

Registration form (basic details)

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1b. Title of research proposal

Border Policies and Sovereignty. Human rights and the right to life of irregular migrants.

1c. Summary of research proposal

On the basis of globalization theories, as well as on the basis of developments in European migration policies, I hypothesize that since 1990 migration law has witnessed a shift from migration control (reactive, focus on concrete individuals) to migration management (pro-active, focus on potential migrant populations). A second hypothesis is that the increased number of 'irregular' migrants dying on their way to Europe is an unintended side-effect of this shift, border policies being part of migration policies. Thirdly, I propose that as a consequence of the shift to border management, the human rights protection previously available regarding migrant fatalities under border control, has become considerably less effective. My research will develop an alternative human rights law approach, which will be more broadly relevant for externalities (in this context: extraterritorial and indirect policy effects in a globalized context). This alternative approach will be based on the presumption that innovations in the exercise of sovereignty should be matched by innovations in human rights law.

In order to achieve this, I will

- Contribute to social theory by making globalization theories falsifiable;
- Create aggregate databases on migrant deaths and European border policies;
- Test three hypotheses, relating to (1) a shift in the "organizing logics" of European migration policy; (2) human rights law and externalities; (3) the relation between European policies and migrant mortality.

This will contribute to social theory on the role of the state in globalization; to theories on how human rights law can respond to new ways of exercising sovereignty; and to the analysis of European migration law and policy – one of the great issues of our time.

Research proposal

2a. Description of the proposed research

Overall aim

With this research, I would like to achieve two inter-related aims: to make theories on the changing role of the state in globalization falsifiable by focusing on the empirical phenomenon of migrant deaths and by measuring concomitant policy shifts in quantitative terms; and to better understand the human rights aspects of migrant deaths by relying on globalization theories. By switching back and forth between empirical data and a normative framework, I will make a methodological contribution to globalization theory, and I will contribute to a better understanding human rights law in the context of globalization.

In her book *Territory, Authority, Rights* (2006), Saskia Sassen rejects both theories holding that in globalization the state is being undermined by global market forces, and theories holding that globalization is not a new phenomenon. Instead, she argues that, in the Keynesian period (1945-1980), state policies were co-ordinated at the international level in order to further the aims of the state's citizens, but since 1980 they are gradually being reformulated in order to further the aims of transnational public as well as private institutions. The state is not being undermined, nor is it the same good old state. State policies are as crucial as before but they have become part of a new "organizing logics". For example, the aim of economic policy is not full employment (as, according to Sassen, it was between 1945 and 1980), but rather optimal competitiveness. This means that a focus on the national citizen as its foundation has been replaced by a focus on the transnational market; Sassen calls this "denationalization of the state". In her analysis, this has been accompanied by two shifts within the state. Power has shifted away from parliaments/the legislature to the administration. Moreover, she argues that in this way as democracy and parliaments become less important as a source of legitimacy, (international) law and the judiciary become increasingly important for the legitimacy of administrative action.

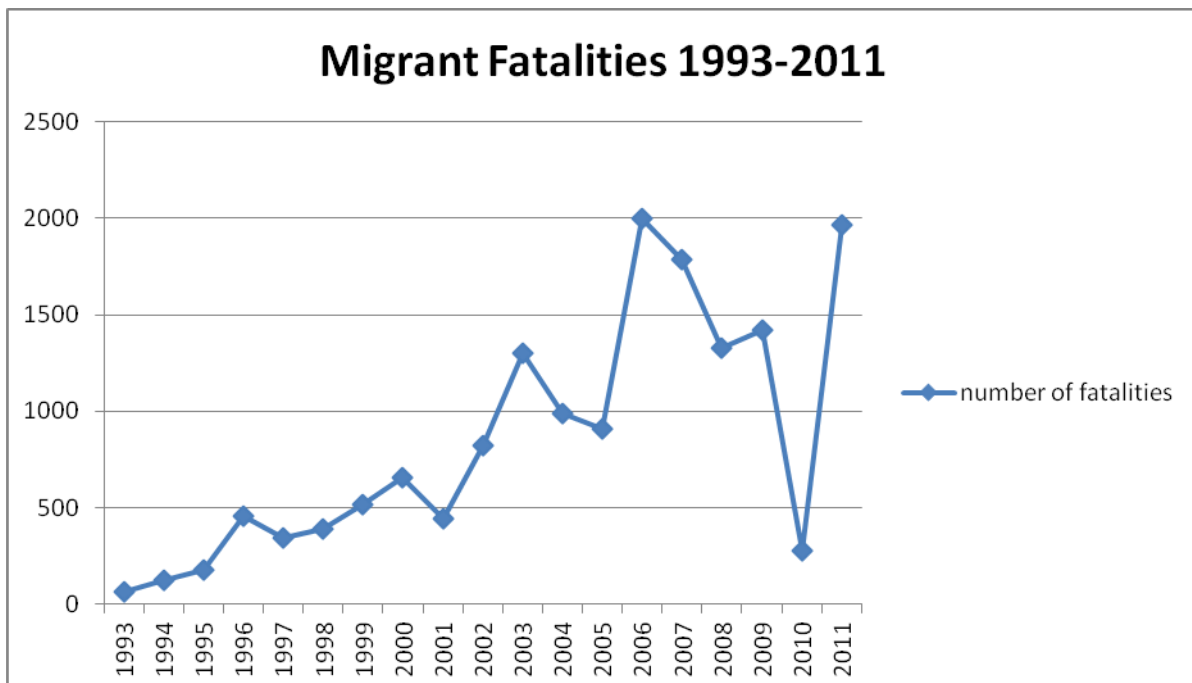
Since 1990, the migration policies of European states have gradually been Europeanized (1985 and 1990 intergovernmental Schengen Agreements; 1992 Maastricht Treaty; 1997 Amsterdam Treaty; 2007 Lisbon Treaty). Initially, the sovereign powers of states in migration policies were subjected to intergovernmental co-ordination outside the European Union. This was undertaken partly in order to make migration policies more effective by bundling them and partly out of a desire to side-step control systems, which were predominantly national, such as parliament and the judiciary (Guiraudon 2000). Gradually, however, European institutions and a European focus became dominant. EU institutions (including the European parliament and the EU Court of Justice) became formally involved. Instead of intergovernmental co-ordination, legislation laying down minimum or even common legal standards on migration was enacted. As a consequence, Europeanization now limits the sovereignty of European states in the field of migration. In the framework of this Europeanization, three developments have occurred:

