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Frontex' Sea Operations: between Security and Human Rights

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Summary

The European Union currently experiences unprecedented high numbers of asylum seekers arriving at its external borders. This year alone around 2 000 migrants have drowned in the Mediterranean. Due to these high numbers European border management practices and the treatment of asylum seekers have become subject to international criticism. Therefore, this research seeks to assess the extent to which Frontex' performance in the EU's external border management is consistent with the right to seek asylum. It is argued that asylum policy in the EU is embedded in a security framework that impedes a migration and asylum policy that emphasizes the security needs of people, and not of nation states. It is further asserted, that Frontex lacks the mandate to facilitate more proactive respect of human rights and humanitarian reasons are utilized to justify the deployment of security strategies. As a consequence, humanitarian questions are addressed by security strategies, placing national security interests at the heart of European asylum policy, instead of humanitarian concerns.

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List of abbreviations

APD	Asylum Procedures Directive
CEAS	Common European Asylum System
EASO	European Asylum Support Office
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESC	European Social Court
EU	European Union
Frontex	European Agency for the Management of Operational Cooperation at the external borders of the member states and the European Union
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
ICCPR	International Covenant on Civil and Political Rights
IR	International Relations
JO	Joint Operation
QD	Qualification Directive
RABIT	Rapid Border Intervention Team
RCD	Reception Conditions Directive
RD	Return Directive
RPPs	Regional Protection Programmes
SAR	Search and Rescue
TFEU	Treaty for the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	UN High Commission for Refugees

1. Introduction

The European Union (EU) currently experiences the greatest refugee crisis since the Second World War. In the month of July the number of migrants reaching the EU reached a record high of 107 000 (The Independent 2015[1]). Almost half of them arrived in Greece (European Commission 2015[2]). As the majority of people crossing the Mediterranean to reach Europe are fleeing from conflict, war and persecution, the Mediterranean crisis is in fact a refugee crisis (UNHCR 2015[3]).

In times of emergency the effectiveness of systems and procedures, in this case the European migration policy and the management of the external borders are put to the proof. These, in the Union's history unprecedented high numbers of refugees arriving at the EU's external borders, reveal the deficiencies of an immigration system shaped by the prioritization of national- over human security concerns. Especially since hundreds of boat migrants drowned in the sea off the coast of Lampedusa in October 2013, the refugee crisis has gained significant public attention. The tragedy at Lampedusa has placed the Union's failure to reconcile its external border management with human rights obligations under scrutiny: the Union's migration policy was blamed of being non-existent and not showing sufficient solidarity towards some member states (Balleix 2014: p. 1).

In the EU's external border management the European Agency for the Management of Operational Cooperation at the external borders of the member states and the European Union (Frontex) plays a distinctive role: the Agency promotes, coordinates and develops the EU's border management. Therefore, when a country experiences difficulties at its borders, Frontex coordinates, upon request, joint operations to facilitate support in the control of the EU's external borders. However, the protection of refugees on the one hand and the control of migration at the borders on the other, are two interrelated functions of states (and the EU) that are in conflict with each other (Katsiaficas 2014: p. 7). Irregular immigrants and asylum seekers are addressed as two different groups of persons, despite the fact that many asylum seekers enter the EU in an irregular manner

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[1] Retrieved from The Independent: "EU migrant crossings reach record 107,000 for July as activists say 'tough rhetoric' has failed", http://www.independent.co.uk/news/world/europe/eu-migrant-crossings-reach-record-107000-for-july-as-activists-say-tough-rhetoric-has-failed-10462481.html, (21.08.2015)

[2] Retrieved from European Commission Speech: "A European Response to Migration: " Showing solidarity and sharing responsibility", http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm, (17.08.2015)

[3] Retrieved from: UNHCR: "Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record", http://www.unhcr.org/5592b9b36.html, (07.08.2015)

Against this background, a debate on the adequateness of the European Union's migration policy and border management has developed in the political sphere and in society. In order to resolve some questions of the ongoing debate, this research seeks to assess the following question: "to what extent is Frontex' performance in the EU's external border management consistent with the right to seek asylum?".

A great body of research on the EU's migration policy and Frontex' compatibility with human rights in general has been established. Given the current situation, the migration system and Frontex will be subject to change. Therefore, it is important to include every new development into the body of academic research. The work of Gabriela Lazaridis and Mariangela Veiko on "The Right to Asylum and EU Asylum Procedures in Greece" (2015) and Alberto De Sordi's publication "Migrants and Asylum Seekers. Italy and Spain between EU border control and national reception system" (2015) constitute some of the academic publications that reflect the current humanitarian crisis and its implications for member states, as well as asylum seekers. Also, Claudio Matera's and Amanda Taylor's publication "The Common European Asylum System and human rights: enhancing protection in times of emergencies" (2014) contributes valuable insights. Given the latest developments in EU migration and asylum policy in response to the refugee crisis, a continuous flow of further contributions to this field of research is necessary.

To answer the research question, this introduction is followed by a portrayal of the chosen research method and an account of constructivist contributions to security studies, the underlying theoretical framework, in chapter two. Chapter three seeks to assess how the right to asylum is implemented in the EU's legal framework and policy approach concerning border management. The chapter finishes with a conclusion that aims to answer the question of how the right to asylum is implemented in the EU's legal framework and policy approach concerning border management.

Chapter four is concerned with the question of the extent to which the right to asylum is reflected in Frontex joint operations Hera II's, the deployment of the Rapid Border Intervention Team (RABIT) in Greece 2010 and Joint Operation (JO) Tritons' performance. To provide an answer to this question, Frontex' role in the EU's external border management in relation to asylum is assessed, followed by an evaluation of the three chosen operations. The chapter finishes with a conclusion that aims to answer the above stated question. The final chapter (chapter five) seeks to provide an answer to the research question: "To what extent is Frontex' performance in the EU's external border management is consistent with the right to seek asylum?".

2. Methodology

This chapter is devoted to the theoretical assumptions underlying the thesis as well as to the approach chosen in order to answer the research question. The first section (2.1.) introduces a constructivist approach to security studies as well as Huysman's approach to securitization and elements of the Copenhagen School. The second section (2.2.) elaborates the methods applied to conduct the research.

2.1. Research Design

The aim of this research is to answer the following question: "To what extent is Frontex' performance in the EU's external border management consistent with the right to seek asylum?". Therefore, the chosen research design is the qualitative descriptive research, applying a case study with multiple cases. The chosen cases hereby are three different Frontex operations.

The independent variable applied is 'Frontex' performance in the EU's external border management' and the dependent variable 'the consistency with the right to seek asylum'. These two variables are operationalized as follows:

Dependent variable: the right to seek asylum

In order to conceptualize the right to seek asylum, chapter three defines the right to seek asylum as a human right's manifestation in international human rights law, like the Convention Relating to the Status of Refugees done at Geneva 1951 (Geneva Convention). International legal acts like this are the foundation of the European Union's interpretation of asylum in its legal framework on immigration, as laid out in Article 78 (1) in the Treaty for the Functioning of the European Union (TFEU). The elaboration of international primary law on asylum and the latter's implementation in European legislation and policies thus serve as a definition of 'the right to asylum' in the dependent variable.

Independent variable: Frontex' performance in the EU's external border management

In pursuit of an evaluation of the Agency's performance in the EU's external border management, three cases have been chosen, with regards to their representativeness of important aspects of Frontex' *modus operandi*: Operation Hera II, the RABIT Operation 2010 in Greece and JO Triton. In this case, the application of a multiple case design allows for a more in depth analysis of Frontex' performance. This longitudinal case selection might uncover trends in the development of EU migration policy and Frontex operations.

To conduct the research, two sub-questions have been developed:

> Sub-question 1: How is the right to asylum implemented in the EU's legal framework and policy approach concerning border management?

> Sub-question 2: To what extent is the right to asylum reflected in Hera II's, Operation RABIT's and JO Tritons' performance?

The application of these sub-questions serves to narrow the scope of the research and provides it with a clear structure.

The research will be conducted following the theoretical framework of a constructivist approach to security studies as well as Jef Huysmans' concept of securitization. The application of a specific theory dictates, to a certain extent, the data to be collected and evaluated. The chosen theories employ a distinct focus on securitizing language. Therefore, EU guidelines and policy programmes on migration and asylum between 1999 and 2015 will be analyzed with regards to securitization the framing of asylum as a source of insecurity.

2.2. Theoretical assumptions

A constructivist approach to security studies and Jef Huysmans' approach to securitization in his book 'The Politics of Insecurity' serve as the underlying framework of this research. Constructivism "seeks to explore how the current reality evolved" (Farrell 2002: p. 59). It focuses on *how* perceptions of threats are socially constructed. Mainstream International Relations (IR) theories on the other side, are engaged in *why*-questions (Karacasulu and Uzgören 2007: p. 32). The establishment of Frontex and its performance needs to be regarded in its political and institutional context. Therefore, it is important to evaluate how migration and asylum are approached in EU policies.

Constructivism allows for a number of advantages in the approach to international politics and security, which are helpful in the analysis of Frontex' embeddedness in the EU's institutional set-up. Constructivists are concerned with norms and identities and do not place international relations in the context of international power and material structure, as rationalism does. Hereby, norms are shared beliefs give meaning to material things and practices. As practices, in contrast to beliefs, are observable, "[b]eliefs must be expressed, if not codified and recorded to be shared" (Farrell 2002: p. 60). Oral or written records of beliefs therefore facilitate valuable opportunities to evaluate the underlying beliefs. Power is referred to as socially constructed knowledge which affects states' interests and identities. Hereby the

functioning of power is central to the question of what constitutes states' interests and by which means they aim to implement them. The notion of threat perception is of great importance to this research. Constructivists argue that threats are constructed and that they are not fixed, but rather subject to changes as relevant actors modify their threat perceptions by changes in their environment. Constructivists claim that their approach to security studies has introduced the 'speech act' as a new dimension in the European security debate (Karacasulu et al. 2007: pp. 36-39; 43 and Farrell 2002: pp. 60-65).

It is the speech act that established the foundation of the Copenhagen School and securitization theory. Ole Waever introduced it into the security discourse and claimed "by definition something is a security problem when elites declare it to be so" (Waever 1995: p. 54). Securitization, according to the Copenhagen School of security studies, is the process in which securitizing speech acts transform non-security issues, like immigration, into pressing security concerns. This happens in a top-down process. Thereby, elite actors transfer a low politics public policy issue into a high politics public policy issue. In the context of immigration, scholars agree that this has happened by linking immigration with crime and terrorism. This effectively removed immigration from the domain of conventional politics to that of emergency politics, allowing for the implementation of increasingly restrictive immigration and asylum policies (Messina 2014: pp. 530-532).

More recent extensions of the concept have added valuable dimensions to securitization and therefore it is not the original securitization concept that is applied here. This research draws on Huysmans' approach to securitization. Just as the Copenhagen School applies a constructivist approach, Huysmans employs the notion of the speech act:

> "The use of security language can actively shape a phenomenon into a security question thereby changing the political understanding of the nature of the policy problem and its evaluation of adequate methods of dealing with it" (Huysmans 2006: p. 23).

This implies that once a phenomenon is framed as a security issue, its definition changes, and so does the understanding of legitimate methods of administering it. Huysmans refers to this as the "security language as a performative capacity" (Huysmans 2006: p. 25).

His framework accepts basic tenets of the original securitization concept, but distances itself from the rather limited framework of securitization's earliest concepts. Whereas the concept of Buzan focuses on the establishment of an existential threat, Huysmans argues that "[a]sylum does not have to be explicitly defined as a major threat to society to become a security question" (Huysmans 2006: pp. 3-4) because security modulation can develop from

the *context* within which an issue is placed rather than from an explicit speech act. The fact that asylum is present in the Schengen Borders Code which has a strong emphasis on policing borders and security serves as a good example. Insecurity therefore emerges from the discursive and institutional embeddedness of an issue, in this case immigration policy, in a security context, which transforms the respective policies into security practices. However, a field of insecurity is not constructed through policy practices in reaction to a threat alone, but by a discourse of danger. Therefore, Huysmans' argues that insecurity is "written and talked into existence" (Huysmans 2006: p. 7).

After having laid out the methodological approach to the research and constructivism as a theoretical foundation, the following chapter seeks to answer the first sub-question: How is the right to asylum implemented in the EU's legal framework and policy approach concerning border management?

