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Human Rights at the European Borders: is there a gap between theory and practice? An analysis through the lenses of detention and the principle of non-refoulement

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1. Introduction

The world we live in is substantially different from what our parents, grandparents and ancestors witnessed. Economic development, new technologies and higher degrees of interdependence have shaped current global experiences to unthinkable extents, and globalization has penetrated in almost every area of everyone's life. Political, cultural, and economic development culminated in an exchange of information, ideals and beliefs that, among other results, produced the interest of the majority of state and non-state actors for human rights. A long-standing issue, human rights have been always discussed, to fluctuating degrees, from the very beginning of humanity. Social classes and discrimination have penetrated every culture and society in the books of history, but until more recent times the efforts produced for the understanding and protection of what are now called "fundamental rights" have been uncoordinated and, ultimately, inefficient. With the advent of globalization, individuals were able to travel the world more efficiently; on the other hand, political development did not necessary entail a universally accepted and enforced respect of human rights. The result of these factors is migration, the phenomenon of moving from one country to another for reasons that are to be found on multiple grounds, spanning from economic motives to safety concerns. Human rights have been discussed on multiple levels: from the national perspective to international fora, mentioning supranational organizations such as the European Union, whose funding principles clearly refer to the idea of protection of human rights. The admixture of all these factors led all these actors to develop understanding and, with time, legal frameworks for the protection of human rights both for nationals and non-nationals. This is the case of the European Union, which enshrined in its treaties fundamental provisions for the safeguard of fundamental rights, in the wider framework of international law that similarly provides for the proscription of their violation.[1]

The aim of this dissertation is to conjugate all these factors in understanding one matter. The European Union has established itself as one of the most powerful political and economic entities in the current political configuration, coming to represent an extremely appealing destination for individuals fleeing from both situations of economic distress and life-threatening contexts. Being the EU both an administratively complex, in the sense of having developed over the years a comprehensive understanding and approach of a broad variety of matters, migration and entry are

[1] De Schutter, O., 2019. *International Human Rights Law: Cases, Materials, Commentary*, (Cambridge, 3rd ed), pp. 13-22

not an exception. Limits, boundaries and regulations have been set to filter migration and to sanction and protect the Union from the irregular strands of migratory flows. Similarly, the Union has devoted quite relevant amounts of effort also to the development of an effective and comprehensive framework for the protection of human rights; needless to say, being the political context subject to such high levels of interdependence, it is unavoidable for these two frameworks to interact on the empirical dimension. The aim of this dissertation, as will be outlined more in-depth in the following subchapters, is to understand the interplay of human rights in light of migratory flows, especially in the areas which are the most affected by the phenomenon. It would be naïve to expect for human rights provisions to be seamlessly enforced in all situations and with no clash with practice; hence, the chapters will work through understanding human rights related to the entry of migrants, focusing on detention and the principle of *non-refoulement*, in order to question whether the application by Member States of the European Union is indeed effectively enforced or if disconnections between theory and practice are widespread, and if so to what extent they are disruptive for the European human rights framework and for the life of individuals.[2]

The first chapter will, hence, focus on the contextualization of the issue. By providing an overview of the historical role and evolution of human rights in light of the European legal order and its interaction within the European Union it is possible to frame the EU as an institution which has been strongly embedded in the protection of human rights, in order for this conception to serve as a background for practically testing whether such narrative would indeed be respected in practice. For the sake of context, the first chapter will also introduce the three main concepts that will be discussed throughout the dissertation: detention and refoulement, the two lenses which are adopted to ascertain whether the thesis is to be proven or confuted, and the territorial dimension, namely the border, which will prove instrumental in understanding the behavior of States and EU institutions in the security enforcement *loci.* Once having provided the necessary definition for the concepts debated in the dissertation, it will be paramount to analyze the different degrees of protection of these rights/lenses, as to understand the full extent of the multi-layered protection granted by sources of both primary and secondary law. The purpose of the second chapter is, thus, to provide the relevant legal background, including pertinent Courts jurisprudence, on which the practice of both the EU institutions and of Member States will be tested against, as to fully grasp the overlooking of such provisions for the sake of security-related interests and to highlight how such a complex framework can still be disregarded in presence of non-compliance and free-riding. Henceforth, the third chapter opens on the extent to which statist and nationalist interests, which

[2] Chalmers, D., and Anthony , A., 2015. *The Oxford Handbook of European Union Law*, Oxford

have historically permeated the EU, have surged to the creation of a framework whose flexibility and whose legal voids allow for the disregarding of human rights at the border; the chapter further starts diving into the harmful effect of practice becoming praxis, hence overcoming its momentum and solidifying itself into a mechanism which is doomed to ultimately erode the right to freedom from arbitrary detention and the respect of the principle of *non-refoulement.*[3]

Chapters 4, 5 and 6 provide for the discrepancies between theory and practice to be fully grasped through a case study split in a twofold point of view. The focus is the Greek-Turkish border, one of the most relevant fronts of the Union vis-à-vis external migration, and the enforcement of these principles by both Member States and the European Union, represented through the actions of the Frontex Agency. Chapter 4 contextualizes the case study, providing information on Frontex's structure and its *modus operandi*, theorizing on the first flaws related to the realm of accountability and responsibility which will be later solidified in the case study through the analysis of the practice. The subparagraph on the EU-Turkey Statement is further pivotal in fully understanding the corruption and distortion of the narrative provided for by Member States and the European Union. The fifth chapter, hence, opens on the analysis of Greek practices in relations to the Evros border with Turkey, where vagueness, lack of information and disrespect of the relevant provisions of detention and refoulement proliferated on a regular basis, to the extent which such practices have solidified into praxis. By considering how Member States' practice erodes the principle of human rights inscribed in the European legal order, the chapter further hints on a degree of connivance with the European and its related institutions and Agency, namely Frontex which will be the subject of the sixth chapter. The focus on Frontex derives from the strict connection of the Agency with the EU mandate and influence, under the assumption that the overlooking of European legal principles by the very EU and its related bodies would result in the ultimate failure of the provisions' enforcement. Hence, analyzing the Union's behavior vis-à-vis the Greek-Turkish border is the unconfutable test for assessing the theory/practice gap. The chapter encompasses land and sea operations, considering both Frontex's sole responsibility, as in the case of operational steps which are privy to the Agency, and accountability stemming from connivance and complicity with Greece and other Member States under the umbrella of joint operations. The seventh chapter concludes by drawing the necessary remarks and in assessing whether the research question is indeed demonstrated or confuted, through an inductive bottom-up approach which hints

[3] Orbie, J., 2006. *Civilian Power Europe: Review of the Original and Current Debates*. Cooperation and Conflict, 41(1), pp. 123–128.

at the long-term and global effect the erosion of these principle by the EU and its Member States' praxis.[4]

a. Evolution of human rights' protection and interplay in the European legal framework

Before diving into the specific provisions related to the matter of the dissertation, an important first step is to briefly outline the role of human rights in the European legal order. This subchapter will hence provide a historical perspective of the process of interplay of the main documents aimed at the protection of human rights in order to understand their differences and the distinctive mode of application within the European *acquis*. The subchapter will hence proceed to outline the importance of the accession of the EU to the European Convention Human Rights as to understand the extent to which the provisions which will be analyzed in the following paragraphs are relevant to the European legal order. By framing the comprehensiveness of the latter, the dissertation will attempt to discern whether the completeness of the principles enshrined, to different degrees, in the European framework is respected and enforced in the praxis of Member States and European agencies.

