Liberty versus Security? EU Asylum Policy and the European Commission

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Abstract

The Common European Asylum System (CEAS) experienced significant developments during the Tampere programme (1999 – 2004). This article analyses how security is constituted or viewed by the European Union in the area of asylum policy; more importantly how the European Commission, in the face of the emerging discourse on the 'war on terror' decided to push for a more inclusive agenda. Thus, the European Commission can (though not always does) play a significant role in this process - the role of a supranational policy entrepreneur that enables the normative construction of a policy. The article analyses the high-profile case of the first phase of the CEAS, particularly the four main directives, its legal and political construction, and suggests the significance of the Commission in the political and normative process. Despite the challenges of the 'war on terror', the Commission managed to keep the CEAS within the limits of the Geneva Convention.

Keywords

Common European Asylum System; European Commission; European Integration; Intergovernmentalism; Liberty; Security; Supranational Policy Entrepreneurship.

IN RECENT YEARS, MIGRATION AND ASYLUM ISSUES HAVE BECOME INCREASINGLY contentious in Western Europe – at the core of electoral campaigns in several European Union (EU) member states: France, the Netherlands, Denmark and the UK. This article analyses how security is constituted or viewed by the EU in the area of asylum policy; more importantly how the European Commission, in the face of the emerging discourse on the 'war on terror', decided to push for a more inclusive agenda.

Since the events of the 11 September 2001 (9/11), it has been argued by some scholars that security has become the dominant force in the first phase of the Common European Asylum System (CEAS). As a result, there has been an active debate on the 'securitization' of the EU asylum and migration policy (Bigo 1996, 1998a, 1998b, 19998c, 1998d, 2001, 2002; Guild 1999, 2002, 2003a, 2003b, 2003c, 2004, 2006; Guiraudon 2000, 2003; Huysmans 2000, 2004). In this context, 'securitization' refers to the theoretical suggestion that asylum and migration are presented as security threats, based on the framework by the so-called 'Copenhagen School' (Buzan 1991; Buzan *et al*. 1998; Wæver 1993, 1995). Levy (2005: 35) suggests that 9/11 represents a turning point because 'the trend towards liberalisation seemed to be stopped dead in its tracks by the events of 9/11'. Boswell (2007) concurs that while EU migration policies were not securitised since 9/11, this does not hold for asylum policies. Some non-governmental organisations (Human Rights Watch, Amnesty International, and Statewatch) have also expressed their fear that security concerns could affect the European Union's effort to create a Common European Asylum System.

However, this fear should be counter-intuitive. The European Union is well known for its legalistic approach to policy problems, which aims to appear to always follow the letter of the law; in fact, the Commission is often derided for being technocratic. It seems thus counter-intuitive that the EU would 'securitize' the EU Asylum Policy. According to the Copenhagen School (who argue that an issue is transformed into a security issue, in other words – securitized, after a securitizing actor presents it as an existential threat and this 'securitizing move' is accepted by the audience), this would mean that EU institutions deliberately construct refugees as a security threat in order to be able to use 'emergency measures' (Buzan 1991; Buzan *et al.* 1998; Wæver 1993, 1995). Buzan, Wæver and de Wilde (1998: 25) note that 'the existential threat has to be argued and just gain enough resonance for a platform to be made from which it is possible to legitimize emergency measures or other steps that would not have been possible (…)'. This means that the same EU institutions that want to give the impression of following the letter of the law want to construct a situation in which the letter of the law can be disregarded ('emergency measures'). The way in which the EU institutions would aim to achieve this would be through a discursive construction of threats, thereby lifting the issues 'outside the normal realms of politics' (Buzan 1991; Buzan *et al.* 1998; Wæver 1993, 1995). On the face of it, this seems plausible for right-wing politicians at the national level, but rather unlikely for EU bureaucrats who loathe nothing more than the 'political limelight'.

Moreover, this goes against several academic arguments that were often made about asylum cooperation in Europe. Amongst academic scholars in the field of immigration and asylum, the argument has been advanced that EU governments decided to 'venue shop'. This meant that they decided to circumvent domestic pressures and obstacles, and therefore 'escaped' to legislate at the EU level where they were protected from these issues (Boswell 2003a, 2003b, 2007, 2008; Ellermann 2008; Freeman 1998; Joppke 1998, 2001; Geddes 2000, 2001; Guiraudon 2000, 2001, 2003; Lavenex 1998, 1999, 2001a, 2001b, 2004, 2006; Occhipinti 2003; Stetter 2000, 2007; Thielemann 2001a, 2001b, 2004, 2005, 2006; Thielemann and Dewan 2006). EU member states, in this argument, have thus decided to enhance their co-operation in the field of asylum and migration in a process driven by national bureaucracies. These state-centred accounts (see especially, Joppke 1998; Freeman 1998) stress the resilience of nation states, their ability to control 'unwanted immigration' and the use of the EU by its member states as a device for attaining immigration and asylum (see Thielemann 2001a, 2001b) policy objectives that are unlikely to be achieved at the domestic level alone. If indeed, national policy-makers are perfectly able to circumvent national pressures in order to restrict immigration and asylum at the EU level, why should they then 'securitize' the issues in order to achieve what they are already achieving? Why should national policy-makers go to a forum where technocracy is valued in order to securitize, which would be far easier in a national context? What are the constraints to securitize at the EU level, notably the Commission and its strong links to non-governmental organisation? Thus, this article will concentrate on the obstacles of securitization, i.e. the EU institutions, notably the European Commission, and the NGOs.

This article therefore argues the following. Firstly, the Common European Asylum System, other than in its intrinsic value, is a very significant case for demonstrating that even with the 'war on terror' on the political agenda (see also Lodge 2004, 2007), the asylum policy in its first phase remained within the constraints of the Geneva Convention, and actually strengthened it. The balance between security and liberty, as a result, did not go as far towards security as some scholars may have feared, despite the importance of warning against such a possibility. Secondly, this article engages with the arguments made by intergovernmentalist EU scholars that the supranational institutions are "late, redundant, futile and even counterproductive" (Moravcsik 1999a: 270). This article argues that the Commission played a very active and significant role – the role of a supranational policy

entrepreneur – and in doing so managed to anchor the EU asylum policy in the prevailing norms of the international community, the Geneva Convention.