3. The EU's approach to asylum

When internal border controls within the EU were abolished after the Schengen Agreement was implemented in 1995, the perceived lack of interior control was associated with a need for increased external border controls and the definition of a common asylum, immigration and visa policy (Council of the EU 2005: p. 4). In order to create the Area of Freedom, Security and Justice (AFSJ), the European Council produced a series of five-year programmes to provide guidelines for the establishment of the AFSJ and the harmonisation of member states' asylum law.

The Council's programmes from 1999 to 2014 and a selection of the Commissions policy programmes on migration will be assessed in this chapter, followed by an evaluation of the CEAS, which evolved against the background of these policy guidelines and programmes. Prior to the assessment of the above listed documents, the following section will provide a framework of the right so asylum, to serve as a definition of this human right throughout the research. The findings of this chapter will contribute important information to answer the research question, as Frontex needs to be evaluated against the background of its institutional and policy environment. Without a comprehensive understanding of the role of asylum in European policy documents and legislation, Frontex' role can only partially be assessed.

3.1. The right to seek asylum

The right to asylum was first recognized the 1951 Geneva Convention relating to the Status of Refugees. It is the *lex specialis* of asylum and the fundamental legal document that defines

who is a refugee, his or her rights and the obligations of states accordingly. Its definitions of the term 'refugee' as well as the principle of non-refoulement have acquired the status of fundamental international law (Wilkinson 2001: p. 2). Therefore, in line with Article 78 (1) TFEU, the EU's asylum law is based on the Geneva Convention. According to Article 1A (2) of the Geneva Convention and its 1967 Protocol, a refugee is any person who, due to:

> "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

As refugees and asylum seekers are often confused, it is important to clarify the distinction between the two: an asylum seeker is a person who has applied for asylum on the ground that he or she has a well-founded fear of being persecuted for the reasons mentioned in Article 1A (2) of the Geneva Convention. A refugee on the other hand is a person whose application for asylum has been successful (Mitchell 2006: p. 1).

Article 33 (1) of the Geneva Convention on the prohibition of expulsion or return enshrines another key element of refugee protection: the principle of non-refoulement. It states that:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."

Together, these two Articles constitute the cornerstones of international asylum law and provide the basis for the European asylum *acquis*. These two Articles are also applied in the Charter of the Fundamental Rights of the European Union, namely in Article 18 and 19 (2) (the Charter of Fundamental Rights). The rights protected in Article 19, concerning the prohibition of refoulement correspond to a number of specific rights codified in other provisions of the Charter and more precisely with Articles 1, 2 (1) and 4 of the EU Charter of Fundamental Rights: "Human dignity is inviolable. It must be respected and protected." and "Everyone has the right to life." and "No one shall be subjected to torture or to inhuman or degrading treatment". However, whereas the Geneva Convention places limits on the prohibition of refoulement, namely when a refugee constitutes a danger to the community or country (Article 33 (2)), the EU Charter states that "no one may be removed, expelled or extradited" (Article 19 (2)). The Geneva Convention therefore limits the protection against non-refoulement, while the EU Charter does not expressly put a restriction on the prohibition of refoulement. This could be interpreted in a way that the EU Charter protects peoples' rights

to a stronger degree than the Geneva Convention. However, as the EU Charter is intended to implement the Geneva Convention, it remains unclear whether this is true or not.

The EU Charter became binding for all member states and institutions when implementing EU law, when the Lisbon Treaty became effective on 1 December 2009. Since asylum law has been fully integrated on the European level, these provisions are binding for all member states. Although nation states have a sovereign right to control their borders and thus, the entry and presence of non-nationals, EU law imposes limits on the exercise of this sovereignty. These limits are on the one hand the principle of free movement of persons, goods, services and capital, manifested in Article 2 (1) of the Schengen Agreement and its 1985 implementing protocol, as well as in Article 26 (2) TFEU and on the other hand the prohibition of refoulement of any person seeking protection at member states' national borders as laid in Article 33 (1) of the Geneva Convention and in Article 19 (2) of the EU Charta (European Union Agency for Fundamental Rights (FRA) 2014: p. 26). Frontex, as an EU agency, is also bound by the Charter. Yet, as will be assessed in chapter four, not Frontex, but the member states involved in joint operations are accountable for human right violations. Although the above listed articles cover the core of the right to asylum, there are more rights and obligations associated with asylum than explained here. The right to leave a country, for example, is an important aspect in this context. It is expressed in Article 12 (2) of the Universal Declaration of Human Rights (UDHR):

"Everyone has the right to leave any country, including his own, and to return to his country".

Considering that outsourcing[4] of European external border control is an issue, especially concerning operations in the territorial waters of third countries, but also on land, this right entails an important principle that needs to be respected by all participating units of the European border control system. In the case of violation of laws and rights guaranteed by the Union, the EU Charter provides the right to an effective remedy and a fair trial in Article 47. Although this is a granted right, asylum seekers who have been returned erroneously can hardly exercise it (Keller, Lunacek, Lochbihler, Flautre 2011: p. 38).

After having defined the scope of the right to seek asylum, the following sub-chapter will assess the EU's approach to irregular immigration and asylum by an evaluation of the

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[4] Outsourcing of border controls means the expansion of the former beyond the territory of a state with the assistance of third countries. Insourcing on the other side constitutes the expansion of controls to the interior, through the strengthening of controls characterized by an increase in expulsion and/ or deportation (Menjívar 2008: p. 355).

Council's guidelines on asylum between 1999 and 2014, some of the Commission's recent policy programmes of the latter and the current status of the Common European Asylum System (CEAS).

3.2. The EU's approach to irregular immigration and asylum

A key development in the construction of migration as a security issue was the spillover of the economic union and the internal market to the internal security project. Because the abolition of internal borders caused a perceived security threat, it was decided to establish the AFSJ to address this threat. To do so effectively, immigration and asylum matters were incorporated in the security aspect of the AFSJ. In relation to these developments, the management of immigration and asylum policies moved from the national to the European level. Another response to the perceived security threat resulting from the abolition of internal borders was the strengthening of external borders. This linking rests on the double assumption that the control of illegal movement of goods and persons happens primarily at the border, and that the abolition of borders guarantees the free movement of people[5]. It was assumed that the freedom of movement also provides opportunities for illegal and criminal activities. These are the reasons why immigration and asylum policy were integrated into a policy framework addressing the security issues that developed from the abolition of internal border controls (Huysmans 2000: pp. 752-753; 759- 760).

The following sub-chapters explains how the right to asylum is implemented in the common European immigration and asylum policy, developed in the context of a security and border management framework. In a first step, the Council's policy documents on the development of an AFSJ and a common migration policy from the Tampere Conclusions 1999 to the post-Stockholm phase 2014 are assessed. These documents provide the general political direction and priorities of the European Union. As it is the Commission's obligation to implement the Council's guidelines into policies and instruments, sub-chapter 3.2.1 will evaluate two of the Commission's most recent policy programmes: the Global Approach to Migration and Mobility (GAMM) and European Agenda on Migration. With regards to these two sub-sections, a special emphasis will be put on the framing if irregular migration as a source of insecurity. In order to assess how these developments are translated into the common

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[5] Although border controls are an effective mean of detecting irregular immigrants, it is not clear that the majority of irregulars are smuggled into a country, as an extended stay in a country, after the expiration of a visa is also a common form of becoming an illegal immigrant. Concerning the free movement of people it needs to be kept in mind, that border controls are not the only impediments to free movement, as work and residency permits, as well as access to welfare provisions and social assistance are a crucial factor too (Huysmans 2000: p. 759).

European migration policy, sub-chapter 3.2.3 is devoted to an evaluation of the CEAS, which is followed by a conclusion that aims to answer the first sub-question: How is the right to asylum implemented in the EU's legal framework and policy approach concerning border management?

3.2.1. Setting the Stage: Political Guidelines on Migration from 1999 to 2014

The Tampere Programme

When the Amsterdam Treaty came into force, the Schengen Agreements became EU law and the former's objectives became EU objectives, including the development of a common migration policy. At the special European Council meeting in Tampere on the development of an Area of Freedom, Security and Justice in late 1999, the foundation for "a common policy on the movement of persons" (Convention Implementing the Schengen Agreement: Article 9 (1)) was established.

The Tampere Conclusions acknowledge the respect for the right to seek asylum and the Union's obligation to commit to the principles of the Geneva Convention as well as the need for consistent control of external borders. Therefore, the Council worked out a framework for the integration of a common asylum system in an AFSJ, to be implemented within the next five years. A comprehensive approach to migration shall be accomplished by the externalization of migration controls (Tampere Conclusions 1999: paragraph 11).

Concerning irregular immigration it is stated that:

> "The European Council is determined to tackle at its source illegal immigration" (Tampere Conclusions 1999: paragraph 23).

Notwithstanding the fact that the conclusions repeatedly refer to the Geneva Convention on Refugees and acknowledge the right to asylum, a connection between irregular immigration and asylum seekers is not drawn. Rather, irregular immigration, including asylum seekers who often have no choice but to enter the EU irregularly, are portrayed as a source of insecurity. A comprehensive approach to migration however should acknowledge that asylum seekers are amongst the irregular immigrants, whose rights need protection. Yet instead, irregular migration is portrayed as a threat and securitizing language is utilized: 'to tackle' has, in this context, a military connotation. Moreover, referring to irregular immigration as 'illegal immigration' criminalizes the act of irregularly entering a nation state.

The Tampere Conclusions underline the goal to address irregular migration at its source; this implies the externalization of border management. The externalization of borders is utilized

"for the purpose of controlling the movement of potential migrants" (Menjívar 2014: p. 357) and some even argue that it "de facto constitute[s] non-refoulement practices (Menjívar 2014: p. 357). It could be argued that this is the case because the externalization of European borders controls the movement of persons seeking international protection, who therefore cannot access European territory and remain in situations in which their lives and/ or freedoms are threatened.

The Tampere Conclusions do not suggest the externalization of border controls as the only tool of border management: there also is an emphasis on readmission agreements (Tampere Conclusions 1999: paragraph 27). These readmission agreements can be problematic due to the fact that human right guarantees are not always a given, as many countries of cooperation do not apply the same, or any, human rights framework, as the EU does. Here, a fundamental problem emerges: most of the countries that sign readmission agreements with the EU do not have the same human rights standards as the EU. Yet, if the Union's does not want to resign from readmissions altogether, these deviations need to be tolerated.

Although the spirit of Tampere is favourable for the protection of human rights, and especially the right to asylum, it lacks sufficient guarantees and significantly reduces access for refugees, as no guarantees to the actual access to asylum procedures are included. Remedies in case of rights violations for example are completely omitted and no specific plans are outlined concerning the implementation of the Geneva Convention's rights. Moreover, the close interrelation between irregular immigrants and asylum seekers is not acknowledged.

The Tampere Conclusions set out the groundwork for future European common migration and asylum policy. In this very early stage it is evident, that border security is prioritized over human security. A focus on human security would prioritize the security of people over the security of the nation state. As defined by the United Nations, human security expands beyond the concept of threats and its link with conflict and military activities and includes any event or process that "can cause death or lessen life chances on a large scale [… and] can undermine States as the basic unit of the international system" (United Nations 2005: p. 26 and Matera 2014: p. 14). The omission of sufficient guarantees and the focus on prevention and deterrence prevents many from ever initiating their claim (European Union Agency for Fundamental Rights 2014: pp. 34-37). These tools are at odds with the promise of protection that the conclusions make. This is also reflected in member states' efforts to keep the number of asylum seekers as low as possible and their attempt to tackle perceived abuses of their asylum systems in the five years following the conclusions (European Council on Refugees

and Exiles (ECRE) 2004: p. 3). Though acknowledging the necessity to protect those in need, the Tampere Conclusions failed to deliver its promises. Instead of the "absolute respect for the right to seek asylum" (Tampere Conclusions 1999: paragraph 13), *minimum* standards for refugee protection were introduced, which allowed member states to continue their restrictive asylum policies (Meyerstein 2005: p. 1509 and Wijnkoop 2014: p. 42).