The role of human rights in the project of development of the European Union has been central since its inception.[5] The bloodbaths Europe had witnessed lead fundamental rights to be included to such an extent which led the Council of Europe to ratify the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1950. This agreement, emerging as a safeguard for avoiding the return of atrocities, left a human right blueprint in the design of the European Union. From the beginning, the draft of the European Political Community included the ECHR as a fundamental element of its legislative *acquis*,[6] ensuring that the human rights tool would function and be relevant vis-à-vis both states and public authorities. The failure of the European Defense Community Treaty of 1954 of being ratified from France lead to the conception of a new framework, the European Economic Community (EEC) and EURATOM, which however lacked a legally binding document on human rights. Nonetheless, the EEC was not totally devoid

[4] Costello, C., 2015. *The Human Rights of Migrants and Refugees in European Law,* Oxford University Press
[5] Fabbrini, F., 2014. *Fundamental Rights in Europe,* Oxford.
[6] De Burca, G., *The Road Not Taken: The European Union as a Global Human Rights Actor,* in *American Journal of International Law*, 105, (2011), pp 649, 660-1

from any legal provision related to human rights, as discriminations on economic grounds and related to national and gender components were outlawed by the very EEC Treaty.[7] The extremely human rights-oriented design of the earliest steps of the European Union produced immediate effects on the legal adjudication dimension, as the European Court of Justice (ECJ) was quick in upholding the protection of fundamental rights from its foundation. Notwithstanding the lack of human rights-related charters to be found in the Treaty of Rome, the *Stauder* case already maintained for human right to be considered within the legal principles of the Community's law,[8] a view which has been solidified in the Nold decision of 1974 as international treaties were considered as a source of inspiration for the Community.[9] The ECJ role as a trailblazer for the enlargement of the human rights *acquis* within the EEC shall not be underplayed: throughout the decades spanning from the 1960s to the 1990s, the Court developed significant human rights jurisprudence and developed on rights related to all fields;[10] furthermore, the ECJ was able to both compel EU institutions and Member States to respect and comply with provisions stemming from Community obligations.[11] The extraordinary developments shaped by the fall of the Berlin Wall provided a change to enhance the process of integration of European states whose result was the Maastricht Treaty of 1992, sealing the birth of the European Community (EC) along with the Economic and Monetary Union, all ascribed to the European Union. The Treaties enshrined the principle that the Union shall respect fundamental human rights as provided for by the ECHR, by national law and traditions and by general principles, reinforcing the perception of the ECJ as advancing its specific mandate for human rights protection in the Union.[12]

The political clashes ensuing diverging views with the EU Member States demonstrates how the preservation of human rights maintained its central role in the different steps of European integration, to the degree in which the European Union reunited in 1999 in Cologne and asserted the necessity for the development of a new instrument for human rights protection: the Charter of Fundamental Rights for the EU. Intended to represent a reaffirmation of the general principles of EU human rights legislation, the Charter built on past concepts and ideas to provide a comprehensive fundamental rights instrument with provisions spanning from historical pillars of

[7] Barnard, C. (1999), *Gender Equality in the EU: A Balance Sheet*, in P. ALSTON ET AL. (ed.), *The EU and Human Rights*, Oxford, p. 215.
[8] *Erich Stauder v City of Ulm – Sozialamt* [1969], Case 29-69, CJEU
[9] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities.* [1974], Case 4-73, CJEU and *Rutili v Minister of the Interior* [1975], ECR 1219.
[10] Cunha Rodriguez, J., *The Incorporation of Fundamental Rights in the Community Legal Order*, in Poiares Maduro, M. and Azoulai, L. *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, 2010, p. 89.
[11] *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, [1989], Case 5-88, CJEU
[12] Von Bogdandy, A., *The European Union as a Human Rights Organization? Human Rights at the Core of the European Union*, in *Comm. Market Law Rev*., 2000, p. 1307.

human rights, such as civil, political, social and economic rights to more recently emerged issues, of the likes of the right to privacy or environmental-related obligations. Formally proclaimed in Nice in 2000, the Charter was granted a non-binding status until 2009,[13] when the Treaty of Lisbon bestowed the Charter the level of EU constitutional law and binding powers over Member States and EU institutions acting within the scope of EU law.[14]

The entry into force of the Treaty of Lisbon in 2009 constituted a pivotal role in development of the gamut of the Union's human rights. Before December 2009, the Court of Justice of the European Union conceived the protection of human rights as mainly stemming from general principles of European law; the awareness of the necessity of allowing such principles to assume a concrete dimension came about along considerations of the extremely important role international human right law had on the European legal framework. The Treaty of Lisbon allowed for the Charter of Fundamental Rights of the European Union to surge to a legally binding role, hence equipping the EU with its own set of human rights.[15] The presence of a binding document within the legal system of the European Union does not, however, imply the abandonment of the use of international law altogether; this is particularly visible in the case of the European Convention on Human Rights (ECHR) which is arguably the most referred to document of international law by the CJEU. The prominent role of the ECHR in the European legal framework has been to constitute a special source of "inspiration",[16] by establishing human rights as being protected inasmuch EU general principles.[17]

The Maastricht Treaty solidified the ECHR's prominence into the legal framework of the EU by adding to Art. 6 of the Treaty on the European Union (TEU);[18] similarly, the Lisbon Treaty follows on the uniformity and correspondence between the ECHR and the EU's principles by adding to Art. 6(2) TEU the obligation for the EU to formally accede to the ECHR. While the process was indeed started after the very Lisbon Treaty, to the extent of producing a draft agreement which successfully developed common grounds between the 47 members of the Council of Europe and the European Union in 2013, the progression was discontinued by Opinion 2/13,

[13] Lenaerts, K., De Smijter, E., , *A "Bill of Rights" for the European Union,* in *Comm. Market Law Rev.*, 2001, p. 273.
[14] Eeckhout, P.,, *The EU Charter of Fundamental Rights and the Federal Question*, in *Comm. Market Law Rev.*, 2002, p. 945.
[15] Paul, C., De Burca, G, Craig, P.P. "Chapter 11 Human rights in the EU". *EU Law: Text, Cases and Materials* 4th ed.). Oxford: Oxford University Press. p. 15
[16] *Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991], Case 260/89, CJEU, para. 41.
[17] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities.* [1974], Case 4-73, CJEU, para. 13
[18] Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–390, Article 6.

where the European Court of Justice ruled on the incompatibility of the draft with EU law.[19] One of the most relevant issues developed in the Opinion revolved around the concept of autonomy. The concept of autonomy, which is always to be considered in a relational fashion, i.e., vis-à-vis another term of comparison, has been claimed by the Court with regards to EU law both in the case of internal autonomy (national law) and external, meaning with regards to international law;[20] this claim of considering itself as the prime supporter of the European legal order's autonomy is clearly identifiable in paragraph 174 of the Opinion, which states that "t*he Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law"*.[21]

The EU and the relevant European legal order have developed overtime an interacting ability with the international legal framework, by maturing an understanding of the interplay of these two legal orders for the sake of EU rules' prioritization over external provision, while providing sufficient degrees of compliance with the latter.[22] Henceforth, Opinion 2/13 halted the process of accession of the EU to the ECHR, a procedure which is still under negotiation. The legal consequence of this failed accession is that the EU legal order does not allow the ECHR to be applicable as such, thus formally freeing the EU by any binding effect provided by the Convention and prompting the use of "European legal order" instead of EU legal order for the sake of comprehensiveness allowed the inclusion of the ECHR in this account of human rights enforced in the European Union's area.. It is not to be forgotten, however, that EU Member States can still face responsibility and liability due to actions committed in exercising European-related duties. Nonetheless, the ECHR maintains its influential power over EU institution inasmuch a matter of European Law, stemming from Articles 6(1) and 6(2) TEU which integrate the ECHR as a source of EU human rights law in the framework of general principles of EU law and the EU Charter. This clear and solid reference exceeds the conception of ECHR as solely providing inspiration, rather assuming the status of principle of general law, at least. Art. 52(3) of the EU Charter further solidify this view, by stating that the uniformity between itself and the ECHR provide grounds for applying the provisions enshrined in the former with the scope of the latter, maintaining the possibility for