The article will proceed in three stages. The first section will critically examine the main advances of the first phase of the CEAS during the Tampere programme. The second section will provide a brief outline of the debate on the political role of the European Commission as a supranational policy entrepreneur, and the precise framework used for this analysis. The third section will demonstrate the empirical findings within the case study of the four asylum directives. Finally, the article will suggest that the European Commission has been significant in the process of European integration in asylum policy by playing the normative role of supranational policy entrepreneurship, and managing to anchor the first phase of the EU Asylum Policy within the Geneva Convention.

The Tampere programme in the EU Asylum Policy

The EU asylum policy is embedded in a long-standing international regime of refugee protection (Loescher 1989, 1992, 1993, 1995, 2004; Marrus 1985, 1988; Noll 2000; Peers 2002, 2004, 2006; Peers and Rogers 2006), which aims to keep the balance between security and liberty firmly towards liberty and the rights of victims of persecution. The international regime was established on 14 December 1949, when a Resolution of the United Nations General Assembly created the office of the United Nations High Commissioner for Refugees (UNHCR). The first instrument was created in 1951, when the Geneva Convention Relating to the Status of Refugees was adopted for Western Europe. Ever since, it has been the cornerstone of contemporary international refugee law, only supplemented by the 1967 New York Protocol, which extended the Geneva provisions to the rest of the world.

Signatories to the convention, which include all EU member states, are required (according to Art. 1A (1) of the Geneva Convention) to offer refuge to a person who:

- has 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 (due to such fear) is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence, is unable or unwilling to return to it due to such fear

Despite being the cornerstone of international refugee protection, not all member states interpret and apply the Geneva Convention in the same way. According to one NGO (interview NGO8), "some EU states' interpretation of the law has no basis in the wording of the 1951 Geneva Convention, is not in the spirit of that convention and is in contradiction to United Nations High Commissioner for Refugees' official advice". Differing definitions of 'refugee' create different levels of protection and an uneven sharing of the responsibility. Most member states have a range of statuses to confer on refugees, with varying socio-economic and judicial rights. This gap in interpretation provides clear opportunities for a progressive EU asylum policy

What are the advances of the first phase of the EU asylum policy during Tampere?

This section will analyse the legal advances of the first phase of the CEAS in more detail below. However, it is first necessary to underline the importance of the CEAS. According to Hailbronner (2004), the CEAS is important, even in the short term. The prospect of a CEAS has already produced harmonising effects in national legislations. With agreed common minimum standards, this will prevent a 'race to the bottom' between national legislators.

They are not competing with each other anymore for more restrictiveness, and thus do not need to lower their standards below their neighbours in order to reduce the numbers.

Moreover, Ackers (2005: 33) makes a strong case for the importance of the CEAS in the longer term. The adoption of the four directives is of historical importance for the EU as it opens up the road to a new period in decision-making on the CEAS. The area becomes communitarised, which signifies transfer of national sovereignty to the EU level. Consequently, asylum policy is now in the EU order - very different from international law (Shaw 2000). Therefore, the Geneva Convention is now cemented in EU law, and the legal value is much stronger than it was before the Tampere programme. This is due to the distinction between international law and EU law - and the principle of national sovereignty compared to an EU pooling of sovereignty (Kaczorowska 2003; Shaw 2000).

Thus, the legal doctrines of the direct effect of EU law and its supremacy will apply to the area for the first time. This creates enforceable legal obligations not only in vertical relations between public authority and individuals, but also in horizontal relations between individuals *inter se* (Weiler 1991, 1999). Community principles with direct effect can be invoked before domestic courts, which must provide adequate legal remedies. This is crucial as it alters the public international law assumption that legal obligations are addressed to states only, and thus do not create direct effects for nationals of that state. This has changed with the CEAS. These laws are now directly enforceable in domestic courts with little discretion. Individual asylum seekers can take states and individuals to the domestic courts. Thus, in addition to the EU supremacy of law, this provides a certain force to asylum rights which was previously missing under international law.

One example is the frequent discussion on whether the UK may leave the Geneva Convention. In the last UK election campaign, the opposition leader Michael Howard (BBC 22 April 2005) called for the UK's withdrawal from the Geneva Convention on numerous occasions. This only reflected statements by David Blunkett, the then Home Secretary, in 2003 (BBC News 2003). While the withdrawal from the Geneva Convention would be possible under international law prior to the CEAS, this is not possible anymore under the current rules. As the UK opted into all of the EU asylum rules, these are now fully binding and enforceable in UK courts. This hypothetical scenario makes it much clearer how the legal value of the Geneva Convention refugee protection has increased with the CEAS.

Moreover, the communitarisation of asylum matters also implies that decision-making procedures have now changed. Future legislation in the area will include the co-decision procedure between the Council and the European Parliament, which was previously only consulted on the matter. In the Council, the voting procedure is now qualified majority voting (Peers 8 November 2004). This then removes any blocking possibilities by any of the 27 member states. Therefore, on the institutional level, the CEAS represents a clear step forward and represents the hope that, with more and more involvement of other 'refugee-friendly' EU institutions, such as the European Parliament, the future of the CEAS is progressive.

However, as the analysis below will demonstrate, the current legislation already provides for a certain degree of progressive elements. The emphasis in the analysis below is only on the adopted legislative instruments - the four directives. The directives discussed below are: (1) the 'reception conditions directive', (2) the 'asylum qualification directive', and (3) the 'asylum procedures directive'. The 'temporary protection directive' is not discussed below due to space restrictions, even though its value and interconnectedness to the first phase is obvious. The temporary protection directive (Council Directive 2001/55/EC), was the first legal instrument in asylum law in the legislative programme since Tampere. As it is intended as an effective instrument of temporary protection in the context of mass

refugee movements for people not falling under the remit of the Geneva Convention, it is not discussed in this article, despite its obvious links.

(a) The 'Reception Conditions Directive'

The reception conditions directive (Council Directive 2003/9/EC) of 27 January 2003 lays down minimum standards for the reception of asylum seekers across member states. Monar (2004: 118) describes this directive as an important new legal element of the common asylum system. It is the first element of three closely linked legislative initiatives: the asylum qualification directive, the reception conditions directive, and the asylum procedures directive.