- (1) externalization: policies are increasingly aimed at creating effects outside the territories of Europe; examples are legislation obliging airlines to check passports and visas before embarkation ("carrier sanctions"); agreements with third countries obliging them to keep migrants away from their territory, and to take back undocumented migrants when they have succeeded in reaching Europe; sea patrols with third countries in their territorial waters or on the high seas;
- (2) privatization: policies are increasingly implemented through private enterprises;

examples are private enterprises being involved in detention, policing, border control, the development and everyday running of databases on illegal migrants, in the development and deployment of high tech systems for the surveillance of land and sea borders; (3) securitization: policies rely increasingly on criminal sanctions, high tech equipment and militarized means; examples are criminal sanctions against airlines, against human smuggling and trafficking (Palermo Protocol), against employers, the use of huge databases, as well as the interoperable radar, infrared and video systems which through computer networks can give information used by air force, navy and coast guard.

Together, these three developments induce the hypothesis (to be tested in project 2 and 3) that a shift has occurred in migration policy. Instead of dealing with individual migrants who had already turned up at European border crossing points (reactive migration control), the aim has become to influence *potential* migrant populations, in order to prevent unwanted migrants from departing on their way to Europe or, once departed, from reaching the border (pro-active migration management). The sovereignty of European states has not been undermined by Europeanization; it has been redeployed in a new institutional context, with a new "organizing logic". This policy is not inspired by the aim of full employment through protection of the national labour market (as before 1990, see De Lange 2007), but by the aim of furthering the interests of transnational public and private entities (including the European Union).

During the period in which this has happened (1990-present), the number of irregular migrants dying annually while trying to reach Europe (overwhelmingly: at sea) has increased sharply. The hypothesis I will put to the test (project 1) is (1) this increased



Source: United 2012

number of reported fatalities represents not only an increase in absolute numbers, but also an increase in relative numbers; i.e. a higher percentage of irregular migrants dies, the mortality rate has gone up; and (2) this increase is a consequence of changes in European border policies, which shifted from border control to border management.

If it is correct that migrant mortality is on the rise, and that this is related to changes in European border policies (which form part of wider European migration policies), this raises a human rights issue which is both of theoretical and of practical/humanitarian importance. The right to life is the ultimate human right. Concerning migrant deaths, two human rights approaches are conceivable. The first, conventional one, would be to emphasize that these deaths occur indirectly (i.e. state agents are not killing migrants, but policies arguably have as a side-effect that irregular migration becomes more dangerous) and often outside the territory of European states. This lack of direct state involvement and of a direct link with the territory stands in the way of state accountability for migrant deaths. The second, innovative one would emphasize that the increased number of deaths is a consequence of changes in state policies. As these policies are partly motivated by the wish to side-step human rights norms (Gammeltoft-Hansen's "sovereignty games", 2011, 17-24), human rights law has to adapt so as not to become obsolete (Shany's "functional approach", 2012). My hypothesis (to be tested in project 4) is that the conventional approach is an effective normative way of dealing with border control, while the functional approach can provide an effective normative way of dealing with border management.

This can be illustrated by comparing migrants who drown in the Mediterranean with the migrants who died while crossing the Iron Curtain. Migrants who died as a result of post-war border control at the Iron Curtain were considered the victims of intentional homicide in lawsuits against Eastern German officials (comp. ECtHR 22 March 2001, *Streletz, Kessler and Krenz v Germany*). However, there are four important differences between the situation at the Iron Curtain and the present border migration policies.

- (1) Protected activity? At the Iron Curtain people died while exercising the fundamental right to *leave* any country, including one's own, while today migrants die while trying to *enter*, which is not a fundamental right.
- (2) Intention? At the Iron Curtain people died by phenomena which were intended to kill (guns, landmines), while today migrants mostly drown.
- (3) Territoriality? At the Iron Curtain, people died on, or very close to, the territory of the country they were trying to leave. Today, it is often unclear where migrants have died; this may have happened on the high seas or in the territorial waters of other states.
- (4) Causality? There was an evident causal relation between the shooting/the landmines and the death of the people at the Iron Curtain. Today, the connection is less direct.

The result may be that conventional human rights law cannot provide an effective normative response to the hypothesized shift from border control to migration management which took place over the past 20 years, confirming the proposition that this shift involves a "sovereignty game" negatively affecting the legal control over the means used to police borders (see on related issues Buyse 2008, Gammeltoft-Hansen 2011, Gil-Bazo 2006, Guiraudon 2003, Den Heijer 2011, Lawson 2004, Mallia 2009, Meredith and Christou 2009, Miller 2010, Rijpma 2009, Torpey 2005, Zureik and Salter 2005).