The Hague Programme

The Hague Programme was the second five-year programme (2004-2009) – that intended to strengthen the AFSJ by further developments towards a common policy on migration, asylum and border control related issues. A defining characteristic of the programme is the emphasis on the threat of terrorism after the September 11 and the Madrid bombings 2004. The EU portrays itself as the provider of security for the European citizens, legitimizing a stricter approach towards irregular immigration (the Hague Programme 2004: Chapter I). Irregular immigration is linked with terrorism and organized crime on the second page of the programme. Like the Tampere Conclusions, the Hague Programme does not acknowledge the close connection between asylum seekers and irregular immigrants. The latter is directly associated with terrorism and organized crime, although its correlation is explained nowhere in the document. Irregular immigration is therefore placed in an environment of insecurity (as outlined in chapter 2.1).

The Hague Programme creates the impression that the EU is invaded by immigrants and stresses that especially member states with long stretches of external borders are confronted with "exceptional migratory pressures" (the Hague Programme 2004: point 1.7.1 in chapter III, 1). An emphasis is placed on the extraterritorialization of border controls through partnerships with third countries, with the aim to "combat illegal immigration […] and tackle the problem of return" (the Hague Programme 2004: point 1.6.1 in chapter III, 1). This use of securitizing language with regards to immigration is applied throughout the entire document to portray irregular immigrants as a threat.

The extraterritorialization of border controls is justified by the statement that "insufficiently managed migration flows can result in humanitarian disasters" and that member states shall "intensify their cooperation [with third countries] in preventing further loss of life" (the Hague Programme 2004: point 1.6.1 in chapter III, 1). This implies that a humanitarian cause is used to justify further control measures. Although the Council stresses that there needs to be a "right balance between law enforcement purposes and safeguarding the fundamental rights of individuals" (the Hague Programme 2004: point 1.7.2. in chapter III, 1), the programme initiates no measures to safeguard asylum seekers' access to asylum procedures.

The Hague programme places immigration and asylum matters in a security environment, by linking the former with terrorism and organized crime. The very fact that irregular immigration is referred to as 'illegal' immigration criminalizes the asylum-seekers that often cannot access legal means to enter the EU. The entire programme emphasizes the need for more security at the EU's external borders and constructs the movement of people as a threat.

The Stockholm Programme

The Stockholm Programme was the Union's third five-year programme (2009-2014) on the development of the AFSJ. A key objective of the programme was the establishment of a Common asylum system by 2012. However, no further plans were made with regards to new asylum instruments. The programme rather focussed on consolidation of the established instruments and practical cooperation as instruments for harmonisation (Wijnkoop 2014: p. 47). In the following, parts relevant to this research will be assessed with regards to the rights of asylum seekers.

Under the headline 'a Europe of rights', the rights of European citizens are prioritized. Although some hints are made towards the scope of persons, to which the described rights apply, it remains unclear whether it is the intention to include categories of persons like undocumented migrants and asylum seekers (Carrera and Merlino 2010: p. 4). This is astonishing because the chapter addresses vulnerable groups, yet makes no explicit mention of people with insecure status like asylum seekers. The only concrete reference towards undocumented persons or asylum seekers is made under point 2.3.2 devoted to the rights of the child, when "unaccompanied minors in the context of immigration policy" (the Stockholm Programme 2009: p. 15) are concerned. This 'no-policy' strategy is at odds with a' Europe of rights' (Carrera and Merlino 2010: p. 5).

Considering the headline: 'a Europe that protects', it could be assumed that in this context the protection of people's rights is addressed. Yet, the section deals with the "protection from trans-national threats" (the Stockholm Programme 2009: p. 35) – a classical state-centric perception of threats. Hereby the trafficking in human beings and smuggling of persons is portrayed as a threat to the internal security of the EU, notwithstanding the fact that many asylum seekers can only access the EU through trafficking and smuggling. The goal to decrease these activities can only be considered legitimate if the Union makes an effort to facilitate legal access to persons in need for international protection. The prevention of crimes that might threaten the Union's internal security is prioritized over the safeguarding of people in need of protection. An emphasis on human security would include not only member states

and their governments in the protection from threats, but their populations (including undocumented migrants and asylum seekers) as well.

The programme's chapter 'access to Europe in a globalized world' mainly focuses on the further development of the European integrated border management and a strengthening of Frontex' mandate. It is stressed that "the strengthening of border controls should not prevent access to protection systems" (the Stockholm Programme 2009: p. 55). The connection between strong border controls and access to protection systems is a key issue: many third country nationals in need of international protection require visa to enter the EU – which they do not qualify for. Thus, they often have no legal means to appeal for protection and need to rely on irregular methods to enter the EU, such as smuggling. In order to respond to this ambiguity, the programme proposes the clarification of Frontex' mandate and an enhancement of the Agency' role "with due regard to ensuring protection for those in need who travel in mixed flows" (the Stockholm Programme 2009: p. 55). It seems like a rather simple solution to refer the problem to Frontex. In fact, it mirrors the programme's general trend towards quick fixes and interim measures, as no specific long-term goals are outlined in the document.

The lack in long-term goals becomes evident in the chapter: 'a Europe of responsibility, solidarity and partnership in migration and asylum matters', with regards to resettlement. When the Stockholm Programme was launched, Cyprus, Greece, Italy and Malta were struggling with increased irregular immigration flows and the challenge to host a higher number of asylum seekers and refugees. They therefore called for more solidarity in the management of irregular migrants and asylum seekers at their borders. Yet, the Stockholm Programme only sets forth a voluntary relocation programme piloted in Malta (Collett 2010: p. 2) – hardly a measure to alleviate the problem. Given the voluntary nature of this programme, it constitutes only a short-term solution. The fact that the programme calls for more solidarity and sharing responsibility among member states, while simultaneously emphasizing that the Dublin System is a cornerstone of the CEAS serves as a good example of the vague nature of long-term goals. The Dublin Regulation rules which country is responsible for the processing of asylum claims and places a heavy burden on the states at the Union's southern border. Referring to the Dublin Regulation in the context of solidarity seems hypocritical. The entire programme prioritizes control-oriented measures to counter irregular migration, such as returns, cooperation with countries of origin and transit – to prevent and reduce irregular migration – as well as readmission agreements and sanctions against employers employing undocumented persons (the Stockholm Programme 2004: p. 66).

Although the Stockholm Programme does not put as much emphasis on the figurative criminalization of irregular immigration to the same extent as the Hague Programme did, insecurity language is consistently applied throughout the document. The programme emphasizes control-oriented measures to respond to irregular immigration, as the focus on return and readmission demonstrates. In addition, asylum seekers are not included in the protection of the most. People seeking asylum have an unsecure legal status and are challenged with many difficulties, like access to medical care and housing. Yet, the programme prioritizes a no-policy towards the protection of asylum seekers that is incompatible with 'a Europe of rights'.

The portrayal of threats and insecurity in the programme is conducted from a state-centric perspective, meaning that the Stockholm Programme emphasizes the protection from threats to the member states and the Union and the securitization of borders[6]. If a human security approach was applied, the safeguarding of irregular migrants' and asylum seekers' rights would be the main security concern. However, this perspective is omitted from the programme. The programme does not provide for long-term solutions like the development of legal means for asylum seekers to access the Union, but rather emphasizes on short-term fixes. Also, delegating the protection of asylum seekers travelling in mixed flows to Frontex is not sufficient because it puts these people in a police- and not a human rights environment, as outlined in chapter 2.2. The voluntary nature of pilot resettlement programme in Malta, at a time when the member states at Europe's southern maritime border experienced extreme difficulties due to large number of arriving persons, underlines the reluctance to make concessions.

The Post-Stockholm Phase 2014

As a follow-up to the Stockholm Programme, the European Council published its Strategic Guidelines for legislative and operational planning of the AFSJ for the next five years in its Council Conclusions of 26-27 June 2014. However, the guidelines focus only on the implementation and consolidation of existing instruments. It is assumed that a proper implementation of the CEAS is sufficient to address the Union's current challenges. Furthermore, the impression arises that the Council's guidelines are unfeasibly insulated from

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A human security perspective on threats would allow for a focus on the security of human beings. As defined by the United Nations, human security expands beyond the concept of threats and its link with conflict and military activities and includes any event or process that "can cause death or less en life chances on a large scale [… and] can undermine States as the basic unit of the international system" (United Nations 2005: p. 26 and Matera 2014: p. 14). [6]

today's realities (Collett 2014[7]), because they neither address the increased numbers of asylum seekers arriving at the Union's borders, nor the growing tensions towards migrants in society. Instead, they prioritize border control, readmission and return as well as the prevention of irregular migration[8]. Therefore it is questionable, to what extent the guidelines can be utilized as a tool to provide guidance (Wijnkoop 2014: p. 48). In addition, reference to the EU Charta of Fundamental Rights is completely omitted from the guidelines. There seem to be profound omissions of important content, especially concerning current challenges. Carrera and Guild (2014) argue that the guidelines need to be assessed against the background of the institutional changes of the Lisbon Treaty: after the treaty reshaped the institutional control of the AFSJ by "liberalizing it beyond the Council rooms"[9] (Carrera and Guild 2014: p. 3), rivalry between the three institutions emerged. For that reason, it can be argued that the Council's Strategic Guidelines aim to restrict the emergence of plural and competing policy agendas (Carrera and Guild 2014: p. 2). This led to the creation of competing agendas in the following years. The authors point out, that "the shape of the European Council Guidelines is more strikingly revealed by its omissions than by the set of priorities expressly included in the text" (Carrera and Guild 2014: p. 13). A comparison between the content of the Strategic Guidelines and the Commission's and Parliament's competing policy goals will be conducted in the following section. Hereby, the Strategic Guidelines will be compared to two Commission Communications: "An Open and Secure Europe: Making it Happen" (COM (2014) 154) and "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union" (COM (20149 144) and the European Parliament's report on Mid-Term Review of the Stockholm Programme.

As stated above, reference to fundamental rights in the guidelines is hardly evident – only with regards to date protection and the protection of free movement (Strategic Guidelines 2014: paragraphs 4 and 12). Moreover, the Charta of the Fundamental Rights of the EU is not mentioned once in the entire document, leading to the consequence that the implications of

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[7] Retrieved from Migration Policy Institute (MPI), Collett, Elizabeth: "The EU's Strategic Guidelines on Migration: Uncontentious Consensus, But Missed Opportunities, http://www.migrationpolicy.org/news/european-union-strategic-guidelines-migration-uncontentious-consensus-missed-opportunity, (22.08.2015)

[8] The impression, that control-oriented measures are prioritized is underlined by the fact that in 2014 a number of police and border enforcing programmes were launched, such as a new generation of Euromed police programmes, the strengthening of the West African Police Information System programme and Frontex' Atlantic Seahorse Cooperation Network programme (Balleix 2014: p. 7).

[9] The competences of the Commission were strengthened and the European parliament was recognized as a co-legislator. As a consequence the Stockholm Programme was still shaped by the Council's monopoly on Justice and Home Affairs, disregarding the new roles of the Commission and the Parliament. This led to tensions between the three institutions and over the following years resulted in the creation of competing visions and agendas of the three institutions[9] (Carrera and Guild 2014: pp. 3-5).

the Charta are not the guiding paradigms in the plans designed by the guidelines (Carrera and Guild 2014: p. 8). In contrast to this, the Commission's and Parliament's documents attribute great importance to the Charta: both underline the importance of the promotion of human rights protection; highlight the importance of the protection of vulnerable groups and call for a strengthening of the fight against xenophobic sentiments in society (COM (2014) 144 point 4.1. (i) and European Parliament Report 2014: paragraphs 15-32).

With regards to legal migration, the Strategic Guidelines refer to legal migration in the context of talent and skills (paragraph 6). In this context, the guidelines also refer to instability in parts of the world and demographic trends and the demographic principle and underline the importance of a comprehensive approach for legal migration and the tackling of irregular migration (paragraph 5). However, none of these points are outlined in detail, giving the Commission not much to work with. In fact, this paragraph is the only one that mentions the current refugee crisis, although it is one of the Union's current most serious challenges. In contrast to this, the Commission is more specific: it highlights the possibility of Protected Entry Procedures, which will be introduced with humanitarian visas and common guidelines[10] (COM (2014) 154 point 3.4.), whereas the Council assumes that current legislation simply needs to be implemented more coherently.

