

Master Thesis
‘European Studies’

Title:

*Possible tensions between the protection of borders and human rights in
the legal foundations of the external border agencies of the European
Union and Australia*

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“Foreseeability” is often introduced as a limit on judicial restructuring of the past and as a protection of individual expectations of property. A man shoots a gun without looking and the consequences radiate out like those of an official act. If the bullet hits a passer-by the man is responsible for the wound. If the bullet strikes a water tank, and water dribbles out and makes a depression in the ground in which a messenger with an artificial leg falls so that his message, which is that a dam is weak, does not reach a radio station and cities are wiped out, the actor is not responsible for the devastation. The difference between the two causal chains is said to lie in the capacity of the actor to predict them, their “foreseeability”.

Joseph Vining, 1978: 140

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Abstract

The purpose of this research is to investigate whether there are conflictual areas in the legal backgrounds of external border agencies, specifically between the areas 'human rights of unlawful immigrants' and 'control and surveillance'.

'Unlawful immigrants', or also referred to as 'illegalized travellers' by Weber and Pickering (2012: 4) are people aiming at auricularly entering another but their home country for safety or economic reasons. Here, at these external borders specific external border agencies operate for detecting them in order to ensure national safety. This Master thesis aims at assessing the legislations of the Australian and EU external border agencies; namely *Australian Border Protection Command* and *Frontex* in order to find any ambiguities within their legal foundations between the areas 'human rights of unlawful immigrants' and 'surveillance and control'.

The inquiry is of qualitative nature and a Grounded Theory Approach is used in order establish empirical findings of themes, categories, and related issues in the documents that constitute the legal foundations of the external border agencies of the EU and Australia.

While scholars have dealt with the negative impact of protection of refugee as a consequence of the securitization of the external borders of the European Union and Australia is a very current topic that has been assessed from many points of view, such as human rights organizations, scholars or media, the legal foundations of external border agencies have not been dealt with to a great extent

Although it has been expected that no conflict within the legislations are apparent as laws are carefully and explicitly worded by the state, who is the 'lawmakers' in the analysis it was found out that a conflictual area within the legislations between 'human rights of unlawful immigrants' in Australia exists. Within the founding legislations of the Union's agency *Frontex* such a conflict has not been found.

Abbreviations

AFZ	Australian Fishing Zone
AMD	Australian Maritime Domain
BPC	Border Protection Command
EC	European Community
EEZ	Exclusive Economic Zone
EU	European Union
GTA	Grounded Theory Approach
HRW	Human Rights Watch
JOPC	Joint Offshore Protection Command
MS	Member States
NGO	Non-Governmental Organization
UNHCR	United Nations High Commissioner for Refugees
RAAF	Royal Australian Air Force
RAN	Royal Australian Navy
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

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Chapter 1 Introduction

The principle of ‘rule of law’ lies out that all decisions of governments are made by the application of legal principles. These principles can be entailed in written or unwritten constitutions. States with ‘rule of law’ automatically make every citizen a subject to law. Millennia ago Aristotle, the great philosopher already said, “law should govern” (Aristotle, 350 b.c.). Nowadays, the United Nations has promoted the rule of law in already over 150 nations (UN Press, 2012) and aims at further enhancement, as rule of law aims at peaceful conflict resolving. The states devote themselves to constitutions having the *right to live* as highest obligation. In states where the rule of law applies, not only birth-citizens are protected by law, but also immigrated third-country nationals.

Europe and Australia face high numbers of immigration waves. Statistics about the inflows of foreign population by nationality have shown that the figures have increased throughout the last ten years. In Australia the immigration rate has risen from 107.148 migrants in 2000 to 206.714 migrants in 2010 and in Europe from 2.876706 in the year 2000 to 2.962619 ten years later (OECD, 2013). These raising numbers of immigrants lead to the fact that the process of becoming a state citizen is costly, takes long and often asylum seekers are turned down.

Moreover, illegal immigration shows a similar raise in numbers. For Europe, reports show that it is impossible to find a significant digit. Generally, the report of the Committee on Migration, Refugees and Population from 2008 on ‘boat people’ states that since 1993 about 8.800 of them have been caught or found dead at the external borders of the Union, peculiarly Italy and the coast of Greece, that is the main transitory country of the EU (Kasimis, 2012). In Australia in 2006 about 60 people trying to unlawfully immigrate by boat were caught offshore and in 2010 6555 (Parliament of Australia, 2012). The Herald sun, an Australian weekly magazine, even claimed that monthly about 2000 boat-people arrive at the Australian coasts (Herald Sun, 2012). Thus, the numbers vary to a huge extent as not many black numbers are apparent and the figures greatly depend on the measurements itself, if government numbers are collected or the ones from NGOs. People go to other countries for many reasons: “Some come simply to seek better economic conditions. Some want to migrate but do not live in areas where in practice this is possible. Some may be queue jumpers. Many seek protection from persecution” (Commonwealth of Australia, 1997). These, ‘illegalized travellers’¹ as Weber and Pickering (2012: 4) name people seeking for entrance into another country, move in unprotected, right-free zones (Douzinas, 2002: 32). These unprotected, right-free zones as Weber and Pickering (2011)

¹ Weber and Pickering (2012) chose this term for matters of correctness, as they are not immigrants, but rather travellers at external borders searching for entrance. Hence, no common term can be found, as the European Commission names them ‘legal immigrants’ (Europa, 2013) and the Australian government ‘unauthorised boat arrivals’, ‘irregular maritime arrivals’ and ‘unlawful non-citizens’ (Presscouncil, 2012). As no overall term has been configured, which means that hereupon the term ‘unlawful immigrant’ will be used.

refer to the external borders of countries are under surveillance of external border agencies. Australia and the European Union have set up such agencies, namely *Frontex* and the *Australian Border Protection Command*, about 6 years ago.

Throughout the last years, attention has spotted controversial ways of functioning of these agencies. The ‘Tampa Affair’ is one of the most noted events in Australia dealing with boat-people. On 26th August 2001 433 Indonesian refugees arriving in a boat were denied access to the Australian territory by the Australian government. Therefore the Norwegian cargo ship MV Tampa rescued them off the waters in front of the Christmas Islands (Maley, 2003). Otherwise is it likely that the boat-people would have drowned under the awareness of the Australian government?

This example as well as the rhetorical question shall emphasize the importance of this study about the agencies’ legal foundations. There are controversial happenings at the Australian external borders that have still not been resolved. On these grounds a study about possible conflicts within the legal foundations of the Australian external border agency might bring new perspectives.

Besides the Australian incident, in early 2011, 25 Syrian refugees have used the Evros region between Turkey and Greece as a crossing point for reaching the territory of the European Union. This also turned into a similarly controversial incident than the Tampa Affair. When they arrived, according to one eye-witness, *Frontex* put them back to the sea without checking their identification, granting medical aid and even beating those who defended themselves (Guardian, 2012).

Incidents where individuals have illegally, which means without the governments approval crossed the external borders of Australia of the EU have been reported to an increasing amount within the last decade. Therefore it has to be assessed why this may have happened; if possibly the judicial side is an explanatory factor. The European Union does not only ensure human rights within its own borders by only accessing countries that have completely adopted the *acquis communautaire* that is the full legal body of the Union, but in December 2012 it has won the Nobel Peace Prize for “over six decades contributing to the advancement of peace and reconciliation, democracy and human rights in Europe” (Nobel Prizes, 2012). The Nobel Peace Prize is handed over to individuals, peoples or organizations that have done “the most or the best work for fraternity between nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses” (Palmowski, 1997). Furthermore, the core values of human rights, democracy and the rule of law have already been embedded in the Unions’ founding treaty and adapted to the Charter of Fundamental Rights in 2000 (European External Actions, 2012). “The Union’s human rights policy encompasses civil, political, economic, social and cultural rights. It also seeks to promote the rights of women, of children, of those persons belonging to minorities, and of displaced persons” (European External Actions, 2012). Therefore, it has a budget of about € 1.1 billion in the period between 2007 and 2013 for

the European Instrument for Democracy and Human Rights to support non-governmental organizations throughout their promotion of these core values. Torture, death penalty and discrimination shall be abolished globally.

Australia is a close combatant of the EU when it comes to progressive values such as democracy, freedom, rule of law and human rights. The Australian government itself states: “Australia’s approach to human rights and freedoms reflects its liberal democratic ideals and a belief in the inherent dignity and the equal and inalienable rights of all people (...)” (Australian Government, 2008, Dep. of foreign affairs and trade). Additionally to this, human rights are declared by the Australian government to be “inherent, inalienable, indivisible and universal” (Australian Government, 2008, Dep. of foreign affairs and trade). The Australian government has set up a *Human Rights and Equal Opportunity Commission* and several additional institutions and organisations in order to safeguard the protection of human rights.

As shown, the EU and Australia both apply the rule of law and show highly progressive values. Nevertheless, both states are intertwined into several incidents where their external border agencies are comminuted for violating human rights.

Therefore this study aims at approaching the legal foundations of these agencies to assess whether an area of conflict between ‘human rights of refugees’ and ‘control and surveillance’ exists.

The statement above the table of content deals with law and ‘foreseeability’. It gives an insight of the fact that the interpretation of law varies because the wording of law is vague. This thesis deals with law and contradictions within law. The question at stake is not *if* the agencies have violated human rights, but rather *what* do their legislations state about ‘human rights of unlawful immigrants’ on the one hand and national ‘control and surveillance’ on the other hand. The leading research question is of exploratory nature:

Do the founding legislations of external border agencies entail tensions between respecting fundamental rights of unlawful non-citizens and ensuring control and surveillance at the external borders of their countries?

The study is a social scientific inquiry into the legal situation of the European Border Agency *Frontex* and the *Australian Border Protection Command*.

In order to approach the topic coherently, the gathering of data will be focused on the following two sub-research questions:

1. What do the legislations of *Frontex* and the *BPC* state concerning fundamental rights of unlawful non-citizens?
2. What do the legislations of *Frontex* and the *BPC* state concerning control and surveillance at the external borders?

Afterwards both sub-questions will be assessed simultaneously in order to find any tensions between the two areas within the legislations.

1.2 Significance, Purpose and Aim of the Study

In the following the purpose, aim and significance of this Master thesis will be depicted. The thesis' significance also entails a literature review on the current state of research on external border agencies.

The aim of the research is the empirical discovery of themes, categories, and related issues regarding possible areas of conflict within the areas of 'human rights of unlawful immigrants' and 'surveillance and control'. This seems peculiarly important, as no study has been preceded about this topic yet. Additionally the clashes of stances on the topic vary greatly because human rights defenders claim wrongdoings of the external border agencies (HRW, 2011), whereas economists and nationalists rather want to avoid further immigration (Beck, 1996). For this reason a study about the legal aspects shows if the agencies act accordingly or breach their own legislations by these actions. It is also possible that they need to respect fundamental rights of unlawful immigrants but also shall not accept any illegal entries and act according to this legal conflict.

In the following the findings of literature research about *Frontex* and the *BPC* focusing on the scholars' various perceptive ranges of the issue will be depicted. Firstly Boswell (2007), Neil (2009) and Wolff (2012) aim at explaining the origins of *Frontex*. Afterwards an insight view of Surber (2012) depicts the daily operations of *Frontex* adhered by an institutional view of the European Commission on the upsetting's of *Frontex*. Hereby the focus lies on depicting a collection on various studies that have examined the European external border agencies from different angles. The necessity of this section especially emphasizes the need of a study on the legal foundations, as this is not apparent in the scientific literature about the EU's external border agency so far.

The literature review on the Australian agency deals with the 'Tampa Affair' and how according to Skwirk (2012) it has been made an issue for gaining votes throughout the national elections. Another approach by Hufnagel (2010) rather examines national and international police cooperation in Australia and how this might lead to problems for the functioning of the police when the interests conflict and most importantly for this study that Australia and the EU face similar problems when it comes to police cooperation across borders due to a lack of a well-developed legal foundation. After pointing out that already the forerunners of the border agencies, namely the police cooperation's fail operating successfully due to this lack, Opeskin (2012) rather goes into detail about the migration policies and points out various tensions within these. The literature on Australia deals with problems in the legislations and tensions in the policies to show that there are contradictions apparent and concluding Weber and Pickering (2012) entail an overview of the most recent findings on black numbers of death at the borders of the EU, US, Australia and Mexico. Most importantly, they introduce terms of the immigrants, borders and problems that might become common, such as 'illegalized travellers'. Hence, these tensions pointed out by scientists show that the issue has been dealt with to some extent and there are tensions in the migration policies and lacks in the laws of police cooperation in the EU and Australia, which is interesting to note as possibly another lack in the legal

foundation of these border agencies can be found.

Generally, the existing literature about *Frontex* and the *Australian Border Protection Command* differs to a great extent. Firstly, scientific literature about *Frontex* has just begun to be published a couple of years ago because the agency has been set up only in 2005 and therefore operates only since six years.

Several approaches aim at explaining the origins of the European Agency *Frontex*. Boswell (2007: 589) states, that *Frontex* has been a result of the increased security measurements after 9/11, whereas Neil (2009, p. 334) argues contrary to this opinion about the establishment of *Frontex*, as it “was not the outcome of that securitization, but rather of its failure” (Neil, 2009: 334). The agency has mainly been one of several steps in order to harden the tools of control (Neil, 2009: 345). Generally, “agencies were assumed to offer greater transparency, expert authority, flexibility, better informed decisions and better implementation (European Commission, 2011). From this perspective, it can be assumed that the establishment of *Frontex* has been processed in order to strengthen the legitimacy of the European Union, as the set-up of an agency drafts the Union’s tasks to that peculiar agency away from the EU institutions itself for better efficiency and effectiveness.

The book ‘At Europe’s borders: Alignments, Pitfalls, Frontex’ (original title in German: ‘An Europas Grenze- Fluchten, Fallen, Frontex’) by Surber (2012) is a compilation of a researcher who wanted to get a personal idea of the five places of European migration policies: Lampasas, Strasbourg, Greece, Warsaw and Switzerland. Not only his experiences are depicted but interviews with Ilkka Laitinen, who is *Frontex*’ executive director and facts given about the 5 border crossing points that have been mentioned above, for gaining an insight view which claims wrong-doings of the agencies’ day to day work. As *Frontex*’ degrading treatment has been examined by Surber as an eye-witness, the study of the legal background of *Frontex* becomes more and more important in order to see if there are tensions within the agencies’ legislations.