State of the art; Innovation

The Europeanization (e.g. Meijers et al. 1997; Boeles et al 2009), as well as the externalization (Maes, Foblets & De Bruycker 2011; Ryan & Mitsilegas 2010; Cuttitta 2005), privatization (Gammeltoft-Hansen 2011: 158-208; see generally on privatization and human rights *Law & Ethics of Human Rights* 5 (2011), 1-423) and securitization (Brouwer 2008; Baldaccini & Guild 2006; Guild & Minderhoud 2006; Zureik & Salter 2005; Mallia 2009) of migration policies as well as border policies (Rijpma 2009) are emerging as objects of research. These studies are predominantly descriptive and have an institutional focus. Feedback towards social and political theory is rare (but see Guiraudon 2000, 2003). However, the main shortcoming of the existing literature is that it suffers from "methodological nationalism" (Wimmer & Glick Schiller 2002) at a European level: developments are explained in Europe in purely European terms. It is highly unlikely, however, that these developments are not equally influenced by the changing role of states in globalization. I wish to address this by analysing the development of European border policies in relation to the changing role of the state in globalization. This will allow me to test the hypothesis that a transformation has occurred in the "organizing logics" of European border policies, characterised by a shift from control to management (project 2 and 3).

Existing studies on migrant deaths are based on unreliable data. The graph given above illustrates this: the dip in 2010 is more likely to be related to poor data than to a very sharp decrease in actual migrant deaths. The most comprehensive, Europe-wide set of data is the list of fatalities of *United*, an international NGO based in Amsterdam. This is based on press reports. This is problematic, because changes in the number of reported deaths may reflect changes in media attention as much as changes in the number of actual deaths. A later data set, which is comparable in methodology and shows comparable trend, is the one of *Fortress Europe*. Kiza (2008) has used the *United* data as a starting point, but his analyses are also based on media reporting. Local, short term studies (such as Godenau and Zapata Hernández 2008, Carling 2007 and Cuttitta 2006) lead to higher numbers than those of *United* or *Fortress Europe* but for smaller areas (Spain and Sicily respectively), and for short periods. This underscores the need for long term data; comprehensive in territorial terms; but also more complete and reliable than the *United/ Fortress Europe* data. The need for such data has been underlined by *inter alia* the European Council (the 2009 Stockholm Programme, par. 6, and 6.1.6), the European Parliament (European Parliament 2007), the Council of Europe (Parliamentary Assembly Recommendation 1467/2000; Commissioner for Human Rights 2007), UNHCR (2007), and NGO's such as the ICRC (2006) and Amnesty International (2006). I would like to remedy the problem of unreliable data by creating an aggregated data set based on local death registries, in order to produce a reliable estimation of the way in which migrant mortality rates have developed over the past 20 years. Together with detailed data on European border policies, and application of linear regression analysis, this will allow me to test the hypothesis that migrant mortality has increased as a consequence of changes in European border policies (project 1).

In human rights law doctrine, the consequences of the extraterritorial exercise of state powers has been the subject of studies for about a decade now (Coomans and Kamminga 2004; Milanovic 2011). Two recent books have mapped the human rights consequences of the externalization of asylum policies (Gammeltoft-Hansen 2011, Den Heijer 2011). They argue for an approach which holds states accountable when and where they exercise state functions. If state activity is not restricted to its territory, neither should human rights supervision. Their findings have been largely confirmed by the European Court of Human Rights' 2012 *Hirsi Jamaa* judgement. In the context of this research

project, however, these studies are insufficient for three reasons. First, the case of migrant deaths is different from the situations addressed by these studies due to the combination of extraterritoriality and the indirect role of European policies. Second, existing literature analyses extraterritoriality without having regard to the wider context, which includes not only Europeanization, privatization and securitization but also the shift from control to management postulated (and put to the test) in this research. Third, existing literature does not address the possibility that the entire context in which human rights function is changing because of the changed “organizing logics” of the state. I wish to remedy this by developing both a conventional and a functional approach to migrant deaths, and by relating the differences between these two approaches to the postulated shift in the organizing logics of the state and the postulated shift from control to management (project 4).

In this way, I will

- Make a methodological contribution to social theory. General theories such as that of Sassen are very valuable because they are general and provide an interpretative frame that can help explain the subtleties and inconsistencies of social reality while at the same time, they tend to be self-confirmatory. Building on my dissertation, I will make abstract social theory falsifiable by formulating concrete hypotheses which can be tested, partly by quantitative methods.
- Make a contribution to theorizing migration policies, in particular border policies, and the increasing number of migrant deaths. These policies and their consequences should not only be analyzed in terms of their functionality (or dis-functionality) for European states, but also in terms of the changing role of the state in globalization.
- Contribute to a new normative approach to human rights law. If it is correct that a paradigm shift is occurring in the organizing logic of states, human rights law runs the risk of becoming obsolete if its foundations are not regenerated in conjunction with this shift. This project will contribute to such theorization by relating the two competing approaches that will be developed in project 4 to changes in the ways in which states function.

Period to be researched

Since World War II, European states put into place modern bureaucratic systems that could deal with immigration: they introduced new legislation, introduced a system of residence permits and entry visas, distinguished between admission (border control) and residence (permits), created links between residence and access to the labour market and social security, set up asylum procedures and allowed immigration to be subject to judicial review. When this happened in the late 1950s and 1960s, the aim was to regulate labour migration towards north-western Europe (guest workers; see about this period Castles and Miller 2009, 96-108; Castles and Kosack 1973). This enormous undertaking, which took place in all western European states between 1950 and 1980 despite regional and national particularities, did not necessarily have the desired effect of controlling migration (comp. Castles and Miller 2009, 205; Andrijasevic 2010, 124-144). However, the latter trend did create a specialised bureaucracy, with the personnel, the conceptual framework and the legal tools that constituted the regulation of migration as a policy field. These policies allowed European states to deal bureaucratically with their migrant labour force. When in the mid 1970s labour immigration policies were put to a halt, the system was adapted, but did not need to change to be able to deal with the ‘new’ forms

of migration (family and asylum) that became dominant after the end of formal labour immigration policies. This period was central in the NWO funded research I carried out with C.A. Groenendijk between 2000 and 2006: *Transnationality and Citizenship: New Approaches to Migration Law*. For the outcomes see Jones 2007, Bem 2007, Van Walsum 2008, De Lange 2007, Pool 2011, De Hart 2012.