Concerning asylum the Council's focus on existing instruments becomes even more evident. It is assumed that an effective implementation is sufficient in order to address asylum questions in the EU; hereby the European Asylum Support Office[11] (EASO) shall be utilized to promote the uniform application of the asylum *acquis*. No reference is made to the large numbers of asylum seekers arriving at the Union's border and the difficulties of Europe's southern member states in dealing with the situation (Strategic Guidelines 2014: paragraph 7). In contrast to the Council, the Commission and Parliament composed very detailed agendas concerning asylum: the Parliament addresses the current refugee crisis in its report and suggests that under the Dublin system, the possibility of suspending transfers to member states under significant pressure should be considered in the future (paragraph 92). Given the fact that solely in July around 50 000 immigrants arrived in Greece this is a reasonable

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[10] These Procedures allow for a differentiation between persons in need for protection and others, before they reach the European border. An individual can therefore contact the potential host state in order to secure a transfer and legal protection (Noll and Fagerlund 2002: p. 3).

[11] [11] The Hague Programme had proposed the establishment of a European Asylum Support Office to ensure practical cooperation between the member states on asylum matters. Therefore, on 1 February 2011 the EASO became operational as an EU agency. In order to support the coherent implementation of the CEAS, the EASO offers training, emergency support, provides expertise on asylum and prepares statistics on migration flows to contribute to the EU Mechanism for Early Warning, Preparedness and Crisis Management.
Retrieved from EASO, https://easo.europa.eu/, (24.08.2015)

suggestion and an aspect that the Council should have considered in its guidelines. In addition, the Parliament underlines the necessity of new measures to implement the principles of solidarity and fair sharing of responsibility (paragraph 93). In light of the latest developments at the European external borders this too is an important aspect. The Parliament as well as the Commission acknowledge the need of further improvements concerning asylum matters, with regards to emergency situations and suggests a number of instruments to address the current challenges[12] (COM (2014) 154 point 3.2).

Concerning the approach to irregular migration, the Council and the Commission both emphasize control-oriented measures such as the strengthening of migration and border management capacities in third countries, addressing smuggling in human beings more forcefully and the effective establishment of a common return policy and the enforcement of readmission agreements. Moreover, the strengthening of Regional Protection Programmes (RPPs) and increased contributions to global resettlement efforts are highlighted (Strategic Guidelines 2014: paragraph 8 and COM (2014) 154 point 1.2 and 4). In contrast to this, the Parliament expresses its concern for readmitted persons under EU readmission agreements and highlights that the Union should continue to integrate immigration in development cooperation (European Parliament Report 2014: paragraph 97). Moreover, it also calls for a human rights-based approach to EU migration and border management (European Parliament Report 2014: paragraph 5).

This comparison between the Council's, the Commission's and the Parliament's agenda on the post-Stockholm phase has shown, that indeed many aspects and concrete proposals made by the Commission and the Parliament are omitted from the Strategic Guidelines. It needs to be highlighted however, that the Parliament's and Commission's proposals do not necessarily promote increased protection of asylum seekers. An assessment of the advocated instruments reveals that some of them are in serious need of revision and do not always promote the rights of those in need of protection. The voluntary return programmes for example are often not really voluntary[13]. Member states apply voluntary return efforts as a money saving alternative to avoid detention costs and asylum and social services support (Webber 2011: p. 103). This

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[12] Like the enhancement of relocation programmes and that the pooling of reception places in times of emergency, to alleviate the pressure from the member states at the Union's borders, should be explored, especially given the current emergency situation. Moreover, the Commission proposes to amend the existing framework on temporary protection to make it more practical and flexile (COM (2014) 154 point 3.3) and underlines the importance of resettlement and protected entry procedures (COM (2014) 154 point 3.4).
[13] . According to the UN High Commission for Refugees (UNHCR) in its guidelines on voluntary repatriation, voluntariness must be viewed in relation to "a) conditions in the country of origin (calling for an informed choice); and, b) the situation in the country of asylum (permitting a free choice)" (Webber 2011: p. 103).

implies that member states' interests are at odds with the interest of the concerned volunteers. "It is generally impossible for the returnee to make an informed choice about the country to which they are returning" (Webber 2011: p. 103). It can be highlighted that a free choice to return requires the volunteer to have a legal basis for asylum (refugee status) in the host country. Yet, return programmes target asylum seekers and others with insecure statuses. Therefore, it should be kept in mind, that return and reintegration are not voluntary if the alternatives are poverty, denial of basic support and the opportunity to work in the host country, with which people with unsecure legal statuses are confronted (Webber 2011: pp. 103-104).

All three institutions emphasize the role of readmission. Concerning the former, the following needs to be highlighted: third countries' asylum systems often do not offer the same guarantees of fundamental rights as those of member states[14]. However, if the Union wants to continue sending refugees to third countries, differences between the protection systems need to be accepted. With regards to the RPPs that are suggested by both the Council and the Commission, the following needs to be emphasized: when launched in countries that are not exemplary in their human rights' protection, the provided resources, aimed to enhance asylum seekers' rights are often not implemented with regards to the human rights to be protected (Balleix 2014: p. 8). The implications of strengthening of third countries' border management capacities are worth highlighting as well: by investing in capacities that foster the control of migration in third countries, the EU may very well be fostering the incapacity of the concerned countries to safeguard human rights standards, as stronger border control capacities imply that fewer people may pass through (Carrera and Guild 2014: p. 11).

The assessment of the European Council's Strategic Guidelines has revealed that the Strategic Guidelines were developed against the background of competing agendas between the Council, the Commission and the Parliament and according to Carrera and Guild (2014) even aim to restrict the emergence of plural policy agendas on migration. The guidelines sideline the EU Charta of Fundamental Rights with the consequence that the entire document lacks a substantial human rights focus and disregards the legal and policy implications of the Charter. When compared to the Commission's and the Parliament's advice on the future of the post-Stockholm phase, it becomes evident that the guidelines not only disregard the implications of the current refugee crisis for EU policy making in the next five years, they also seem to reject

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[14] Under a readmission agreement signed with Ukraine in 2007, the country tried to send recognized refugees back to Russia. Also, some agreements were signed with countries, like Pakistan 2010, where people are still persecuted on grounds of their religion, political orientation or ethnicity (Balleix 2014: p. 6).

concrete proposals made by the Commission and the Parliament with regards to for example fostering more solidarity and adequate human rights standards. It is an alarming development that in times when people depend on the proper functioning of the European Union, the institutions are so torn, that the policy guidelines adopted to lead the way towards the next five years in the AFSJ, provide so little guidance.

This assessment of the policy guidelines on the AFSJ and migration issues by the European Council is now followed by an evaluation of two recent policy programmes adopted by the Commission: the Global Approach to Migration and Mobility from 2011 and the European Agenda on Migration 2015.

3.2.2. Implementing the Guidelines: EU's Migration and Asylum Policy

The Global Approach to Migration and Mobility 2011

The Commission's Global Approach to Migration and Mobility is the overarching framework of the Union's external migration and asylum policy. After the Stockholm Programme requested an evaluation of the Approach to Migration (GAM) from 2005, the Commission presented the GAMM as a revised version of GAM. It was formally adopted in May 2012.

The GAMM is based on four pillars: legal migration, irregular migration, international protection and migration and development and serves as a reflection of the EU's strategic objectives and constitutes "the overarching framework of EU external migration policy" (GAMM 2011: point 1).

It is striking that, in contrast to the above assessed policy programmes, the securitizing dialogue concerning irregular migration has disappeared. The previous use of the term 'illegal immigration' has been replaced by the politically more correct 'irregular immigration', effectively removing the connotation of irregular immigration with crime and insecurity. Yet, upon closer inspection it becomes evident the implementation of the right to asylum in the GAMM remains patchy. Given the fact, that the GAMM claims to "address all relevant aspects of migration in a balanced and comprehensive way" (GAMM 2011: Introduction), the topic of asylum is not addressed in a comprehensive way. The fact that asylum seekers often enter the EU in an irregular manner in order to appeal for asylum is not acknowledged. Consequently, asylum seekers and irregular immigrants are addressed as two different groups of people when they are in reality not as easy to distinguish. Therefore asylum seekers, who enter the EU irregularly are classified as irregular migrants and treated as such. It can be stated that the GAMM mirrors the Council's guidelines in their apprehension of asylum as a secondary route to immigration and the characterization of asylum seekers as potentially false

(Matera 2014: p. 14). Irregular immigration and asylum policy are two closely connected policy areas and should not be dealt with separately, as is the case in the GAMM.

Under the GAMM's second pillar on "preventing and reducing irregular migration and trafficking in human beings" (GAMM 2011: p. 15), the Commission accentuates that:

> "The legitimacy of any framework for migration and mobility depends on effectively addressing irregular migration. Safe and secure migration is undermined by those who operate outside the legal framework" (GAMM 2011: p. 15).

This statement has twofold implications: firstly, the legitimacy of the EU's migration policy depends on the effective management of irregular migration. Secondly, this places the EU in the position of the care-taker and security provider in order to defend its migration policy against the insecurities arising from irregular immigration. In conjunction with the notion of effective regulation, the Commission further highlights that a lack of adequate regulation fosters irregular migration:

> "A broad understanding of security means that irregular migration also needs to be considered in connection with organized crime and lack of rule of law and justice, feeding on corruption and inadequate regulation" (GAMM 2011: p. 15).

This effectively creates a vicious circle in which irregular migration feeds on the inadequacy of migration regulation, which remains illegitimate as long as it is undermined by the existence of irregular migration. EU policy-makers consider the introduction of stricter visa policies and border controls a tool to reduce irregular migration (GAMM 2011: p. 15). However increased controls enable even fewer people to obtain access to legal means of immigration to the EU, which contributes to the number of people seeking irregular methods to enter the territory of member states. Considering the EU's approach to irregular migration, it becomes apparent, that policy-makers are trapped in this cycle. As the above quoted statement reveals, irregular immigration is still subject to criminalization in a figurative sense. Although the securitization of immigration through the application of police, criminal law and military language is not utilized in the context of irregular immigration, the GAMM does not apply a humanitarian concept towards the issue either. The application of a humanitarian concept would include the security of people trying to enter the EU, for whatever reasons, and not only national security. Immigrants' well-being and the safeguarding of their rights would constitute the core of immigration policy. Instead, the GAMM focuses on national security, whereby great importance is attached to the concept of extraterritorialization. This is especially evident in the GAMM's third pillar concerning the promotion of "international protection and enhancing the external dimension of asylum policy" (GAMM 2011: p. 17). A

strengthening of relevant non-EU countries' asylum systems and national asylum legislation in order for these countries "to offer a higher standard of international protection for asylum seekers" (GAMM 2011: p. 17) is advised, in order to deal with migration to the EU. This means, that once such countries are declared to possess sufficient asylum systems, EU member states are able to return asylum seekers to these countries. This potentially produces more countries capable of hosting asylum seekers and constitutes, in principle, a development to be welcomed. Key instrument to the achievement of this goal, as pointed out in the GAMM, are the RPPs. The Commission specifically emphasizes that such programmes shall encompass cooperation with North African countries like Egypt, Tunisia and Libya. Yet, it needs to be noted that when launched in countries that are not very good at enforcing the protection of human rights', these programmes are not always implemented in the spirit of respecting the rights they are supposed to protect (Balleix 2014: p. 8). It is questionable whether the efforts to support the creation of adequate asylum systems in third-countries with the help of RPPs actually lead to acceptable asylum systems.

The assessment of the GAMM has revealed that a link between the internal and external dimension of migration policy is established, which is a great advancement from the previous policy programmes. As asylum seekers often travel in mixed flows, border controls need to be sensitive towards the fact that irregular immigrants may be in need of international protection. Although it needs to be highlighted that the GAMM's discourse on immigration is much more positive and that the latter is no longer portrayed as a threat, the GAMM emphasizes a policy reaction to irregular immigration that creates a vicious circle of stronger border controls and visa to reduce irregular immigration However, the more legal access to the EU is limited, the more asylum seekers will have to rely on irregular manners to enter the Union. As a consequence, the affected groups of people have to embark on even more dangerous journeys and are even more vulnerable to exploitation.

The GAMM also prioritizes cooperation with third countries and the improvement of their asylum systems. Approaching irregular migration by means of reducing incentives to travel to the EU because other countries offer good protection systems should be regarded as a reasonable aim as well. However, in this context, cooperation and transfer of resources like money to third countries needs to be conducted with sensitivity towards the issue that especially in countries with problematic human rights records, these resources are often not utilized for their designated purposes and might even contribute to further insecurities for asylum seekers.