Australia and its governments’ behaviour towards refugees has been depicted by scholars since a longer period of time than the Union’s behavior towards refugees. The studies mainly focus on human rights violation itself but not on this variety of causes such is the case of the literature examining *Frontex*. According to Hugo (2002: 38) Australia has preceded one of the biggest human rights violations, the so-called *Tampa Affair* and altered it into a political issue throughout election. Reviews state that the *Tampa Affair* “even made the Australian Labour Party (ALP) win the national selections in 2001” and is consequently being ‘used’ throughout political debates (Skwirk, 2012). This view by Hugo (2002) is important because the government actually ‘used’ the *Tampa Affair* for gaining political power. Perhaps if there are unclear laws of the *PBC*, the government does not aim at correcting them for their own political success.

Opeskin (2012: 2) goes further and states that the Australian government made use of

protocolling incidents violating human rights in order to win the election when the international norms and constraints counter argued the current governments position. This means that they used the norms of the international Conventions for blaming the party in office for gaining more votes. These tensions between international fundamental rights and national migration policies are important to emphasize as this leads to further assumptions about contradictions in national and international policies that might be reflected in the Australian legislatives of the *BPC*. Contrary to Opeskin, who dealt with the de facto contradictions between these two fields, this research deals with the de jure tensions.

Hufnagel (2012) reports about the harmonization of police cooperation in Europe and Australia, focusing on the tensions of the local/national and national and supranational level. Important information can be taken from this article concerning the establishment of police cooperation as well as its history. Nevertheless Hufnagel (2010) deals rather with the cooperation of state forces concerning the inner borders of the two continents than the external border protection. The author states that “legal frameworks regulating cooperation are still embryonic” (Hufnagel, 2010: 46) in the EU and Australia, which gives evidence that as the legislations for police cooperation are not well-developed, the ones of the external border agencies are neither. Hence, this needs to be assessed in the analysis.

Weber and Pickering (2011) attempt to give a profound study on the current research and studies about death at external borders in their book ‘Globalization and Borders – Death at the global frontier’. Their work aims at enlightening the issue with depicting details about the border crossing points, mentioning the agencies’ defamatory statements of *Frontex* and the Australian government regarding responsibilities of the border deaths. Additionally the lack of existing life saving policies at the global borders is critically inspected. Thereinafter the book entails a detailed comprehension of government’s policies, NGO reports and media references about deaths at the global frontiers. Here it becomes obvious that although their book is currently the most comprehensive piece about border agencies, it lacks an insight on the agencies’ legal foundations.

Concluding, the border agencies of the EU and Australia have been studied already to quite some extent, amongst others the reasons for their establishment, their history of police-cooperation and mostly incidents dealing with human rights violations. The current state of research has been one of the motivational factors of writing the thesis, as not many studies on the legal foundation of external border agencies can be found.

1.4 Structure of the thesis

The thesis starts with the introduction of the main topic, the research question and the depiction of the external border agencies at stake. Thereinafter the conceptualization introduces *Frontex* and the *Australian Border Protection Command* because their tasks, management board and aim of operations are necessary background information. At this juncture two models of analysing controversies within legislations will be inaugurated. Afterwards the operationalization shows how the study will be put into execution.

Subsequently the comparative analysis of the EU's and the Australian legislations of the external border agencies with the Grounded Theory Approach (Chapter 4) show results that will be put into perspective (Chapter 5) and concluded in the end (Chapter 6).

Chapter 2 Conceptualization

The concepts introduced in the following are essential for assessing the research question; whether the founding legislations of external border agencies entail tensions between respecting fundamental rights of unlawful non-citizens and ensuring control and surveillance at the external borders of their countries. As the comparative study deals with the EU and Australia, firstly the external border agencies of the EU and Australia will be depicted. Their development, tasks, management board and legal foundations will be introduced. In the end of this section Table 1 entails an overview of the most important facts about *Frontex* and the *BPC*. This is important as already here, whilst looking at the constructs similarities and differences can be seen which might also be available throughout assessing their legal foundations. As explained later in more detail, it becomes clear that *Frontex* is more transparent with information than the *BPC*, whereas the *BPC* is more precise on how to deal with national security and unlawful immigrants than *Frontex*, when aiming at finding information about the agencies.

Secondly, two models on controversies with law will be given that are useful for the assessment of the legislations of the border agencies. This aims at clarifying the concept ‘controversies’ within legislations, as it is central to the study at stake for showing that this precise study on contradictions of the legal foundations of external border agencies has not been assessed in the current literature.

2.1 External Border Agencies

Frontex, which is the short version for *Frontières extérieures*, has been established in 2005 in order to enhance the external border security throughout coordinating the operational cooperation of the EU Member States (Frontex, 2006).

Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union provides the legal basis for the European Agency *Frontex*. *Frontex* is an intelligence-driven agency which is placed in Warsaw, Poland by 2005/358/EC: *Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (Frontex, 2006). It is a community body, showing legal identity as well as autonomy over its budget. The Management Board, consisting of operational heads of national border guard services and representatives of the European Commission governs *Frontex* (Frontex, 2006).

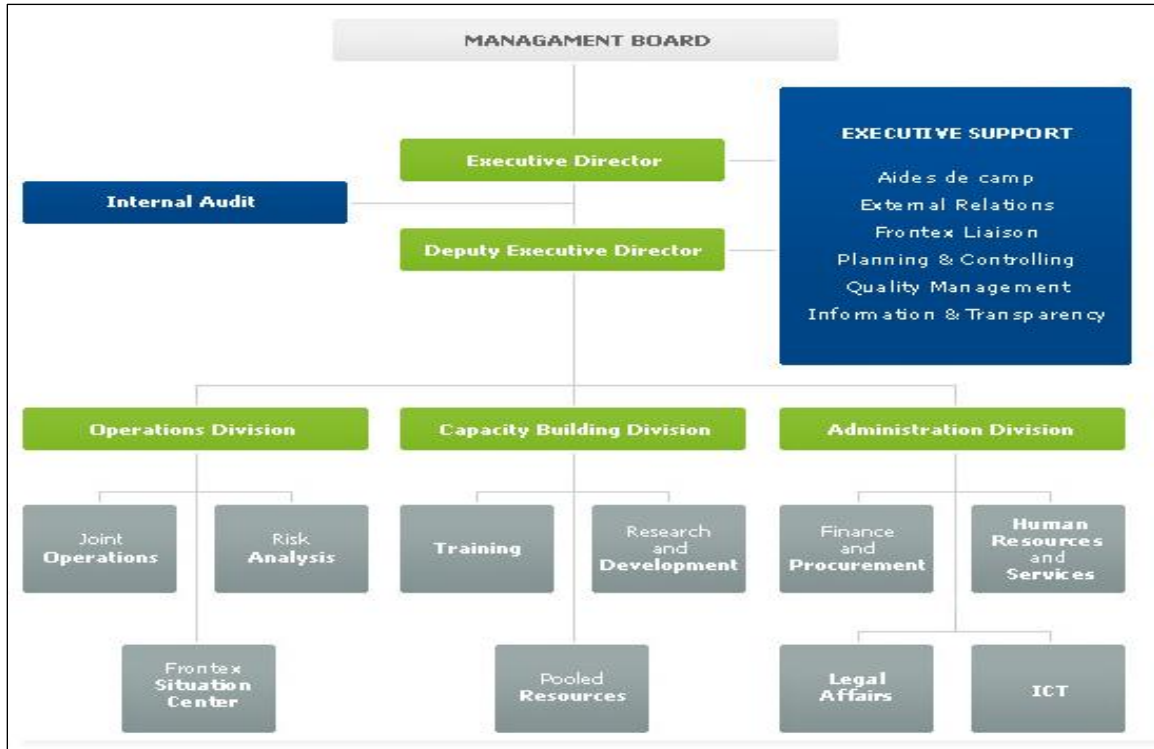
The working scopes of *Frontex* are divided into six areas, namely “risk analysis, coordination of operation cooperation between Member States, training, facilitating the attainment of research and development goals, providing a rapid crisis-response capability available to all Member States, and assisting Member States in joint return cooperations” (Frontex, 2006)

As mentioned above, the agency has been established by the *Council Regulation (EC) 2007/2004* and has regard to the *Treaty establishing the European Community*. After amendments of the *Regulation (EC) No 863/ 2007*, mechanism for the creation of Rapid

Border Intervention Teams have been formally established (Frontex, 2006). The *Regulation (EC) 863/2007* also refers to the *Treaty establishing the European Community*, particularly *Articles 62(2) and 66 (Regulation (EC) 863/ 2007)*. The agency holds two external powers, namely the rights for direct cooperation with third countries and secondly the facilitation agreements, meaning *Frontex* is legally enabled to establish operational cooperation between the Member States and third countries (*Art. 14*). This listing of legal acts is important to show that the regulations amend each other and are constantly re-newed. Moreover, they are especially developed for *Frontex*.

The composition of *Frontex* can be seen in Graph 1, which shows a flow chart depicting the hierarchy of the staff of *Frontex*. The Management Board consists of one representative of each Member State and two representatives of the European Commission as entailed in *Council Regulation (EC) No 2007/2004*: “in order to control effectively the functions of the Agency” (*Council Regulation (EC) No 2007/ 2004*). Not only the establishment of financial rules or verification of execution are tasks of the Management Board, but also to “establish transparent working procedures for decision making by the Agency” (*Council Regulation (EC) No 2007/2004*).

Graph 1: Structure of *Frontex* (Frontex, 2011).



In 2007 the founding Regulation has been amended by the *Regulation (EC) No 863/2007 of the European parliament and of the Council of 11 July 2007*. Throughout the adjustments, mechanisms for the creation of Rapid Border Intervention Teams have been included. This step is peculiarly important as these teams are set up to deal with the massive refugees as the external borders of the EU. This shows on the one hand that *Frontex* regularly enhances its staff and missions according to the needs of the EU but also its legislations. Hence, the regulation establishing these Rapid Border Intervention Teams will also be examined throughout the analysis as they might adhere new rules regarding ‘human rights of unlawful immigrants’ and ‘surveillance and control’ than the establishing Directive.

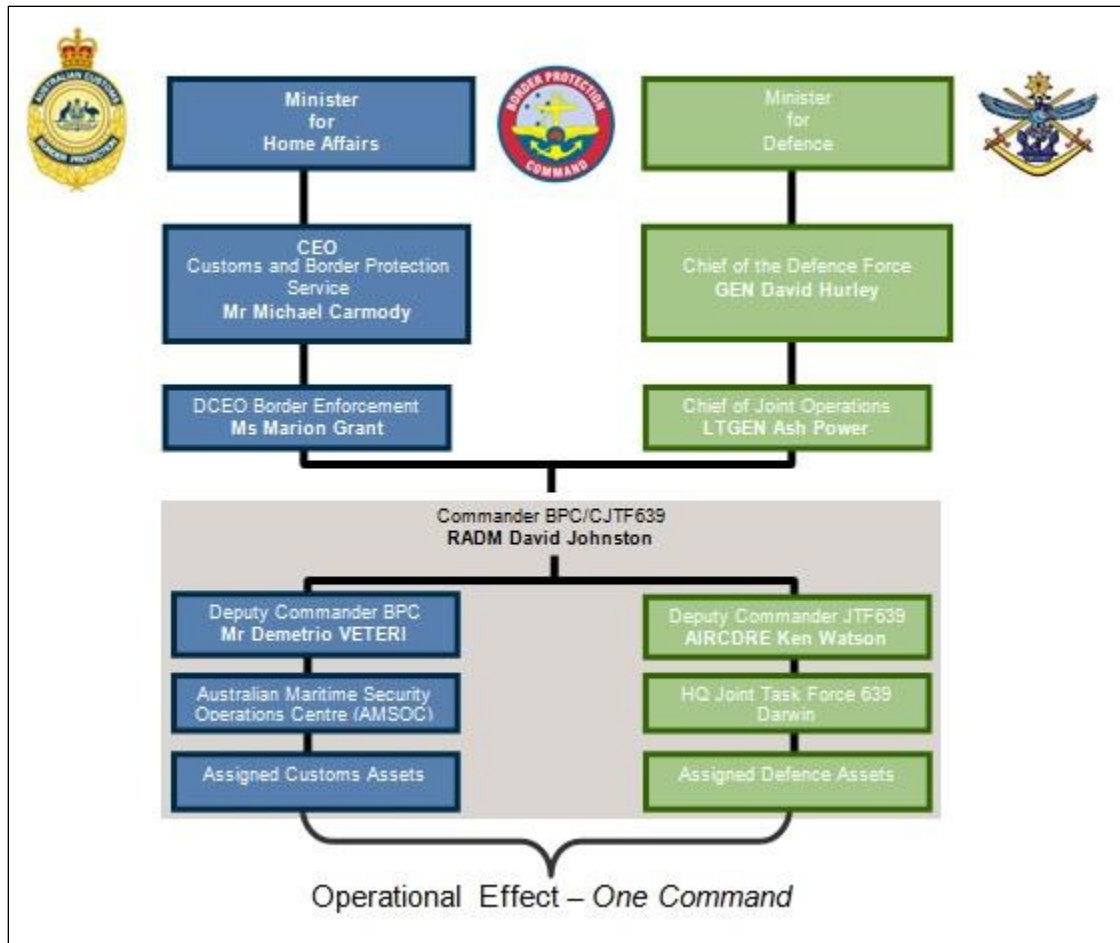
Moreover, the regulating tasks and powers of guest officers have been set out by the latest amendments by *Regulation (EC) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*. Again, these changes have been written down in amendments of the Directive and therefore need to be analysed in order to find new paragraphs about human rights and control.

The current form of the *Australian Border Protection Command (BPC)* has been established by the Australian Government in 2006 for better coordinating national awareness and response efforts to protect Australian’s interests in the Australian Maritime Domain

(AMD). *BPC* is a multi-agency taskforce, which utilises assets assigned from Australian Customs and Border Protection Service and the Department of Defence to conduct civil maritime operations. Moreover, it is a maritime law enforcement agency. It is not established by a specific doctrine as it exercises powers on behalf of other Australian Government Agencies under the *Customs Act*, *Migration Act* and *Fisheries Management Act* (Australian Government, 2011, Home). The *BPC* refers to these Acts that have not been specifically developed for the agency, as *Frontex*' legislations have.