Hailbronner (2004: 78) explains the reasons why the reception conditions directive is such an important one. Firstly, the substantial differences in reception conditions in the various EU member states can be a factor for migratory movement of refugees within the EU. Logically, based on the Dublin convention and now the Dublin regulation, asylum seekers can only apply for asylum once in the EU, and thus the conditions in which they are being received matter significantly in their choice. In 2001, the Commission initiated this legislation, which was subsequently passed by the Council in January 2003. It defines certain key terms of the Geneva Convention, such as applicants for asylum, family members, unaccompanied minors, reception conditions, and detention.

The directive only applies to applicants for asylum, which has been criticised (Guild 2004: 213), especially as it does not apply to the temporary protection directive. The question of which basic rights and benefits asylum seekers deserve should be based on their needs rather than on the grounds on which the claims are based, according to this argument. This is a valid argument, but as the competent authorities in member states always have to presume an application for asylum, this should address the issue.

The directive generally accords freedom of movement to asylum seekers within the territory of the host state or within an area assigned to them by that state. This addresses more restrictive regulations of some EU member states (Hailbronner 2004: 79). Detention will only be allowed in order to check the identity of the applicant for asylum. Refugee organisations have rightly criticised the practice of restricting the freedom of movement as being contrary to human rights provisions. Yet, as Hailbronner (2004: 80) demonstrates, some member states' practices (for instance Germany) tended to be even more restrictive.

Member States must guarantee several reception conditions:

- Material reception conditions, such as accommodation, food and clothing.
- Family unity.
- Medical and psychological care.
- Access to the education system for minor children and language courses.
- Lodgings in a house, accommodation centre or hotel.
- In all cases, applicants must have the possibility of communicating with legal advisers, NGOs and the UNHCR.
- Access to employment.

The most heavily disputed provision concerns the access to employment - criticised for the delay in access to it (Guild 2004). At the same time, member states have been generally reluctant to grant access to the labour market in the field of migration. In this directive, they are at least obliged to open access to the labour market and vocational training to applicants for asylum 12 months after they have lodged their application. Thus, despite the criticisms related to its complicated procedure (Guild 2004: 215), and the UNHCR

argument that a six months delay would have been preferable, it is already significant that throughout 27 EU member states this was possible at all. In addition, as with all reception conditions, member states will be free to apply more favourable conditions of reception.

In conclusion, this directive rectified one particular problem within the member states - the wide variance of reception conditions. It is clear from the evidence presented that this is an advance in those conditions across the EU 27. For most member states, they will need to be higher than before the directive. Equally, there is no obligation to lower any favourable conditions. Consequently, the directive is beneficial for the European Union.

(b) The 'Asylum Qualification Directive'

The asylum qualification directive (Council Directive 2004/83/EC) addresses three important elements of asylum: (1) the recognition of refugees, (2) the content of refugee status, and (3) the approximation of rules. In addition, the directive highlights the grounds for qualification for subsidiary protection.

In order to make the distinction between subsidiary protection and refugee status clear, the directive provides definitions of both concepts. A refugee is defined exactly as in article 1A of the Geneva Convention. On the other hand, a person eligible for subsidiary protection is a:

> third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.

As Hailbronner (2004: 58) suggests, both protection as a refugee within the terms of the Geneva Convention, and subsidiary protection – for those who fall outside the convention - are included in this legislation.

The directive addresses many of the issues in substantive asylum law which have had forced divergences in national practices before, and it increases protection. Firstly, the established grounds for persecution are the same as in the Geneva Convention, thereby solidifying the group of people qualifying for refugee status. In addition to the generally accepted forms of persecution, the directive sets out three principles, which have not been applied by member states prior to it (Hailbronner 2004: 60). For the first time, *'persecution can stem from non-state actors'* where the state is unable or unwilling to provide protection. Given the increase in people fleeing on such grounds, this is a significant widening of the concept. Secondly, the directive also includes child specific and gender specific forms of persecution, not in existence prior to the legislation (Monar 2005: 132). Finally, persecution may take place even though all persons in a particular country face generalised oppression. In essence, the effect of all these legal changes means that the directive goes beyond existing refugee rights enshrined in the Geneva Convention.

Balzacq and Carrera (2005: 48-49), however, are concerned as to why refugees and persons under subsidiary protection are not treated equally. They demonstrate that some rights accorded to persons granted subsidiary protection are below the rights of refugee protection. Consequently, they wonder whether this is a *'double standard consistent with the general philosophy of equality of treatment for people in need of and who qualify for international protection'*. Yet, persons who are granted subsidiary protection do not qualify for international protection under the Geneva Convention (Hailbronner 2004: 62). The

provisions in this directive represent the first concrete European initiative to protect those who fall outside the refugee definition.

In an ideal world, one could conceive of rewriting the Geneva Convention to broaden the concept of asylum. However, this has not happened to date, and the alternative to this directive is only the member states' discretion as to how much they want to help. Under this directive, there is no discretion anymore, and subsidiary protection rights are codified. Consequently, this is a substantial success in expanding rights for people in need of protection.

(c) The 'Asylum Procedures Directive'

On 9 November 2004, the Council agreed politically on the directive on minimum standards for procedures - the Asylum Procedures Directive (Balzacq and Carrera 2005: 50). The Commission had first presented its proposal for the directive in September 2000, and submitted an amended version by June 2002. After intense negotiations, a 'general approach' was agreed in April 2004, and politically confirmed in November 2004. The directive had not formally been adopted by the end of 2004 due to the lack of agreement on a list of 'safe country of origin'. Yet, on 1 December 2005 it was finally formally adopted, leaving the list to the side.

The harmonisation of asylum procedures is of vital importance for a common asylum system together with the reception conditions directive. Firstly, it contributes to the prevention of secondary movements of asylum seekers. Secondly, it is vital for the asylum seekers themselves as they are no longer able to freely choose their country of application under the Dublin Regulation. As they cannot chose their country anymore, it is vital to harmonise procedures in order maintain fairness towards people in need of protection. Thirdly, this legislation will enable follow-up legislations in the area in the longer term (Hailbronner 2004: 70).