[19] Halberstam, D., *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward'*, German Law Journal, 16 (2015), 105
[20] De Witte, B., '*European Union Law: How Autonomous Is Its Legal Order*?', Zeitschrift für öffentliches Recht, 65 (2010), 142.
[21] Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, Case Opinion 2/13, CJEU
[22] Odermatt. J., '*When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law'*, EUI Working Papers, MWP 2016/ 17, Max Weber Programme, pp. 11 et seq.

the EU to develop more stringent provisions related to the protection of human rights.[23] The autonomy of the related courts, meaning the ECtHR and the CJEU, has been widely contested throughout jurisprudence and related understanding developed by scholars. It would be outlandish for the CJEU not to refer whatsoever to ECtHR case law in their completeness; on the other hand, the potential binding effect of the latter is what threatens the autonomy of the CJEU. Nonetheless, in order to frame the role ascribed to the ECHR in EU law, the afore-mentioned Articles 6 TEU and 52 of the EU Charter provide a substantial incorporation of the Convention in the latter, and for extension in the European legal framework.

Such substantial incorporation provided by Art.6 TEU does not, however, provide for the full integration and assimilation of the ECHR into the EU legal order and, as a consequence, of the penetration of ECtHR case law into the CJEU legal reasoning and jurisprudence. The reason is threefold: the integrative process of Art. 6 TEU is extremely subject to the accession of the EU to the ECHR; hence, as long as the process is not completed, full overlapping is impossible and the ECHR cannot assume the same legal weight of the CFREU within the European Union. Art. 6(3) TEU does provide for ECHR provisions to be still integrated and serve as an inspiration in quality of principles of Union's law; nonetheless, the degree of penetration and influence is different from the effect of what only the accession would yield. Secondly, complaints addressed at the EU brought before the ECtHR still suffer from inadmissibility *ratione personae*, in light of the EU not being a Contracting Party to the Convention.[24] The third limit is related to the *Bosphorus* presumption or "presumption of equivalent protection", entailing a "presumption of compliance" of the EU and its legal order with the ECHR. This presumption is extended also in cases where a Member State's actions are carried out in the framework of implementing EU law, in case the latter does not provide any degree of discretion to the States.[25] Henceforth, only the practical act of accession to the ECHR would prompt for the EU to close the aforementioned gaps and, most importantly, to subject the Union to another layer of human rights, entailing the redirection of complaints related to the EU to the Union itself, the very party able to address, remedy and compensate for the violation contested.

More practically, the prominence that the interplay between the ECHR and the European Union has assumed entails that in the light of the EU's accession in the ECHR framework, the latter

[23] Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391–407, Article 52(3)
[24] *Confédération Française Démocratique du Travail v. the European Communities* [1978], Application No. 8030/77, ECtHR
[25] De Sousa Gonçalves, A.S., 2022, *The ECtHR's Bosphorus Presumption and the European Union's principle of mutual trust*.

would not enjoy solely the status of other international agreements, but rather fall among the foundations of European primary law. In order to pursue such objective, it shall be understood how the accession would not provide ammunition for the ECHR to present itself as a harmful external interference, but rather as an instrument of good administration which would enhance the allocation of powers and interpretation of the European legal order. Rather than producing internal friction between EU treaties, the accession could produce a more integrated approach to fully pursue the highest standard of protection of human rights, allowing an improvement of the functional structure of both the legal documents and the related courts.[26]

Another area that shall be taken into consideration for the sake of developing a comprehensive view of the European legal framework is the applicability in the system of the European Union of human rights obligations under treaties protecting human rights. International governmental organizations are well established subjects of international law with the deriving obligations from their principles of law, general principles, *jus cogens* and obligations stemming from treaties. Hence, considering the extent to which the European Union is under obligations imposed by human rights treaties is instrumental for the framing of the provisions which will be analyzed in further detail in the following subchapters.

Treaty membership of the European Union results limited with respect to participation by Member States, due to the fact that human rights treaties have historically allowed access more easily to the latter than the former. A peculiar exception to this custom is the ECHR, whose membership has been mandated by the Lisbon Treaty, as previously explained. In order for the EU to enter human right treaties, accession could either occur *de facto* and *de jure*. The standard procedure would either consider formal accession or ratification of the treaty, which would however entail for the treaty to allow IGOs' membership; otherwise, the EU could affirm through a sufficiently specific declaration that it accepts human rights treaties as formally binding, as declared possible by the International Court of Justice in its opinion on State desire to be bound by specific obligations.[27] Additionally, the European Union has complete freedom over acting as legally bound by specific international obligations by internal measure, as in the case of the 1951 Geneva Convention and the related 1967 Protocol which were referenced in Art.78 TFEU as a standard for European compliance.[28] Similarly to treaty law, the EU is also legally bound to the safeguard of

[26] Korenica, F., 2015, *The EU Accession to the ECHR, Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection.*
[27] *Nuclear Tests (Australia v France)* [1974], ICJ Reports 253, para. 43
[28] Joined Cases *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dler Jamal (C-179/08) v Bundesrepublik Deutschland* [2010], CJEU, and *Nawras Bolbol v Hungary* [2010], C-31/09, CJEU

human rights standard which have surged to the status of customary international law.[29] The customary IL *acquis* is, for definition, subject to higher degrees of uncertainness with respect to treaty law; however, the practice of jurisprudence and well-established case law has propelled some rights to be considered by the ICJ as customary, as in the case of the right to self-determination and, a more relevant case for this dissertation, the principle of freedom from arbitrary detention.[30] This particular set of rights has arguably ascended to the status of peremptory norms (*jus cogens*), with the power of invalidating provisions which conflict with such norms, including IGO's acts and legislation.[31] While the Court of First Instance provided quite a large understanding of the norms of *jus cogens*, as ruled in the *Kadi* case,[32] by stating that international law recognizes as such all norms protecting human rights, the overly-generous consideration lacks an adequate analysis of the current international legal framework, for which further consideration is still a matter of debate for scholars. For the sake of our argument, the ECJ has repeatedly acknowledged the role of international practice and *opinion juris* as relevant in the internal and external dimension of the European Union as stemming from its *erga omnes* nature.[33] As a consequence, EU provisions and secondary legislations which contrast customary international law on human rights are considered breaches of human rights violations towards thirds states, while violations of the *jus cogens* are automatically considered void in nature.[34] The third dimension of international obligations' interplay in the European legal order is the *de facto* succession to obligations of the EU Member States. Art. 351 TFEU affirms the possibility for Member States to maintain their duties under precedent obligations, which the CJEU has interpreted as producing two main consequences, the first being the possibility for EU Member States to prioritize international foregoing obligations over EU ones, and the second being the constriction for EU to avoid interference with these incumbent obligations.[35]

The ramifications of these two implications have produced a further consideration, highlighted in the *Kadi* and *Yusuf* cases. In these two rulings, the Court claimed that "*in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of the Charter have the*