Around 1990, several developments coincided and changed both migration and migration policies. The Iron Curtain fell, which made the impermeable border that ran through Europe permeable. Long distance air traffic increased dramatically, accompanied by larger volumes of long distance migration. After the 1986 Single European Act (the first major reform of the European Communities since the founding Rome Treaty of 1957) European integration in the field of migration took form (the 1992 Maastricht Treaty, 1997 Amsterdam Treaty). Based on Sassen's work, my hypothesis is that the policies and bureaucracies created during the post-War era, together with new technological possibilities (initially, huge databases were the major innovation), "jumped track" and became part of a new "organizing logics". This hypothesis is supported by one of the outcomes of my earlier research project '*Transnationality and Citizenship: New Approaches to Migration Law*'. In all the sub-projects, the researchers found two turning points: 1973 (end of labour migration; shift to family and asylum migration), and 1990 (Europeanization, which is at the core of the present proposal).

Project 1: Migrant Mortality & Border Policies (PhD)

Existing research strongly suggests that the number of migrants who have died while trying to reach Europe in an irregular manner has sharply increased. They have died overwhelmingly at sea in or near Spain, Italy, Malta and Greece. The number of reported fatalities has increased by ten, while it is unlikely that the number of irregular migrants has increased by the same or by a similar factor (De Haas 2008, 2010). Therefore, the hypothesis that migrant mortality has increased seems plausible. In existing literature, this increase has been related to European border policies in a very general manner. These policies (so existing studies suggest) mainly influence the *manner* of irregular migration, without influencing the *volume* of irregular migration in a meaningful way (Kiza 2008, Spijkerboer 2007; comp. Baldwin-Edwards 2006, Carling 2007, Cuttitta 2006, Godenau and Zapata Hernández 2008, Pugh 2004). The dominant hypothesis holds that border policies have influenced the itineraries, means of transport and the timing of irregular migration ("waterbed effect"; comp. European Asylum Support Office 2012: 16) resulting in more dangerous ways of travelling and in higher migrant mortality.

If correct, this hypothesis could have important consequences for European policies and for the accountability of European states under human rights. But the hypothesis has not been tested sufficiently to allow for such conclusions. Existing studies have three shortcomings. First, the data set on migrant mortality is of insufficient quality, because it is based on media reports. Variations in these reports may reflect variations in media attention as much as variations in migrant deaths. This project will remedy that by creating a reliable data set on migrant mortality. Second, European border policies figure in these studies only in a very general manner, while a more precise overview of those policies would allow for confirming or denying a relation between policies, means of travel and migrant deaths. This project will remedy that by creating a reliable data set on European border policy measures. Third, the relation between border policies and migrant mortality has been studied in a very global way. This project, by combining the two data sets on migrant mortality and border policies, will test the hypothesis of increased

migrant mortality following border policy measures.

The research question in this project is: Has migrant mortality increased over the past 20 years as a consequence of changes in border policies?

Since 1990:

- (a) When, where and how many deceased migrants have been found in Europe?
- (b) According to existing studies, how many migrants have tried to reach Europe?
- (c) Which border policies have been developed in the framework of the European Union?
- (d) Which border policy measures have been taken by Spain, Italy, Greece and Malta?
- (e) Can the development of migrant mortality be related to changes in the border policies and practices of European states?

The methodology used in this project will be a time series observation. The number, location and moment of migrant deaths will be used as a time series. It will be established whether or not the introduction or modification of border policy measures is followed by a change in mortality (linear regression; comp., but based on unreliable data, Kiza 2008, 213-323). This allows only for weak conclusions on causality, but because of the non-experimental nature of this quantitative research, a times series design is the best available method (comp. Bijleveld 2009, 102-109). While experimental research is impossible on this topic, on the basis of secondary data an effort will be made to triangulate the results of this project with the experiences of migrants, smugglers, border officials, etc. (Carling & Hernandez-Carretero 2011; Klepp 2011; Alpes 2011; Andrijasevic 2010; Gatti 2008). In addition, a comparison will be made with similar studies on migrant deaths at the Mexico-US border (Nevins 2002, 2003; Cornelius 2001; Eschbach et al. 2001; Gobierno Federal 2009).

The data that will be used in this project are of particular importance. For the number of migrant deaths, official death registries will be used instead of the existing NGO data based on media reports. These official registries will be used in order to create a comprehensive data set of migrant deaths. A pilot project has proven the viability of using official death registries as a source for migrant deaths (Spijkerboer 2012). For the number of irregular migrants, four existing kinds of data will be used (existing estimations: Kovacheva & Vogel 2009; Düvell 2009; Triandafyllidou 2010; capture/recapture data: Van der Heijden et al 2003; relation to regularly residing migrants: Leerkes et al 2007; relation to regular immigration, based on Eurostat/OECD data, Salt and Almeida 2006; see generally on irregular migration to Europe Düvell 2011). By identifying whether there are correlations between them, one or two of these may be discarded, allowing for a reliable estimation of the volume of irregular migration to Europe. For the border policies, policy documents and existing literature from European, Spanish, Italian, Maltese and Greek practice will be used to create a comprehensive data set on concrete border policy measures.

The innovative aspects of this project are the following. First, data series design research is clearly the most appropriate method. It has not been used in the context of migrant mortality, however. The introduction of this methodology in this field constitutes a significant innovation and lifts the quality of research on this topic to a higher level. Second, the creation of two comprehensive data sets, which will be made available online, is a significant step forward for the field of migration research.

