Joint Declaration relating to readmission" where parties "agree to bilaterally adopt the appropriate provisions and measures to cover readmission of their nationals in cases in which the latter have left their countries".

**35.** Justice and Home Affaire Council Meeting, held in Brussels on 28-29 November 2002. Doc. 14817/02.

**36.** Concerning readmission agreements signed by EU Member States, http://www.mirem.eu/datasets/agreements/index?set_language=en

**37.** *Réseau U.E. d'experts indépendants en matière de droits fondamentaux. Observation thématique No. 2: Les droits fondamentaux dans l'action extérieure de l'Union Européenne en matière de justice et d'asile et d'immigration*, CFR-CDF.Obs. Them.2003.fr. January 2004. 29/40.

**38.** Regulation (EC) No. 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS). *OJ* 18.3.2004 No. L 80/1-5.

**39.** *Global Approach to Migration*, European Union Council 15/16.12.2006 §IV and Annex I, and *European Pact on Immigration and Asylum*. European Council. Brussels, 24 September 2008. Doc. 13440/08 LIMITE ASIM 72.

The European Commission proposed to implement two RPP: one in the Western Newly Independent States (Ukraine, Moldova, Belarus), and the other in Sub-Saharan Africa (Great Lakes/East Africa), mainly in Tanzania.

Strictly from the perspective of the external dimension of asylum European policy, the implementation of RPP creates several problems because of the risk of considering the countries involved as *safe havens*, "allowing EU States not to process asylum claims lodged by individuals having transited through these countries" (Bouteillet-Paquet, 2005).

In 2006, the approach on the external dimension of immigration and asylum European policy changed slightly with the endorsement of the *Global Approach to Migration* (European Union Council 15/16.12.2006 §IV and Annex I). With this approach, the EU intended to enhance links between migration issues and development, recognising "the importance of tackling the root causes of migration, for example through the creation of livelihood opportunities and the eradication of poverty in countries and regions of origin, the opening of markets and promotion of economic growth, good governance and the protection of human rights". The strategy is based on stressing partnership with third countries instead of on deepening bilateral restraint commitments on a specific subject. Priority actions would be focused on Africa and the Mediterranean countries, but an extension of this approach to Asia and Latin America is foreseen in the future. The Global Approach is aimed at including the protection of refugees, the enhancement of reception of asylum seekers and readmission, and return policies among a number of other questions, such as the promotion of co-development projects; the pooling of support measures in capacity building in order to manage and control migration in a more effective way; and the promotion of reintegration of returnees. From this perspective, asylum ceases to be considered in crisis management terms, and is embedded with migration and Human Rights issues on the development agenda and other External policies of the EU. In this regard, Regional Protection Programmes continue to be implemented in connexion with other instruments. Notwithstanding this, Regional Protection Programs make a greater contribution to the strategy of legitimating the externalisation of the asylum function of the EU Member states.

The financial resources for enhancing cooperation with third countries in questions related to migration and asylum were covered by geographical instruments including PHARE (pre-accession countries), TACIS and MEDA (the Balkans, Mediterranean and Eastern European countries), and also by the AENEAS programme (created in 2004 to cover the period 2004-2008) which was intended to highlight the weakness identified in these issues.[40]

Due to the end of the EU financial framework in 2006, the period of the AENEAS programme was shortened to three years, and its activities continued with the thematic programme within the framework of the 2007-2013 financial perspectives. According to the European Commission, "the general objective of the thematic programme in the fields of migration and asylum is to bring specific, complementary assistance to third countries to support them in their efforts to ensure better management of migratory flows in all their dimension". The thematic programme complements geographic instruments and supports new initiatives and "will cover the major fields of action which correspond to the essential facets of the migratory phenomenon", including international protection (COM (2006) 26, section 3).[41]

40. The AENEAS Programme was endowed with € 250 million and attracted "a larger (although still limited) participation of governmental and non-governmental organisations from third countries and EU Member States" (COM (2006) 26, §2.3).