[29] *International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport* [2008], C-308/06, para.51
[30] *United States of America v. Iran* [1980], ICJ Reports 3, 42.
[31] Crawford, J., *The International Law Commission's Articles on State Responsibility* (2002), pp. 276–280.
[32] *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005], Case T-315/01, Court of First Instance
[33] *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998], Case C-162/96, CJEU, para. 45
[34] Ahmed, T., De Jesús Butler, I., *The European Union and Human Rights: An International Law Perspective*, European Journal of International Law, Volume 17, Issue 4, 1 September 2006, Pages 771–801
[35] *Attorney General v Juan C. Burgoa* [1980], Case 812/79, CJEU, paras. 9-11

effect of binding the Community".[36] The CJEU, in a familiar fashion to what asserted over the years, has provided a somehow restricting application of the UN Charter in the European legal order, allowing for penetration only in cases of clear compliance and correspondence between the Charter and primary law and general principles of the EU.[37] The argument proves quite straightforward as the UN Charter and the principles of human rights stemming from it do indeed reinforce the standards provided for in the European legal order, thus ruling out the possibility of incompatibility (at least in the form of general concepts, as caveats were found for which the issue of interpretation has been also of particular prominence in the *Kadi* case and other instances). The CJEU did indeed confirm that UN-related human rights obligations and treaties do comply with the conception of "general principles", hence applying within the European legal framework and binding EU Member States.[38] Art.351 TFEU does henceforth provide not only for the compatibility of the UN human rights principle with EU Law, but also highlights the *de facto* succession of the obligations for Member Sates stemming from the UN Charter by legal EU-related competences.[39]

The subchapter did, therefore, aim at framing the evolution of human rights in the European legal framework in order to provide a preliminary understanding of how the provisions that will be analyzed in the following chapters both came about and interplay in the European legal framework. Through the discernment and appreciation of the different levels, layers and dimension of the Eropean *acquis*, the practices and praxis managed by Member States and agencies are more comprehensively ascertained and dissected in light of the interconnected legal framework the EU provides for.

b. Setting the stage: detention, refoulement and borders

The European Union has historically been invested in the management of its borders; nonetheless, over the last two decades such attention has perceptibly increased towards the tackling of irregular migrations at the Community's external borders. This commitment has become a top

[36] *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005], Case T-315/01, Court of First Instance, para. 203 and A*hmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005], Court of First Instance, para. 253
[37] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008], CJEU, para. 308
[38] *European Parliament v Council of the European Union* [2006], Case C-540/03, para. 37
[39] United Nations Human Rights, Office of the High Commissioner, Europe Regional Office, *The European Union and International Human Rights Law*, undated, pp. 22-30

priority for the Union also foreseeing the 2004 enlargement, then expanding the European border management in light of the European Neighborhood policy, developed over the years. The control of sea borders, specifically those around islands, has been widely recognized by European institutions as pivotal, especially since 2006, a year in which the continent experienced increasing pressure coming from migratory flows.[40]

In particular, the sets of islands which surged to a more prominent level of attention in the European policy making are the following. Firstly, the Canary Islands, receiving migrants from Mauritania and Senegal to Tenerife, a set of islands which has been subject to fluctuating flows over the years. Secondly, the Italian islands of Lampedusa and Linosa, which in the first decade of the millennium received from 15.000 to 20.000 migrants, during the Arab Spring more than 51.000 and are commonly subject to African flows and related countries' turmoil. The third island is the one of Malta, whose small number of inhabitants continuously receive proportionally high number of migrants. The fourth set is the one of the Aegean Islands, which are the destination for migrants coming from both Asia and Africa and throughout the years were established, along with the land territories of Greece and the Turkish-Greek borders, as one of the main corridors towards Europe. Particular attention will be devoted to the last case, namely Greece both on its sea and land borders, as developed in the case study that will be discussed afterwards. This renewed attention of Europe to its external borders is inscribed in the broader conception of "external dimension" of European policies on the matter, which in turn has taken the dimension of "externalization" of European borders due to the Union's practices and praxis. A long-standing issue, the external dimension of EU policies related to migration and asylum attained a new degree of priority with the Tampere Council in 1999, defining the necessity for EU policies to include such matters, and with the Seville Council Conclusions of 2022, calling for joint management of the afore mentioned flows.[41]

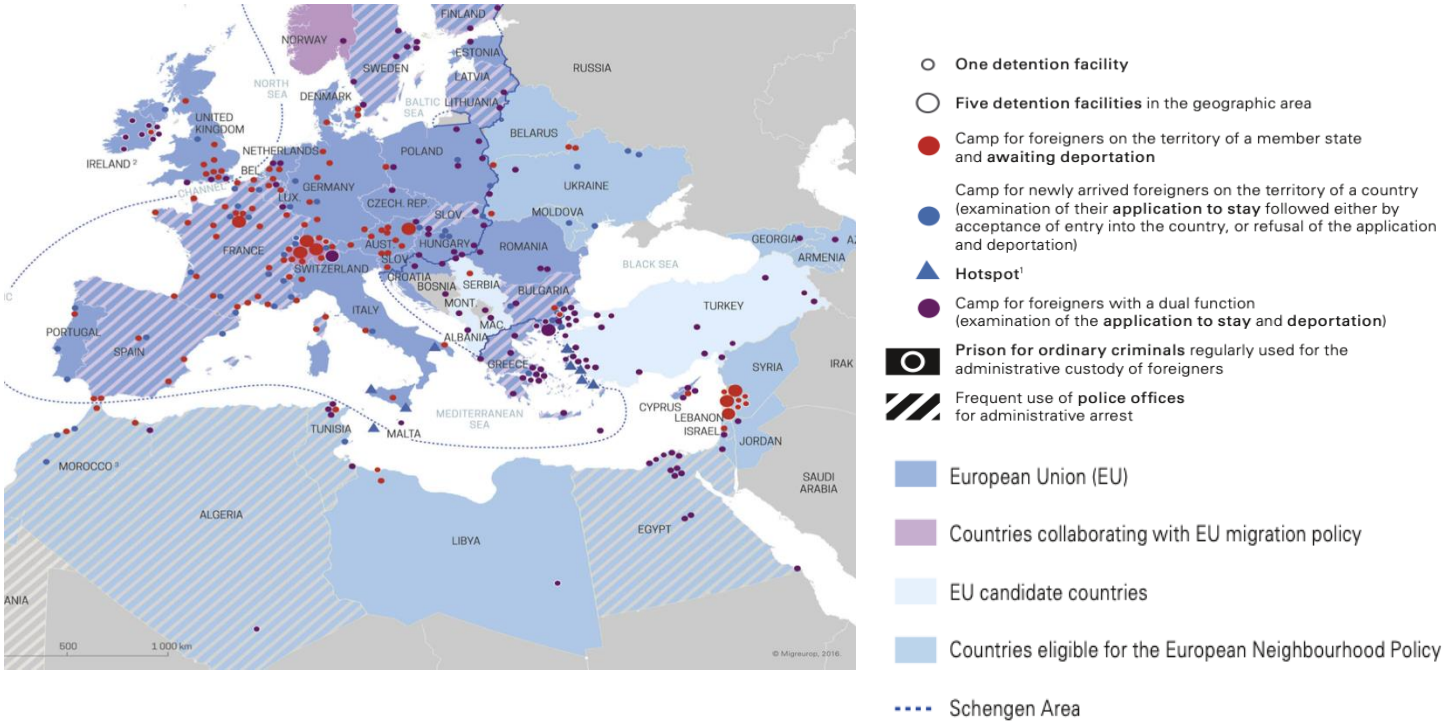
The concept of externalization took concrete form with the idea of "safe third country", a concept which will be discussed more in detail later due to its relevance in the Greek-Turkish border case, which was later translated into the "first safe country" principle, implying for asylum seekers to apply for international protection in the first country they enter which has the capacity to offer such protection, of the Dublin Convention of 1990 and its following iterations.[42] Further stimulus has been provided by the 2006 establishment of the Frontex agency, which has contributed

[40] Bernardie-Tahir, N., Schmoll, C. *Opening up the island: a 'counter-islandness' approach to migration in Malta*, Island Studies Journal, 9(1), 2014, pp. 43-56.
[41] Lavenex, S. (2006). *Shifting up and out: the foreign policy of European immigration control*. West European Politics, 29(2), pp. 329-350.
[42] Lavenex, S. (1999). *Safe third countries: Extending the EU asylum and immigration policies to Central and Eastern Europe*, Central European University Press.