The European Agenda on Migration 2015

The European Agenda on Migration was published on 13 May 2015 against the background of the refugee crisis in the Mediterranean. It aims to offer solutions for Europe to move forward in the area of migration, in the short and medium term (European Agenda on Migration 2015: p. 17). The Agenda defines four levels of action, which aim to provide the EU with a migration policy that respects the right to seek asylum, responds to humanitarian challenges and presents a clear framework for a common migration policy. These levels will be assessed with regards to the right to asylum.

Level one focuses on the reduction of incentives for irregular migration. Hereby, no new instruments are suggested. Rather an intensification of existing instruments is deployed, such as an enhancement of the role of migration of EU Delegations in the concerned countries and the deployment of European migration liaison officers. Additionally, the role of external cooperation assistance, especially development cooperation is highlighted in the Agenda.

The second level, 'border management – saving lives and securing external borders', mainly concerns the strengthening of the EU's external borders – and not saving lives. It is stated that the Commission will introduce a 'Union standard for border management', as border management in the different member states varies. The launch of the 'Smart Borders initiative' in 2016 is underlined, which shall increase the efficiency of border crossings. While it facilitates crossings for nationals not requiring visa, it is also portrayed to be a strengthening tool "in the fight against irregular migration" (European Agenda on Migration 2015: p. 11). Despite an emphasis on the saving of lives in the headline, which evidently includes the lives of irregular immigrants, irregular immigration is portrayed as a threat and placed in a security context, instead of a humanitarian one. This becomes evident with regards to the focus on border management issues in this section of the agenda. With regards to 'saving lives' the agenda refers to closer cooperation with coastguards, because they "have a crucial role for both saving lives and securing maritime borders" (European Agenda on Migration 2015: p. 11). Also, the agenda highlights the possibility of Frontex supporting key African and EU neighbourhood countries in the management of their borders, aiming at more secure borders but also the strengthening of the capacity of these countries to save lives of migrants in distress. Yet, it needs to be kept in mind that stronger border controls in transit countries constitute a hindrance to people trying to seek international protection in the EU. It can be argued that cooperation with so-called "key African and neighbourhood countries" (European Agenda on Migration 2015: p. 11) aims to reduce the number of people entering the EU in an irregular manner, as they are confronted with stronger borders in countries of departure.

Furthermore, it is questionable whether people's lives are in fact saved if they cannot embark on a journey to the EU but have to stay in a country of origin or transit. Although level two is supposed to concern both saving lives and securing external borders, the emphasis clearly lies on border security, with little reference to 'saving lives'.

Level three, 'Europe's duty to protect: a strong common asylum policy', addresses the implementation of the CEAS and the Dublin system[15]. Concerning the former, the agenda stipulates a number of measures aimed at increasing a coherent implementation of the CEAS[16]. According to the agenda, the Commission will strengthen Safe Country of Origin provisions. All in all these steps are to be welcomed as they have the potential to improve asylum seekers' rights, as an improvement of the standards on reception conditions and more uniform asylum decisions with the help of the EASO are envisaged. However, given the diversity of asylum systems as well as interests of the member states, a coherent implementation of the above listed measures might be difficult to accomplish.

The last level, 'a new policy on legal migration', is mostly concerned with economic migration, including visa policy and development benefits for countries of origin. The only reference to asylum is made under the headline 'effective integration': for the period between 2014- 2020, at least twenty percent of European Social Fund resources will be contributed towards social inclusion, with a special focus on those seeking asylum.

The European Agenda on Migration was issued in response to the "plight of thousands of migrants putting their lives in peril to cross the Mediterranean" (European Agenda on Migration 2015: p. 2). With consideration of this background it needs to be stated that in this document too, a human security approach is not applied. Instead, border security and the externalization of border controls are predominant, as the repeated emphasis on third country cooperation to reduce the number of immigrants arriving at Europe's borders shows. With regards to the humanitarian crisis at Europe's borders the European Agenda on Migration lacks sufficient ideas and priorities to alleviate the pressure asylum seekers as well as member states are experiencing. Instead of a focus on the established system, new ideas, such as the

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[15] With regard to the Dublin System, it is emphasized that the system does not work the way it should: it is highlighted, that in 2014 only five member states processed 72% of all asylum claims EU-wide (European Agenda on Migration 2015: p. 13). The Agenda therefore highlights the need to comprehensively apply the Dublin system EU-wide and furthermore mentions the evaluation of the Dublin system in 2016, with regards to a fairer distribution of asylum seekers in Europe.

[16] Such as the introduction of a new systematic monitoring process, guidance to improve the standards of reception conditions and asylum procedures, an increase of practical cooperation between the European Asylum Support Office (EASO) and the member states to create more uniform asylum decisions as well as a more effective approach to abuses.

facilitation of legal means for asylum seekers to enter the EU and a stronger emphasis on means to increase solidarity and fair sharing are necessary.

3.2.3. The Outcome: The Common European Asylum System

The CEAS aims at enhancing development of the AFSJ. Its objective is the introduction of common standards and procedures concerning all aspects of asylum. These common standards codify the member states' responsibilities concerning the reception of asylum seekers, the processing of their claims and the guarantee of their protection (Katsiaficas 2014: p. 1). Despite the Union's efforts to implement a common asylum system which fully respects fundamental rights asylum seekers still experience difficulties in the process of asylum application (Human Rights Watch 2013[17]). Asylum processes are inconsistent due to different capacities of the member states to run effective asylum systems (Katsiaficas 2014: p. 11). It also needs to be highlighted that the CEAS does not have the characteristics of a *common* system, as it is still in the making. There is no guarantee that two identical appeals for asylum receive the same response in two different member states. Instead of a common approach the CEAS "currently manages an equilibrium between cohesion and rivalry among states" (Rossi 2014: p. 3). One the one hand, member states need to cooperate because the control of access of asylum seekers is a common issue[18]. On the other hand however, some member states tend to leave control to others who are more directly involved[19]. Thus, the combination of the asylum systems' interdependency and the rivalry between the member states results in a stronger degree of restriction and creates the so-called Fortress Europe (Rossi 2014: pp. 1-3). To alleviate the discrepancies in implementation of the CEAS, the EASO was institutionalized as an EU agency in early 2011 to facilitate a more coherent implementation of the CEAS (Visser 2014: pp.71-72).

The recast Qualification Directive (QD) as well as the recast Reception Conditions Directive (RCD) are not implemented homogeneously in the member states. However, EASO's work might alleviate those deficiencies in the future. For now, the consistent application of the GD and the RCD depends on the increasing role of European Court of Justice's and the ECtHR's jurisdiction (Matera 2014: p. 13). The recast QD provides a set of common standards to

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[17] Retrieved from https://www.hrw.org/world-report/2013/country-chapters/france-germany-greece-hungary-italy-netherlands-poland-romania (21.07.2015)

[18] Due to the fact that many member states have similar levels of welfare and economic development and because of their close geographical location, in the eyes of asylum seekers, one country is as good as another. This creates an interdependence of asylum policies between the countries and if one country opts for more restrictive policies, the neighboring countries are likely to see a shift in the flow of asylum seekers (Rossi 2014: p. 2).

[19] The Dublin III Regulation which still places a large burden on the member states at Europe's external borders is a good example here.

identify the qualification of persons as refugees or those in need of international protection. The recast RCD provides for common standards for the living conditions of asylum applicants. The latter's revision includes new standards, rendering the systematic detention of asylum seekers impossible (paragraph (15) of the Preamble of Directive 2013/33/EU). Although now detention is only to be used as a measure of last resort, there are numerous reports of member states still practicing the systematic detention of asylum seekers. This is especially the case for the southern-border member states. Greece for example is "failing badly to respect the human rights and dignity of migrants, asylum seekers and refugees", (Global Detention Project 2015: p. 3) especially with regards to detention. Asylum seekers in Italy are vulnerable to severely inadequate living conditions and homelessness and many member states have ceased to return asylum seekers to Italy under the Dublin III Regulation (Global Detention Project 2015: p. 5). The situation in Malta is even worse, as the country declared a 'national crisis' due to the high numbers of asylum seekers arriving at its coasts. The German Administrative Court suspended transfers to Malta in January 2015, because asylum seekers in Malta are at risk of inadequate detention conditions without access to an effective remedy. In addition, the court was not sure that asylum seekers are treated according to the principles of the Charter of the Fundamental Rights of the EU and the 1951 Geneva Convention (Global Detention Project 2015: pp. 5-9).

The recast Asylum Procedures Directive (APD) was adopted in 2013 and aims to facilitate better access to asylum procedures, by the provision of stronger safeguards. Considering that under Article 6F of the APD asylum applicants have to be on the territory of a member states, it needs to be highlighted that the lack of legal possibilities for asylum seekers to enter the EU causes people to embark on dangerous journeys.

The Dublin III Regulation defines criteria for determining which member state is responsible for the examination of an asylum claim. Hereby, an unfair burden is placed on the member states at the EU's external borders. With regards to Article 80 TFEU governing that the principle of solidarity should guide the application of migration and asylum policy it needs to be underlined that the implementation of the CEAS disregards this principle (Matera 2014: p. 13). Dublin III does not consider the reasons why asylum seekers may chose one destination rather than another, due to language skills or employment opportunities (Fratzke 2015: pp. 24-25).

The evaluation of the CEAS has revealed that it is not coherently implemented by the member states. To facilitate a more consistent implementation of the CEAS, the EASO has been established. Components of the CEAS have been revised in recent years to promote the

protection of asylum seekers' rights. With regard to the application of the CEAS it needs to be stated that national interests outbalance the common method. There is an ambiguity between the different national asylum systems on the one hand and rivalry between the member states on the other hand that has contributed to the creation of the Fortress Europe. Therefore, there is an ambiguity between general objective of an asylum system – the protection of persons – and the EU's approach – the securitization of borders (Matera 2014: p. 14).

The previous sub-chapters have assessed the evolution of the EU's asylum policy in order to gain a detailed overview of the current stage of development of both the general treatment of migration and asylum issues – especially concerning the humanitarian crisis unfolding at the Union's southern and eastern borders – and the European asylum system. This detailed overview will be summarized in the following section to answer the first sub-question: How is the right to asylum implemented in the EU's legal framework and policy approach concerning border management?

3.3. Conclusion

Article 78 (1) TFEU states that the EU shall develop a common asylum policy that is in line with the Geneva Convention and its Protocol. The Tampere Programme called on the EU to create common migration and asylum polices and repeatedly underlines the importance of the proper implementation of the Geneva Convention and human rights protection. Yet, irregular migrants and asylum seekers are treated as two different groups of people. A shortfall that has not been rectified in even the most recent policy documents. This implies that restrictive measures against irregular immigrants often constitute restrictive measures against asylum seekers. The Tampere Conclusions emphasize a number of control-oriented measures to address irregular migration that are consistently applied throughout the succeeding policy documents published by the Council and the Commission: there is an emphasis on readmission agreements, returns and third country cooperation with the aim to support the facilitation of stronger border control capacities in third countries to keep the numbers of migrants passing through to Europe as low as possible. In the light of the terrorist attacks on September 11 and the Madrid and London bombings 2004 and 2005, the Hague Programme introduced a securitized approach to immigration (see chapter 3.2.1 The Hague Programme). Nonetheless, the first decade of the development of a common migration policy fostered the establishment of new frameworks and regulations. Not all member states' had asylum systems in the beginning. The fact that every member state today possesses an asylum system is a great achievement. However, it also needs to be underlined that especially the first phase lead

to a race-to-the-bottom concerning asylum standards, as it were the minimum standards that were agreed upon. Yet, even then, some member states had to raise their protection standards to meet this minimum (Wijnkoop 2014: p. 43). These early developments can be attributed to the fact that the first two programmes established the baseline of EU asylum policy.

Contemporary policy development on the other hand is much more difficult to accomplish, as it is generally easier to agree on basic principles, than on more sophisticated details that further intervene in member states' sovereignty. As the Union already struggled to establish general principles; the pursuance of more complex policies, such as the integration of a comprehensive human rights framework within the EU's external policy proves to be even more difficult. The Stockholm Programme is rather vague and not very ambitious. Instead it focuses on further coordination of border management and a review of the existing asylum *acquis*. In addition, the European financial crisis has impeded a more ambitious course and the currently large numbers of people arriving at the Union's external borders have placed the European asylum acquis and member states' willingness to respond to the problem under scrutiny (Collett 2014: pp. 1-5).