41. In addition to the thematic programme, three framework programmes have been created for the period 2007-2010. On of them encompasses refugee issues: "Security and Safeguarding Liberties", concerning crime and terrorism (745 M€ for the period); "Fundamental Rights and Justice" (542.90 M€); and "Solidarity and Management of Migration Flows" (4020.37 M€). This latter encompasses the External Borders Fund, the Integration Fund, the Return Fund, and the European Refugee Fund. Online information. http://ec.europa.eu/justice_home/funding/intro/funding_intro_en.htm [See: 25 March 2010]

The thematic programme on cooperation with third countries in the areas of migration and asylum was established in Regulation (EC) No. 1905/2006 of 18 December 2008 (article 16.2 *e*), and concerning asylum, the areas of activity which should be covered are:[42]

"Promoting asylum and international protection, including through regional protection programmes, in particular in strengthening institutional capacities; supporting the registration of asylum applicants and refugees; promoting international standards and instruments on the protection of refugees; supporting the improvement of the reception conditions and local integration, and working towards lasting solutions".[43]

**Proposals for the delocalisation of asylum applications processing centres beyond the European Union borders.**

The idea of transferring the site of processing asylum applications addressed to the Member States beyond the frontiers of the EU was not new in 2004, when The Hague programme was approved. In 2000, the European Commission assumed the approach taken by some EU States which suggested that one of the problems of asylum in Europe was the disorder and unpredictability of the arrival of asylum seekers. It considered that "processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme are ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or trafficking gangs or having to wait years for recognition of their status".[44]

The EU member states have proposed main two ways to achieve ordered and managed entries of asylum seekers and refugees: establishing Transit Processing Centres, and designing Protected Entry Procedures and coordinated resettlement measures. The establishment of detention centres for illegal migrants and asylum seekers should serve these purposes. This would be followed by an examination of the approach by the European Union and its members to these three issues.

*Transit Processing Centres*

The discussion on the idea of processing asylum applications abroad, with the participation of EU Member States and institutions as well as non governmental actors such as human and refugees' rights organisations began after the UK Prime Minister presented a document summarising the British *new approach* to the refugee question in 2003, during the British presidency of the European Council.[45]

First, some measures were proposed in order to improve the management of migratory flows in the regions of origin and to improve protection in the source regions by means of *Regional Protection Areas* (RPA). Second, the document proposed the creation of processing centres in protected zones of third countries, preferably in transit countries (*transit processing centres*, TPC). According to the British proposal, asylum seekers arriving in the territory of EU Member States should be transferred to those *transit processing centres* and once the corresponding procedures are completed, those recognised as refugees would be resettled in Member States according to a burden-sharing system (others would be returned to their country of origin). The second part of the British proposal received a great deal of criticism from ONG's which

**42.** Regulation (EC) No. 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation. *DOUE* 27.12.2006, No. L 378/41-71. Article 16.2 (e).

**43.** The 2009 and 2010 Annual Action Programmes for the Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum establishes the amounts for the financing measures in these areas: 38.5 M€ from the Community's budget allocation for 2009, and 31.4 M€ from the EU budget allocation for 2010, http://ec.europa.eu/europeaid/documents/aap/2009/aap_2009_dci-migr_en.pdf [See: 25 March 2010]

**44.** Commission of the European Communities. Towards a common asylum procedure and a uniform status, valid throughout the Union, for people granted asylum. COM (2000) 755 final. 22 November 2000, §2.3.2.

**45.** *New International Approaches to Asylum Processing and Protection*. 10 March 2003. This letter was sent by Tony Blair to Costas Simitis, Greek Primer Minister. Contextualisation and reactions to the document: NOLL, 2003.

pointed out the risks in terms of human rights and basic principles related to standards of refugees and asylum seekers protection and warned against the establishment of detention centres in North Africa. Amnesty International blamed the fact that "involuntary transfer of people to another country for extra-territorial processing is inherently unlawful, and the risk of human rights abuses in the course of transfer is high". "Transfers would amount to discriminatory treatment, in breach of human rights standards" (Amnesty International, 2003). Other risks were pointed out, such as fewer opportunities to benefit from effective remedies against violations of human rights and against transfers, and the problems arising from the detention measures inherent in the system.

The British proposal advocated creating areas outside EU territory with an uncertain legal status regarding the exercise of jurisdiction and therefore regarding the responsibility of third countries where centres would be placed for the observance of European standards of protection of Human Rights and of the International Asylum and Refugee Regime.