to the development of a web of externalization EU policies through cooperation and agreements with third countries and the coordination of operations of border management in the external borders of the community. Henceforth, over the decades the European Union has developed an arsenal of measures on the legislative and administrative dimension for the reception and management of migrants. While the magnitude of the flows for which the Europe is a sufficient trigger for sparking the interest in the measures of reception and the levels of respect devoted to them by Member States, one of the goals of this dissertation as it is instrumental to conceptually and practically frame the other two, the last sentence spills over to another area of interest of the following subchapters, namely the detention of migrants. Since the 1990s, this measure has become one of the most common methods for migrants management, both worldwide and at the European level; the cumbersome mechanism that more-than-seldom occurs is that incredibly copious flows pressuring European external flows at the same time, combined with the lack by high numbers of migrants and asylum seekers to enter European territory without regular documentation (small note: asylum seekers are allowed to cross borders without relevant papers as granted by the Geneva Convention),[43] too often result in detaining individuals either for legitimate legal reasons, as in the latter case, or in less legally compliant cases, as in the first. The latter instance is what requires more attention, as too often EU Member States fell into the trap of acting outside their legal obligations for reasons not included the exceptions provided therein. The detention of migrants is extremely correlated with breaches of human rights for individuals which are substantially "parked" in waiting areas and detained for long periods with no sufficient legal grounds for the incarceration and inadequate conditions of detention. Migrants are held in *ad hoc* structures or pre-existing buildings which not necessarily satisfy basic hygienic conditions or provide the adequate administrative and social guarantees, both in an official and *de facto* status which will be discussed more in-depth later. Areas where detainees are held include centers in remote areas, as in the case of Greek islands, or temporary small spaces as those employed by Frontex. While detention shall be retained as a measure of last resort, EU Member States' practice on the matter seem to conflict with such affirmation, demonstrating how the state systematically adopt this measure in cases which do not fall into the legal umbrella designated for the issue.

[43] Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Art. 31

FIGURE 1: Detention Facilities in Europe



Source: Migreurop and Arbogast, 2016[44]

The detention of migrants is extremely embedded in the concept of return of migrants, as those lacking appropriate documentation are expected to be subject to being returned and lose the possibility to enter the states, unless providing the certifications needed. While this does not necessarily apply to asylum seekers, throughout the chapters the misalignemnt between legislation and practice entails several degrees of breaches of human rights, especially with respect to asylum seekers. The return of individuals to other territories or countries of origin is an extremely problematic issue to cope with in some cases, as it is widely known how many flee their countries due to ongoing persecution or due to being subject to risk of torture, mistreatment and other serious harm. The principle of *non-refoulement* precisely deals with the protection of these individuals, providing an obligation not to return individuals to such territories in order to provide safety, where possible, on legitimate grounds of risks and threats. The third area of interest of this dissertation, the principle of *non-refoulement* is a long-standing part of international law, refugee law and customary

[44] Arbogast, L. and Migreurop, *Migrant Detention in the European Union: A thriving business. Outsourcing and privatization of migrants' detention*, 2016, pp. 8-13

international law to the extent of sharing with the much-related prohibition of torture its *jus cogens* nature. As will be later analyzed, its scope is extremely wide, and derogations are not provided for by relevant legal obligations due to the extreme importance of the right protected by this principle. As the European Union prides itself in being a proficient defender of human rights, the *non-refoulement* principle is no exception to the wide protection provided for by the European *acquis*. The principle is acknowledged by law and by the courts, and the stark contrast with cases of blatant violation of this principle are those which triggered the related part on this dissertation, which leave human rights defender surprised at the view of EU Member States hindering the application of the rules protecting this principle or looking for caveats and methods to prevent it from being triggered.

A further consideration shall be devoted to the geographical area of interest of this dissertation: the borders. Borders have historically represented human ties, both of power and agency, social structures and the interdependent interplay between surrounding structures, both interstate and intrastate, resulting in border policy and border security.[45] The concept of border has evolved over the years, but in the modern order the most widely accepted conception revolves around the statecentric conception of sovereignty, management of boundaries and demarcation of the exercise of power and authority. The literature provides different attached meanings to borders: Holdich believes that borders fall into categories of either good or bad,[46] Semple identified borders from a more naturo-centric point of view,[47] while Jones believes in the ability of borders to reduce tensions.[48] All these concepts contribute to the idea of borders as buffer zones, central to complex interactions between states and national policies, structured by the former. Following from this, borders have historically assumed a unifying or diving role, usually resulting from the interaction between external pressure and internal reception (Fry 98), the changing factors of border policies and a factor for the development of borderland studies and border security policies. The role of borders is particularly relevant for Europe. Starting from the Roman Empire and the Res Publica Christiana, European States have historically shared, as proposed by Voltaire, a common set of values and goals. The very reason why the word "barbarian", in the meaning of alien and different, was given birth to in the context of differentiating Europeans and non-europeans, should be explanatory for the degree of interdependency and interrelatedness that European states, even throughout history and wars, have always purported as an undeniable link among them.

[45] Brunet-Jailly, E. (2005). "*Theorizing Borders: An Interdisciplinary Perspective*." Geopolitics 10:4, 463-69.
[46] Holdich, T. (1916). *Political Frontiers and Boundary Making*. London, UK: Macmillan
[47] Minghi, J. "*Review Article: Boundary Studies in Political Geography*." Annals of the Association of American Geographers 53:3, 1963, pp. 407-28.
[48] Jones, S. B. "*Boundary Concepts in the Setting of Place and Time*." Annals of the Association of American Geographers 49, 1959, pp. 241-55.

The European Union is a clear exemplification of such union of values as it gorups those countries ascribing to the European ideals, which are for the extension the ideals of the international community (i.e., also non European states), sharing geographical proximity and, to an extent, similar history and roots. Borders have penetrated the conceptual framework of the European Union to the extent of applying them to trade flows with the creation of the European single market and the Eurozone, providing geographical restrictions to the economic scope of the Community. These factors, namely cross-border interaction, cross-border culture, multi-layer political activity and market forces are recognized by the Theory of Borderland Studies as analytical lens which consitute, disintegrate or integrate borders.

For the matter at stake, what is important to retain is the role of borders as the place where cultures and states collide, and the first place where migration occurs. Since the 1990s, the EU borders started being under higher degrees of restriction for third-country migrants, which in turn resorted to other, usually illegal, methods of border crossing to still reach the Union. The increasing pressure of migratory flows at the borders of the EU called for enhanced cooperation, resulting in the establishment of the Schengen Visa, part of the Schengen Agreement of 1985 which produced a much more interconnected internal space but, in turn, hardened the contrast between the Union and the non-Member States.[49] As previously mentioned, the extraterritorialization of borders which occurred over the years resulted in the external borders assuming a much more important role, that along with the decentralization of border security produced the effect of becoming the quintessential location for matters of migration, either illegal or legal, and a focal point for the scope of the dissertation. Borders became areas of law enforcement; as the states' first line of confrontation with migratory flaws, it was essential to equip countries with adequate instruments to enforce the relevant procedures right from the first moment individuals enter a country. For this very reasons, borders came about to become places where human rights are worringly blurred due to costant and fluctuating migratory flows' pressure, questioning the extent of the self-proclaimed status of the EU as defender and promoter of human rights vis-à-vis constant claims of breaches of human rights. By understanding the legal framework and the empirical praxis of states with respect to the three afore-mentioned main concepts, the gap beween the legal and the practical dimension will be framed as to question the effectiveness of EU policies.