A further factor that adds to the difficulties is the disaccord between the Council, Commission and Parliament, which has led to the creation of Strategic Guidelines that omit the vital importance of human rights from their agenda. Instead a control-oriented approach is pursued that considers existing instruments sufficient to address the current humanitarian crisis at a time when member states need complex guidance and a turn around to humanitarian principles.

Although the right to asylum is acknowledged in all documents but the most recent Strategic Guidelines, its implementation proves difficult due to member states' reluctance to commit to more solidarity and fair sharing of responsibility. In addition, the system lacks an effective system of accountability for the member states that do not comply the Union's asylum *acquis* (Wijnkoop 2014: p. 49). European migration policy is conceived within the framework of border management and security. Due to the embeddedness of a fundamental human rights issue in a security environment it is questionable whether the right to asylum will be implemented in the interest of the people in need of protection, instead of national interests, without major institutional reform.

After chapter three has provided an answer to the first sub-question, the following chapter aims to answer the second sub-question: "To what extent is the right to asylum reflected in Hera II's, Operation RABIT's and JO Tritons' performance?". This will be accomplished by

an assessment of Frontex in general, and an evaluation of the three chosen operations, followed by a conclusion.

4. The Right to Asylum in Frontex Operations

Despite the fact that EU law guarantees for the right to asylum, ways to facilitate the arrival of asylum seekers are not provided for. Individuals seeking asylum in the EU are primarily nationals of countries requiring visa to enter the Union. These persons often do not qualify for an ordinary visa and thus have to enter the EU in an irregular manner (European Union Agency for Fundamental Rights 2014: pp. 34-37). Therefore, border control activities need to be sensitive towards the balance between regarding human rights guarantees and effective border control.

In order to evaluate the extent to which Frontex' role in joint operations complies with the right to asylum, this chapter assess the second sub-question: "To what extent is the right to asylum reflected in Hera II's, the RABIT Operation's and JO Triton's performance?". This will be accomplished by an assessment of Frontex' tasks and obligations, including their limits, with regards to the right to asylum, followed by an evaluation of the three joint operations. It is important to highlight that Frontex operations should not be viewed as homogenous, but instead as part of a "localized border regime that is formed by local conceptualities, characterized by its own individual spatiality and configurations of stakeholders, conflicts and relations" (Kasparek and Wagner 2012: p. 173). This means that Frontex operations are diverse and each informed by their individual circumstances. Therefore, generalizations can only be made with great carefulness. Nonetheless, an assessment of the chosen operations can provide valuable insights.

4.1. Frontex

Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the external borders of the member states and the European Union, amended by Regulation (EC) No 863/2007 and Regulation (EU) No 1168/2011 sets out Frontex' tasks and responsibilities. Though mostly administrative in nature, it provides for the Agency's basic principles and thus serves as a basis for all its activities. Therefore, an assessment of the Frontex Regulation provides important insights.

First of all it needs to be highlighted, that Frontex' main task is to facilitate cooperation measures concerning the management of external borders and to ensure to coordination of member states' actions in the implementation of those measures (Paragraph (4) of the

Preamble of Council Regulation (EC) No 2007/2004). It falls not within the scope of the Agency's tasks to rescue migrants at sea, which needs to be considered. Yet, Frontex has to fulfil its tasks in full compliance with EU law, including the Charter of Fundamental Rights and the Geneva Convention and obligations related to access to international protection, especially the principle of non-refoulement (Article 1 (2) of Council Regulation (EC) No 2007/2004). The only Article relating to irregular migration is Article 14 on facilitation of operational cooperation with third countries and cooperation with competent authorities of third countries. According to Article 14 these cooperation shall take place with regard to human rights. Article 14 (1) codifies that:

> "The Agency and the Member States shall comply with the norms and standards at least equivalent to those set by the EU legislation also when cooperation with third countries takes place on the territory of those countries."

This means, that Frontex and the member states have to comply with the EU's human right framework at *all* times. The inclusion of minimum human rights is new to the regulation[20] and potentially strengthens the rights and freedoms of people in need of international protection in third countries, as these countries have to apply the same human rights standards as the Union within the framework of cooperation. Therefore, Article 14 (1) serves as an equivalence test between the norms of the country of cooperation and EU norms. Considering the fact that third-country cooperation are launched "with a view to contributing to the prevention of and the fight against illegal immigration and the return of illegal migrants" (Article 14 (4) of Council Regulation (EC) No 2007/2004), Article 14 (1) constitutes a very strong mandate and formal limits. However, the monitoring of the respective standards is difficult, which renders the equivalence test problematic.

Article 14 places irregular immigration in an insecurity environment. Although recent EU policy programmes ceased to utilize an 'illegality' discourse, the Frontex Regulation still does. The term 'illegal immigration' in itself figuratively criminalizes irregular immigrants, who often have to enter the EU in an irregular manner in order to appeal for asylum. Moreover, in order to answer to the perceived threat of 'illegal migration', the regulation points out that irregular immigration needs to be 'fought against', disregarding the fact that many asylum seekers enter the EU in an irregular manner and are in need of protection.

Concerning the implementation of fundamental rights, Article 26A (1) stipulates that Frontex shall establish a Fundamental Rights Strategy, which "shall put in place an effective

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[20] The inclusion of minimum human rights has been added by Regulation (EU) No 1168/2011 of the European Parliament and of the Council on October 25 2011.

mechanism to monitor the respect for fundamental rights in all the activities of the Agency".

However, no reference is made with regards to the respect or enforcement of fundamental rights; the strategy merely has a monitoring function. Under Article 2A Frontex is required to develop a Code of Conduct. However, it is not legally binding and there is no reference to sanctions in case the code is broken (Keller et al. 2011: p. 41).

Although Frontex is bound to comply with EU human rights law, responsibility for the implementation of the former lies with the member states. In a note to the European Parliament regarding fundamental rights on 8 October 2010, it was stated:

> "The respect of Fundamental Rights (…) is unconditional for FRONTEX and is fully integrated into its activities. In fact, Frontex considers the respect and promotion of fundamental rights as integral part of an effective border management and both concepts go, therefore, hand in hand" (as cited in Keller et al. 2011: p. 22).

Frontex is obliged to comply with EU human rights standards, yet the Agency is not responsible for the *facilitation* of compliance within joint operations. Ilkka Laitinen, Director of Frontex commented at the interdisciplinary committee meeting of the LIBE Committee on 'Democratic Accountability in the Area of Freedom, Security and Justice, Evaluating Frontex':

> "As regards fundamental rights, FRONTEX is not responsible for decisions in that area. They are the responsibility of the Member States." (as cited in Keller et al. 2011: p. 22).

This means, that Frontex, according to Laitinen, does not have the powers to scrutinize member states. The Agency's mandate encompasses the coordination of joint operations and is therefore only accountable for matters concerning its responsibilities in this field. Article 13 of Frontex' Fundamental Rights Strategy states:

> "Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations (JOs) and therefore also for the respect of fundamental rights during these activities."

Considering the two statements and Article 13 of the Agency's Fundamental Rights Strategy, it can be concluded that, although the respect of fundamental rights shall fully implemented in the Agency's activities, Frontex has a 'neutral' role, leaving the member states in charge of the respect and implementation of human rights' standards. This creates an ambiguous situation in which member states are in charge of the implementation of an operation's compliance with fundamental rights, whereby Frontex simply executes its tasks, without taking action in case of rights violations.

Considering this assessment of Frontex' legal framework, it can be concluded that the Agency was created to be a 'neutral' player in the EU's external policy: the Agency's main task is the facilitation of cooperation between the member states, not the guarantee of human rights at sea. However, from a human rights perspective, the fact that Frontex cannot be held accountable for human rights' violations renders its practices at the borders problematic. In the event of human rights violations by member states during joint operations, Frontex is not permitted to take action. A very good example for this incapability to take action occurred during the RABIT Operation in Greece, when detention in Greek detention centres facilitated inhuman or degrading treatment. Yet, all Frontex was able to do, was talking to the Hellenic Policy authorities and writing letters to the Commission (Human Rights Watch 2011: p. 27). Article 14 (1) of the Frontex Regulation provides for very strong standards concerning cooperation with third countries. Although this is a positive development, it needs to be pointed out, that compliance with it is very difficult to monitor, especially given the fact that the majority of Frontex' are disclosed to the public.

4.1.1. Operation Hera II

The Hera Operations were launched at Spain's request in summer 2006. Joint surveillance sea operation Hera II succeeded Hera I on 11 August 2006 and aimed to enhance the control of the area between the West African coast and the Canary Islands (see Appendix 1). This was accomplished by "diverting vessels using this migration route and contributing to the reduction of human lives lost at sea during the dangerous long journey" (Frontex Annual Report 2006: p. 12). For this end, the area of deployment covered the territorial waters of Mauritania, Senegal and Cape Verde. Although the goal to save lives constitutes a good one in general, it is questionable whether the applied method in fact contributed to the immigrants' welfare, as people in need of protection had to stay in a country of transit or origin.

The operation sought to deter *Cayucos* (small, open wooden boats) transporting irregular immigrants from setting off the African coasts. If they departed nonetheless the aim was to intercept them in the territorial waters of the country of departure. In this case the authorities of the sending country were in charge of the immigrants' return to their territory. These return missions were possible due to bilateral agreements between Spain and Mauritania and Senegal, concluded prior to Hera II. Only if intercepted outside the 24-mile zone off these countries' coasts were the immigrants escorted to the Canary Islands and offered the possibility to lodge an asylum claim (Carrera 2007: pp. 21-22). Considering the fact that immigrants were deterred from leaving the West African coast and returned to their countries

of origin without having been offered to lodge an asylum claim when intercepted within the territorial waters of the countries of departure, it becomes evident that there is a potential that Frontex' procedures during Hera II have violated the right to leave a country under Article 12 (2) of the UDHR (State Watch 2007[21]).

Because Frontex' border control activities during Operation Hera II were not restricted to the territorial waters of the European member states only, it needs to be clarified that the principle of non-refoulement also applies extraterritorially. The prevailing view on this is adopted from the UNHCR's assessment of the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol:

> "It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction".

This implies that the principle of non-refoulement is not restricted to a certain territory. Instead, whenever a member states exercises its jurisdiction, it is bound by European and international law concerning asylum. This means that interceptions outside the territorial waters of member states are bound by the same rules, as interceptions within EU territory. In this context, it is therefore important to establish if and when interception equals effective jurisdiction. The exercise of jurisdiction is understood as effective control over an individual. This means, whenever a boat is pushed back in international waters or a boat is transferred to a coastal state, including non-EU countries, effective control and thus, jurisdiction is exercised (Vandvik 2008: p. 32) and the actors involved are bound by the prohibition of refoulement. Yet, it needs to be noted that the monitoring of whether effective jurisdiction is indeed exercised or not is very difficult.

In an interview on Hera II a spokesman stated that 1243 immigrants had been intercepted and commented further: "that's 1243 who have not got to the Canaries […] it is a preventive operation." (Bailey 2006: 19.07.2015[22]). This statement adds to the impression that the saving of human lives was used to justify the means to prevent as many immigrants, and potential asylum applicants, as possible from reaching EU territory. Hera II was not the only time when humanitarian causes were used to justify a border control operation[23], as will be outlined in

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[21] Retrieved from: State Watch: "Three-fold increase in dinghy deaths as the EU border moves south", http://www.statewatch.org/news/2007/apr/02spain-dinghy-deaths.htm, (16.08.2015)
[22] Dominic Bailey: „Stemming the immigration wave", BBC News Retrieved from http://news.bbc.co.uk/2/hi/europe/5331896.stm (91.07.2015)
[23] For further information please see Cuttitta, Paolo: "From the Cap Anamur to Mare Nostrum: Humanitarianism and migration controls at the EU's maritime borders", in Matera, C and Taylor, A (eds.): "The Common

chapter 4.1.3 on JO Triton. Due to the high number of diverted vessels and "saved" migrants, Hera II is, according to Frontex, the Agency's "most successful joint operation" (Frontex General Report 2009: p. 9). Yet, the extent of this success is open to discussion: Frontex claims that the lives of those intercepted were saved but it is uncertain whether those immigrants' alternatives were less dangerous than the boat journey to the Canaries. The two alternatives for such people were either staying in their country or origin or departure, or embarking on a different and potentially more dangerous route. Also, the fact that the number of immigrants arriving at the Canaries remained rather constant throughout the entire operation further adds to the doubts about Hera II's success: instead of halting migration from West Africa, the immigration route rather moved elsewhere[24]. (Carrera 2007: p. 23)

As in the Union's migration policy programmes, Frontex' applied a securitizing discourse towards irregular immigration in its publications. According to the 2006 Annual Report, the aim of Hera II was to "enhance the control" (Frontex Annual Report 2006: p. 12). This statement further adds to the impression that Hera II was not designed against the background of a humanitarian mission – which was used to justify the deployment of the operation within third-countries' territories - but instead to increase control.