Strategies aimed at improving the management of asylum in Europe must ensure a fair balance between efficacy and protection. This would prevent a hypothetical arrangement of entrances aimed at keeping asylum from ever replacing spontaneous arrivals and applications for asylum in the EU Member States, which are the main expression of the *right to seek asylum* recognised by the 1948 Universal Declaration of Human Rights (article 14). A system where spontaneous arrivals were deported would represent a *radical break*, and lead to the transformation of the refugee regime into another system working in a permanent *state of exception* (Noll, 2003; 304-310, 340).

The British proposal was supported by Denmark and the Netherlands, and led to counterproposals by the UNHCR (UNHCR, 2003) and the European Commission (COM (2003) 152; COM (2003) 315). The European Council of Thessaloniki, held in June 2003, laid aside the proposal under pressure from France and Sweden. It was revived one year later by Italy and Germany. However, the idea of TPC did not seem feasible in the short or medium term. The Hague programme only stipulated carrying out a study in consultation with the UNHCR which "should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside the EU territory, complementary to the Common European Asylum System and in compliance with the relevant international standards" (§1.3). The Stockholm programme does not explore this path, but does not close the door completely.[46]
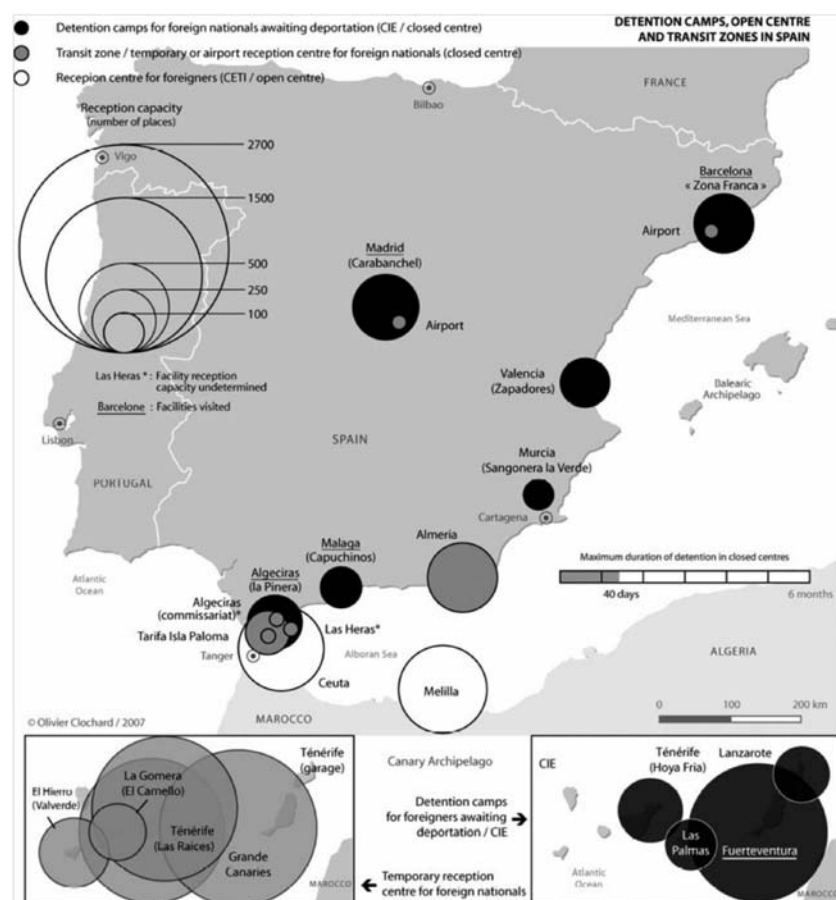
*Detention Centres*

Nevertheless, what is nowadays a fact in the EU is that detention centres for illegal immigrants and asylum seekers who were unable to present their applications to the authorities of the destination country have been established. The idea of the establishment of detention camps outside the frontiers of Europe has put into practice. It is difficult to ascertain how many detention centres exist, because they are formally under the jurisdiction of the host country, but their relationship with European Union States is undeniable. They can even be said to have an indirect responsibility in terms of the way people treat them. The *Immigrant Detention Centre* located in Nuadhibou (Mauritania) is one of these centres. The objective behind constructing this centre was to accommodate illegal immigrants intercepted before their arrival to Spain or who had just arrived in the Canary Islands.