Project 2: Denationalization of Border Policies through Privatization? (PhD)

Privatization of migration policies has been widely noticed in existing literature (see generally Gammeltoft-Hansen and Sørensen 2012); the increased role of private actors can be taken as an established fact. Literature on the practice of privatization is scarce, while (apart from passing reference in Aus 2006) I have been unable to find literature on the role of the private sector in the development of border surveillance. In existing literature, privatization is seen as a means to implement pre-existing aims of migration policy. This might be correct for the introduction of carrier sanctions in the early 1990s but it is likely to seriously underestimate the interests of high tech firms in border surveillance technology. In publications which focus on the use of technology in migration policies, it is acknowledged that technological possibilities co-determine the pace and direction of policy developments (Dijstelbloem and Meijer 2009, 233; Wisman 2012). However, in these publications technology is considered as an external factor which is taken as given, and privatisation is equalled to “outsourcing” (Gammeltoft-Hansen 2011, 164; comp. Dijstelbloem and Meijer 2009, 250; Dijstelbloem 2009). If we follow Sassen’s approach, however, technology has to be conceptualised not as merely an instrument, but as phenomenon that is actively shaped by enterprises seeking profit maximisation, and who are likely to create technology for that purpose. Not only policy *instruments*, but also policy *aims* are co-created: policy makers want what technology can deliver, which potentially puts high tech industries in the role of *defining* policy aims, in addition to merely finding technical possibilities to *execute* them. Existing literature underestimates the possibility that public policy aims are shaped in part by the profit maximisation aims of private enterprises. This project will focus on the public-private partnership in an early example of privatization: carrier sanctions; and in the ongoing development and implementation of surveillance technology at borders. It will address the extent to which the aims of border policies are co-determined by private enterprises creating technological possibilities.

The research question in this project is: How has the increased role of private actors over the past 20 years affected the aims of border policies?

- (a) Which firms are involved in the implementation of carrier sanctions and border surveillance, and what financial interests do they have?
- (b) Since 1990, how many people are and have been employed by private enterprises in the context of carrier sanctions and border surveillance? Since 1990, what is the turnover of private enterprises in the context of carrier sanctions and border surveillance?
- (c) Are private enterprises involved in shaping the policies which they implement, and if so in which way?
- (d) Have new aims of border law and policy been formulated in order to make use of the potential of privatization?

This project requires a mix of political science methodologies. Sub-questions a and b require a descriptive approach, and together seek to trace the role of private enterprises in European border policies. Establishing the financial interests of the firms involved will be done on the basis of a mixed method: interviewing stakeholders, and analysing public financial data. Taken together, sub-questions a and b will falsify the privatization hypothesis. Sub-questions c and d require qualitative methods (interviews with stakeholders, documents on research meetings and on tender procedures), linking the interests identified by sub-questions a and b to the policies which will be identified by sub-questions c and d.

This project will be based on data most of which are in the public domain. Carrier sanctions and their implementation are a matter of public law, hence by their very nature in the public domain. The research and development of border surveillance technology has been publicly funded. Therefore, this can also be traced in the public domain (see for example Acosta 2012; <http://www.perseus-fp7.eu/>; http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=3628; both last accessed 23 July 2012). Contracts for implementation of surveillance also have to be the subject of public tender procedures; therefore, the relevant information can be found in the public domain. The co-creation of border policy aims predominantly occurs during the research and development stage, which is subject to deliberative processes which can be traced through public sources (for example documents of the European Commission: COM(2008)68 final; COM(2011) 873 final).

The innovative aspect of this project is twofold. First, the social theory analysis of denationalisation is formulated in such general terms that it can be formulated convincingly, but it cannot be tested empirically. By using Sassen's analysis for formulating a concrete hypothesis, the validity of her analysis can be tested. This approach constitutes a methodological innovation. Second, this project contributes to the analysis of migration law and policy by conceiving of privatization not as an instrument of migration policy, but as something that co-creates migration policy and potentially changes its very aims.

Project 3: From Border Control to Border Management? (PostDoc)

The externalization, privatization and securitization of European migration law and policy have been widely commented on in existing research. In some literature, the idea has been put forward that these developments constitute a shift from reactive migration control, aimed at individuals, to pro-active migration management, aimed at populations (Geigner & Pecoud 2010, 2012). These developments have been analysed in functionalist terms as either increasing the efficiency of European policies, or as symbolic measures aimed at pacifying the electorate (e.g. Broeders 2009). These studies, valuable as they are, suffer from methodological nationalism in that they explain developments in Europe in purely European terms. It is highly unlikely, however, that they are not equally influenced by the changing role of states in globalization. This project will remedy this shortcoming by analysing the externalization, privatization and securitization of European migration policy as an aspect of Sassen's new organising logic of the state. This new logic is characterized by denationalization of the state (central in project 2), accompanied by a shift *within* the state of power towards the administration and increased importance of (international) law as a source of legitimacy. The hypothesis that will be tested in this project is that the changes in migration law and policy (externalization, privatization, securitization) have led to a shift from migration control (reactive, orientation on individuals) to migration management (pro-active, orientation on populations) constituting a new migration regime. Also, an analysis will be made as to the effects of this for the effectiveness of human rights law (comp. in the context of detention Cornelisse 2010). While project 2 is an in depth analysis of privatization, this project will include the processes of externalization and securitization in its analysis of the shift from control to management; it is therefore much broader in nature.

The research question in this project is: do the developments in European border policies over the past 20 years justify the conclusion of a new migration regime?

- (a) Are externalization, privatization and securitization characteristic for everyday border practices, or are they innovative but marginal aspects of it?
- (b) Is migration management the aim of the everyday border practices, or are they still mainly aiming at migration control?
- (c) Has the executive gained more power compared to parliament, and has (international) law acquired a more important role as a source of legitimacy compared to democracy?
- (d) In the context of the developments in migration law over the past 20 years, have the consequences of these border practices become harder to evaluate in terms of human rights law as a consequence of their location (extraterritoriality), agents (privatization) or subject (national security)?