The history of the *Border Protection Command* refers back to the late 1960s, when the Royal Australian Air Force (RAAF) and Royal Australian Navy (RAN) began to surveillance the Australian borders when 12-nautical-miles-fishing-zones have been declared. Illegal immigration and people smuggling was an issue which caught the governments attention in the late 1970s in line with an increase in foreign fishing vessels, which made them enhance the nautical mile Australian Fishing Zone (AFZ), now Australian Exclusive Economic Zone (EEZ). In 1999 the prime minister established the Coastal Surveillance Taskforce in response of two undetected arrivals of Suspected Irregular Entrant Vessels (SIEVs) in order to enhance intelligence gathering and analyse. In 2004, the Joint Offshore Protection Command (JOPC) was created as the Taskforce on Offshore Maritime Security reported to the Parliament that Customs and Border Protection and Defences work increasingly on tasks about offshore maritime patrol, response and interdiction capabilities. The JOPC has been renamed into *Border Protection Command* in 2006 in order to better reflect the organizations' role. It is responsible for the coordination and control of operations in order to protect Australia's national interests against the following maritime security threats: "Illegal exploitation of natural resources, illegal activity in protected areas, irregular maritime arrivals; Prohibited imports/exports, maritime terrorism, piracy, robbery or violence at sea, compromise to bio-security and Marine pollution (Australian Government, BPC, 2011). These tasks will be assessed overhaul throughout the legislative assessment. Graph 2 shows the organizational structure of the *BPC*. It is accountable to the Minister for Home Affairs as well as the Minister for Defence.

Graph 2: Organizational Structure of the BPC (Australian Government, 2012, about us).



The personnel of the *BPC* is from the Australian Customs and Border Protection Service, the Department of Defence, the Australian Fisheries Management Authority, and the Australian Quarantine and Inspection Service. The current Commander is Rear Admiral David Johnston, RAN. He is being supported by the Deputy Commander, (Border Protection Command), the Deputy Commander (Northern Command Headquarters (JTF639)), the Chief of Staff, the Command Legal Officer, the Director Governance and Command Support, the Director Operations, Director Intelligence, Director Strategy, Engagement & Counter Terrorism, Director Operational Planning, and the Regional bases in Cairns, Darwin, Broome and Thursday Island (Australian Government, 2011, about us). Additionally, the *BPC* regularly coordinates activities with a range of other Commonwealth, State and Territory Government agencies in order to execute its tasks.

Table 1 shows the key facts about both agencies and gives information on the difficulties of retrieving the same information for both agencies, such as their equipment. Hence more importantly, one task of the Australian agency is to fight illegal immigration whereas *Frontex* states more vague the need to ‘assist Member States in join return operations’ as a goal, but does not mention any specific task on illegal immigrants. The attention is drawn to the wording in the overview, as the *PBC* is more specific on the goal towards illegal

immigrants than *Frontex* is. This enhances the need to pay attention when analyzing the legal foundations of the border agencies, as there might also be peculiar differences in the wordings towards goals or respecting human rights.

Table 1: Key facts about *Frontex* and the *BPC* (Own creation, 2013).

	Frontex	BPC
Year of establishment	2005	2006 - (1960s: beginning of agency dealing with people illegally entering coastline)
Mission	- enhancing the external border security throughout coordinating the operational cooperation of the EU Member States	- better coordinating national awareness and response efforts to protect Australian's interests in the Australian Maritime Domain (AMD)
Framework	- it is a community body, showing legal identity as well as autonomy over its budget. - Responsible Management Board, consisting of operational heads of national border guard services and representatives of the European Commission governs	- BPC is a multi-agency taskforce, which utilizes assets assigned from Australian Customs and Border Protection Service and the Department of Defense to conduct civil maritime operations. - BPC regularly coordinates activities with a range of other Commonwealth, State and Territory Government agencies in order to execute its tasks. - Moreover, it is a maritime law enforcement agency - accountable to the Minister for Home Affairs as well as the Minister for Defence
Tasks	- Risk analysis, - Coordination of operational cooperation between Member States, - Training, - Facilitating the attainment of research and development goals, - Providing a rapid crisis-response capability available to all Member States, and - Assisting Member States in joint return operations	Fighting: - Illegal exploitation of natural resources; - Illegal activity in protected areas; - Irregular maritime arrivals; Prohibited imports/exports; - Maritime terrorism; Piracy, robbery or violence at sea; - Compromise to bio-security; and Marine pollution
Figures	- in 2011 between 1000000-2000000 refugees seeking asylum in GB and GER, and between 10000-100000 in other EU Member States (see App. 1 and 2)	- in 2011 between 10000-100000 refugees seeking asylum (see App. 1 and 2)
Refugees coming from	a. o. Sudan, Angola, Congo, Somalia (see App. 1 and 2)	a. o. Afghanistan, Malaysia, Indonesia (see App. 1 and 2)
Equipment	- 2011: staff of 313 people permanent - 2011: € 118187 million - Frontex and the host country plan the operation and then forward requests to MS that can decide if they make contribution and equip Frontex (CRATE: Centralised Record of Available Technical Equipment coordinates the 21 airplanes, 27 helicopters, 116 ships of the MS)	- 2011: staff of 5674 people - 2011: \$ 1006.7 million - Border technologies include any equipment that aids the detection, search, examination or surveillance of ships, aircraft, goods or persons entering or departing Australia.

Concluding it can be said that both agencies are relatively new in its current form. Additionally both agencies have mentioned ‘irregular maritime arrivals’ (Australian Government, BPC, 2011) and ‘illegal immigration’ as threats to internal security, public policy, public health or international relations (*Regulation (EC) No 863/2007 RAPID; Art. 3*). Most distinctive are the different forms of authority of the agencies. Whereas the Management Board of *Frontex* is composed of one official of each MS, the Australian agency is accountable to the Minister for Home Affairs and the Minister for Defence.

Contrary to *Frontex*, the *BPC* has not been established by a specific doctrine but has regard to the *Migration Act (1958)*, the *Migration Reform Act (1992)* and the *Fisberies Management Act (1991)*, which are extended in the *Border Protection Legislation Amendment Act (1999)*. In order to find information about how the *BPC* is legally supposed to treat illegal immigrants at Australia’s external borders, it is essential to filtrate these Acts for sections about this topic. Thereinafter, the similarities and differences of these agencies might be indicators that these can also be found within the legal foundations. Focusing on differences of the frameworks of the agencies in the above section, the following deals with the controversies within legislations.

2.2 Controversies with(in) legislations

After having dealt with the external border agency of the EU and Australia separately and in a table for a better overview, the following part of this conceptualization deals with controversies with legislations and laws. This second part is important for the overall understanding why the topic is worth examining as so far no research has focused on the legal foundations of external border agencies, but more importantly to understand the debate on law. Vining’s and Seligman’s assessment will be introduced because they approach the topic of controversies with legislations to two different extents, Vining dealing with the content of law and Seligman emphasizing that law is a man-made matrix. Both approaches will be picked up again when assessing the EU and Australian content of law.

The first model of interest is Joseph Vining’s, which deals with the dependency of the legislations’ content on the neutrality of its raisers. He therefore calls law a ‘linguistic discipline’ (Vining, 1008: 1), which refers to that fact that people ‘speak’ to individuals in order to affect their behavior. That is, according to Vining (2008) the greatest distinction of the discipline of law from other disciplines. On the one hand there is no clear separation between law and language and on the other hand law is assumed to emerge from the neutrality of the ‘lawmakers’ (Vining, 2008: 9). Vining (2008: 13) refers to the fact that legislations, such as the Geneva Convention 1951 which deals with refugee rights is very vague in its wording or even as he says “imprecise to affect ‘rational’ decision-making” (p. 13). Concluding, already in 1967 Joseph Vining foresaw in his book ‘Legal Identity- the coming age of public law’ that law is and will remain resilient. This approach by Vining has been chosen for the research at stake as it gives a very comprehensive insight on how

people take law for granted, as the nation have developed it, but Vining contradicts this assumption by saying it is subjectively written. Hence, as the Geneva Convention from 1951, that is *the* international convention dealing with refugees is imprecise in its wording it can be assumed that the agencies' legislations of the EU and Australia also entail such imprecise paragraphs. The focus of attention throughout the assessment lies on the wordings of the legal foundations.

Seligman (1974) rather points out that one needs to keep in mind, while analysing legislations, that states are choosing their lawmakers. That is to say, Seligman goes a step further than Vining. Whereas Vining has mentioned that law is a linguistic discipline that might bring shortfalls in the content of the law, Seligman emphasizes that the states make law and therefore, possible shortfalls in the law are created on purpose by the states. States recruit people to work in certain institutions that prepare legislatives: "Recruitment influences the distribution of power, the representativeness of elites, elite competence, policy outputs, and the collective norms of the elite" (Seligman et al., 1974: 33). Therefore legislative decision-making is influenced through two factors, such as the 1) social representativeness of legislative candidates and 2) their political socialization. Especially the second factor refers often to economic benefits: "the social background is often related to major economic interests in their constituencies" (Seligman et al., 1974: 190). The topic of states creating law according to their needs is essential to the assessment of the external border agencies' legislations as well. Following, any contradictions that can be found between 'human rights of unlawful immigrants' and 'surveillance and control' might be there on purpose, by knowledge of the states that chose the lawmakers.

Concluding both theorists show valuable aspects for this research but miss essential factors, as Vining deals with the fact that law and language is always intertwined, which means that the way one phrases the legislations depends on the language, wordings, framing. This is important as the upcoming assessment deals with possible contradictions within legislations and hence if they are apparent, according to Vining the vague wording by the lawmakers leaves space for interpretation. Moreover Seligman deepens this approach by saying that the states chose lawmakers according to their own preferences. This means if contradictions are being found Seligman does not only say that these contradictions leave space for interpretation of the law, but rather that these shortfalls are established on purpose by the states.

Both approaches deal with the facts that the wording in legislations is done purposively by their lawmakers, hence the states which leads to the conclusion that any conflictual areas within the agencies' law are also created on purpose by the states in order to leave room for interpretation for the agencies to act.

As mentioned earlier, studies on conflicts within the content of the legal foundations of external border agencies can hardly be found in the current literature and is therefore this study is an attempt of approaching on this topic.

Chapter 3 Operationalization

The section ‘operationalization’ shows how the study has been preceded. The research design will be explained as well as the case selection followed by explaining the origin of data. Additionally it will be explained why the Grounded Theory Approach has been outlined as most suitable for this study as well as the reasons for choosing the European and Australian external border agencies as cases.

3.1 Research Design: Case study

A case study is a holistic in-depth examination of a topic that can be investigated quantitatively but also qualitatively as Sadovnik (2007: 422) states. The following study is of qualitative nature. As two different cases, the Australian and the Union’s agencies at stake are being assessed with two different datasets, the study is well suitable for a case study as research design. The units of observation are legal documents for both cases, which is another factor making the study appropriate as a case study. This is based on Patton’s (2002) “perspectives to the same data set” as mentioned in Yin (2009: 116). The design of a case study has been chosen as a fundamental factor for this investigation of the agencies legal foundations because it “investigates a contemporary phenomenon in depth and within its real-life context, (...)” (Yin, 2009: 18).

3.2 Case selection: Frontex and BPC

The Australian and the European external border agencies have been chosen for several reasons. Firstly, Europe and Australia receive large number of applications for immigration and a raising number of unlawful immigrants on their borders as Weber and Pickering (2012) mention. Australia and the EU have ratified the 1951 Convention Relating to the Status of Refugees which means that they are obliged to protect those who apply for refugee status (Human Rights and Equal Opportunity Commission, 1997: 5). Furthermore, Europe also claims that it ensures “equivalent rights and treatment for non-EU nationals throughout the EU” (EUFocus, 2008: p. 1). Moreover the EU and Australia are attractive to refugees because of their rather stable economic situation and Europe’s welfare system (Surber, 2012). Concluding, the first reason for choosing Australia and the EU are various similarities, as attractiveness to immigrants and a rather stable economic situation compared to countries with war or great famines.

Secondly, another similarity is that Australia and Europe are in the point of focus of media, politics and organizations since a couple of years, due to advent incidents where they are accused of degrading treatment by media (Herald Sun, 2012) and non-governmental organizations of violating human rights (HRW, 2011). It is interesting to assess if any contradiction within their legislations might exist that could be an explanation for these incidents. A third factor for the choice of assessing the EU agency and the Australian agency is that the working language of documents and legislations is English for the European and Australian cases, which saves time and costs for translation.

3.3 Data collection

3.3.1 Origin of data: Legal documents

The data collection includes primary legal sources, such as formal legal documents of external border agencies. This analysis of legal documents is one of the major methods of social research and “meaningful and appropriate in the context of qualitative research” (Mason, 2002: 79). Finding out a possible area of conflict between ‘human rights of unlawful immigrants’ and ‘control and surveillance of Europe and Australia’ can be preceded in ways such as interviewing staff of the external border agencies as well as retrieving information from non-governmental organizations that are independent from the organizations. Hence, the point of focus lies at finding out contradictions within the legal backgrounds, which means that these are the units of observations. Moreover legislatives are the most important documents of every state with rule of law (United Nations, 2006: 1). The process of passing a legal document is very complex, with many ratification procedures, amendment possibilities as well as highly careful choice of the wording. Therefore, whatever the findings will be, one can be sure that the governments have phrased every legal document specifically. Additionally, the current state of research does not entail studies about the legislatives of the external border agencies to a great extent. Therefore the assessment of the agencies’ legal foundations shall be a contribution to the existing literature dealing with external border agencies. All legal texts the agencies refer to will be assessed. This means not only the founding Directives of *Frontex* and the three main Legislations the *BPC* (table 2) refers to, but also the ones which are referred to within the laws, such as the Geneva Convention. A list of the legislations that are of interest for the study because the agencies refer to them is given in Table 2.

Table 2: Overview of the legislations Frontex and the BPC refer to, alphabetically ordered (own creation).

European Union	Australia
Charter of Fundamental Rights of the EU	Border Protection Legislation Amendment Act 1999
Convention for the protection of human rights and fundamental freedoms as amended by protocols No. 11 and 14	Convention relating to the status of refugees of 28 July 1951 (Geneva Convention)
Convention relating to the status of refugees of 28 July 1951 (Geneva Convention)	Customs Act 1901
Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2005/358/EC)	Fisheries Management Act 1991
Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union	Migration Act 1958
Regulation (EC) No 652/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code)	
Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of operational cooperation at the External Borders of the Member States of the European Union	
Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanisms and regulating the tasks and powers of guest officers	

3.3.2 Method: Interpretive Analysis & Grounded Theory Approach

Throughout searching for a well-fitting method finalizing the research question, the vagueness and lack of an appropriate theory made it complicated to make a strictly deductive study with a quantitative set of data. Hence, the Grounded Theory Approach seemed most appropriate because it deals with qualitative data and aims at developing a coherent set of data based on assessing legislations of external border agencies, Yanow (2000) emphasises that qualitative research cannot be undertaken without the awareness that arguments are ‘subjective’ (Yanow, 2000: 9) and more importantly also in this analysis of legislations, that there is a realm of processes existing that cannot efficiently be studied by cost-benefit analyses or decision analyses (Yanow, 2000: 4). As the study at stake is of qualitative nature, the Grounded Theory Approach has proven to be most useful in the case of analyzing legislations, because it gives opportunity to already analyse data while collecting it (Brüsemeister, 2009: 190). Webley (2010: 15) states, “it is a theory of research, a data collection method, a mode of analysis and a way of generating theory”.