[46.] The European Council invites the Commission "to finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications" but nothing is said concerning the location, in the EU or abroad, where such procedures should take place (§ 6.2.1).

There are 21 detention centres for foreigners in Spain[47]. Two of them, located in the Spain's African enclaves of Ceuta and Melilla, are open centres (CETI, *Centro de Estancia Temporal de Inmigrantes*). In general, the others are closed centres (CIE, *Centro de Internamiento de Extranjeros*) except the centres for asylum seekers and other vulnerable people (pregnant women, unaccompanied minors, etc.). Some are located in transit zones (Global Protection Project 2009; European Parliament, 2007; 144).

As shown on the map, in recent years the most overcrowded centres are situated in the Canary Islands. In response to repressive measures at the borders, immigrants try to reach Europe from more places further to the southplaces. For this reason, the Spanish government tries to turn them back when they are nearer these places. By 2005-2006, reaching Europe through Ceuta and Melilla had become increasingly difficult, especially after the tightening of controls and the improvement of intruder detection systems installed on the fences around those cities. The Moroccan authorities increased their repressive practices, including expulsions in the desert (CEAR, 2006; 71-81).

From 2006 onwards, the departure points for sub-Saharan migrants gradually moved southwards. People tried increasingly dangerous methods and travelled in larger boats, known as "cayucos", instead of in "pateras" (small dinghies used to cross the Strait of Gibraltar). Nouadhibou and Nouakchott, in Mauritania, and even Senegal, Gambia and Guinea became departure points. In 2006-2007, many immigrants tried to arrive, mainly in the Canary Islands (other destinations in the continent were also attempted).

Source of the graphic: European Parliament, 2007.

During these years, the European Commission created different means of financial aid aimed at supporting Mauritania in the improvement of its border controls and the observance of its commitment to readmit illegal migrants and return them to their countries of origin. Spain concluded a Protocol to establish the return to Mauritania of illegal immigrants arriving in Europe after departing from a Mauritanian harbour. In this context, the Nouadhibou Immigrant Detention Centre was built by members of the Spanish army in March 2006, with the financial support of the Spanish government (*Agencia Española de Cooperación Internacional para el Desarrollo*) (CEAR, 2008a; CEAR, 2009a; 61-72). It is now accountable to the Mauritian Ministry of the Interior and as pointed out in a CEAR Report, they lack legal foundation and "the majority of the facilities, especially the cells, do not reach minimum conditions of habitability, healthiness, safety and privacy" (CEAR, 2008a; 28). Moreover, the Centre has no protocol for informing detainees about their eligibility for applying for international protection (CEAR, 2009a; 69-70). The CEAR Report concludes with the recommendation that the centre should be closed and European and Spanish cooperation linked to detention measures suspended (*Idem*, 70).

## *Protected Entry Procedures and resettlement*

One central issue in the attempts to externalise the process of asylum applications, both in the British proposal for common European processing centres abroad and the immediate sending of illegal immigrants before they can apply for asylum to the authorities of the destination country is the weak commitment of EU Member States to the resettlement of protected people.

There are two ways to obtain an ordered and managed arrival of asylum seekers and refugees to the EU: *protected entry procedures* (PEP) and resettlement of people coming from a *first country of asylum*. Neither of them is new, but they both have been barely examined at EU level, because countries are reluctant to make commitments to receive immigrants, even in the case of protected people. Some countries, such as Spain, have used PEP because their legislation on asylum makes embassies competent places to apply for asylum.[48] Others use or have used PEP on a permanent or temporary basis.[49]

The Commission envisaged two ways of implementing PEP: *a)* By the establishment of a *EU Regional Task Force* responsible for disseminating information; if required, assisting local authorities and the UNHCR in the refugee determination process; and, finally, managing entry and resettlement into a Member State; or *b)* By the introduction of a rudimentary form of Protected Entry Procedures in all Member States such as a harmonised humanitarian visa of entry (COM (2003) 315, section 6.1.2.3). At present, the application of PEP remains a method that EU Member States can apply unilaterally through their diplomatic and consular offices. In the absence of a basic agreement on this issue, the major disagreement between States forced the European Commission to rule out establishing PEP at EU level and to retain the possibility of using it as an *emergency strand* (COM (2004) 410, section 35).