[49] Bigo, D., and Guild, E. (2003). "*The Visa: Instrument of the Remote Setting of the 'Undesirables/" Cultures & Conflit*s, pp. 49-50

2. The European Legal Framework: obligations and provisions

The European legal order is a well-developed machine, as most will say, as it provides for an *acquis* encompassing a wide gamut of obligations for the protection of human rights, an achievement which not many regional organizations can argue having reached. The disconnect, however, occurs when the legal dimension translates to the practice; here, breaches and violations of the European legal framework are too often denounced for the EU to reclaim its role as a proficient executor of its rules. In order to understand where practice collides with legislation, it is first instrumental to outline the relevant provisions for the matter at hand, namely correlating how reception of migrants and asylum seeker translates to detention and refoulement, and the cases provided for by relevant jurisprudence. Once acquired a sufficiently wide perspective on the legal obligations of the European Union and of its Member States, the assessment of the breaches will be carried out in a more encompassing and comprehensive manner to comprehend the extent of the detachment between theory and practice. The following subchapters will, hence, follow a waterfall outline, meaning that will start by considering international human rights law and international customary law, follow with the ECHR that stands in a role of particular relevance for the European Union, and then considering the Union's legal framework. Needless to say, this waterfall perspective will collimate and merge in more than one point, as the penetration of international law, *jus cogens* and general principles of law have already been discussed as for their penetration in the European legal order.

a. Arbitrary detention and restriction of liberty: treaty law and primary sources of law

The most relevant primary sources of law on the matter of liberty of persons and restriction related to it are the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR) and the Charter of Fundamentl Rights of the EU (CFREU). More specifically, Art. 9 ICCPR, Art. 5 ECHR and Art. 6 CFREU do provide the most relevant rules, restrictions and guidelines on freedom of persons, sharing a common concept in the

proscription of arbitrary detention. As previously mentioned, the approach adopted for the consideration of this procedures will start from the general into the particular, following the order in which the sources have been presented a few lines prior, hence first considering the ICCPR. Art.9 of the ICCPR states that "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.",* further proclaiming some legal guarantees for the individual detained, such as the right to be promptly informed of the reasons, to be promptly brought before a judge, the right to challenge the detention before a court and to receive compensation. Hence, deprivation of liberty must be compatible with both international and domestic law in order to be considered lawful, the legal grounds and method must be consistent with international law, and the loss of liberty must not be arbitrary or breach the protections included in Art. 9.[50] The Article provides not only for the safeguard to be applied in the first place of detention, but also for their recurrence in order to avoid any continuance of arbitrary detention.[51] Hence, what is considered to be a breach of the Covenant's provisions is both the failure to provide justice in case of violations of Art.9 and the lack of effective measures, laws and practices that are relevant to the enforcement of the Article. A particular emphasis has been drawn by jurisprudence and legal discourse to the role of judicial control mechanisms highlighted in Art. 9(3) and Art. 9(4), as they allow for protection from both unlawful detention and from forms of ill-treatment. The requirement for *promptness* stemming from this article further applies to detention during pending trials, as detention shall be proportionate, used as a last resort and reasonable.[52] The last feature is strongly connected to the judicial authority itself and its independence and impartiality, implicitly entailed in Art.9(3) ICCPR and paramount for the whole process to be considered lawful.[53] The ICCPR provision is strongly matched by Art. 5 ECHR, the next source of law to be considered as impacting EU's Member States and the European legal order.

Art. 5(1), and for extension the sub-paragraphs (a) to (f), of the ECHR provides grounds of lawfulness, outside of which no individual shall have its right to liberty restricted. Art. 5 (1)(a) states that a lawful ground is provided "*after conviction by a competent court*". Hence, any conviction related to the deprivation or restriction of liberty is relevant to this sub-paragraph. In order for a court to be considered competent, the sole display of fundamental features of courts are

[50] *Shams and Others v. Australia* [2004], Human Rights Committee, Communication No. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, para 7
[51] *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, [2004], Human Rights Committee, CCPR/C/21/Rev.1/Add.13, para 15
[52] *Labita v. Italy* [2000], Application no. 26772/95, ECtHR (GC), para 153
[53] Amnesty International, *'The Human Rights Committee's New General Comment On The Right To Liberty And Security Of Person'* (2012)

not sufficient. As highlighted by the *Weeks v. the United Kingdom* case, the competent court shall not possess solely advisory functions but rather it shall also "*have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful*."[54] The term "after" in Art.5(1)(a) does not only imply a chronological causality in a single point; it rather refers to the detention, meaning the deprivation of liberty, stemming from a legal procedure culminating in conviction. The relevant jurisprudence evolved over the years; whereas at the beginning the need for a causal link between the very conviction and the restriction of the right to liberty was compelling and resulted in the unlawfulness of any preventive detention being continued on different grounds than the initial conviction, as in *W.A. v. Switzerland* (paras 39-45),[55] further deliberations on the matter connected preventive detention, or at least some forms, to the process of conviction by a competent court, as in *Ruslan Yakovenko v. Ukraine* (para 51).[56] Similarly, evolving jurisprudence further impacted the possibility to extend people's detention on the grounds of public security; in cases the courts gathered sufficient information to affirm that the individual could reoffend, the detention could be extended according to domestic law.[57]

Art. 5 (1)(b) reads: *"the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law".* Following the *Beiere v. Latvia* case, the jurisprudence highlights two main elements relevant to the sub-paragraph at hand: the possibility for the individual to comply with the order of a court, and the knowledge of the court orders by the individual.[58] Some examples of non-compliance include, but are not limited to: non observation of residence restrictions (*Freda v. Italy* case),[59] breach of bail conditions (*Gatt v. Malta* case),[60] refusal to undergo medical tests and examinations,[61] and failure to fulfill economic obligations, such as paying court fines (such as in the *Velinov v the former Yugoslav Republic of Macedonia* case).[62] The second part of the paragraph, concerning the obligations prescribed by law, requires an incumbent obligation (such as presenting themselves at a

[54] *Weeks v. United Kingdom* [1988], Application no. 9787/82, ECtHR.
[55] *W.A. v. Switzerland* [2022], Application no. 38958/16, ECtHR, paras 39-45
[56] *Ruslan Yakovenko v. Ukraine* [2015], Application no. 5425/11, ECtHR, para 51
[57] *Klinkenbuss v. Germany* [2016], Application no. 53157/11, ECtHR, para 47
[58] *Beiere v. Latvia* [2012], Application no. 30954/05, ECtHR
[59] *Freda v. Italy* [1980], Application no. 8916/80, ECtHR
[60] *Gatt v. Malta* [2011], Application no. 28221/09, ECtHR
[61] *X v. Federal Republic of Germany* [1975], Commission Decision
[62] *Velinov v. the Former Yugoslav Republic of Macedonia* [2013], Application no. 16880/08, ECtHR

police station for questioning[63] or not committing offences). Here, the jurisprudence requires the obligation to be proportional,[64] specific and concrete.[65]

Art 5(1)(c), allowing detention "*for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*", clearly states how criminal proceedings do have a role in enabling freedom restriction options. The individual(s) can be detained under these grounds according to reasonable suspicion linked to an existing and pending criminal proceeding.[66] This provision does not allow undiscriminated preventive detention, as authorities are consistently required to provide reasonable grounds for which it is beyond likely that the individual has been involved in an offence, and that such offense could have been avoided via prior detention.[67]