Although the GTA does not prove to be very high in reliability: “in the limited sense that it (GTA) is verifiable” (Strübing (2008: 81) as qualitative research does not aim at providing

high reliability but rather a systemic approach of quality of the study. Still, GTA does show a high validity through the processes of axial and open coding (Strübing, 2008: 83). Coming to representativeness, the Grounded Theory Approach rather aims at establishing a theory that is representative on its own and not the production of results shall do so (Strübing, 2008: 82). Finally, there are various approaches in GTA that ensure a high quality of the study (Qualitätssicherung), such as a specific way of theoretical sampling, coding or writing memos as Strübing (2008: 88) explains.

This thesis precedes the Glaserian approach to GTA, that is dealing with the concerns and problems of a given setting and quite interactionist, as the process and formation of coding and the theory generating seems most suitable.

3.4 Data Analysis

3.4.1 GTA analysis

Due to the fact that the Grounded Theory Approach develops an empirical discovery of themes, categories, and related issues regarding the legal documents founding the European and Australian external border agencies, during the research process rather than it tests a hypothesis that has been clarified in advance, the data analysis starts already while collecting the data. The analysis itself is a continuous process of coding. Firstly, 'open coding' that is the examination of data line by line in order to find any concepts (Strauss and Corbin, 1998) and secondly the 'axial coding', which aims at finding connections between the categories made in the earlier process takes place. Afterwards 'selective coding' aims at further defining the categories. As already mentioned earlier, memos will be written in order to keep track of how the categories have been distinguished (Brüsemeister, 2000: 197).

3.4.2 Coding

'Coding' is preceded on several levels as it allows interpreting already whilst still categorizing the legal foundations of the border agencies. Firstly, the legislations of the European and Australian external border agencies are being read word by word in order to find several main categories. This process, named 'open coding' has been applied to all the legislative documents the agencies are building upon or refer to. Important to note is that in this research the process was not fully 'open' because the legislations have been assessed for lines about 'human rights of unlawful immigrants' and 'surveillance and control'.

Afterwards, the axial coding defines connections between these categories, which in this thesis have been the core-categories 'tasks', 'mission', 'human rights of unlawful immigrants', 'surveillance and control' and 'third-country nationals'. Afterwards the selective coding process defines them further into sub-categories. As the line-by-line coding can be separated more detailed either into the analytical underlying process, or simply the descriptive obvious analysis, the unit of observations are decisive. In this thesis the units of observations are legal documents and thus the obvious wording will be analysed.

The process of coding has been started by assessing an overview over the legal documents one by one separately. Firstly the legislations of *Frontex* and then the ones giving the legal background of the *BPC* have been read. Already here one could see various important factors. Firstly, the legislations of *Frontex* have specifically established for the border agency, whereas the *Australian Border Protection Command* rather refers to already existing legislations and Conventions. Secondly and consequently, the Australian legislations cover a different range of issues than the European documents. The Customs Act deals with customs and the Fisheries Management Act mainly deals with fishing in the Australian Fishery Zone (AFZ). Thus, these paragraphs have been read but are not of any importance to this study and have therefore not been put into categories. Only relevant topics that could be brought into connection with the research question thus deal with either illegal immigrants, illegal entry or surveillance and control were interpreted. Hereinafter categories have been established about sections dealing with the same topic, which again have been separated into categories. The very same procedure has been used for the Australian legislative documents and the already existing categories have been used or altered when needed. Overall, with this scheme the researcher aimed at finding uniformity between the legislations. Paragraphs and articles dealing with the same content were put into one category and new relevant ones opened a new category, which show the ordered contents of the legislations.

The scheme has been finalised after no categories have been assessed anymore and then core-categories as in table 3, 4, 5 and 6 can be seen, which are rather conceptual frameworks than descriptive were arranged. For these mind maps I used the programme xmind. Some core-categories have been divided into subordinated categories as can be seen in graph 3 and 4 throughout the comparative analysis. Most importantly, the interpretation of data has started while collecting and assigning the subordinate categories to the core categories.

Chapter 4 Comparative analysis of the legal backgrounds of Frontex and the BPC

The analytical section of this thesis assesses the legal foundations of the external border agency of the EU and Australia. As already mentioned, the open coding process is not completely open, as it especially searches for categories on the two main topics 'surveillance and control' and 'human rights' entailed in the directives and treaties in order to array these into more specific categories. Distinctions can be made with regard to the tasks of the agencies, the goals and the termination concerning of the legislatives dealing with the subjects of 'human rights' and 'control and surveillance'. The first and second sub-research question will be assessed throughout this part:

1. What do the legislations of *Frontex* and the *BPC* state concerning fundamental rights of unlawful non-citizens?
2. What do the legislations of *Frontex* and the *BPC* state concerning control and surveillance at the external borders?

For both agencies five core categories have been retrieved. The graphs (3 and 4) show that each core category 'tasks of agency', 'goals of agency', 'surveillance and control', 'human rights of unlawful immigrants' and 'termination on individuals' is differently to be scrutinized according to the sub-categories as the writing of memos has shown. Especially when it comes to the tasks and goals of the agencies there are different sub-categories. Thus, for matters of readability these sub-categories are intertwined in the following analysis and not mentioned with separate headlines, but rather shown in a comprehensive table in the end of each category. The succession shows *Frontex* and afterwards the *BPC* throughout the analysis of every core category. As it is impossible to cite each legislation dealing with a certain core category, the appendices show categorical tables depicting the legal paragraphs supporting the analysis.

Before the categorizations will be given the nature of the legislations of *Frontex* and the *BPC* will shortly be described in order to expose possible differences or similarities that might be interesting for the conclusion. *Frontex* is legally established by Council Decision (2005/358/EC), Council Regulation (EC) No 2007/2004, Regulation (EC) 652/2006, (EU) No 1168/2011, (EC) No 863/2007 and refers to the Charter of Fundamental Rights of the EU and the Geneva Convention. The Australian agency regards to the Migration Act, Fisheries Management Act, Customs Act and the Geneva Convention. *Frontex*' law is established by more 'complex' legislations than the Australian law. A 'council regulation' is a legislative act of the EU that simultaneously becomes enforceable as law in all Member States of the Union, whereas a 'council decision' is also a legal instrument that is only binding to those it is addressed to (Craig and de Búrca, 2007: 86). A 'charter' grants authorities or rights which is separate from the EU, although it is a necessity to adopt in order to become a Member State, whereas a 'convention' needs to be signed and ratified by

the different parties adopting it (EU Charter, 2004). Hence, they are all legal acts but show different ways of implementation. Due to the differentiations in the governmental compositions, the Australian border agency refers to legislative acts that are simply called acts and not divided into regulations or decisions. This explanation has shown that the various laws of the Union are so distinctive due to the fact that there are many countries in the Union. Sometimes a law is binding to all of them, sometimes just to some of MS, therefore they name the legislations differently.

4.1 First core category: tasks

The first core category that has been identified throughout assessing the legal foundations of *Frontex* and the *Australian Border Protection Command* are their tasks.

Frontex is legally enacted to facilitate the application of existing and newly developed measures regarding surveillance and control. Moreover, trainings related to control and surveillance shall be introduced by *Frontex* staff according to Council Regulation (EC) 2007/2004, 7) and further equipment and research needs to be provided (Council Regulation (EC) 2007/2004, Art. 7: par. 2, par. 3). The legislation states that the staff of *Frontex* also shall “carry out tasks related to the checks of persons at and the surveillance of the external borders” (par. 13) in order for effective cooperation between the national frontier guards and the supranational staff. *Frontex* needs to provide resources and staff in order to support the Member States effectively (Regulation (EC) No 836/2007, par. 4). Thus, no specific ways on how this is done is being introduced. Nevertheless, par. 20 mentions, that although the European MS hold the authority over controlling the external borders, no “financial means should be made available for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the EU” (Regulation (EU) 1168/2011.)

Assessing the tasks of the *BPC*, the Australian legislative states that ships and aircrafts can be searched for people “without warrant” in order to control that person for customs or properties that are to be declared (Customs Act 1901, Art. 185AA 1). Hereby, the duties of the *Border Protection Command* are rather situated in the direction of control of illegal customs but non-citizens illegally present on the Australian territory. The Fisheries Management Act also does not deal with control of illegal immigrants but persons seeking the grant of fishing and the control of their boats (par. 16B(4)). Referring to tasks safeguarding national security, the Migration Act 1958 states the need for identification of non-citizens that threaten national security, as e.g. they have a criminal transcript (Migration Act, 1968: Section 5B(g)). Additionally the *BPC* is responsible for keeping peace in the detention centers and ensuring that no video material is being made or even stored (Migration Act, 1958: 261AKF). Paragraph 4 of the Migration Act states that “the minister may issue a conclusive certificate in respect of a non-citizen if the minister is satisfied that (a) the non-citizen is a threat to the security of the Commonwealth or of a state or territory; or (b) it is in the public interest to do so. 500A Refusal or cancellation of

temporary safe haven visas (1d) the person is a threat to national security” (Migration Act, 1958: Par. 4). Which means, that the minister has the discretionary of acting on her own if she represents the nation’s will. The Australian legislation sets out that the *BPC* staff may act in cases of threats to national security, if a foreign boat in the Australian Fisheries Zone (AFZ) does not stop with “any reasonable means consistent with international law to stop the boat (incl. firing at or into the boat after firing a warning shot,...)” Part 6 (Fisheries Management Act, 1991) Division 1 Officers, 84 Powers of officers: (1ii). Another task important to assess is, which legal guidelines exist about the treatment of non-citizens that are illegally present in Australia and the EU. Staff from the *BPC* can legally remove unlawful non-citizens when the minister or a delegated person refuses to grant a visa (Migration Act, 1958: Par. 193 (1a(iv)). Section 501, 501A and 501B) and when they are prevented from leaving the vessel. The Division on removal of unlawful non-citizens lays out that the officer must remove unlawful non-citizens (Migration Act, 1958: 8, 198) but does not concretise how the removal should be proceeded

Aside these tasks, the Geneva Convention dealing with refugees, that Australia and the countries of the European Union have signed states that the Office of the United Nations High Commissioner for Refugees has regularly to be updated by reports about national information and statistical data (Geneva Convention, 1951 Art. 35). It is not explained in which time frame they have to draft these reports.

Dealing with the sub-category ‘deportation/removal’ in the European Union legislatives, *Frontex* shall be assisting the nations throughout the removal of non-citizens (EC 2007/2004 (7). Additionally it is not stated how the process of removal shall be preceded, but rather that *Frontex* is supposed to find the best practice in cooperation with the Member States of the EU. The European legislation does not concretely lie out any removal practices, nor does *Frontex* hold responsibility, but the Member States itself: “operational aspects of return of third-country nationals illegally present in the Member States fall within the competencies of the authorities responsible for controlling external borders” (EC 2007/2004 Art. 11). In table 3 the core category ‘tasks’ is further divided into sub-categories. The table gives a good impression on the different ways of wording the legislations of the agencies entail.

Table 3: Core category ‘Tasks’ divided into sub-categories (own creation).

Tasks	Frontex		BPC
Tasks	<ul style="list-style-type: none"> - introduce trainings related to control and surveillance - restrict financial support for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the EU (EC) No 863/2007, 3) - provide further equipment and research (EC) No 863/2007, 3) - carry out tasks related to the checks of persons at and the surveillance of the external borders (EC) No 863/2007, 4) - assist Member States by providing appropriate and sufficient resources, in particular personnel (Regulation (EC) No 863/2007) 	Tasks	<ul style="list-style-type: none"> - search ships and aircrafts order to control that person for customs or properties that are to be declared (Customs Act, 1901, 185AA) - identify non-citizens who threaten national security (Migration Act, 4A) - keep peace in detention centres and ensure that no video material is being made or even stored (Migration Act, 1958, 261AKF)
Removal	<ul style="list-style-type: none"> - assist MS throughout the removal of non-citizens (EC 863/2007, 4) 	Removal	<ul style="list-style-type: none"> - remove unlawful non-citizens or people not covered under 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d) (Migration Act, 1958, 91N)
Reports	<ul style="list-style-type: none"> - regularly update UNHCR with reports and statistics 	Reports	regularly update UNHCR with reports and statistics
Authority	<ul style="list-style-type: none"> - MS hold authority over control of external borders of the EU (EC 863/2007, 4) 	Grant/refuse visa	<ul style="list-style-type: none"> - minister or representative may refuse visa or cancel visa when person threat to national security or it is in the common interest of the people (Migration Act 1958, 4a)

4.1.1 Summary

The tasks of the two agencies differ to a great amount. *Frontex*’ tasks are fairly supporting the Member States throughout their operations, whereas the BPC is the executive hand of the Australian government. The authority of *Frontex* lies in the hands of the Member States, whereas the BPC does not mention authority. Regarding the research question, on a more substantial level, it could be argued that as the *BPC* does not state who holds authority, in reverse no one holds responsibility for the agencies’ actions, compared to *Frontex*, where the MS hold responsibility. The Australian minister may for personal reasons or in the will of the people refuse visa to unlawful immigrants and remove this, but no details are given what is meant by ‘on personal grounds’, how the ‘will of the people’ is found out, and how the removal procedure happens. *Frontex*’ refers to the Charter of Fundamental Rights that needs to be regarded throughout preceding tasks, whereas the BPC does not mention this condition explicitly. The Australian law states that a task is to detect non-citizens that endanger national security, such as persons having a criminal record. Notwithstanding it is not displayed which other traits are regarded as threatening

national security. This vague wording gives reasons to argue for space for interpretation as the fact does, that the minister may refuse or cancel visa when threatening national security if it is “in the common interest of the people” (Migration Act, 1958: Par. 193 (1a(iv)). Section 501, 501A and 501B). Again, what exactly this means is not defined.