The methodology of this project will be mixed. For the first sub-question, concrete border control activities in two of the four relevant countries will be qualified as internal or external, public or private, and administrative or security; this requires a hermeneutic methodology (see on hermeneutics in law Taekema 2010; comp. Bosch 2012). Then, the amount of people and money devoted to these activities will be measured quantitatively. This will allow me to test fashionable (and possibly ideological) characterisations of border policies in an objective manner. For the second sub-question, the same border control activities will be qualified (again hermeneutically) as to their aim; I will focus both on the explicit or ostensible aims ("patrols are for intercepting undocumented migrants...") and on potential implicit aims ("... but even if only few migrants are intercepted, this will deter potential migrants"). Again, the amount of people and money devoted to these activities will be measured quantitatively. This is a second way of testing current (and possibly politically biased) characterisations of border policies in an objective manner. The third sub-question requires an analysis of border practices, and the extent to which they have been subjected to parliamentary and judicial control. For this, policy documents, parliamentary records and case law reports in the two selected countries as well as at the European level will be analysed. The fourth sub-question will develop a human rights analysis of border practices before and after their externalization, privatization and/or securitization. Does such an analysis confirm the hypothesis that it is easier to apply human rights norms to acts undertaken on, and having effect on, the territory, by public agents, as part of administrative law? This requires the application of standard international law sources (conventions, custom, general principles, judicial decisions and doctrine) to a select number of consequences of border practices before and after externalization, privatization and securitization.

The data in this project will be the border practices in two countries to be selected from the four relevant countries in this study (Spain, Italy, Malta and Greece). Included will be data on the controls of individuals at border crossing posts (airports, harbours, where applicable external land borders), air and sea patrols, and co-operation with third countries. For all of these, I will look at both personnel costs and technology, including research and development.

The first innovative aspect of this project is methodological: it turns an interpretative analysis from social theory into a falsifiable hypothesis which can be tested in a positivist manner. My earlier experience with this (in that case: discourse analysis) has made me conclude that linking social theory and empirical sociology can be very fruitful (Spijkerboer 2000: 9-12). As this rarely occurs, I wish to develop this further and make

my methodological contribution more explicit. This is partly inspired by the second innovative aspect of this project: analysing developments in European migration law and policy as part of the changing role of states in globalization. Third, this project exposes a potential inconsistency with Sassen's analysis. If the shift from control to management indeed sidelines human rights law, this would contradict her thesis that law is increasingly important as a source of legitimacy, and would give support to the competing hypothesis that such shifts might be motivated, in part at least, by a desire on the part of states to avoid legal control ("sovereignty game": see below).

Project 4: Human Rights and Migrant Mortality (PI)

The literature on the human rights aspects of migrant mortality is only in its initial stages and has several drawbacks. It is based on problematic data concerning migrant mortality and border policies. There are two fully fledged analyses of the externalization of European asylum policies (Den Heijer 2011, Gammeltoft-Hansen 2011) the main outcomes of which were confirmed by the 2011 *Hirsi Jamaa* judgement of the European Court of Human Rights, in which the Italian pushbacks of Somalian and Sudanese migrants to Libya were found to be violations of human rights law. The restriction of these studies to the asylum context makes it problematic to transpose these analyses to migrant mortality. In general legal literature about territorial limitations to human rights responsibility, a distinction is beginning to be made between a traditional territorial approach to jurisdiction (exemplified by the *Bankovic* decision of the European Court of Human Rights, on the bombing of the Belgrade TV station by NATO airplanes in 1999) and what is sometimes called a functional approach (Shany 2012). In the asylum context, Gammeltoft-Hansen has put forward the notion of sovereignty game, i.e. a development towards the exercise of sovereignty in such a way that it does have effects outside a state's territory, while state responsibility is restricted to both acts and effects occurring on a state's territory. If these sovereignty games succeed, states can put policies into practice without being accountable for these practices under human rights law. Furthermore, human rights analyses are insufficiently theorized because they do not take into account the changing role of the state in globalization. This project will address these shortcomings by developing a full fledged human rights analysis of migrant mortality, based on reliable data, using the approaches of sovereignty games and Sassen's analysis of the changing role of the state in globalization. In this way, a synthesis may be achieved between Sassen's thesis that (international) law is increasingly important as a source of legitimacy, and the sovereignty game thesis, which holds that states seek to evade law which would make law less important as a source of legitimacy. I would like to raise the possibility that these phenomena may be part of a dialectical process, in which efforts of states to side-step particular forms of control (democracy, rule of law) elicit efforts from other actors (such as the human rights community) to bring state action within the scope of human rights law, and vice versa.

The research question of this project is: Are European states and private enterprises accountable under human rights law for the postulated increased migrant mortality of the past 20 years?

- (a) What is the content of a human rights analysis of migrant mortality which relies on the hypothesis that European states and private enterprises are *not* accountable for migrant mortality?
- (b) What is the content of a human rights analysis of migrant mortality which relies on the hypothesis that European states and private enterprises *are* accountable for migrant mortality?

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- (c) How do the differences between these two analyses relate to the postulated shift from migration control to migration management, and to Sassen's hypotheses of denationalisation of the state, increased administrative powers, and increased importance of law as a source of state legitimacy?