*Resettlement* measures were looked upon favourably by the Commission as forming part of Regional Protection Programs, but they have yet to be implemented at EU level. The European Commission considers that files would be selected in cooperation with the UNHCR and that the transfer of people would be done with the aid of the International Organisation

48. The number of applications for asylum presented in the Spanish embassies has been usually low. According to the CEAR annual reports, the following number of applications were presented in embassies or consulates: 349 (7.73%) in 2008, (CEAR 2009a, 342); 1,725 (22.15%) in 2007 (CEAR 2008b, 216); 320 (6.04%) in 2006 (CEAR 2007, 236); and 395 (7.52%) in 2005 (CEAR 2006, 107). The new Spanish Asylum law stipulates that it is possible to apply for asylum in the embassies, but nevertheless establishes that only nationals of countries other than the one where the embassy is located may apply for asylum. In these cases, a procedure to be adopted will determine in which cases the applicants would be moved to Spain (Article 38 *Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*, *BOE* 31 October 2009, no. 263, 90860-90884).

49. In 2002 the *Danish Centre for Human Rights* working for the European Commission concluded that Austria, France, the Netherlands, the United Kingdom and Denmark (until June 2002) used PEP regularly and that Belgium, Germany, Ireland, Italy, Luxemburg and Portugal had used PEP occasionally (NOLL 2002, 4).

for Migration (IOM) (COM (2004) 410, section 22-34). Some EU States, such as Sweden, Finland, Denmark, the United Kingdom, Ireland, the Netherlands, Portugal, France, Romania and the Czech Republic take part annually in the resettlement programmes implemented by the UNHCR. Others, such as Spain, have occasionally participated (UNHCR, 2008). In the case of Spain, the new Law on Asylum introduces *ex novo* a legal framework for the adoption of resettlement programmes in collaboration with the UNHCR.

As regards the future, taking into account the European Pact on Immigration and Asylum and the prospects for the Stockholm programme, the European Commission advocates extending Regional Protection Programmes in partnership with the UNHCR, enhancing political dialogue with origin and transit countries, such as Libya and Turkey, and continues to propose the implementation of Procedures for Protected Entry and the facilitation of humanitarian visas "on the aid of diplomatic representations or any other structure set up within the framework of a global mobility management strategy" (COM (2009) 262, section 5.2.3).

As for resettlement, on 2 September 2009 the European Commission proposed a "Joint EU Resettlement Programme" aimed at providing an effective instrument for closer political and practical cooperation between the Member States "so as to increase the effectiveness and cost-efficiency of their resettlement activities, as well as the humanitarian and strategic impact of resettlement" (European Commission, IP/09/1267; *id.* MEMO/09/370). This Programme is based on voluntary decisions by the EU States and intends to contribute to the resettlement of particularly vulnerable refugees who are currently in Jordan, Syria, Chad and Kenya. Although the Programme aims to facilitate the resettlement of people who deserve protection from third countries, it seems that EU Member States more easily accept the resettlement of protected people already present in EU territory when a country faces disproportionate pressure from highly vulnerable people, as is the case in Malta, where a pilot project for this purpose has been in place since June 2009.

It could be concluded that the EU has explored the strategy of improving protection in third countries through *regional protection programmes* – although the results do not show less migratory pressure – in more depth than ways to achieve ordered and managed arrivals by means of PEP or common *resettlement* programs. This seems to show that from the EU States perspective, one of the main objectives of the external dimension of asylum policy is to prevent the need to resettle people. EU States should demonstrate through action that they are willing to carry out their function of asylum by accepting the resettlement of a large number of protected people. As the ex EU Commissioner Jacques Barrot pointed out in December 2008, the EU Asylum policy is a *duty* for Europe, and the reception of persecuted people is linked to complying with the Human Rights that was the basis for the construction of Europe[50].