The wording is very decisive in the comparison of the legislations between Europe and Australia. Additionally it can be seen that the tasks of *Frontex* rather refer to the operational management at the external European borders and the work at the borders themselves. The *Australian Border Protection Command* has more far-reaching tasks entailed in its legislatives, such as ensuring order in the detention centers and finding out of non-citizens jeopardize national security. Another point worth drawing attention to is the tasks, mentioned in the Australian law, to ensure that no video material is smuggled out of one of the detention centers. Here, the question is on what reasons this is grounded and if the Australian government acts in line with its own and the international legislation, it seems gratuitous to specifically mention that in the law. Most importantly for the research question is the observation, that the Australian legislation assigns the task to remove unlawful immigrants illegally present in the Australian territory. *Frontex*' law neither explains on what grounds Member States may remove non-country nationals and get assistance of *Frontex*. The order for removal is more precisely stated in BPC's legislation.

4.2 Second core category: goals

The firstly mentioned goal of *Frontex* is to ensure control and surveillance by respecting the area of freedom, security and justice (AFSJ) (Council Regulation (EC) 2007/2004, 1). Additionally, fighting illegal immigration is trying to be aimed at throughout effective management at the external borders of the EU through checks and surveillance (Regulation No 863/2007 RAPID, par. 3). Par. 5 (Council Regulation (EC) 2007/2004) adds that the current measures for practical assistance to the MS and the surveillance of the external border are not sufficient, specifically when large numbers of third country-nationals try to enter European grounds. The amending legislation from 2011 (Regulation (EU) 1168/2011) once more emphasizes the need for enhanced cooperation between the MS and the *Frontex* staff and underlines the need for generally accepted settlements and procedures for control and surveillance at the EU's external borders (par. 3). Both factors are highly important to the Union in order to diminish illegal immigration and human trafficking that can threaten international relations of the Member States, public policy, health and internal security (par. 4), for which control and surveillance is essential. Concluding, *Frontex* needs to support the Member States throughout providing resources and staff (Regulation (EC) No 836/2007, par. 4). In terms of responsibility, paragraph 4 also clearly mentions the Member States' responsibilities and emphasized the role of the agency to enhance cooperation between the Member States and assists with operations concerning the external border management and the deportation or return of third-country nationals: “The responsibility for the control and surveillance of external borders lies with the Member States”.

Regulation (EC) No 863/2007 RAPID states that *Frontex* shall support the Member States in fighting threats to internal security, public policy, public health and international relations, such as illegal immigration or trafficking in human beings as the regulation states in Art. 3, because at this juncture, the facilities for the assistance and checks at the external borders, hence the surveillance system is not fully developed specifically in times when large masses of non-citizens of the EU illegally aim at entering the Union’s territory (Regulation (EC) No 863/2007 RAPID: Art. 5). Regulation (EU) 1168/2011 Amendment of *Frontex* Regulation repeats how important the agency is for supporting the coordination of the Member States (Art. 19).

The goals for the *Australian Border Protection Command* are similar as the ones of *Frontex* as diminishing threats to security is the main goal (Migration Act, 1958: Section 5B: 202). Additionally the Migration Act lays out that the *Border Protection Command* shall represent the people’s will. However, within the legislations a variety of goals has not been included. The most distinctive factor is that the *BPC* does not in detail lay out any goals, compared to *Frontex* as can be seen in table 4 that depicts an overview of the core category ‘goals’ for both agencies.

Table 4: Core category ‘Goals’ divided into sub-categories (own creation).

Goals	Frontex	BPC
goals	<ul style="list-style-type: none"> - aims at an integrated management for uniform and high level of control and surveillance to ensure free movement of persons and safe ASJF (EU 1128/2011, 2) - fight illegal immigration through effective management, checks and surveillance (EC 863/2007) - make current measures throughout practical assistant to MS sufficient when large numbers of third-country nationals arrive at borders. - establish common rules for procedures and standards for cooperation between Frontex staff and MS (EU 1168/2011, 2) - Support MS through granting resources and fighting threats to public policy, health and internal security (EC 863/3007) 	<ul style="list-style-type: none"> - diminish security threats (Migration Act, 1958, 4A) - represent people’s will (Migration Act, 1958, 4B)
responsibility	<ul style="list-style-type: none"> - MS hold authority, Frontex rather enhances their cooperation and assists throughout operations and deportation of third-country nationals (EC 863/2007) 	

4.2.1 Summary

The goals mentioned in the legislatives are similar as *Frontex* and *BPC* need to fight any threats to the national security. Additionally, the Australian law states that the *BPC* needs to “represent the people’s will” (Migration Act, 1958, 4A) but does not name any measurement on what this is or how this needs to be pursued. *Frontex*’ regulation is more clear in the perspective by stating that illegal immigration needs to be diminished by enhancing effective management, checks and surveillance. It is not explained how this is

done, but as learned throughout the section ‘tasks’, the most significant step is further cooperation of the MS assisted by *Frontex*. In general it can be observed that the goals are a lot more defined for *Frontex* than for the *BPC* as can be seen in table 4. Moreover in the Australian legislative no section in the agencies’ responsibilities could be tagged, whereas Council Regulation (EC) 2007/2004 intelligibly expresses that the responsibility of *Frontex*’ actions is held by the MS.

The ‘tasks’ and ‘goals’ give reason to pay special attention in the following on the phrasing of the legislatives as well as the question if hereinafter the *BPC* also leaves as much space for interpretation by not further conducting certain laws as observed so far. Throughout section ‘tasks’ an important insight has been given that for security reasons the *BPC* is supposed to remove unlawful non-citizens that are illegally present on Australian territory, contrary to *Frontex* that does not act on its own but supports the Member States throughout deportations. Adding, in the section ‘goals’ it was examined that *Frontex* needs to diminish illegal immigration throughout surveillance and effective management as does the *BPC*, without suggesting how.

4.3 Third core category: Human Rights of unlawful immigrants

The third core-category that has been acknowledged is ‘Human Rights of unlawful immigrants’. Assessing the legislations of *Frontex* with regard to ‘Human Rights of unlawful immigrants’, firstly the Regulation (EC) No 863/2007 RAPID explains that throughout the joint operations of the Member States the officers must not discriminate (part. 14). The *BPC* refers to human rights as a given for individuals which stand under the protection obligation of Australia (Migration Act, 1958: 91N) and for individuals for whom Australia is a “safe third country” (Migration Act, 1958: 91D). It can be observed that the establishing legislation of *Frontex* refers to respecting fundamental rights as they are displayed in the Art. 6(2) of the Treaty on European Union and in the Charter of Fundamental Rights of the European Union (EC 2007/2004). This reference to the TEU delivers Art. 6(2) TEU: “The Union shall respect fundamental rights as guaranteed by the European Commission for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of community law”. The latest Regulation amending *Frontex*’ legal background (EU No 1168/2011) refers to the international law again by stating that the agency needs to fully respect Union law, the Charter of Fundamental Rights of the EU and the Convention Relating to the Status of Refugees (Geneva 1951). (TFEU: Art. 74(1)2). The Direction adds that *Frontex* shall fully respect fundamental rights as well as the rights of refugees and asylum seekers that goes hand in hand with the prohibition of refoulement (Regulation (EU) 1186/2011: Art. 1(9)).

The legislations refer to international law, which therefore needs to be assessed as well. Art. 3 of the Geneva Convention states that every nation accepting the Convention may not

discriminate any refugee without regarding the nationality, race or gender. Art. 27 lays out that any contracting state needs to issue identity papers to refugees. Art. 31(1) displays that any contracting state must not impose any penalties because of illegal entrance on refugees when they fall under the refugee status. Also, the refugees shall be granted enough time and all the necessary facilities in order to be able to receive admission of another nation (Art. 31(2)). Hereinafter the Geneva Convention mentions that the principle of non-refoulement applies (Art. 33(1)). That means that no refugee may be expelled or returned when life or freedom may be endangered, but only when the country sees the refugees as threatening national security (Art. 33(2)). Australia and all states within the European Union have signed to Geneva Convention.

Table 5: Core category ‘Human Rights’ divided into sub-categories (own creation).

HR	Frontex		BPC
HR strategy	<ul style="list-style-type: none"> - No discrimination while operating (EC 863/2007 Art. 4(2)) - Fully respect fundamental rights and rights of asylum seekers and refugees - Fundamental Rights Officer control if operations are in line with human rights strategy - Principle of non-refoulement applies - Geneva Convention states no discrimination on grounds of gender, race, nationality (EU 1168/2011) - need to issue identity papers - detention for illegal arrival is prohibited (EC 2007/2004) 	HR strategy	<ul style="list-style-type: none"> - HR as standard for people who need protection (Migration Act 1958, 91D, 3b) - Geneva Convention states no discrimination on grounds of gender, race, nationality - need to issue identity papers Migration Act, 91D, 3) - detention for illegal arrival is prohibited - principle of non-refoulement applies (Migration Act, 1958, 91D, 7)
Refers to	<ul style="list-style-type: none"> - Treaty on European Union - Charter of Fundamental Rights of the European Union - Geneva Convention 1951 	Refers to	<ul style="list-style-type: none"> - Geneva Convention 1951

4.3.1 Summary

Distinctive differences of the legal foundations of *Frontex* and the *Australian Border Protection Command* can be evidenced, such as the fact that the *BPC* has mentioned human rights only in its Migration Act from 1958, whereas *Frontex* latest amendment from 2011 (Regulation (EU) No 1168/2011) prolongs the fundamental rights strategies that have been established in 2007. Such a reformation has not been happened within the Australian law since 1958 which is drastic difference as the topic of unlawful immigration has become more and more apparent in the in the early years of 2000, which is about 40 years later than the Act has been established. This leads to questions about the currentness of the Australian legislations regarding ‘human rights of unlawful immigrants’.

The Australian legislative states that fundamental rights need to be applied on non-citizens that are under protection of Australia. Hence no explanation is given which people are under this status. That shows that legislations are phrased in such a way that certain conditions, scilicet to be under safety protection, have to be met before the fundamental rights strategy fully applies.

Therefore it seems that *Frontex* and the *BPC* have referred to legislations that are rather vague and leave space for interpretation. Thus, *Frontex* has changed this in 2011 with its amending Regulation. This established also a Fundamental Rights Officer, who shall work as a watchdog over the missions of *Frontex* and ensure these are in line with the human rights strategy. Australia's legislations seem to be not as detailed and precise as the European amending law, thus in 1954 it has fully accepted the Geneva Convention 1951. This core- category has given further information on what the others have already shown, namely vague phrasings and space for interpretation within the Australian founding law. Additionally the Australian law is not as up to date as the European one.

4.4 Fourth core category: surveillance and control

The Regulation (EU) 1168/2011, par. 2 states that a need for common rules at the external borders for enhancing 'surveillance and control' is apparent. The term 'security' is not depicted in *Frontex*' legal background, contrary to the Australian legal background, where a whole section in the Migration Act 1958 introduces 'security'. In this it is lied out that 'security' issues deal with the need to enhance the Departments ability for the identification of "non-citizens who have a criminal history, who are of character concern or who are of national security concerns,..." (Migration Act, Section 5B(g)) and in par. 202 that deals with 'Deportation of non-citizens upon security grounds', which refers to the fact that non-citizens are a threat to national security. Moreover, the Migration Act 1958 refers to Section 4 'Definitions of the Australian Security and Intelligence Organisation Act 1979' as it entails the definition of security. Security means: "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: i. espionage; ii. sabotage; iii. politically motivated violence; iv. promotion of communal violence; v. attacks on Australia's defense system; or vi. acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa)" (Australian Security and Intelligence Organisation Act 1979, Section 4 (b)). Again, when aiming at analyzing the definition it becomes obvious that 'acts of foreign interference' is quite an indetermined vocable that is not explained in further detail.

The Customs Act 1901 deals with 'security' in a way related to illegally shipping goods into the AFZ only as well as the Fisheries Management Act 1991 lays out legal parts about fishing vessels of other nations and security of fish stock agreements, which is of not

valuable interest for this assessment regarding ‘human rights’ and ‘control and surveillance’.
 Table 6: Core category ‘surveillance and control’ divided into sub-categories (own creation)

Surveillance and control	Frontex		BPC	
	Surveillance and control	- enhance security and control for fighting threats to national security (Regulation (EU) 1168/2011, Art. 4)	Surveillance and control	- fight threats to national security (Migration Act, 4A) - deportation of non-citizens when security is threatened (Migration Act, 1958, 91N) - Security means the protection of land and people from espionage, sabotage, violence against politics, the community, the defense system, protection of the territory - ensure custom and shipping security and fight against illegal actions (Fisheries Management Act 1991, Part 6, D1)

4.4.1 Summary

Compared to the vague phrasing of European understanding of ‘security’ in its legislations, the Australian law depicts detailed definitions. In both legislations, the term ‘security’ is connoted with the need to fight security threats, but only BPC’s legislations explains in detail what these are. Here, a noteworthy difference appears from the categories before, as in these, the Australian law was more vague and left space for interpretation. In this case of ‘security’ it is the other way round. After having depicted the categories ‘tasks’, ‘goals’, and ‘human rights’ the category ‘control and surveillance’ gives another consideration having the research question in mind. As throughout the other categories Australia has always shown vague phrasings in its legislation, for the first time *Frontex* deals with this ambiguity.

4.5 Fifth core category: third-country nationals

A distinctive feature about the sub-category ‘third-country nationals’ is, that the European and the Australian legislatives name them differently. Australia refers to ‘offshore entry person’ (Migration Act, Section 5) when speaking of unlawful non-citizens and also ‘transitory person’ (Migration Act, Section 5). Hereinafter the European legislative deals with ‘third-country nationals illegally present’ (EC 2004/2007 (5)) or ‘third-country nationals attempting to enter its territory illegally’ (EC No 863/2007 (7)). Thus all terms have in common the fact that they deal with illegally present people. The Border Protection Command lays out detailed definitions of what the terms mean and which persons fall under its umbrella, whereas law of *Frontex* does not depict definitions of the terms.

Subsequently, the Geneva Convention on the status of refugees displays that persons unlawfully entering into a contractual country shall be treated as any other refugee falling under the Convention. For clarification of the refugee Convention defines a refugee as (Article 1A(2)): “Any person who owing to 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/her nationality and is unable, or owing to such fear,

is unwilling to avail himself/herself of the protection of that country” (Refugee Council of Australia, 2012, The Refugee Convention). Moreover various criteria have to be fulfilled in order for a person to be recognized as a refugee under the Refugee Convention:

- “The person must be outside their country of origin
- The reason for their flight must be a fear of persecution
- This fear of persecution must be well founded (i. e. they must have experienced it or to be likely to experience it if they return)
- The persecution must be due to one or more of the five grounds listed in the definition
- They must be unwilling or unable to seek the protection of their country” (Refugee Councils, 2012).