The methodology for this project will use elements of both mainstream legal approaches (Dworkin 1986) and critical legal studies (CLS; see Kennedy 1997). In mainstream legal approaches, the idea is that one legal analysis is the best one. Every lawyer knows that this is problematic, as both parties to a conflict can come up with formally valid argumentations supporting their diverging positions (Spijkerboer 2010). In critical legal studies, the indeterminacy of law is illustrated ever again. This goes against the reality of the experience of many lawyers that in the overwhelming majority of cases, one analysis is as experienced as more correct than the other ones. This project will take a bit from both sides to this debate. The two conflicting analyses of migrant mortality will be developed into fully fledged, convincing legal argument. The interest of doing so is not to decide which one is correct (it can be presumed that they both are) but to establish their relation to the two migration regimes postulated in the larger research. The hypothesis I will investigate is that the no accountability-position relies on presumptions that fit with European migration law and policy as it was before externalization, privatization and securitization; before the shift from control to management; and before the new, denationalized organising logics (with more administrative power and more law based legitimacy). Furthermore, the accountability-position relies on presumptions that fit with European migration law and policy after the shift to a new "organizing logic".

The data relied on in this project will, whenever possible, be based on the outcomes of the other three projects. Where these are insufficiently clear or ambiguous, they will be postulated. The sources of the two competing human rights analyses will be the usual sources of international law (conventions, custom, general principles, and judicial decisions and doctrine).

The innovative aspect of this project is, firstly, in the legal methodology. By developing two equal analyses for competing positions, I will go beyond the standard differences between a mainstream and a CLS analysis of legal issues. Second, the project will link legal analysis with social theory by investigating core legal issues in terms of social theory.

Time schedule

The time schedule of this project is as follows:

	Year 1	Year 2	Year 3	Year 4	Year 5
PhD 1	Data collection	2 papers on migrant mortality and border policies	Paper on relation between policy and mortality	Finalising PhD	
PhD 2	Data collection	2 papers on carrier sanctions and border surveillance	Paper on influence of private sector on policy aims	Finalising PhD	
Post Doc	Data collection	Paper on externalization, privatization and securitization	Paper on shift from control to management	Paper on human rights aspects of policy changes	International conference; edited volume
PI	Data collection	Paper on conventional approach to migrant deaths	Paper on functional approach to migrant deaths	Paper on conventional/ functional approach & social theory	Paper on methodology of making social theory falsifiable

A note on the data collection: collecting the data on migrant deaths from local or regional death registries (Project 1) is feasible, as was established during a pilot project in Sicily in 2011 (see on this Spijkerboer 2012). From this pilot, it appeared that this data collection has to be done on the spot; it is simple but time consuming. Collecting data on border policies and practices (project 1 and 3) requires desk research, with knowledge of Spanish, Italian, Greek (English is one of the official languages on Malta). Therefore, during the first year of the research, substantial funds have been reserved for research assistants in Spain, Italy, Malta and Greece, while in the second year substantial funds have been reserved for processing these data (see the budget, 3a of this proposal). This will be done in close co-operation with three academics I have already worked with in the past in Spain, Italy and Greece (see below). On Malta, the data collection is much easier because of its small size (there is a limited number of local death registries) and the fact that English is an official language.

At the end of the first year, and after that annually, a two day seminar will be organised in which the researchers will get feedback of the three leading academics and the three national experts mentioned below. In this way, the quality of the research projects will be enhanced, and it is assured that the researchers stay in touch with current developments in both academia and in European policies.

At the end of the second year, in addition to the annual "internal" seminar, a seminar will be organized where the researchers present their data to a mixed audience of academics, policy makers and the human rights community. At the end of the third year, a similar seminar will be organized where the researchers present their analyses in rough form. This will enable them to test both the correctness and the usefulness of their approach. In the last year of the project, a large international conference will be organized, where the outcome of the research as a whole is presented and where other researchers can contribute their own work. This conference will target academics, policy makers and the

human rights community (comp. the *Gendered Borders* conference in 2004 and the *Fleeing Homophobia* conference in 2011). On the basis of this conference, and edited volume will be published.

Cooperation

This project requires cooperation at two levels. First, despite my experience on that point the interdisciplinary nature of the project is challenging, and will require a collaboration with other disciplines in migration research. For the migration studies aspects, I will cooperate with three leading interdisciplinary migration researchers Hein de Haas, Co-Director of the International Migration Institute (University of Oxford, UK, 2009 ERC starters grant), Ninna Nyborg Sørensen (Head of Migration Research group of the Danish Institute for International Studies), and Rutvica Andrijasevic (University of Leicester, UK). They will participate in the annual meetings with the research group in order to give feedback to operational research plans and interim findings. I have successfully cooperated with all three in the past.

The data gathering requires cooperation with researchers in Southern European countries. For data gathering in the Mediterranean region, I will cooperate with three researchers whom I have encountered as national experts in the context of the 2009 Exploratory Workshop *The Human Costs of Border Control*: Martin Baldwin-Edwards (Panteion University, Athens, Greece); Paolo Cuttitta (Università degli Studi di Palermo, Palermo, Italy); and Dirk Godenau (Department of Applied Economics, University de la Laguna, Tenerife, Spain). I have co-operated with all three in the past.

They all have explicitly agreed to cooperate with me on this project.

An exploratory workshop funded by ESF, held at VU University Amsterdam in October 2009 (www.rechten.vu.nl/nl/onderzoek/human-costs-border-control/), sought to map the relevant issues and to discuss directions for future research. In developing the present proposal, I have been able to use the outcomes of this workshop as a resource. De Haas, Baldwin-Edwards and Cuttitta took part in this workshop, while Derek Lutterbeck (University of Malta) was involved in the preparation of the workshop but was unable to attend; I intend to co-operate with him for research on Malta.

Deliverables

The concrete deliverables of this research will be:

- A public database on migrant deaths since 1990
- A public database on border policies since 1990
- Eleven academic papers, to be published in peer reviewed journals
- Two dissertations
- One edited volume
- One international conference
- One dissemination workshop in Brussels
- Two seminars where initial findings are presented to academics, policy makers and the human rights community.