Monar (2005: 133) describes how both the Treaty of Amsterdam and the Tampere programme demanded the adoption of policy instruments within the transitional period of five years ending on 30 April 2004. This put considerable pressure on the Council for the adoption of the directives in time, which was managed in a meeting on 29-30 April. The Asylum Procedures Directive defines minimum standards for procedures, which include:

- access to the asylum process
- the right to interview
- access to interpretation and legal assistance
- detention circumstances
- the appeals procedure

In addition, it defines controversial concepts, such as:

- 'First country of asylum': this allows applications to be rejected where applicants have been recognised as refugees in another country with sufficient protection in that country.
- 'Safe country of origin'[1]: this allows considering a group of applications of nationals of one country to be unfounded, thereby entering into an accelerated procedure. The failure to agree on a specific list of countries in this category has delayed its formal adoption.

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[1] It is worth noting that the European Parliament has successfully challenged aspects of the safe country of origin provisions before the European Court of Justice (ECJ) in case C133/06

- 'Safe third country': this allows the transfer of responsibility for the processing of an asylum application to countries of transit to the EU.

This directive has been more severely criticised by NGOs (ECRE *et al.* 2004) and academics than the other three directives. The main arguments relate to a supposed incompatibility with international obligations (ECRE *et al.* 2004: 51). Costello (2005) criticises the three controversial concepts: (1) first country of asylum, (2) safe country of origin, and (3) safe third country. In her view, these provisions threaten to undermine many of the other laudable features during the Tampere process, in particular the Asylum Qualification Directive (Costello 2005: 36). According to Costello, these three provisions will undermine access to and the integrity of asylum procedures in the European Union.

Doede Ackers (2005), who negotiated the Asylum Procedures Directive on behalf of the Commission, disagrees. He explains the rationale for adopting it and the different stages in the negotiations. Firstly, Ackers (2005: 32) disputes that the politically agreed general approach breaches international human rights obligations. It is argued that for each of the safe third country provisions, certain safeguards should be laid down to ensure that if member states properly implement these rules, no breaches of international law occur.

Secondly, as it stands the approach adds value to the soft-law standards already agreed, including the procedures according to the UNHCR Handbook (Ackers 2005). On the question of appeals procedures, the general approach even introduces the obligation to ensure an effective remedy before a court or tribunal, which goes beyond the standards in the Handbook. It is vital to note at this point that the Handbook is only soft-law in international law, and thus left to the individual interpretation of domestic courts, which can vary significantly across the EU.

Finally, Ackers (2005) argues that several member states will have to raise their standards to comply with the provisions in the general approach. Thus, a framework which requires higher standards than the previous practice of member states can hardly be described as a breach of international law – certainly not of customary international law. Fullerton (2005) fully agrees with this view. In her article, she analyses the asylum situation in Spain and Portugal. Although the Iberian Peninsula is closer to regions of conflict and migratory routes than most European Union states, the numbers of asylum seekers registered in Spain and Portugal are far lower than in other member states of comparable size and economic development (Fullerton 2005: 659). While multiple factors deter refugees from seeking asylum in Spain and Portugal, their inadmissibility procedures are the most important. Both states employ an inadmissibility procedure which results in the rejection of a substantial majority of applicants for asylum prior to any hearing on the merits.

The Asylum Procedures Directive limits the grounds for rejecting a claim as inadmissible, whereas the Spanish and Portuguese procedures dismiss asylum applications on far broader grounds. Consequently, they will contravene the Procedures Directive. As a consequence, an asylum procedures directive that increases the number of asylum seekers who will be able to apply for refugee status in a number of member states - such as Spain and Portugal - is a clear legal advance for refugee rights.

In conclusion, this section has demonstrated that the CEAS has brought very clear legal advances in terms of refugee protection. The CEAS has produced harmonising effects in national legislations, and, with agreed common minimum standards, it is likely that this will prevent a 'race to the bottom' between national legislators. Moreover, the CEAS is also of importance for the EU as it opens up the road to the communitarisation of asylum policy, which signifies transfer of national sovereignty to the EU level. Thus, the legal doctrines of the direct effect of EU law and its supremacy will apply to the area for the first

time. Therefore, individual asylum seekers can take states and individuals to the domestic courts. In the next two sections, it will be argued that the European Commission played an important role in the legal advance. The next section will provide the theoretical framework for this analysis, while the subsequent section will provide the empirical evidence for this theoretical suggestion.

The European Commission as a Supranational Policy Entrepreneur (SPE)? The case of the CEAS

It is important to evaluate the role of agency in this significant process of European integration in an area so close to the very essence of the nation state. The debate over agency in European integration (and thereby regarding the EAW) falls within the dispute between intergovernmentalists (Hoffmann 1966; Moravcsik 1993), supranationalists (Haas 1958; Stone Sweet and Sandholtz 1997, 1998; Stone Sweet *et al.* 2001), and institutionalists 'somewhere in between' (Beach 2004a, 2004b, 2005a, 2005b; Kaunert 2005, 2007; Pollack 1997, 2003) concerning the role of supranational institutions in the process of European integration.

This article suggests a reconceptualisation of the framework of supranational policy entrepreneurs (SPE), which is often referred to by the academic literature that discusses the role of agency in European integration (Beach 2005a; Moravcsik 1999a; Pollack 1997, 2003; Stone Sweet and Sandholtz 1997, 1998; Stone Sweet *et al.* 2001) when analysing the political role of the European Commission. The concept of a political entrepreneur is grounded in the works of Kingdon within the context of US politics. Kingdon (1984: 173) suggests a policy-making model starting with the identification of a problem (first stream), which is then followed by a search for alternative solutions (second stream) and a decision among these alternatives (third stream). On some occasions, a 'policy window' opens for the adoption of certain policies. Policy entrepreneurs, "advocates […] willing to invest their resources – time, reputation, money' (Kingdon 1984: 188), stand at this window in order to propose, lobby for and sell a policy proposal. However, this conceptualisation needs to be extended by using constructivist insights of norm construction and entrepreneurship (Kaunert 2007).