Excluded from the status of refugees are persons who have committed heavy crime against peace, humanity and any other serious non-political crime.

Table 7: Core category ‘third-country nationals’ divided into sub-categories (own creation).

Third-country nationals	Frontex		BPC	
	termination	- third-country nationals illegally present - third-country nationals attempting to enter its territory illegally refugees: persons who fear to be persecuted according to their nationality, race or membership of a certain political group, where the home-country fails protection (EC 2007/2004, Art. 5).	termination	- offshore entry person (Migration Act, 198A) - transitory person - refugees: persons who fear to be persecuted according to their nationality, race or membership of a certain political group, where the home-country fails protection (Migration Act, 91D)
	actions	- third country nationals illegally entering EU territory shall be treated as any refugee (Geneva Convention)		- third country nationals illegally entering Australian territory shall be treated as any refugee (Geneva Convention)

4.5.1 Summary

The fifth category ‘third-country nationals’ has been divided into sub-categories (table 7) that are ‘termination’ and ‘action’. The legislatives of both agencies state that third-country nationals shall be treated as refugees when they cross the borders of the EU or Australia. Regarding ‘termination’ the legislatives vary greatly from each other. In this case again, Australia’s legal text gives a definition of an offshore-person, whereas *Frontex*’ law does not state what exactly a third-country national is. As both agencies refer to the Geneva Convention, they both refer to the same definition of ‘refugees’. This core-category brings some extensions to the gained knowledge because here again, the Australian but the European law gives definitions on the terms it uses. When analysing these paragraphs on ‘third-country nationals’ it becomes evident that as the Geneva Convention depicts, people

have to fulfil certain conditions for falling under the refugee status and than they are regarded as in need of protection of the EU and Australia. The question is in how far these conditions cover many of nowadays refugees because the Convention is similarly obsolete, ratified in 1952, as the Australian Migration Act from 1958.

4.6 Overall summary

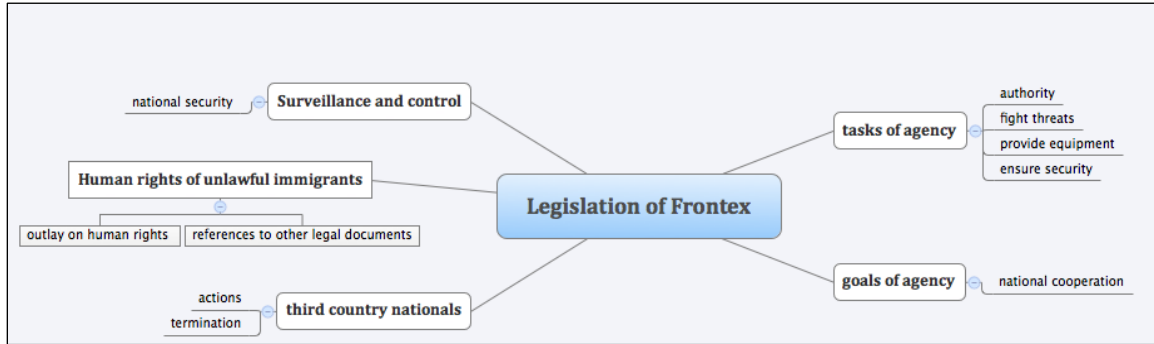
Throughout this chapter the core categories that have emerged from the word-by-word reading of the legal foundations of *Frontex* and the *BPC* have been explained in order to draw a possible link to the structures of the agencies. ‘Tasks’, ‘goals’, ‘human right of unlawful immigrants’, ‘surveillance and control’ and ‘third-country nationals’ were the core categories of which some underlying categories could be established as shown in the mind maps (graph 4 and graph 5). Moreover the sub-research questions have been answered within the analysis as they asked for assessing what the legislation of the EU and Australia mention about ‘human rights of unlawful immigrants’ and ‘surveillance and control’. Regarding the first sub-question: ‘What do the founding legislatives of *Frontex* and the *BPC* state concerning ‘human rights of unlawful immigrants?’ interesting findings have been retrieved. The legal foundations of *Frontex* mention ‘human rights’ a lot more than the Australian law does. Already while depicting the ‘tasks’, EU law refers to the Charter of Fundamental Rights for all activities and operations, which Australian law does not. *Frontex*’ legislation is a lot more precise than *BPC* law, as throughout all operations no discrimination may take place, it has set up a ‘watchdog’ to assure all operations respect the human rights strategy and it has regularly enhanced its human right strategy and refers to the Geneva Convention. Contrary, the Australian law mentions these standards applying for certain people, which need protection but does not further define these people and then alludes to the Geneva Convention. Australia sets conditions that have to be ‘fulfilled’ before one falls under their human rights protection, such as if the person fears its life in its home-country.

The second research question: ‘What do the founding legislations of *Frontex* and the *BPC* state concerning ‘control and surveillance’ firstly refers to the tasks of the agencies. This core-category lays out that *Frontex* needs to introduce trainings related to control and surveillance, check people at the borders for reasons of surveillance and fight threats to internal security. The European legislative state that *Frontex* has to diminish security threats such as unlawful immigration but it does not mention how. For the *BPC* the peace in detention centers is a matter of security as well as the identification of third-country nationals threatening national security. In cases of security threats by these non-citizens, the *BPC* needs to deport them. Hence, in the case of European ‘security’, no clear definition is given compared to the *BPC*.

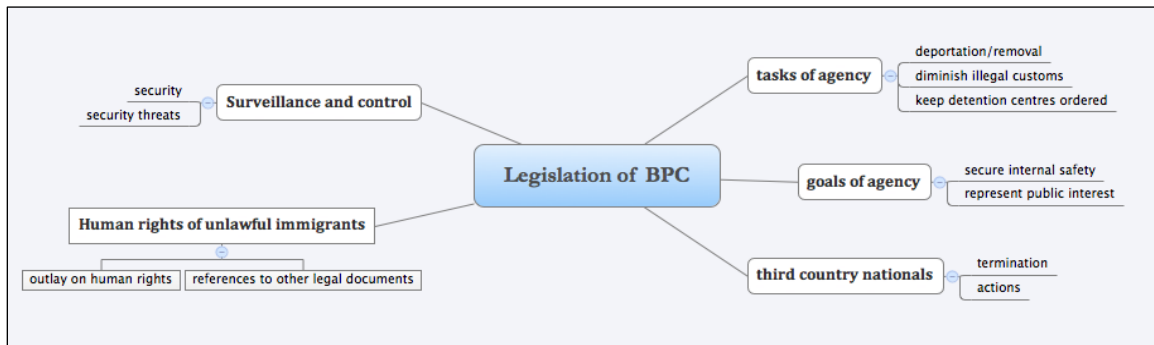
Graph 3 shows the core categories: *tasks*, *goals*, *illegal refugees* and *termination of Frontex*’ legislation and Graph 4 the ones for its Australian pendant. The core categories are listed below in the way they have been depicted in the memos throughout the collection of data.

For both agencies the same core-categories have been assessed as the agencies and hence their legislations deal with the same topic, but in several cases use different wording, although they refer to the same subject.

Graph 3: Core categories and sub-categories of Frontex' legislation (own creation).



Graph 4: Core categories and sub-categories of BPC's legislation (own creation).



Chapter 5 Discussion

The upcoming chapter aims at putting the findings of the analysis into the context of the research. The legal documents establishing *Frontex* and the *Australian Border Protection Command* have therefore granted a deep insight of the legal backgrounds of external border agencies. For giving a coherent response to the leading research question, models that have been introduced in the earlier part of the thesis (Ch. 2) do only seem partly suitable for the cases apparent. Governance studies need to be assessed as well for finding out if these related issues explain the conflicts and development of the law of external border agencies.

Throughout this analysis it has become apparent, that the approach by Vining (1967), who states that law is a linguistic approach of affecting people's behavior, law depends on the neutrality on the lawmakers is useful when analysing law. The scientist mentions that most legislations are very vague in their wording, as can be evidenced in the European and Australian legal foundations of external border agencies as well. Seligman (1974) also focuses on the lawmakers by stating that the states chose their law-makers and therefore certain elites establishes the law. Moreover he says that the state chooses its lawmakers according to their own preferences and delineation. This could be one explanation for the differences between the legislations, which will be depicted in the following.

As already depicted throughout the comparative analysis, a major distinctive feature of both agencies is the choice of words within their legal foundation. Affirming Vining's approach, it can be said that the legislations entail vague wording. This applies especially for the Australian one; as for example third-country nationals need to fulfill several premises until they get national custody granted. Hence, these are not depicted in detail. Here the Union law is more precise because each third-country national illegally present in the EU falls under the states protection, without exceptions. Additionally also Seligman's model shows some valuable factors for the study. The fact that states choose their lawmakers needs to be kept in mind and related to the field of governance studies as in Chapter 5.1 Putting finding into perspective.

By assessing the content of law, it has been found out, that a contradiction within the area 'surveillance and control' and 'human rights of unlawful immigrants' in the legal foundations of the Australian Border Protection Command does exist. On the one hand, illegal immigration is regarded as a threat to national security, which shall be fought by the BPC (Migration Act, 1958: Section 5B: 202), with the removal of these persons. On the other hand Australia has signed the Geneva Convention 1951 lying out rights for refugees that examine unlawful immigrants granting the same treatment as refugees, which is basic survival aid and enough time to ensure admission of another nation (Geneva Convention, Art. 31(2)). Most importantly, the Convention prohibits refoulement. Contrary, the Migration Act states that illegal refugees may be expelled when they threaten national security. According to the fact that the legal foundations of the *BPC* define unlawful immigrants as a threat to national security, the Geneva Convention contradicts with the

Migration Act.

The founding legislatures of the European agency *Frontex* do not depict such an area of conflict within the areas ‘control and surveillance’ and ‘human rights of unlawful immigrants’. The legal documents state that the operational aspects such as return of the third-country nationals illegally entering the Union fall under the national competencies: “operational aspects of return of third-country nationals illegally present in the Member States fall within the competencies of the authorities responsible for controlling external borders” (EC 2007/2004 Art. 11). As *Frontex*, and consequently the 27 MS, also refers to the Geneva Convention 1951, the staff of *Frontex* legally has to ensure that the principle of non-refoulement applies and the illegally present persons can only be displaced when they have found another nation’s admission.

Hereinafter it has been shown that there might be differences between the legislations as EU’s law is constantly being re-newed, latest in 2011 whereas the Migration Act from 1958 still is the leading document of the *BPC* which has been prolonged in the 1999 Amendment Act. The legislation of Australia is not being developed according to the current rising numbers of migration and increasing number of unlawful immigrants illegally entering Australian territory. Where the EU has introduced a ‘watchdog’ for granting that operations are being preceded in line with the human rights convention, the Australian legislation has not introduced such thing, or a similar authority. Additionally, the main distinction is that Australia states ‘unlawful immigrants’ as a threat to national security, which *Frontex* does not state within its legislations. *Frontex* is obliged to support the MS by deporting non-citizens but it is not legally settled that *Frontex* decides whom to deport.

5.1 Putting findings into perspective

Seligman (1974) states that the states choose their law-makers and therefore the way legal acts are made represents the government’s interest. Assessing this with the ‘governance’ perspective, a useful approach for enlightening the development of the legislations of the European and Australian external border agencies is the so called ‘Policy Paradox’ describing political decision-making by Stone (1988). Stone (1988) argues that policy problems are defined by measuring phenomena (p. 163). A great difference in the outcome appears as it depends on which measurement is used: “The fundamental issues of any policy conflict are always contained in the question of how to count the problem” (p. 164). This assessment sheds an interesting light on the approaches dealing with the European and Australian legal background. Going a step further than Stone (1988) does, who argues that the numbers are usually interpreted in various ways and configured as needed for statistical data, a policy-problem within the law of the external border agencies can easily be omitted by their governments as it is impossible to measure the success of law, and in this case *Frontex* or the *BPC*. As law is a linguistic discipline as Vining (1976) states, the European and Australian legislatures cannot be measured for success and therefore no policy-problem can be decried.

So in case that we combine Stone and Seligman, this would mean that the Australian law has not been changed since 1958 because no party can officially measure any problems. The data given in this research do not prove this assumption but lead to these suppositions as the Australian border agency is constructed very differently than the European one. For the European legal background of *Frontex* this holds not true, as the law has regularly be renewed. A reason for this can be the fact that *Frontex* is set up by 27 governments, the MS of the Union, whereas the BPC by only one, the Australian government. When assessing this with the Principal Agent Theory (PAT) that is originated in the area of economics, where one party named the 'principal' refers tasks to another party, the 'agent', due to various reasons such as expertise (Kassim and Menon, 2003, p. 122), several attributes might explain the fact that *Frontex* regularly changes its legislations. In order to avoid problems when the principal and agent do not have common interests, several measurements can be applied in order to prevent agency loss (Tallberg, 2006: 9). Four of them are examined regarding *Frontex* and the BPC. Firstly, 'contracting' is a measurement in order for the principal to ensure no independent operations of the principal. *Frontex* and the BPC are both bound to legislations which means they fulfil this criteria. Secondly, 'screening and selection' are measurements ensuring compliance and thirdly 'monitoring and reporting'. If screening and selection happens throughout the operations of the BPC is disputable and not to be found out within the legislations, but *Frontex* has legally established a 'watchdog' whom neutrally assesses the operations for compliance of *Frontex*' human rights strategy. Both agencies are in charge of regularly writing reports to the UNHCR, which means the third measurement also applies, as the Geneva Convention legally sets out. Fourthly, 'institutional checks' guarantee the exact accomplishment of the agent in line with the principal's perception. This can also be evidenced in the organizational structure of *Frontex* because the Management Board exists of 27 deputies of the MS and therefore is directly controlled throughout its work. The *Australian Border Protection Command* does not openly lay out if these institutional checks take place, but as the Minister can decide on personal grounds to restrict visas to people, it is not likely that the Minister is being controlled by any other instances.