What is particularly relevant in this provision is the limb concerning the "reasonableness" of suspicion, whose vagueness has been tried to be restrained through case law. The *Sabuncu and Others v Turkey* case highlights how "good faith" is not sufficient to grant grounds for preventive detention;[68] hence, authorities are required to engage in inquiries aimed at justifying freedom restriction through evidence able to meet the hypothetical approval of an objective and external observer.[69] The reasonableness of suspicion has, as one would expect, raised several doubts throughout the years, calling for clarifications in more than one case. In the aforementioned case's paras 146 and 147, questions arose around two main areas: the time dimension, namely whether having committed a crime before criminalization would be considered still a breach of the law, and the rights' exercise dimension, namely whether the alleged offences were committed in the exercise of the rights provided for under the Convention. In conclusion, Art. 5(1)(c) displays some gray areas, further highlighted in the comparison between two cases: the *Labita v Italy* and *Talat Tepe v Turkey* cases.[70] These two cases represent a stark clash of case law due to the fact that in the former case hearsay evidence, or uncorroborated proof, was considered insufficient, hence not constituting satisfying grounds for preventive detention under reasonable suspicion. In the latter case, statements

[63] *Stefanov v. Bulgaria* [2021], Application no. 26198/13, ECtHR
[64] *Saadi v. the United Kingdom* [2008], Application no. 13229/03, ECtHR (GC), para 70
[65] *Kurt v. Austria* [2019], Application no. 62903/15, ECtHR (GC), para 185
[66] *Ibidem*, para 187
[67] *Ibidem*, para 186
[68] *Sabuncu and Others v. Turkey* [2020], Application no. 23199/17, ECtHR, paras 146-147
[69] *Kavala v. Turkey* [2019], Application no. 28749/18, ECtHR, para 128
[70] *Labita v. Italy* [2000], Application no. 26772/95, ECtHR (GC), para 156 et seq

which were later retired still allowed the courts to consider the "reasonable suspicion" grounds in full effect.[71]

Art 5(1)(d) deals with matters related to the "*detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority".* The list of circumstances under which the minor's liberty can be restricted has been defined in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* case as "non exhaustive";[72] hence, large degrees of interpretation are left in the hands of the competent legal authorities. Art 5(1)(e) sets the ground for liberty deprivation under medical and social grounds, namely "[…] *for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants"*. The rationale behind this subparagraph does not solely lie in the necessity for detention to serve as a protection for public health and safety as it also entails that some of the afore-mentioned individuals might benefit from detention, thus making liberty deprivation in their own interest. The latter consideration particularly applies to the article's limb concerning "persons of unsound mind", while in the other cases the main constraints set forth by the article and case law deal with the general principle of proportionality, i.e. that less severe measures could not yield the same results and would in turn pose a threat to public health and safety, and distinction, i.e. as in the case of deciding which is the degree and threshold of alcoholism over which persons can be considered as a public threat.[73]

Art 5(1)(f) states that deprivation of liberty is allowed in case of "*the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".* The rationale behind this subparagraph is that the State is to authorize the entry to the alien in an immigratory context,[74] while granting that the detention applied as a response to unauthorized entry is compliant with the overall rationale of Art.5 of avoiding arbitrary detention.[75] The concept of detention being "freed from arbitrariness" under subparagraph (f) is closely related to the idea of good faith, meaning that the detention shall be pertinent to the provision, it shall be carried out in places which allow for appropriate conditions under the paramount idea that such aliens are often displaced as a result of endangering circumstances in their home countries.[76]

[71] *Talat Tepe v. Turkey* [2004], Application no. 31247/96, ECtHR, para 61
[72] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* [2007], Application no. 13178/03, ECtHR, para 100
[73] *Hilda Hafsteinsdottir v. Iceland* [2004], Application no. 40905/98, ECtHR, para 42
[74] *Khlaifia and Others v. Italy* [2016], Application no. 16483/12, ECtHR (GC), para 89
[75] *Saadi v. the United Kingdom* [2008], Application no. 13229/03, ECtHR (GC), paras 64-66
[76] *Saadi v. the United Kingdom* [2008], Application no. 13229/03, ECtHR (GC), para 74

Historically, the ECtHR has expressed reservations as to the practice of the authorities to automatically place asylum seekers in detention without an individual assessment of their particular needs. The main relevant case concerning this systematic detention at the border is the *Thimothawes v. Belgium* case. In February 2011 Mr. Thimotawes arrived at Zaventem airport from Turkey; with no proper entry documents he was denied access to Belgium and detained, even after having applied for international protection at the very border. His application was repeatedly denied even in light of proper documentation of the applicant's mental health; only five months later, due to the tardiness of the Belgian system which failed to process his application within two months, he was released. The case was brought before the ECtHR in light of the, alleged, arbitrariness of detention due to the absence of whatsoever assessment of the individual's needs, failing to meet the proportionality criteria as less coercive measures were believed by the applicant to be able to yield the same results. The Court recognized the role of states in exercising their sovereign right of exercising detention in the context of migration management and entry restriction on the grounds outlined in Art. 5(1)(f) of the ECHR, highlighting how such deprivation of liberty shall follow two dimensions: being rooted in domestic legal bases (the internal lawfulness dimension) and in international general principles (external lawfulness). While the internal lawfulness dimension is exhausted under Article 74/5 of the Belgian Aliens Act, and general conditions of external lawfulness are respected, such as the condition of necessity, the issue of the alleged arbitrariness of the detention has been questioned by the Court. The ECtHR did indeed find that Thimothawes' conditions had not been considered appropriately, having judged on his application in a "laconic and stereotypical" fashion and "not allowing the applicant to understand the concrete reasons justifying its detention".[77] Ultimately, the Court ruled that the detention had not been arbitrary due to sufficient ability to control the detention measure by the Belgian authorities and to the overall reasonability of detention, the systematic detention of international applicants at the borders was consistently critiqued in light of the impossibility to effectively assess each individual's needs, allowing for it to be considered as a legal precedent under EU law.[78]

Traditionally, the jurisprudence has allowed some room for various degrees of States' interpretation and agency. Due to massive influx of immigrants and asylum seekers that the European borders have witnessed irregularly but constantly in recent years, the Court has recognized that as Member States might indeed face difficulties in coping with high numbers of

[77] *Thimothawes v. Belgium* [2017], Application No. 39061711, ECtHR, paras 76-77
[78] Wissing R, *'Systematic Detention Of Asylum Seekers At The Border: On The Need For An Individualised Necessity Test* (Strasbourg Observers, 2017) <https://strasbourgobservers.com/2017/06/09/systematic-detention-of-asylum-seekers-at-the-border-on-the-need-for-an-individualised-necessity-test/>

arrivals, they can enforce a domestic legal regime, authorized by the competent courts and authorities, which envisions a more comprehensive deprivation of liberty in a zone, rather than detaining individuals in other places, namely detention structures. This concept has been put forward in the *Z.A. and Others v Russia* case, where it has been accepted that a transit zone could be the chosen site of liberty deprivation, upon clear indication of spatial and temporal limits to the confinement. Similarly, the afore-mentioned case also considers how the trigger for such order from the competent authority might include grounds related to the processing of asylum-seeking requests and for identification, hence for smoothening the process of entry of immigrants.[79] The main requirement set forth by this subparagraph is the final purpose of having a "view to deportation or extradition", be it under national law or European Law.[80] The deprivation of liberty shall be contingent to and justified by ongoing proceedings for deportation and extradition, whose failure to be deemed as fair will result in the detention being non permissible on the grounds of Art (5)(f).[81] [82] The detention shall not be "punitive in nature and should be accompanied by appropriate safeguards",[83] which in the assessment carried out in the case of *Jones and Others v the United Kingdom* exemplified time-limits as a necessary but not sufficient requirement for granting lawfulness to the detention.[84]

The other paragraphs of Art.5 of the Convention, from paragraph 2 to 5, outline the guarantees for fairness and protection from arbitrariness. Paragraph 2 provides for detained person to be "informed promptly, in a language which he understands, of the reasons for his arrests and any charge against him". This paragraph entails giving the possibility to the individual to understand the complexity of situation and possibly to challenge the detention before a court.[85] The information shall be given to the individual himself or, in case the individual is incapable of correctly receiving the information, a guardian or a lawyer can be the recipients .[86] By "promptly", the *Fox* case has developed that the reasons for the detention shall not be necessarily provided by the officers at the moment of the arrest but shall be delivered within the first few hours. Article 5(3) expresses the right to be promptly brought before a judge, clearly outlining the guarantees for the individual to be