Why is this important? At the political bargaining stage (the politics stream), where decisions amongst different alternatives are taken, the EU is dominated by member states preferences and interests. In principle, this would indicate the benefits of a liberal intergovernmental analysis for the policy area. In this view, European integration can best be explained as a series of rational choices made by national leaders and dominated by national interests (Moravcsik 1991, 1993, 1998, 1999a, 1999b). But where do member states' national interests and preferences come from? Moravcsik (1998) assumes national interests to be exogenous of the EU process. The interests of the member states are stable before they come to the bargaining table. However, is it reasonable to assert that preferences are exogenous? The EU has created a system whereby member states continuously interact at different levels. The claim that this would not change preferences over time appears doubtful. Even within the context of the international system with less social interaction amongst states, Katzenstein (1996) has demonstrated convincingly how norms and values shape national interests. Constructivist literature clearly showed how these norms change over time (Finnemore 1996a, 1996b; Finnemore and Sikkink 1998).

Yet, if national interests and preferences are shaped by different norms and values, as argued in this article, this implies that a fourth stream – the norm stream - is underlying the three other streams. Norms consequently influence the definition of political problems, the search for policy alternatives, and finally the national preferences in the politics stream where decisions are taken.

How can norms be constructed and how can they be observed? Firstly, actors provide reasons for action. The SPE constantly pushes for his reasons for action to become accepted as a norm, albeit in competition with other actors. This is the first stage of norm creation in the norm life cycle as described by Finnemore and Sikkink (1998), and is followed by the norm socialisation stage. Eventually, a norm becomes the dominant norm. Consequently, SPEs are important in the social construction and reconstruction of norms that steer the political movement of the other streams.

This article will assess the extent to which the European Commission has been able to play the role of an SPE with regard to the CEAS. Asylum policy is a very difficult field with complex decision-making rules (Noll, 2000). Article 63 TEC sets out a framework agenda for the transitional period of five years; it requires the Council to adopt a variety of measures within 5 years. However, it is striking that the majority of measures contain the mandate of minimum standards. Article 63 TEC asks the Council to adopt the following four measures 'within a period of five years after the entry into force of the Treaty of Amsterdam':

1. 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States;
2. minimum standards on the reception of asylum seekers in Member States;
3. minimum standards with respect to the qualification of nationals of third countries as refugees;
4. minimum standards on procedures in Member States for granting or withdrawing refugee status;'

However, according to article 67 TEC, "during a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament". It is only after this period of five years that the Commission gains its usual sole right of initiative. While this article is often seen as a 'break' on the Commission in order to curb its legislative powers, in practice, as the subsequent section shows, this has not had this effect necessarily. In fact, it encouraged the Commission to have the most competitive proposals, which in the area of the CEAS meant that no member state actually thought it was able to present better proposals than the Commission.[2]

The legal instruments available to the EU pre-Tampere used to be very weak with little legal effect - mainly conventions, which had to be ratified by each member state individually. These were replaced with new instruments (directives) in 1999. Nonetheless, during the Tampere programme from 1999 to 2004, the decision-making procedure was based on the so-called 'consultation procedure'. This meant that the European Parliament only had to be consulted, but was left with no decision-making power. The sole legal decision-maker was the Council of Ministers, which had to vote by unanimity. Very clearly, this meant that every proposal by the Commission has to be negotiated upon, and often this involved significant changes (Batjes 2006; Lambert 2004), which could appear to limit the argument that the Commission would play a significant role in the CEAS.

Yet, the next section argues that despite this institutionally weak(er) position by the Commission, compared to the first pillar, it managed to significantly influence the policy shape of the CEAS. Institutionally, it possesses the key role as political 'monitor' and legal 'enforcer' of the law in the asylum area. The Commission has the legal power to investigate

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[2] This information came from a range of 26 interviews carried out with individuals from the various Permanent Representations of the Member States and the Missions to the EU of Candidate Countries, carried between 1 April 2004 and 1 August 2004,

claims that member states are failing in their EC law obligations and to bring them before the European Court of Justice (ECJ) for such alleged failures. While this formal instrument also remained largely untouched, the Commission nevertheless managed to shape the policy direction through a series of soft law measures over a prolonged period and through consensus-building by developing and funding pro-migrant organizations.

Kaunert (2005, 2007) conceptualises the ways in which political entrepreneurs can achieve this in the following:

1. First mover advantage: SPEs need to come in faster with their proposals than their rivals.
2. Persuasion strategy: As suggested above, in order to achieve acceptance, other actors need to be convinced by the reasons for the action suggested.
3. Alliances: It is vital for the SPE to form initial alliances with other powerful actors to create a bandwagon effect, whereby more actors will join the 'winning team'.

Evaluating the normative construction of the Common European Asylum System by Commission: To what extent was it an SPE?

The following section will analyse the normative construction of the Common European Asylum System. In the preceding two sections, it has become clearer that the CEAS is an area of 'normative construction'. How has the analysis of this normative construction of the EU asylum policy been operationalised? Firstly, norms are defined as: "written and non-written rules which are reasons for action of different orders. They enable, restrain, or constitute different actions by providing a standard of appropriate behaviour for a particular reference group" (Kaunert 2005: 462). Secondly, it is essential to examine the complimentary underlying normative question of the rule around which the political 'grand debates' are structured, i.e. the official and unofficial political discourses between actors in the policy-making environment.

How far can one attribute changes in the norm stream, if any, to the supranational policy entrepreneurship of the European Commission? This section will demonstrate how the European Commission has acted to initiate and push this process of normative change, which is part of its role as a supranational policy entrepreneur, and enables a political adoption process. It constructs the political environment in which a policy is adopted – and thereby sets the agenda (Kaunert 2007), which means it also fulfils its legal role as the 'engine' or 'motor' of European integration.

The Commission as a strategic first mover: EU asylum becomes connected with the Internal Market and international humanitarian norms

The Commission's strategy was two-fold: firstly, 'a persuasion strategy' as a 'first mover' in order to get the foot in the door. It socially constructed the functional link between a 'moving policy train' – the single market – and EU action in asylum matters. It pushed for this starting in the 1970s, throughout the late 80s and early 90s. It published communications that became the reference points for later legislation in the CEAS. Secondly, the Commission also constructed EU asylum action into the international prevailing norms on refugee protection - the Geneva Convention - which gave it more legitimacy as an actor. Norms only develop gradually, and therefore the Commission would have to act pragmatically in the meantime. The following section will demonstrate both of these aspects.