The assessment of Hera II has demonstrated that although Frontex states that Hera II was designed to save lives, Hera II was a control-oriented operation, intended to prevent as many as possible from reaching the Union's territory. Although proactive life-saving is not included in Frontex' mandate, the latter was used by Frontex to justify the operation's scope. Also, it is questionable to what extent lives were actually saved during the mission, as many of the 'saved' persons were returned to a country of origin or transit from which they wanted to flee. In this context it needs to be remarked that the principle of non-refoulement might have been violated. People returned to the shores were left with the choice of either staying or embarking on a different or potentially more dangerous route.

Evidently, the entire operation was informed by the Union's approach towards irregular immigration, which is shaped by the member states' national interests. As outlined in chapter three, the EU's policy programmes are shaped to a great extent by the member states' reluctance to engage in an external border management less informed by national security and more by human security concerns. This is mirrored in Hera II. Moreover, it needs to be clarified that Frontex acted within the scope of its mandate and cannot be held accountable for

European Asylum system and human rights: enhancing protection in times of emergencies", Centre for the Law of EU External Relations (CLEER) Working Papers 2014/7

[24] Consider appendix 2 for a table on monthly data on arrival of *pateras* (flat bottom boats) and immigration in the Canary Island in 2006

the potential rights violations during the operation, as the participating member states are responsible for the implementation of human rights standards and not Frontex.

4.1.2. RABIT Operation

After a decrease in irregular migration to Italy and Spain, the number of irregular border crossings in Greece increased from 50% of the total EU detections to 75% of the total detections in 2009 (Frontex Annual Risk Analysis 2010: p. 12). According to Frontex "this is one of the largest single influxes of illegal migration into the EU ever recorded" (Frontex Risk Analysis Network (FRAN), Quarterly Update, July-September 2010: p. 12). Therefore, the Greek government asked for assistance in the control of its external border with Turkey and on 2 November 2010 the first Rapid Border Intervention Team in the history of Frontex was deployed. Because the situation in Greece was classified as a situation of "exceptional and urgent" (Paragraph (7) of Regulation (EC) No 863/2007) pressure, the deployment of RABITs was legitimized, as laid out in the RABIT Regulation.[25] Because a reduction of irregular migration of 76% between November 2010 and March 2011 was recorded, the operation was deemed "a clear success" (Frontex Annual Risk Analysis 2010: p. 24). This proclaimed success will be assessed from a human rights perspective and in consideration of access to asylum.

The goal of the RABIT operation was to stabilize the situation, to decrease migratory pressures and to support the national authorities in building capacity (Frontex RABIT Evaluation 2011). Therefore, it can be stated that for RABIT operation a humanitarian cause was not utilized to justify its actions. Upon closer examination of documents published by Frontex, it becomes evident, that the issue was dealt with within a security context and not a humanitarian one. The Frontex General Report 2011 for example states that the RABIT mission was "an adequate operational response to tackle the exceptional and urgent emergency situation caused by massive migration flows" (Frontex General Report 2011: p. 15). Yet, as Carrera and Guild argue, this massive influx of migration at the Greek-Turkish border needs to be taken with caution, when considering the nationalities of detected persons, which come from countries considered to be the main sources of refugees, according to UNHCR (Carrera and Guild 2010: p. 11). This means, that a large amount of the 'illegal immigrants' Frontex aimed to fight, were in fact people seeking international protection.

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[25] What is special about the RABITs is the fact that they "provide support for a limited period of time" and that they only "should take place in exceptional and urgent situations" (Paragraph (7) of the Preamble of Regulation (EC) No 863/2007), because regular forms of assistance are deemed insufficient in the face of the arrival of large numbers of third country nationals trying to enter the territory of member states in an irregular manner (Preamble of Regulation (EC) No 863/2007).

Frontex' role in Greece led to the treatment of *every* person, including asylum seekers, as irregular immigrants (Carrera and Guild 2010: p. 15).

Apart from an increase in irregular crossings detections at the Greek- Turkish border, Greece also faced international criticism concerning its detention centres. The European Court of Human Rights (ECtHR) had proclaimed that migrant detention in Greece constitutes "inhuman and degrading treatment"[26] (as cited in Human Rights Watch 2011: p. 1). In the wake of *M.S.S. v. Belgium and Greece,* where the court declared that Greek detention practices violated Article 3 of the European Convention on Human Rights and that its asylum system was dysfunctional, many member states stopped to transfer migrants back to Greece under the Dublin II Regulation (Human Rights Watch 2011: pp. 2 and 54). Moreover, according to a Human Rights Watch Report, the fact that Frontex apprehended and transported migrants to Greek detention centres, knowing of the conditions there, constituted a violation of the prohibition of inhuman and degrading treatment (Human Rights Watch 2011: p. 46).

Frontex was aware of the conditions in Greek detention centres at all times, however, it did not fall within the scope of the Agency's mandate to take action because the mandate only covered initial processing. The reception of persons crossing the border in an irregular manner did not fall within the scope of its mandate (Human Rights Watch 2011: p. 26). Here again it becomes evident, that although there are human rights concerns to be raised, the limits of Frontex' mandate hardly justifies these accusations.

While it is a sovereign state's responsibility to ensure human rights, Frontex' task in Greece constituted enforcement of border control. Greece however failed to comply with its human rights obligations, leaving migrants and refugees confront with enforcement barriers, without having access to human- and refugee rights and sufficient remedies (Human Rights Watch 2011: pp. 53-54).

The RABIT Operation in Greece was a control-oriented operation aimed at reducing migration flows. Within the framework of the operation, arriving irregular migrants were perceived as a threat to the EU, disregarding the fact that the majority of people were legitimate asylum seekers. The assessment of the RABIT Operation clearly demonstrates the lack of Frontex' ability to intervene in human rights violations committed by member states during joint operations. Because Frontex is not equipped with the mandate to scrutinize member states, the fact that the conditions in Greek detention facilities violated human rights

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[26] Article 4 of the Charter of the Fundamental Rights of the EU prohibits torture and inhuman or degrading treatment or punishment.

had to be tolerated. As Greece failed to meet its human rights standards while Frontex facilitated additional border controls, asylum seekers were faced with more control measures and fewer safeguards for their rights.

4.1.3. JO Triton

Joint Operation Triton was launched in November on request of Italy for EU support. Against the background of the drowning of over 300 people off the coast of Lampedusa in October 2013, Italy had launched operation 'Mare Nostrum', which was portrayed by the Italian government as a humanitarian mission to save lives and received praise and support from humanitarian organizations. Although Mare Nostrum was largely portrayed as a Search and Rescue (SAR) mission, its second major aim was the capturing of smugglers. Therefore, Mare Nostrum was not only a SAR, but also a security mission. In fact, Mare Nostrum did not differ very much from previous Italian border control operations[27] (Cuttita 2014: pp. 26-28). This aspect of Mare Nostrum if often omitted from reports on Mare Nostrum and JO Triton. In its comparison between the two operations, the human rights organization "*Pro Asyl*" completely neglected the fact that Mare Nostrum, just like Triton, was a security mission. Following *Pro Asyl*'s line of argumentation, the EU denied Italy financial support for its humanitarian mission and instead launched Triton as a border security mission (Pro Asyl 2014[28]).

Nonetheless, during Mare Nostrum's deployment around 100 000 migrants were rescued at sea and after Italy's request for support by moving Mare Nostrum onto the European level was denied, the mission was terminated in late October 2014 and replaced by JO Triton (Pro Asyl 2014[29]). Although not exclusively, Mare Nostrum was equipped with a mandate for search and rescue, which the EU denied to incorporate into JO Triton's mandate. Instead, the EU's 'immediate'[30] response to the unfolding crisis in the Mediterranean was an intensification of border controls and surveillance and most importantly, the refusal to include sufficient SAR capacities to save human lives at sea. As is stated in JO Triton's operational

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[27] As a detailed portrayal of Mare Nostrum expands beyond the scope of this research please consider Cuttitta, Paolo: "From the Cap Anamur to Mare Nostrum: Humanitarianism and migration controls at the EU's maritime borders", in Matera, C and Taylor, A (eds.): "The Common European Asylum system and human rights: enhancing protection in times of emergencies", Centre for the Law of EU External Relations (CLEER) Working Papers 2014/7

[28] Retrieved from: Pro Asyl:"Europas Schande: "Triton" und "Mare Nostrum" im Vergleich", http://www.proasyl.de/en/news/news-english/news/europas_schande_triton_und_mare_nostrum_im_vergleich/ (14.08.2015)
[29] Retrieved from: Pro Asyl:"Europas Schande: "Triton" und "Mare Nostrum" im Vergleich", http://www.proasyl.de/en/news/news-english/news/europas_schande_triton_und_mare_nostrum_im_vergleich/ (14.08.2015)
[30] The EU was not very quick to act, as Italy launched its own SAR already in late 2013

plan[31] 2014, its operational aim is to "implement coordinated operational activities at the external sea borders of the Central Mediterranean region in order to control irregular migration flows towards the territory of the MS of the EU and to tackle cross border crime" (Operational Plan Triton 2014: p. 6). The objectives to achieve this aim are also listed in the operational plan; stated as the top two objectives are the enhancement of border security as well as its efficiency. Though not included in Triton's objectives, the plan states that Triton shall deploy technical and human resources to, amongst others, "contribute to search and rescue in order to render assistance to persons in distress" (Operational Plan Triton 2014: p. 7). However, as stated by Frontex' interim director Gil Arias, there is a "fundamental difference" between the two operations: Mare Nostrum was a "seek and rescue operation", whereas Triton focuses on "border controls" (Pro Asyl 2014[32]). Although Triton's operational plan demands the operation to contribute to SAR, it was conceived as a security mission only. As expected, the abolishment of Mare Nostrum and the launch of JO Triton led to growing numbers of migrant deaths. This can be contributed to the fact that initially, JO Triton was equipped with significantly fewer financial and material assets and a more limited area of deployment than Mare Nostrum. European leaders eventually responded when around 1200 migrants died at sea in April 2015. In an emergency European Council meeting in Brussels it was decided to triple Triton's financial and material resources and to expand its operational area. According to the EU heads of governments these measures were introduced to "increase the search and rescue possibilities within the mandate of FRONTEX" (as cited in Amnesty International 2015: p. 2). Though an increase in SAR possibilities is generally to be welcomed, it needs to be mentioned that this increase is supposed to take place within the mandate of Frontex. It is striking that the heads of governments refer to a mandate that is, with regards to SAR, non-existent, as Frontex is tasked with the coordination of operational support. The Frontex Regulation does not specifically instruct Frontex to engage in SAR activities. Therefore again, the ambiguousness of the tasks and responsibilities concerning Frontex becomes evident. In a comment in an interview on the meeting in Brussels with The Guardian in April 2015 Frontex' Executive Director Fabrice Leggeri said:

> "Triton cannot be a search-and-rescue operation. I mean, in our operational plan, we cannot have provisions for proactive search-and-rescue action. This is not in Frontex's mandate, and this is, in my understanding, not in the mandate of the European Union".