2b. Knowledge utilisation

The project has an output at three levels:

1. Policy analysis: it will be established whether there is a connection between European border policies and migrant fatalities. This will have consequences for these policies, both if a link is found and when it is found to be absent.
2. Legal analysis: it will be established whether, and if so under what conditions indirect consequences of European policies occurring outside European territories are within the purview of human rights law. This has wider significance for the role of human rights law in globalization.
3. Social theory: it will be established whether, and if so in which manner, theories on globalization and sovereignty have to be adapted and refined in the context of European migration law and policy.

Concretely:

Contribution, possible use, impact

- *European border policies and their possible relation to migrant deaths:* The possible role of European policies in migrant deaths will be clarified. I will contribute concrete suggestions for adapting European policies so as to limit migrant deaths. The identification of such concrete possibilities for change will enable European states to minimize the loss of life. If the hypothesis of increased migrant mortality as a side-effect of European border policies is correct, the impact may be a reduction of the loss of life of migrants.
- *Human rights law and globalization:* The issue of externalities in human rights law is increasing, possibly in actual fact but in any case in litigation (NATO bombing of Serbia, accountability for UN forces such as in Srebrenica, pushbacks of migrants at sea; liability of corporations such as Shell for human rights violation in Nigeria). The contribution of this research will consist of analysing the relation between globalization and human rights law (*why* is this increasingly a problem?) and formulating a human rights law doctrine, which responds to the hypothesized fundamental shifts in the exercise of sovereignty. This will enable the human rights community as well as human rights institutions (national and supranational supervisory bodies) to adapt human rights law to new realities. The impact will be that (a) the exercise of state sovereignty will be legitimate because it is based on human rights; and (b) that the exercise of state sovereignty can be corrected where policies based on a management approach infringe on human rights law.
- *Academic network building:* the project itself, as well as the publications and academic meetings will contribute to bringing together academics from disciplines working on migration, human rights and globalization. This network will: enable the improvement of the quality of the solutions formulated in the research; formulate broadly shared issues for future research on this issue; and will be beneficial for the dissemination for the research outcomes. The impact will be a stronger capacity in Europe for research on developments in migration law and policy, human rights law, and globalization.

Target groups/interested parties

- *European border policies and their possible relation to migrant deaths*: obviously, the interested party is the group of undocumented migrants who may lose their lives on the journey; they are the people who should benefit from the project. However, in order to reach that end result, the outcomes of the research will be directed at
 - European policy makers, both at the EU level (Commission, Council, Parliament, Frontex) as well as at the national level; European policy makers have expressed concern over the issue of migrant deaths (e.g. the 2009 Stockholm Programme, par. 6, and 6.1.6; European Parliament 2007, the Council of Europe 2000);
 - The European human rights community, which also expressed concern over the issue of migrant deaths (civil servants, NGO's, lawyers, judges); the European human rights community finds the issue an important one (e.g., Commissioner for Human Rights 2007, UNHCR 2007, ICRC 2006 and Amnesty International 2006).
- *Human rights law and globalization*: academics, the human rights community, potential litigants and courts.
- *Academic network building*: academics in law, migration studies and globalization studies.

The steps we will take to get the research results to the target groups:

- *European border policies and their possible relation to migrant deaths*:
 - each researcher will issue one publication, reflecting the core of the outcome of his/her research, in venues targeted at policy makers and the human rights community.
 - in addition, one day of the final conference will be targeted at these groups.
 - A special dissemination workshop will be organised in Brussels, aimed at European institutions (European Commission, European Parliament, Council of Ministers, Frontex, European Asylum Support Office, Council of Europe)
 - The two databases (on migrant deaths and on border policies) will be made available online, together with the publications resulting from the research projects.
- *Human rights law and globalization*:
 - The papers on human rights law of the Post Doc and the PI will be published in prominent human rights law journals; this deceptively simple method of dissemination is appropriate here, because there is a limited number of journals which "everyone reads";
- *Academic network building*:
 - because of the mixed background of the research team, and of the people with whom I will co-operate (see above) we will have an excellent position for reaching out to the academic target group. The wealth of disciplines involved in the VU University's Migration and Diversity Centre will be another source.

Contact and or arrangements we have with users and or target groups:

I have extensive experience in getting research outcomes across to these target groups, both nationally and internationally (Odysseus network, conferences: Gendered Borders (2004) and Fleeing Homophobia (2011)). I will use the experience I have gained there for the present research. Concretely, my connections with the Odysseus Network, the Migration & Diversity Centre, as well as the informal network I have built over the past 25 years, in particular in Europe, makes it possible to reach the policy makers, the human rights community, as well as the academic community who work on these issues.

2d. Any other important remarks with regard to this application

I have initiated and coordinated the Migration & Diversity Centre at VU University Amsterdam, bringing together some 50 researchers from the Faculties of Law, Social Sciences and Arts (www.vu.nl/mdc). This was an expression of my affinity with, and has functioned as a platform in which I could further develop, interdisciplinary legal research methods. The *Inclusive Thinking* project with Prof. James Kennedy (history, UvA) and Prof. Halleh Ghorashi (sociology, VU), (3 postdocs, 3 PhD candidates, funded by VSB Fonds) was developed in the Migration and Diversity Centre.

I have experience with carrying out and supervising multidisciplinary research. My PhD (*Gender and Refugee Status*, 1999, awarded the Preamium Erasmianum in 2000) contained both a statistical analysis of the recognition rate of male and female asylum applicants (putting an end to the widespread idea that women get asylum less often than men) as well as a qualitative ("thick") discourse analysis on asylum decisions of female applicants. I supervised the PhD of anthropologist Guno Jones (2007), and of sociologist Dennis Broeders (2009). Together with Prof. James Kennedy (history, UvA) and Prof. Halleh Ghorashi (sociology, VU) I lead the interdisciplinary *Inclusive Thinking* project.

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