50. "L'Asile, un devoir pour l'Europe", Speech, 30 October 2008, *Assemblée Générale Biannuelle* ECRE (European Council on Refugees and Exiles) http://ec.europa.eu/commission_barroso/barrot/archive/081030-%20L_Asile_un_devoir_pour_%20l_Europe.pdf [See: 24 March 2010]

## Conclusions

Measures and instruments of various types implemented by the EU Member States contribute to the externalisation of their function of asylum to third countries. The use of the *safe third country* concept is the closest, and the one which produces externalisation in the most direct way. However, the use of the *safe third country* concept by EU States,

even after an attempt to harmonise this concept, leads to different treatments of asylum seekers coming from the same region and arriving in different European Union countries. Their opportunities to challenge the decision to return them to a *safe third country* in each particular case are also unequal, in terms of the availability of effective remedies, for instance. There have been demands for the removal of all the exceptional categories from the Procedures Directive, such as *safe third country*, *European safe third country* and *safe country of origin* which "have the effect of diminishing or excluding the general procedure for specific classes of asylum seekers. All asylum seekers should be entitled to a fair and effective procedure" (Guild et al., 2009, section 3.2.2).

The use of the *safe third country* concept and readmission agreements contribute to the definition of a new functional external border of the European Union beyond the political frontiers of the EU countries, which is used to keep asylum seekers and refugees outside the EU. There is a bordering process reshaping the frontiers of Europe for forced migrants who try to gain access to the protection of one EU member state. For refugees and asylum seekers who have travelled through *safe third countries* of transit, the borders of the EU should encompass non-European countries that have particular agreements with the EU.

After the approval of The Hague program, the purpose of externalisation focused on the implementation of the external dimension of asylum policy, which was based on the implementation of RPP for the first time. Nowadays, as a result of the Stockholm Programme, the European Immigration and Asylum Policy seems to be more integrated into the External Relations of the EU through the Neighbourhood Policy and the Euro-Mediterranean Partnership. The externalisation of the asylum function has become a little more tenuous and legitimised in formal terms. The development of external aspects of the asylum policy is aimed at reducing and if possible eliminating spontaneous arrivals of asylum seekers through third countries.

After examining the strategy of externalisation and enhancement of capacities for offering protection and durable solutions in the region of origin to asylum seekers, some conclusions concerning the EU approach to asylum should be drawn. The EU and its member states approach the question of asylum based on the following assumptions:

1. Secondary flows of refugees and people in need of protection must be avoided;
2. Since Europe does not produce refugees or people in need of protection, the refugee problem is not a European one. If it exists, it is due to the lack of capacity for protection in the regions of origin and transit countries which receive the forced migrants first.
3. The *non-refoulement* principle does not always amount to a right of asylum in Europe. It only obliges European States not to expel or return anyone to a place where he/she fears persecution. *Refoulement* is therefore allowed to all safe countries through which asylum seekers have travelled before arriving on EU territory.
4. The return to *safe third countries* would be best justified if the EU implemented resettlement programs, but there is no link of conditionality between the two issues.

To be equitable, the externalisation of the function of asylum of EU Member States requires first, that the use of the *safe third country* notion strictly respects some substantive and procedural guarantees

(*effective protection* in the third country, and the existence of a sufficient link between the asylum seeker and the third country); and, second, that the development of the External Dimension of the European asylum policy ensures a fair balance between the interests of the States and their duty to provide protection to the people who deserve it, which is the core of the asylum function of States.

Political and normative instruments enabling the externalisation of the asylum function of the EU Member States construct a new functional border encompassing safe third countries which have readmission agreements and particular international relations with the EU. One of the functions of this new border is to keep refugees and asylum seekers who cannot return to their country of origin, ensuring that they would benefit from protection, outside the EU. Regional Protection Programmes and Action Plans support and legitimize the construction of this new external border of the European Union. For asylum seekers trying to reach Europe in order to seek protection not arriving directly from their country of origin, the external border of the European Union's area of shelter should be placed beyond the frontier of the EU Member States. This new functional external border of the EU for asylum seekers devalues the quality of the European refugee regime and has led to the application of a lower standard of protection of Human Rights, particularly when this border embraces non-European countries which are not signatories to the European Convention of Human Rights and do not have a similar system of protection.

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A selection of his recent books includes:

*English*
- 2009 *The Muhammad Cartoons controversy in comparative perspective,* L. E. Lindkilde, P. Mouritsen and R. Zapata-Barrero (Special issue in *Ethnicities*, Sage Publications, Vol. 9 no. 3)
- 2009 (ed.) *Immigration and self-government of minority nations* (Peter Lang editor, Col. Diversitas)
- 2009 *Citizenship policies in the age of diversity* (Barcelona: Cidob Foundation)
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