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[31] Although the operational plan was made available online at ask the EU (www.asktheeu.org), most content has been censored
[32] Retrieved from Pro Asyl: "for a European system of rescue at sea!", http://www.proasyl.de/de/themen/eu-politik/detail/news/for_a_european_system_of_rescue_at_sea/, (14.08.2015)

Though this statement sounds harsh, and the comment on the EU's mandate is open to debate, it mirrors the fundamental conflict concerning all Frontex operations: Frontex is merely responsible for the facilitation of cooperation between the member states. Yet, regardless of the mandate and the responsible body, the European Commission stressed that "search and rescue efforts will be stepped up to restore the level of intervention provided under the former Italian 'Mare Nostrum' operations" (as cited in Amnesty International 2015: p. 2). Following Triton's amendments, the rate of migrant deaths at sea sunk from 1 in 16 (6.2%) from January to April, to 1 in 427 (0.23%) in the time between April and June (Amnesty International 2015: p. 3). Concerning these figures, JO Triton could be claimed successful in the saving of lives at sea. However, it is unclear how many of the saved migrants are sent back to their country of origin. Also, the situation as it currently is in Greece reminds of the Greek refugee crisis in 2010. According to the UNHCR the situation in Greece disgraceful (Deutschlandfunk 2015[33]) and it seems as if Frontex' cooperation with Greece is likely to result in the same dilemma as in 2010: Greece's inability to safeguard human rights and Frontex' lack of competence to address the latter. With regards to the provision of asylum seekers rights and access to asylum procedures, the current developments are worrying.

The fact that the EU experiences a severe refugee crisis in the Mediterranean was well established when Italy asked the EU to support its efforts. The majority of people crossing the Mediterranean are Syrians, Afghans and Eritreans, who are mostly considered to qualify for refugee status. This means, that most of the people arriving at Europe's shores are legitimate asylum seekers. Yet, upon request by Italy, the EU did not intervene in the manner required by the situation. Instead an operation with an almost exclusive focus on control measures was launched. This means that the EU adopted a control strategy, aimed at keeping irregular immigrants outside, in a situation in which hundreds of people in need of international protection arrived at the European borders. When a member state is challenged by a humanitarian crisis at its external borders and the EU refuses to contribute to a mission aimed at, amongst other, rescuing people and instead chooses increased border controls, it mirrors a refugee policy that prioritizes a perceived need for internal security over human lives. Although JO Triton's mandate was eventually amended it is unlikely that this development implies an evolution of European border management towards an increased focus on human rights. After all, JO Triton is still a border control operation, aimed at controlling the

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[33] Retrieved from Deutschlandfunk: „UNO wirft Griechenland totales Chaos vor", http://www.deutschlandfunk.de/fluechtlinge-uno-wirft-griechenland-totales-chaos-vor.1818.de.html?dram:article_id=327662, (24.08.2015)

movement of irregular migrants, despite the fact that the majority of these migrants are legitimate asylum seekers and require different treatment than irregular immigrants.

The previous sub-chapters have evaluated the scope of Frontex' tasks as well as Operation Hera II, the RABIT Operation in Greece and JO Triton in order to establish the extent to which the right to asylum is reflected in Hera II's, Operation RABIT's and JO Tritons' performance. Against the background of these sub-chapters' findings, the following section seeks to provide an answer to the second sub-question.

4.2. Conclusion

To what extent is the right to asylum reflected in Hera II's, Operation RABIT's and JO Tritons' performance? Frontex is a European agency provided with a mandate to facilitate cooperation measures concerning the management of external borders and to ensure to coordination of member states' actions in the implementation of those measures. Although the respect of fundamental human rights is acknowledged in the Frontex Regulation, the Agency is not equipped with the mandate to scrutinize member states, if the latter violate human rights in the framework of joint operations. This observation leads to a number of issues with regard to the right to seek asylum. Most importantly however, it does not fall within the scope of Frontex mandate to ensure the implementation of the right to asylum. The assessment of Hera II, the RABIT Operation and JO Triton has demonstrated that, although human rights violations during joint operations coordinated by Frontex took place, Frontex itself cannot be held accountable, as the implementation of human rights lies within the responsibility of the member states.

The evaluation of Hera II has shown that the humanitarian cause was utilized to justify the intervention. Frontex named Hera II its most successful operation, due to the amount of 'saved' lives. As discussed in sub-chapter 4.1.1 this conclusion is open to discussion. Moreover, it was Hera II's mission to deter boat migrants from leaving the west-African shores. As pointed out in the respective sub-chapter, the principle of non-refoulement has potentially been violated in the course of the operation. Yet, Frontex cannot be held accountable for possible violations.

When in 2010 Greece struggled with large numbers of asylum seekers arriving at its borders, the RABIT Operation was launched to support the Greek authorities, disregarding the fact that the situation required a humanitarian response and not a security mission. In this operation, the situation in Greek detention centres unveiled Frontex' inability to take action when rights

are violated. The ECtHR had ruled that detention in these centres constituted inhumane and degrading treatment. As it was the RABIT Operation's mission to apprehend and transport migrants to detention centres, it can be argued that this practice constituted inhumane and degrading treatment and violated one of the asylum seekers' most fundamental rights. Yet, here again Frontex cannot be held accountable, because Greece had to facilitate the compliance with human rights, and not Frontex.

The assessment of JO Triton has not revealed new insights in relation to the right to asylum and Frontex specifically, but instead underlines the general impression that arises considering the findings of this research: European migration policy is embedded in a security context, causing humanitarian questions to be addressed by security strategies. With regards to the assumption in chapter 2.1 that trends in the development of the Union's migration policy and Frontex' operations might be uncovered, it can be stated that the underlying trend in the EU's external and migration policy is the securitization of irregular immigration. Thereby, the close connection between irregular immigrants and asylum seekers is not acknowledged and the latter are often dealt with within a security framework.

5. Conclusion

This research aims to answer the following question: "To what extent is Frontex' performance in the EU's external border management consistent with the right to seek asylum?". In order to do so, the right to asylum has been defined as a human right enshrined in international human rights law and the Charter of the Fundamental Rights of the European Union. As outlined in chapter 2.2 and in line with the constructivist approach, nothing develops independently from its environment. Therefore, chapter three contains a detailed evaluation of the Council's policy guidelines on immigration matters from 1999 to 2014, two recent policy programmes by the Council and an assessment of the CEAS. The observations made contribute important information that help to evaluate Frontex' role, the scope of its mandate and contributions to joint operations. The research has shown that Frontex was established within a border management context that prioritizes member states' interests over humanitarian obligations. It has been observed that there is indeed a close connection between the policy guidelines and programmes on migration and asylum and the CEAS on the one side, and Frontex on the other: the policies' priorities are mirrored in the scope of Frontex' mandate. The security of member states and the Union as a whole is perceived to be threatened by irregular migrants, disregarding the fact that many of them are legitimate asylum seekers in need of international protection. Security strategies are utilized to respond

to humanitarian problems and the alleged "saving of lives" is used to justify security strategies.

With regards to the first sub-question, "how is the right to asylum implemented in the EU's legal framework and policy approach concerning border management?" chapter three has revealed that the commitment towards a common European migration policy has resulted in the installation of asylum systems in all member states, which constitutes a great achievement. Nonetheless, migration policy in the EU takes place within a security framework that emphasizes control strategies and is engaged in a discourse of insecurity. Although the right to asylum is acknowledged EU-wide, it is not referred to as a humanitarian issue, but instead as a security problem.

Concerning the second sub-question, "to what extent is the right to asylum reflected in Hera II's, Operation RABIT's and JO Tritons' performance?" it has been revealed that Frontex lacks the mandate to take action when member states violate against human rights during joint operations. Although Frontex has to comply with the EU Charta, only the member states can be held accountable for rights violations. In addition, the assessment of the three operations has shown that humanitarian reasons are often used to justify the enforcement of border controls. The assessment of the three operations has shown that migration policy and asylum, an essentially humanitarian field, is conceived within a security framework that provides security solutions to humanitarian questions.

The insights gained can now be utilized to answer the research question: "To what extent is Frontex' performance in the EU's external border management consistent with the right to seek asylum?". To answer this question, two different approaches can be utilized, one that relieves Frontex of rights violation charges and one that does not. Strictly speaking, Frontex' performance is compatible with the right to seek asylum because it simply does not fall within the scope of its mandate to facilitate the respect of fundamental rights. The member states are responsible for the proper implementation of human rights standards. The other approach to answer the research question is as follows: the fact that Frontex lacks the mandate for a more proactive facilitation of fundamental rights does not excuse the rights abuses that take place, regardless of Frontex' alleged unaccountability.

As Frontex' border management responsibilities are so closely connected to the humanitarian field of asylum, it should be considered essential for Frontex to be equipped with a stronger mandate regarding the facilitation of human rights. It is questionable though, whether a stronger mandate is sufficient for a more coherent implementation of the right to seek asylum, in the EU, as the entire policy field is conceived within a security framework. In addition, one

would have expected the EU to make some long overdue amendments to its migration policy in the face of the current refugee crisis. The opposite however has happened: there are internal struggles over authority on EU level that have caused the development of policy guidelines for the next five years, that possess only very little potential to guide.

In the midst of Europe's biggest refugee crisis, British Prime Minister David Cameron employs dehumanizing language towards refugees (The Guardian 2015[34]), Slovakia announced it will only accept Christian refugees (BBC 2015[35]) and France and Britain signed a security pact to address the Calais refugee crisis that has been criticized to lack a comprehensive humanitarian framework (Aljazeera 2015[36]). These developments point towards a continuation of the established approach to migration and an enforcement of the Fortress Europe.

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7. Appendix

Appendix 1
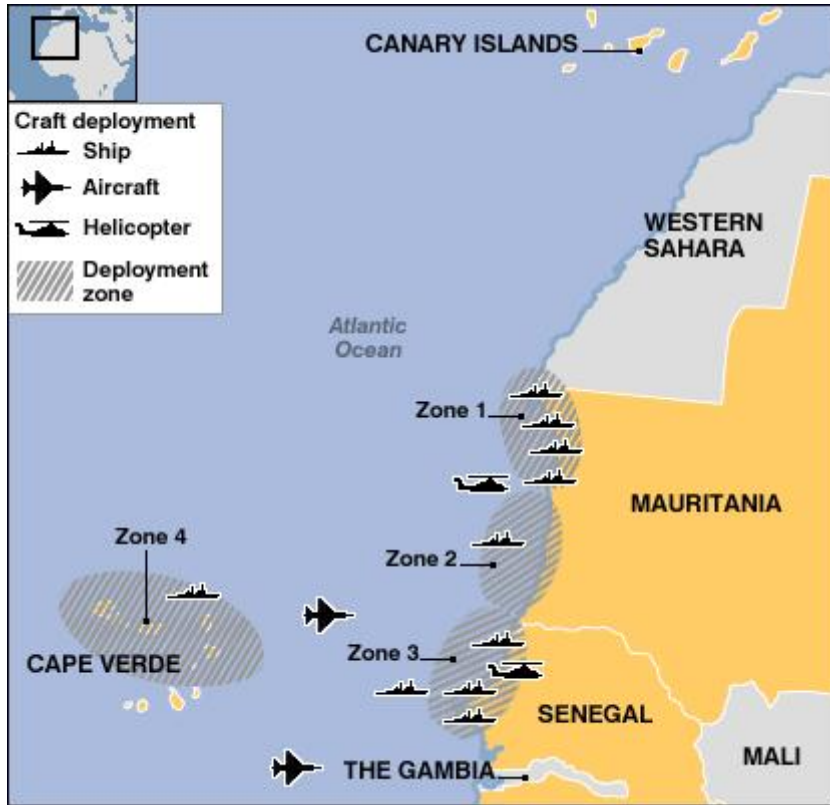
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Appendix 2

Monthly data on arrival of pateras and immigration in the Canary Islands in 2006

	Pateras	**Immigration**
January	19	706
February	32	1,083
March	51	2,063
April	18	688
May	78	4,974
June	34	1,455
July	38	2,531
August	86	5,997
September	112	7,736
October	50	1,644
November	52	1,393
December	31	1,478
TOTAL	**603**	**31,863**

Source: Carrera, Sergio: "The EU Border Management Strategy, Frontex and the Challenges of Irregular Immigration in the Canary Islands", Centre For European Policy Studies (CEPS) Working Document No. 261/ March 2007, p. 23

8. Statement of authorship

I, Alexandra Pommer confirm that the work presented in this research has been performed and interpreted solely by myself except where explicitly identified to the contrary. I confirm that this work is submitted in partial fulfillment for the degree of B.A. & B.Sc. in Public Administration and has not been submitted elsewhere in any other form for the fulfillment of any other degree or qualification.

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