This excursion into the area of 'governance studies' aims at drawing a link between the purely legal assessment of the topic and the more abstract level of regarding the two different forms of regimes of frontier-defense of Australia and the EU. As supposed earlier, here again after introducing the policy paradox of measuring problems and the Principal Agent Theory the main difference between the agencies is their organizational up-setting, which in the European case means 27 deputies from each MS in the Management Board that mutually control each other. Additionally as cases exist where the European Court of Human Rights has sued MS, the sanctions are apparent compared to Australia. In Australia the border agency has never been sued and in the legislations it is also not stated who holds responsibility for the actions.

Chapter 6 Conclusion

As presented earlier, the aim of this research is the empirical discovery of data-based themes and categories within the legal foundations of external border agencies between 'human rights of unlawful immigrants' and 'surveillance and control'. This has been studied with a comparative case study of the European external border agency *Frontex* and the *Australian Border Protection Command*. The theoretical model has been presented in Chapter 4 and 5, the model of conflicts within legislations of external border agencies. The core categories 'tasks', 'goals', 'surveillance and control', 'human rights of unlawful immigrants' and 'third country nationals', with sub-concepts have been identified.

The core-category 'tasks' revealed a difference between the EU and the Australian legislation because *Frontex*' tasks are explained more detailed. It is legally depicted that *Frontex* may only retrieve financial support for operations in line with the EU Charter of Fundamental Rights. Additionally, it assists the Member States throughout deportations, but it may not initiate actions. The *BPC* is legally enacted to remove non-citizens who are a threat to national security, but it is not mentioned how. Moreover, the Australian legislation does not state anything about who holds responsibility, but in that the minister may on personal grounds refuse to grant a visa. In the European case, the Member States of the Union hold authority for the operations. This core-category and its sub-categories have given the insight that the European legislative is more precise whereas *BPC* has more space to interpret its legislative. Secondly, the core-category 'goal' leads to the very same conclusion as the goal of the *BPC* is not explained well, only to diminish the threats to national security and that it needs to represent the people's will. Hence, it is not explained how the threats need to be diminished or how the people can depict their will. *Frontex* is legally obliged to diminish illegal immigration throughout effective management and enhancing surveillance. Again, the Australian legislative is not as clear as the European one, which lies out ways on how to diminish illegal immigration. Throughout the third category 'human rights of unlawful immigrants' various observations can be drawn. Throughout all operations the staff of *Frontex* needs to ensure non-discriminating behavior, whereas the *BPC* grants protection to people falling under this term and therefore need to fulfill certain criteria before they are protected. As both agencies refer to the Geneva Convention 1952 they may not send the refugees back without medical aid, checking their identification papers and may not put them in detention centers. This means that the Geneva Convention clearly states the principle of non-refoulement as well as the need to grant them safety, compared to national law. The category 'surveillance and control' entails a shift in the phrasings. Here, for the first time it can be observed that the Australian law is more precise in stating what security means and if security is threatened non-citizens need to be deported. This contrasts the Geneva Convention that has laid out the principle of non-refoulement without exceptions. *Frontex* does not explicitly depict what is meant by the exercise to enhance security and control in order to fight national security threats; neither does it explain how this shall be preceded by the *Frontex* staff. The same observation can be

made when assessing the fifth core-category ‘third-country nationals’ as again, the Australian law gives definitions of ‘offshore entry person’ and ‘transitory person’. Both agencies legislations refer to the Geneva Convention that gives a definition on ‘refugees’. Additionally, the Geneva Convention also explicitly states that unlawful immigrants entering the territory of the EU or Australia need to be treated as any refugee, which means may not be send back or deported but need to be granted medical aid and support. Here another contradiction within Australian and international law can be seen. Australia has stated that people falling under the countries protection are protected, whereas the Geneva Convention lies out that every non-citizen illegally entering the national border is granted safety.

The research question: ‘*Do the founding legislations of external border agencies entail tensions between respecting fundamental rights of unlawful non-citizens and ensuring control and surveillance at the external borders of their countries?*’ has been assessed and it can be stated that there are conflicts between these two areas. Thus, it depends on which peculiar agency one looks at. The legal foundations of the *Australian Border Protection Command* entail conflicts. The Australian national law, the Migration Act 1958 contradicts with the international law, the Geneva Convention 1951. Here, the Migration Act states that unlawful third-country national illegally present can, if they are a threat to national security be expelled. Thus, ‘unlawful immigrants’ are a threat to national security as explicitly expressed. The Geneva Convention clearly refers to the principle of non-refoulement, which does not allow a state to expel any unlawful immigrant without ensuring their safety, a new country to stay in. Secondly, the Geneva Convention entails the law that every persons unlawfully enters Australia, he/she automatically falls under the status of any refugees, which means the principle of non-refoulement applies. Contrary, the Migration Act 1958 depicts that certain people fulfilling various conditions fall under the protection status of the country and those who threaten national security shall be deported by the *BPC*.

This contrast within legislations has not been found out in the European Union law.

The Grounded Theory Method has proven to be well in assessing data while collecting and granted an insight in the legal background of the European and Australian background with interesting findings.

Additionally, it has been looked at existing research about discrepancies within legislations. The process of analysing law has compassed around the background of legislations, the ‘lawmakers’ (Seligman, 1967) and the ‘vague wording’ (Vining, 1978) which have been helpful in order to pay special attention to the various ways the legislations are phrased.

The introduction of ‘governance studies’ has given some explanations on the existing conflict within the Australian law. Firstly, policy problems are to be measured in county, which is impossible as legislations cannot be measured in counts. This could be one explaining factor for discrepancies within national and international law of Australia.

Secondly, the Principal Agent Theory has well given an insight about the differences of the organizational structures of the regimes of frontier-defence in Australia and the EU. The European external border agency is set up in a way including more controlling instanced than the *BPC*. *Frontex* is set up by 27 deputies of the MS who control the institutional way of acting, has established a ‘watchdog’ controlling every operation and has further regularly prolonged and amended its legislations, including more and more human rights strategies. Within the legislations of the *BPC* these organizational measurement cannot be evidenced.

Concluding, only the Australian external border agency entails conflict within its legal documents regarding ‘human rights of unlawful immigrants’ and ‘surveillance and control’ which have not been found in the legislations of the European external border agency. However, throughout depicting the sub-categories for both agencies, it has become clear that the legislations are rather vague and leave space for interpretations for *Frontex* and the *BPC*.

6.1 Importance of study and future research

The research has given a detailed collection of the legal basis of *Frontex* and the *Australian Border Protection Command*. The Grounded Theory Approach aimed at collecting as many data as possible from the units of observations. This section on prospective research enlightens several issues, which seem important to shed a clearer light on the issue of discrepancies within legal foundations of external border agencies. The existing studies about the topic are rather focusing on the backgrounds of legislations, but not their content.

Firstly, the Australian legislation contradicts with the international law on human rights of refugees and therefore this contradiction should be ruled out. As mentioned several times, the Geneva Convention 1951 is not in line with the Migration Act 1958. Therefore a change of the Migration Act is needed. Additionally it seems significant to study if this contradiction is possible existing due to the fact that no ‘watchdog’ over the operations *Australian Border Protection Command* has legally been established. Another significant sector that should be studied in future research is the question in how far the Australian parties use these incidents at their coastlines throughout the political elections. The Guardian has been cited before, stating that in 2001 the Tampa Affair has been a crucial topic for winning votes. The trustworthiness of this statement would be interesting to analyse.

Moreover, the upcoming statement might lead to the conclusion that especially in the Australian cases of deaths at the external borders the need to re-new the legislation isn’t too urgent: “In the wake of the Tampa affair, the Norwegian Government is reported to have proposed the reform of maritime laws to strengthen the docking rights of shops’ captains whose vessels rescue refugees at sea – These proposals were actively opposed by the Australian and US governments” (Weber and Pickering, 2011: 182). Therefore the governments deliberation should also be studied. One way would be to use the GTA on every political statement of the Australian government on incidents off their coasts when

‘illegalized travellers’ play a role.

The legislations of the European agency *Frontex* have frequently been enhanced and changed. Especially the amending legislation from 2011 has established very important aspects guarding human rights of unlawful immigrant. As no area of conflict can be found between security and human rights after these amendments from the year 2011, the daily work of *Frontex* needs to be controlled further in order to assess if the implementation of the ‘watchdog’ to ensure that all operations are in line with *Frontex*’ fundamental rights strategy proves to be efficient and hence the death and send-back-procedures are diminished.

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Tables

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Table 4: Own creation (2012). *Core category 'Goals' divided into sub-categories.*

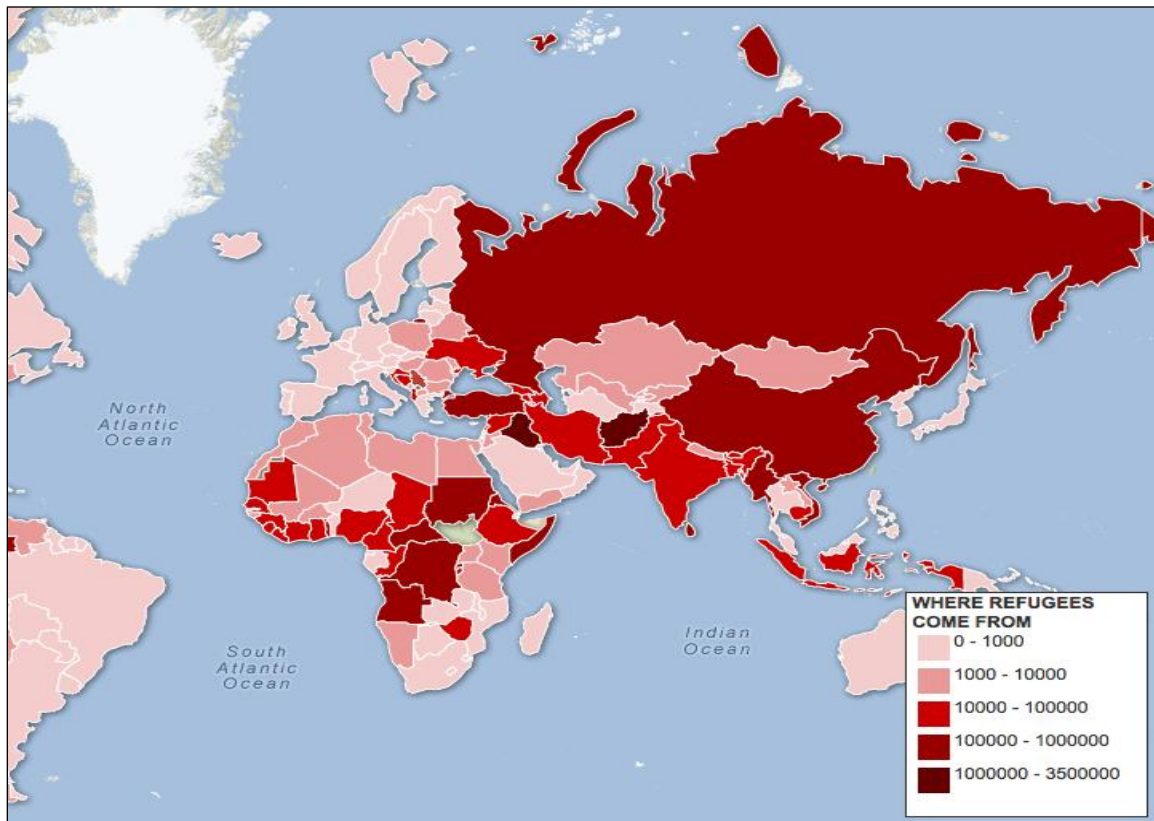
Table 5: Own creation (2012). *Core category 'Human Rights' divided into sub-categories.*

Table 6: Own creation (2012). *Core category 'surveillance and control' divided into sub-categories.*

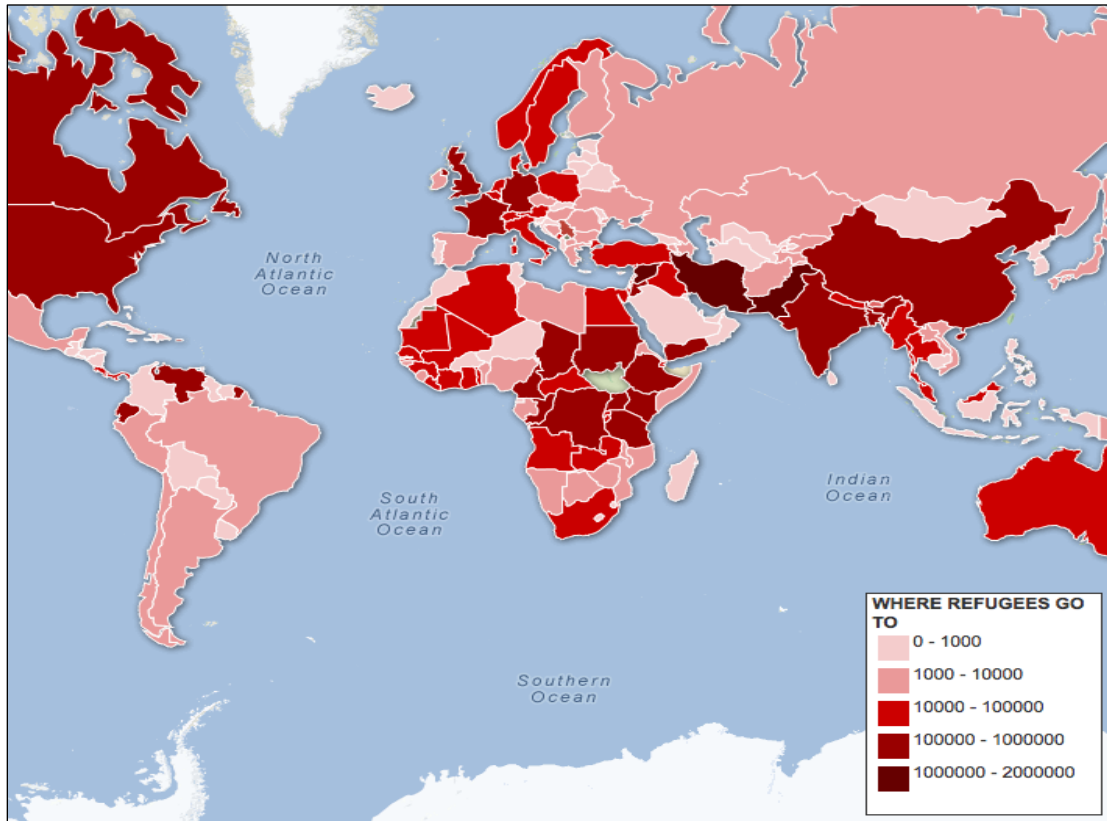
Table 7: Own creation (2012). *Core category 'Third-country nationals' divided into sub-categories.*

Appendices

Appendix 1: Where refugees come from (UNHCR, 2011).