The first serious attempt to shape the EU asylum agenda was the Commission's famous 'White Paper' (COM (84) 310 final) on the completion of the Internal Market in 1984

(Geddes 2000: 70; Mitsilegas *et al.* 2003: 28; Mitsilegas 2009). It is significant for this research as it represents the origins of the Commission's attempts to gain competences for the EU in asylum policy. The document proposed the abolition of all internal border controls, but also provided a link between the former and economic growth, as well as a whole range of compensatory measures – such as immigration, asylum, external border controls, and policies on visas and drugs, and crime. Yet, none of the asylum proposals made succeeded due to the gradual nature in which norms often develop (Geddes 2000: 71; 2001: 24). Yet, member states accepted the link between the internal market and the EU asylum policy – and in time the success of the single market would drag along the EU asylum policy - as long as the European Commission kept pushing.

In 1991, the Commission took the next steps in its persuasion strategy - constructing the link to both the single market and international refugee norms. The communication from the Commission (SEC (91) 1857 final) acknowledged the fact that the political and social importance of the right of asylum had increased in Western Europe (see Commission of the EC 1991). It was claimed that, as a consequence, individual states were less able to deal with the problem caused by the increased influx of asylum seekers. However, the Commission insisted that humanitarian standards would need to be maintained, and took the 1951 Geneva Convention as a starting point. The communication also underlined the humanitarian objectives of the Convention.

The following common actions were envisaged in the short term in order to cope with the increase in asylum seekers (Commission of the EC 1991):

- speeding up administrative and judicial decision procedures
- harmonisation of the conditions under which people can be turned down at the external borders
- effective return policy of the rejected asylum applicants
- exchange information procedure

The following actions were envisaged with regards to the harmonisation of asylum law in the internal market (Commission of the EC 1991):

- harmonising the national criteria and practices regarding the determination of refugee status
- harmonising the rules with regards to the stay of "de facto" refugees (those who do not qualify for Convention refugee status)
- harmonisation of the reception conditions for asylum seekers

These suggestions are already exceptionally close to the objectives of the Tampere programme of 1999. The communication in 1991 even includes its outcomes in 2004 - the directives on asylum qualification, asylum procedures and reception conditions. The suggestions by the Commission had no clear legal basis in the Treaty of Maastricht in 1992 and certainly not before Maastricht in 1991, and were extremely ambitious. While not being pursued in policy terms, they clearly did affect the norm environment of decision-makers. The issues never slipped off the agenda from the day of this communication – which the Commission ensured with future communications.

The communication in 1994 (COM (94) 23 final) represented another important step in the persuasion strategy (see Commission of the EC 1994). With a view to stimulate discussion and debate, it followed on from the earlier document of 1991 (also referred to in COM (94) 23 final: 23-27). It built on the suggestions made in 1991. The communication called for the following measures:

- a harmonised application of the definition of a refugee in accordance with article 1 a of the Geneva Convention
- the development of minimum standards for fair and efficient asylum procedures
- the elaboration of a convention on manifestly unfounded asylum applications
- the harmonisation of policies concerning those who can be admitted as refugees, but may be in need of help
- a measure harmonising schemes of temporary protection
- a European fund for refugees

These measures all represent the basic foundation of what became the Tampere programme in 1999, and, finally, the outcomes of it in 2004 - the directives on temporary protection, asylum qualification, asylum procedures, and reception conditions, and even other adopted instruments, such as the European Fund for Refugees. Indeed, all of the aforementioned communications display the determination of the Commission to drive forward the process of EU integration in EU asylum matters. Yet, an efficient EU asylum policy would only be possible with a major treaty change (Gradin 1999). Therefore, it was implicit in the strategy of the Commission that it could compromise as long as the goal of full communitarisation was reached.

Connecting the asylum policy to International Human Rights norms in the face of the 'war on terror'

In the previous section, it was demonstrated how the European Commission managed to connect the EU asylum policy to the single market. Acceptance of this fact led to increasing dynamics in the area. Yet, it was equally important for the Commission to link asylum policy to the Geneva Convention. This was particularly important after 9/11 - the terrorist attacks on New York and Washington.[3] The following section will demonstrate the strategy used in this endeavour - divided into two parts: (1) the anchoring of EU asylum policy before Tampere 1999 by relying on civil society and NGOs, and (2) the continued insistence on international human rights standards after 9/11, despite shifts in rhetoric to accommodate the 'war on terror'. This is in contrast to the area of criminal justice, where the 'war on terror' was pushed strongly as a reason for action (Kaunert 2007).

Firstly, when the Commission started to construct a role for the EU into national asylum policy, it had decided to link it to both the single market - to push the project - and the internationally prevailing refugee protection norms - to gain legitimacy. The latter is particularly important as the Commission has been frequently attacked for not being democratic since the 1990s. The essence of its legitimacy problem is that the 'unelected' Commission is widely perceived as detached from the concerns of EU citizens. Thus, its own legitimacy needed to be increased through the legitimacy of other actors in the field - the UNHCR, NGOs, and the European Parliament. The literature has established that the Commission often aims to use NGOs to improve its own legitimacy (Greenwood 2003). Both Hix (1999) and Geddes (2000) have pointed out their importance for the Commission, particularly in the areas of asylum and migration.

Yet, European integration always remains the most important objective above all for the Commission. Geddes (2000: 134) suggests the success of this strategy. While NGOs criticise current EU policy, the answer to the problem tends to be more, not less, 'Europe'. This was

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[3] Nonetheless, it needs to be acknowledged that there has been a tension between refugee rights and terrorism since the beginning of JHA intergovernmental cooperation in the 1970s and 1980s. It could even be argued to have been a key driver of cooperation which preceded even the single market and was edging the European Community into a policy sphere designed to track 'others' - primarily refugees and asylum seekers under the Dublin programme (see Lodge 2004, 2007).

confirmed throughout interviews.[4] There was widespread support for a communitarisation of asylum matters in particular. As described by Geddes, the mood of NGOs was one of frustration because of the lack of what they perceived to be progress in the asylum policy. At the same time, they did not attribute the blame on the European Commission, which was perceived as an ally. The blame was usually attributed to the Council of Ministers and member states.

Some NGOs were under no illusion of their own ability to influence the Commission, asserting that they were mostly utilised by the Commission when it was useful to do so[5] – to gain information and legitimacy. Despite this realisation, they represented an important ally for the Commission, being useful on two fronts (Geddes 2000: 136): (1) they push for asylum solutions based on the Geneva Convention, and (2) they implicitly support European integration by operating at the EU level, thus making the political issues de facto 'problems of Europe'.

It is important to note at this point that the Commission partially created this useful ally (Geddes 2000: 143). A significant number of NGOs indicated that the Commission was actively involved in the creation of their EU structures or their organisation in general, and continues to finance the majority of them.[6] These findings also confirm Geddes' suggestion of some 'top-down' influence of the Commission on pro-migrant groups (Geddes 2000: 143).

Secondly, the anchoring of the EU asylum policy within the international prevailing refugee rights norms became vital after 11 September 2001. At this point, norms could have easily shifted towards a securitisation of asylum - the construction of asylum as a security threat. Yet, from the documentary and interview evidence presented below, it is clear that the Commission took the political decision at that time to not link the asylum issue to the 'war on terror'.[7]

Van Selm (2003: 143) describes it as remarkable that the Commission's proposal for a Framework Decision on combating terrorism made no mention of refugees, asylum, or the exclusion of any person seeking refugee status. In her view, this was particularly remarkable as the Geneva Convention did provide grounds for exclusion from refugee status for terrorists. Yet, the Commission decided not to link the issues of asylum and terrorism.

Nonetheless, in agreement with the NGOs' views[8], the war on terror did influence the policy area (Boswell 2007, 2008). The conclusion of the 20 September 2001 meeting reflected mainly judicial and criminal co-operation, but also asylum matters (Van Selm 2003: 145). The conclusions, amongst others, invited the Commission to examine the relationship between safeguarding internal security and complying with international protection obligations and instruments. This is of particular importance. It appears as an attempt by member states to put internal security above international protection norms, and thus effectively to securitize asylum.

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[4] This information came from a range of 11 interviews carried out with individuals from various Non-governmental organisations (NGOs), carried between 1 April 2004 and 1 August 2004,

[5] This information came from interview (number 2) of a range of 11 interviews carried out with individuals from various NGOs, carried between 1 April 2004 and 1 August 2004,

[6] See note 4.

[7] This information came from two interviews (numbered 10 and 16) carried out with 25 individuals from the European Commission, carried between 1 April 2004 and 1 August 2004,

[8] See note 4.

Yet, in the end the Commission managed to keep the policy anchored within international norms, and thereby prevented a shift into security (see Commission of the EC 2001). Consequently, in the working document entitled, *The relationship between safeguarding internal security and complying with international protection obligations* (Commission of the EC 2001), the Commission did not advocate any change in international refugee protection, and bases the Geneva Convention at the heart of any response. This was written in response to the Council conclusion mentioned above.

There are two main premises of the Commission working document: (1) bona fide refugees and asylum seekers should not become victims of the recent events, and (2) no avenues should exist for the supporting of terrorist acts. The document made it clear that a scrupulous application of the exceptions to refugee protection available under the current laws is the appropriate response. It was therefore an outright rejection of placing security in contradiction to existing refugee protection instruments. This was confirmed in an interview with the author of this document.[9] Moreover, while the Commission acknowledged that terrorists might use asylum channels, it considered this as not likely, as other channels would be more discreet and more suitable for criminal practices.

It was suggested for the member states to use existing legal instruments (Commission of the EC 2001) - based on the Geneva Convention – such as:

- Article 1 (f), the exclusion clause, should be used within the asylum procedure in order to avoid refoulement
- if sufficient grounds are known for exclusion, an accelerated procedure should start

There were suggestions for the following policy alterations (Commission of the EC 2001):

- the creation of EU level guidelines on the use of exclusion clauses
- the proposal on minimum standards for asylum procedures should include provisions for the cancellation of status on the grounds of information coming to light after processing of claims

In essence, this document followed up on the somewhat harsher language of the 20 September 2001 conclusions of the European Council. Yet, contrary to the initial demand which seemed to indicate an attempt to present asylum as a security threat in the war on terror, the working document did not deviate from accepted international norms. In fact, it demonstrated the legal value of the Geneva Convention, and thereby strengthened it. It resisted the temptation to move an issue into the security area when it was perceived as a human rights issue. In fact, the Commission rescued this political perception by trying to reconcile the demands for greater security with the international refugee protection norms.

It would have been difficult for the Commission to do otherwise, as it had consistently anchored the EU asylum policy in international refugee norms. Consequently, it could have been perceived as inconsistent and thus less credible. It would have lost legitimacy in the eyes of the NGOs, who have been supporting the Commission in its efforts to create an EU asylum policy. Any deviation from this established position would have damaged the Commission politically. Yet, the demands by member states seemed to go into that direction - attempting to place security above refugee protection. In the end, the Commission managed to please both by presenting harsher rhetoric using the language

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[9] This information came from interview (number 16) of a range of 25 interviews carried out with individuals from the European Commission, carried between 1 April 2004 and 1 August 2004,

of security, while maintaining the Geneva Convention as the bedrock of the EU asylum policy.

Conclusion: Which way should the EU go? – Communitarising the EU asylum policy as the main strategic goal

Table 1 (below) provides a map for the development of norms in the area of asylum during the Tampere programme, summarising the main developments of the two previous sections. Initially, EU co-operation on asylum before the Tampere programme had been mainly in quadrant II of the matrix. It was characterised by an anchoring in the internationally prevailing norm on national sovereignty and the refugee protection norm - the Geneva Convention. At this point, there were three different possibilities for norms to develop if there was any change at all.