Appendix 2: Where refugees go to (UNHCR, 2011).



Appendix 3: Legislations of Frontex and BPC regarding tasks (own creation)

Control	<u>Frontex</u>	<u>BPC</u>
	<p>n. m. Council Regulation (EC) No 2007/2004 of 26 October 2004</p>	<p>Part 2 (Section13) Control of arrival and presence of non-citizens Section 5B (g) to enhance the Department's ability to identify non-citizens who have a criminal history, who are of character concern or who are of national security concern; and ... Section 140L (1c) and authorised officer may require and take a security under section 269 or enforce a security already taken under that section (2c) an authorised officer may require and take a security under section 269 or enforce a security already taken under that section. 202 Deportation of non-citizens upon security grounds (1a)... a threat to security... (1b) the Minister has been furnished with an adverse security assessment in respect of the non-citizen by the organization, being an assessment made for the purposes of this subsection; (2b) there adverse security assessment made in respect of the non-citizen is not an assessment made in respect of the non-citizen is not an assessment to which a certificate given in accordance with paragraph 38(2)(a)of the Australian Security Intelligence Organisation Act 1979 applies; and (c) the non-citizen applies to the Tribunal for a review of the security assessment before the end of 30 days after the receipt by the non-citizen of notice of the assessment. (3b) the adverse security assessment made in respect of the non-citizen is an assessment to which a certificate given in accordance with paragraph 38(2)(a) of the Australian Security Intelligence Organization Act 1979 applies. Section 203 (4) A notice given by the Minister pursuant to subsection 38(1) of the Australian Security Intelligence Organization Act 1979 informing a person of the making of an adverse security assessment, being an assessment made for the purposes of subsection (1) of this section, shall contain a statement to the effect that the assessment was made. (5) Despite subsection 29(7) of the Administrative Appeals Tribunal Act 1975, the Tribunal must not extend beyond the period of 28 days referred to in subsection 29(2) of that Act the time within which a person may apply to the Tribunal for a review of an adverse security assessment made for the purposes of subsection (1) of this section. (6) In this section: adverse security assessment, security assessment and Tribunal have the same meanings as they have in Part IV of the Australian Security Intelligence Organisation Act 1979. Organisation means the Australian Security Intelligence Organisation. security has the meaning given by section 4 of the Australian Security Intelligence Organisation Act 1979. Section 252G powers concerning entry to a detention centre (b) disrupt the order or security arrangements at the detention centre; (4ii) disrupt the order or security arrangements at the detention centre. 261AKF unauthorised impairment of video recordings (ii) the security of the storage of a video recording... 261KG Meanings of un d modification and unauthorised impairment etc (c) impairment of the security of the storage of a video recording; or... Division 15: 269 Securities (1) An authorised officer may, subject to subsection (1A), require and take security for compliance with the provisions of this act or the regulations or with any condition imposed in pursuance of, or for the purposes of, this Act or the regulation... (a) cash deposit (b) form of security approved by the Minister. Section 226L. Identifying information that may be indefinitely retained Migration Act 1958</p>
	<p>n. m. Council Decision 2005/358/EC</p>	<p>185AA Searches of people on certain ships or aircraft (1) for the purposes set out in subsection 2, a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched of the person: ... Control of customs/properties Customs Act 1901</p>
	<p>(3) Effective management of the external borders through checks and surveillance helps to combat illegal immigration and trafficking in human beings and to prevent any threat to the internal security, public policy, public health and international relations of the Member</p>	<p>16B (4) Of the person seeking the grant of a fishing... control of the boat... Fisheries Management Act</p>

States. Border control is in the interests not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. (4) Responsibility for the control of the external borders lies with the Member States. Bearing in mind the critical situations which Member States from time to time have to deal with at their external borders, in particular the arrival at points of the external borders of large numbers of third country nationals trying to enter the territory of the Member States illegally, it may be necessary to assist Member States by providing appropriate and sufficient resources, in particular personnel.

Regulation (EC) No 863/2007

(5) Border control at the external borders is in the interest not only of the MS at whose external borders it is carried out, but also of all MS which have abolished internal border controls. (20) in most MS, the operational aspects of the return of third country nationals illegally present in the MS fall within the competence of the authorities responsible for controlling the external borders... No Union financial means should be made available for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the EU.

Regulation (EU) 1168/2011

Appendix 2: Legislations of Frontex and BPC regarding goals.

Security	Frontex	BPC
	Council Regulation (EC) No 2007/2004	(4) The minister may issue a conclusive certificate in respect of a non-citizen if the minister is satisfied that (a) the non-citizen is a threat to the security of the Commonwealth or of a state or territory; or (b) it is in the public interest to do so. 500A Refusal or cancellation of temporary safe haven visas (1d) the person is a threat to national security Migration Act 1958
	Council Decision 2005/358/EC	Ensure legality related to goods, illegally shipping goods into the AFZ etc. Customs Act 1901
	Effective management of the external borders through checks and surveillance helps to combat illegal immigration and trafficking in human beings and to prevent any threat to the internal security, public policy, public health and international relations of the Member States. Border control is in the interests not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Regulation (EC) No 863/2007	88 Release of seized property (1b) ...as to the giving of security.... (1Ab) ...the conditions on which the property may be released under subsection (1) include a condition as to the giving of security for payment of those costs if the person is convicted of the offence. Art.5 Compliance power: (5.3) Fishing vessels of the US and their crews arrested for breach of this Treaty shall be promptly released upon the posting of a reasonable bond or other security. Penalties applied in accordance with this Treaty for fishing violations... Rest about security of fish stock agreement. Fisheries Management Act 1991
	(2) Union policy in the field of the external borders aims at an integrated border management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the Union and a fundamental component of the area of freedom, security and justice. To that end, the establishment of common rules on standards and procedures for the control and surveillance of the external borders is contemplated Regulation (EU) 1168/2011	

Appendix 4: Legislations of Frontex and BPC regarding human rights of unlawful immigrants.

Core-Category	Frontex	BPC
Human Rights/ Fundamental Rights	This Regulation respects the fundamental rights and observes the principles recognized by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union EC 2007/2004	91D Safe third countries 3b the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and ... 91N non-citizens to whom this subdivision applies: 3iii meets relevant human rights standards for persons to whom that country has protection obligations; or... Part 2: Control of arrival and presence of non-citizens Division 7 Detention of unlawful non-citizens (3) If: (a) a person covered by subsection (1) has not made a complaint in writing to the Australian Human Rights Commission, paragraph 20(6)(b) of the Australian Human Rights Commission Act 1986 does not apply to the person; and (b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and... Migration Act 1958
	The Union shall respect fundamental rights as guaranteed by the European Commission for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member State, as general principles of community law. 6(2) Treaty on European Union (TEU)	n. m. Border Protection Legislation Act about Migration
	Charter of Fundamental Rights	n. m. Customs Act 1901
	“Members of the teams shall, in the performance of their tasks and in the exercise of their powers, fully respect human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures. While performing their tasks and exercising their powers, members of the teams shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” Regulation (EC) No. 863/2007 Art. 4(2)	n. m. Fisheries Management Act 1991
	Regarding to TFEU (Art. 74 77(2) b and d, Art. 1 (1) 2: The Agency shall fulfill its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the EU; the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva 28 July 1951; obligations related to access to international protection, in particular the principle of non-refoulement; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Art. 26a of this Regulation, “fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of <i>refoulement</i> ” (Art. 1(9). Adding Art. 26a Fundamental Rights Strategy (1) FR strategy needs to be developed, monitoring forces shall monitor FR compliance Establish a Consultative Forum assisting in fundamental rights matters, Introducing a Fundamental Rights Officer reporting to management Board and Consultative Forum Regulation (EU) No. 1168/2011	

Appendix 5: Legislations of Frontex and BPC regarding surveillance and control.

Surveillance	Frontex	BPC
	<p>(1) Community policy in the field of the EU external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the European Union and a fundamental component of an area of freedom, security and justice. To this end, the establishment of common rules on standards and procedures for the control of external borders is foreseen. (4) The responsibility for the control and surveillance of external borders lies with the Member States. The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures. (5) Effective control and surveillance of external borders is a matter of the utmost importance to Member States regardless of their geographical position. Accordingly, there is a need for promoting solidarity between Member States in the field of external border management. The establishment of the Agency, assisting Member States with implementing the operational aspects of external border management, including return of third-country nationals illegally present in the Member States, constitutes an important step in this direction. (7) training related to control and surveillance... (13) agency may create branches dealing with surveillance and control (20) EU institutions are responsible for legislations of border control and surveillance... Art.1 (2). Responsibility of control and surveillance lies within the MS.... Art.2 (1d) further research on control and surveillance of external borders... Art.5 additional training for control and surveillance.... Art. 6 further research on control and surveillance Art. 7 further equipment for control and surveillance Art. 8 (1) support of other MS for control and surveillance (3) acquire technical equipment Art.16 specialized branches for control and surveillance Art.17 (3) staff in the field of control and surveillance Council Regulation (EC) 2007/2004</p>	<p>n.m. Migration Act 1958</p>
	<p>(3) Effective management of the external borders through checks and surveillance helps to combat illegal immigration and trafficking in human beings and to prevent any threat to the internal security, public policy, public health and international relations of the Member States. Border control is in the interests not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. (5) The current possibilities for providing efficient practical assistance with regard to checking persons at the external borders and the surveillance of the external borders at European level are not considered sufficient, in particular where Member States are faced with the arrival of large numbers of third-country nationals trying to enter the territory of the Member States illegal(13) In order to work effectively together with national border guards, the members of the teams should be able to carry out tasks related to the checks of persons at and the surveillance of the external borders while deployed on the territory of the Member State requesting their assistance. (14) Similarly, the efficiency of joint operations coordinated by the Agency should be further improved by enabling, on a temporary basis, guest officers from other Member States to carry out tasks related to the checks of persons at and the surveillance of the external borders. (16) while granting surveillance guest officers may not discriminate Art.6 (1) throughout surveillance Regulation: EC No. 562/2006 and Art. 8e of EC No 1997/2004 (8) databases of nations may be checked to ensure surveillance and border checks Art. 8(3) shall be replaced by: The agency may acquire technical equipment for checks and surveillance of external border to be used in its experts and within the framework of the Rapid team Art. 10.</p>	<p>n. m. Customs Act 1991</p>

<p>Guest officers in surveillance according to EX no 563/2006 establishing the Code of conduct (8) databases for surveillance checked by guest officers Regulation (EC) No 863/2007</p>	
<p>(2) Union policy in the field of the external borders aim at an integrated border management ensuring a uniform an high level of control and surveillance, which is a necessary corollary to the free movement of persons within the Union and a fundamental component of an ASFJ... (3). The efficient implementation of the common rules on standards and procedures for the control and surveillance of the external borders calls for increased coordination of the operational cooperation between the MS (4) Efficient management of the external border through checks and surveillance contributes to combat illegal immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the MS. (18) provide training... surveillance at external borders... Art.1(2) While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency, as a body of the Union as defined in Article 15 and in accordance with Article 19 of this Regulation, shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code established by Regulation (EC) No 562/2006 (*). It shall do so by ensuring the coordination of the actions of the Member States in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and of surveillance of the external borders of the Member States. Art 6 replaces Art. 6 and 7: research for surveillance at external borders ... Art.8 is amended as follows: paragraph 1 replaces by: without prejudice to Art 78(3) of TFEU one or more MS facing specific and disproportionate pressures and confronted with circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders may request the agency for assistance. The agency shall in accordance with article 3 organize the appropriate technical and operational assistance for the requesting MS: ...par.3 is replaced by: (3) The agency may acquire technical equipment for checks and surveillance of external borders to be used by its experts and within the framework of rapid interventions for their duration. Regulation (EU) 1168/2011</p>	<p>Part 6 Surveillance and enforcement. Division 1 Officers (84) Powers of officers (1ii) if the master does not stop the boat as required and the boat is not an Australian-flagged boat, use any reasonable means consistent with international law to stop the boat (incl. firing at or into the boat after firing a warning shot, ...) if officer believes boat has been used for illegal fishing Fisheries Management Act 1991</p>

Appendix 6: Legislations of Frontex and BPC regarding third country nationals.

Third country nationals/unlawful non-citizens/ offshore persons	Frontex	BPC
	<p>(5) Effective control and surveillance of external borders is a matter of the utmost importance to Member States regardless of their geographical position. Accordingly, there is a need for promoting solidarity between Member States in the field of external border management. The establishment of the Agency, assisting Member States with implementing the operational aspects of external border management, including return of third-country nationals illegally present in the Member States, constitutes an important step in this direction. (7) training for removal of third country nationals... (11) see above Art.5 Training: The agency shall offer additional training return of third country nationals... EC 2007/2004</p>	<p>offshore entry person: offshore entry person means a person who: (a) entered Australia at an excised offshore place after the excision time for that offshore place; and (b) became an unlawful non-citizen because of that entry.</p> <p>transitory person means: (a) an offshore entry person who was taken to another country under section 198A; or (b) a person who was taken to a place outside Australia under paragraph 245F(9)(b); or (c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001: (i) was transferred to the ship HMAS Manoora from the ship Aceng or the ship MV Tampa; and (ii) was then taken by HMAS Manoora to another country; and (iii) disembarked in that other country; but does not include a person who has been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol. Migration Act</p>
	<p>(5) The current possibilities for providing efficient practical assistance with regard to checking persons at the external borders and the surveillance of the external borders at European level are not considered sufficient, in particular where Member States are faced with the arrival of large numbers of third-country nationals trying to enter the territory of the Member States illegally. (7) The deployment of Rapid Border Intervention Teams to provide support for a limited period of time should take place in exceptional and urgent situations. Situations of this kind would arise where a Member State was faced with a mass influx of third-country nationals attempting to enter its territory illegally which required an immediate response and where the deployment of a Rapid Border Intervention Team would contribute to providing an effective response. Rapid Border Intervention Teams are not intended to provide long-term assistance. Art. 1(1) est. a mechanisms for arrival or third-country nationals.... EC No 863/2007</p>	<p>n. m. Border Protection Legislation Act about Migration</p>
		<p>n. m. Customs Act</p>
		<p>Offshore: Art. 23 Measures taken by a port State (2) A port state may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals. Fisheries Management Act</p>