Table 1: The EU at a normative crossroads –developments in the EU asylum policy
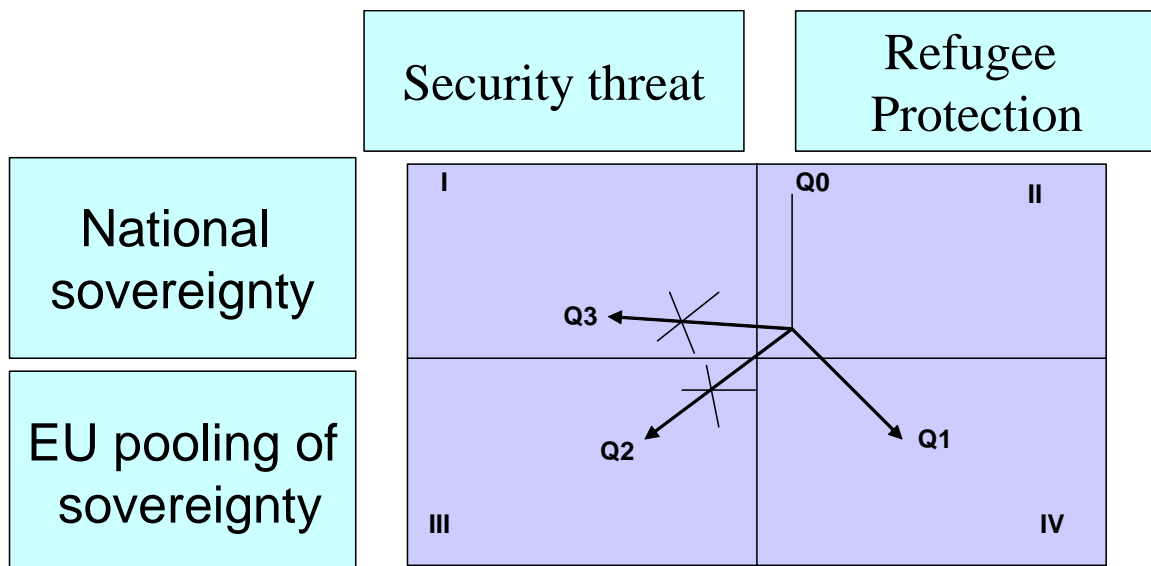
Firstly, the policy could develop from Q(0) to Q(3). This change would imply that national sovereignty would remain the bedrock of asylum polices in Europe, and thus there would be no movement on the axis of whether the EU should be legislating in the area of asylum. In fact, this would imply that no EU legislation would be possible, or indeed the legislation efforts would be meaningless.

The second alternative would have been a development from Q(0) to Q(2). This change would imply that a Supranational Policy Entrepreneur had managed to persuade the European member states to pool national sovereignty in the area. However, the implications of 11 September 2001 would have been used in such a way as to construct asylum as a security threat in order to achieve this goal. In some sense, this is the most likely scenario, as it is similar to the area of counter-terrorism where European integration was pushed forward in the wake of the terrorist attacks on New York (Kaunert 2007).

Nonetheless, it is the third alternative that the Commission managed to achieve, which involved movement from Q(0) to Q(1). This implies that the Commission managed to persuade member states of the pooling of national sovereignty at the EU level. At the

same time, this pooling is firmly anchored in international refugee protection norms – especially the Geneva Convention.

Norms changed very significantly during the Tampere programme - and the Commission was clearly significant, as the aforementioned evidence suggests. It played the role of a strategic first mover in order to shape the debate in a way that placed the EU at the centre of the policy. Yet, in the area of asylum, these norms developed incrementally. In fact, the Commission had started to push in the 1980s, and managed to construct the area normatively to the single market. At the same time, the Commission had anchored it in the internationally prevailing norm of refugee protection - the Geneva Convention. Yet, the norm of national sovereignty still remained very sticky and difficult to change.

In fact, this had changed by the end of the Tampere programme, and the first phase of the EU asylum policy has been established. It was a significant success and the main goal of the Commission - the full communitarisation - had been achieved. Nonetheless, contrary to expectations, this had not been achieved by going from Q(0) to Q(2), but rather to Q(1). In fact, the Commission had never attempted to construct an EU asylum policy based on the perception that it was a security threat. Even after 11 September 2001, it pushed for the fulfilment of international obligations under the Geneva Convention.

Even under difficult circumstances, such as September 11, it pushed to include refugee rights under the Geneva Convention, and opposed the perception of asylum seekers as a security threat. In the end, this strategy paid political dividends. In fact, all four asylum directives actually increased the legal value of the Geneva Convention. This also implied the fact that the EU asylum policy had been cemented in this norm more strongly than it had before. As explained, the legal value of EU law is much harder than international law, which means that it has actually given the Geneva Convention 'extra teeth'. At the same time, the Commission managed to maintain, in principle, the support of the UNHCR, the NGOs and the European Parliament, and thus maintained its own legitimacy in the process. This makes its success all the more remarkable.

This confirms the suggestion by Boswell (2007), that asylum policy was not securitized at the EU level after 9/11. This does not mean that it is not restrictive in some dimensions; yet, it is progressive in other dimensions, notably in its increase in legal value of the Geneva Convention. As suggested at the beginning of the article, it seems counter-intuitive that the EU would 'securitize' the EU Asylum Policy, and goes against several academic arguments that were often made about asylum cooperation in Europe (Boswell 2003a, 2003b, 2007, 2008; Ellermann 2008; Freeman 1998; Geddes 2000, 2001; Guiraudon 2000, 2001, 2003; Joppke 1998, 2001; Lavenex 1998, 1999, 2001a, 2001b, 2004, 2006; Occhipinti 2003; Stetter 2000, 2007; Thielemann 2001a, 2001b, 2004, 2005, 2006; Thielemann and Dewan 2006). If national policy-makers are perfectly able to circumvent national pressures in order to restrict immigration and asylum at the EU level, why should they securitize the issues in order to achieve what they are already achieving? And why would European institutions join in this process, in which they stand to lose credibility and legitimacy in the eyes of their allies, the NGOs and the UNHCR? The answer is such that they are not taking part in this process; in fact the European Commission has done its utmost in the first phase of the CEAS to prevent such developments. Yet, without a doubt, this does not mean that member states may not try again in the future, especially in times of recession and depression. We will need to see to evaluate any further development of EU asylum policy with the future 'Stockholm Programme', which will succeed to the Hague programme after 2009/10.

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