[79] *Z.A. and Others v. Russia* [2019], Applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, ECtHR (GC), para 162
[80] *Chahal v. the United Kingdom* [1996], Application no. 22414/93, ECtHR, para 112
[81] *Amie and Others v. Bulgaria* [2013], Application no. 58149/08, ECtHR, para 72
[82] *Sy v. Italy* [2022], Application no. 11791/20, ECtHR, para 79
[83] *Azimov v. Russia* [2013], Application no. 67474/11, ECtHR, para 172
[84] *Jones and Others v. the United Kingdom* [2014], Applications nos. 34356/06 and 40528/06, ECtHR, paras 83-96
[85] *Fox, Campbell and Hartley v. the United Kingdom* [1991], Applications nos. 12244/86, 12245/86 and 12383/86, ECtHR, para 40
[86] *Z.H. v. Hungary* [2012], Application no. 28973/11, ECtHR, paras 42-43

protected through judicial control against any interference carried out by the executive branch,[87] including the risk of ill treatment and power abuse.[88] The adequate period for being brought before a judge for being considered "prompt" has been defined as four days in the *Oral and Atabay v Turkey* case;[89] however, also shorter periods have been considered in special cases.[90] [91]

The ICCPR has directly impacted the legal system of European Courts as emphasized in *Kurt v. Turkey,* where the European Court of Human Rights directly drew from case-law related to the ICCPR and the United Nations Human Rights Committee, like *Quinteros v. Uruguay* (107/1981), in order to stress the ECHR's strong commitment against arbitrary deprivation of liberty through prompt judicial control.[92] Art.5 (3) and Art. 5(4) of the ECHR stress the importance of protecting both the individual's security and the rule of law by guaranteeing legal safeguards and ensuring the effectiveness of judicial control mechanisms, in compliance with Art.9 ICCPR. Similarly, *Medvedyev and Others v. France* gives prominence to how "*The Court […] notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment".*[93]

Hence, both Art. 9 ICCPR and Art. 5 ECHR entail an *a priori* guarantee of legal safeguards, meaning providing judicial control in an accessible and effective way for individuals to be able to vindicate their rights. The empirical emanation of such principle is displayed in guarantees such as the access to lawyers,[94] the possibility to prepare an adequate defense,[95] and fair access to evidence[96] to promote the effective application of Art. 9 ICCPR. The last article of the afore-mentioned relevant provisions for liberty of persons is Art.6 CFREU, which states that "*everybody has the right to liberty and security of person".* The rights protected by this article, according to Art. 52(3) of the same Charter, are consistent with the afore-mentioned Art.5 ECHR, hence submitting to the same type of restrictions and limitations. The protection of rights under these two

[87] *Brogan and Others v. the United Kingdom* [1989], Applications nos. 11209/84, 11234/84, 11266/84 and 11386/85, ECtHR, para 58
[88] *Ladent v. Poland* [2008], Application no. 11036/03, ECtHR, para 72
[89] *Oral and Atabav v. Turkey* [2009], Application no. 39686/02, ECtHR, para 43
[90] *Vassis and Others v. France* [2013], Application no. 62736/09, ECtHR, para 60
[91] ECRE, and Heinrich-Böll-Stiftung, *Reception, Detention And Restriction Of Movement At EU External Borders* (Heinrich-Böll-Stiftung European Union 2022)
[92] *Kurt v. Turkey* [1998], Application no. 15/1997/799/1002, ECtHR, paras 123-124
[93] *Medvedyev and Others v. France* [2010], Application no. 3394/03, ECtHR (GC), para 118
[94] *Dayanan v. Turkey* [2009], Application No. 7377/03, ECtHR, paras 31-33
[95] *Fodale v. Italy* [2006], Application No. 70148/01, ECtHR, paras 43-45
[96] *Garcia Alva v. Germany* [2001], Application No. 23541/94, ECtHR, para 39

articles is to be broadly encountered in national constitution law. Several are the Member States which provide for the protection of human liberty against arbitrary detention, most of them calling for the set requirements of prompt notice and access to judicial review of the grounds of detention. This is the case of Art.20 of the Constitution of the Republic of Lithuania,[97] Art. 13 of the Constitution of the Italian Republic, which provides for the deprivation of liberty to be subjected to the decision of relevant authorities, to be necessary and be promptly decided upon,[98] Art. 5(1) of the Constitution of the Hellenic Republic,[99] and Art. 66(1) of the French Constitution.[100]

While this subchapter provided for an overview of the rights related to the protection against restriction of freedom, especially if arbitrary, the last paragraph shall be devoted to principles of international law, which still cover relevant areas of the matter at hand and are guiding rules to which abide to.[101] The entitlement to the freedom of movement is mainly regulated and guaranteed by Art 2 of Protocol 4 of the ECHR, Art. 12 of the ICCPR and Art. 26 of the Geneva Refugee Convention. Under the precondition of lawful presence, governed by domestic law, all those lawfully present in a territory are entitled to freedom of movement and of residence; any restriction enforced by domestic law shall always comply with international law.[102] While exceptions can be made, hence restrictions can be imposed by States on individuals' freedom of movement, three are the main requirements to be observed while applying the regulations at hand. The first obligation to be fulfilled is that restrictions shall be provided for by law through criteria that are specific and clear. Secondly, the restrictions shall comply with the provisions under Art.2 (3) of Protocol 4 to the ECHR and Art. 12 (3) of the ICCPR, which list the grounds for legitimate purposes for restriction to the freedom of movement. Art. 2(3) of the Protocol 4 to the ECHR states, similarly to what is included in Art. 12(3) of the ICCPR, that such grounds include *"[…]interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".[103] The third requirement calls for the restriction to be necessary to fulfill and achieve one of the afore mentioned objectives; i.e., the measure shall be appropriate in the sense that it is able to effectively tackle the

[97] Constitution of the Republic of Lithuania, Art. 20
[98] Constitution of the Italian Republic, Art. 13
[99] Constitution of the Hellenic Republic, Art. 5(1)
[100] Constitution of France, Art. 66(1)
[101] ECRE, and Heinrich-Böll-Stiftung, *Reception, Detention And Restriction Of Movement At EU External Borders* (Heinrich-Böll-Stiftung European Union 2022)
[102] *General Comment no. 27: Article 12 (Freedom of Movement)* [1999], Human Rights Committee, CCPR/C/21/Rev.1/Add.9, para 4
[103] Council of Europe, *'Protocol No. 4 To The Convention For The Protection Of Human Rights And Fundamental Freedoms, Securing Certain Rights And Freedoms Other Than Those Already Included In The Convention And In The First Protocol Thereto, As Amended By Protocol No. 11'* (1963).

issue at stake, and proportional, meaning that no less impactful restriction could have yielded a sufficiently satisfying result.[104] The determination of whether or not a measure constitutes detention is dependent on the specifics of the case, and the ECtHR and CJEU have reached opposite judgments respecting relatively comparable situations. When determining whether applicants for international protection being held in the area of borders or in an international zone holding applicants for international protection at a border or in an international area constitutes detention, the European Court of Human Rights considers the following criteria: the specific case, situation and choice of the applicant; the domestic laws and provision to be applied in the case; the dimensions of the restriction, namely the magnitude, duration and nature of it.[105] The peculiarity of the disagreement between ECtHR and CJEU's judgments is visible in *Ilias and Ahmed v. Hungary,* as the ECtHR recognized that the applicants being held in the transit zone at the Hungarian borders for 23 days did not account for detention.[106] Contrariwise, in 2020 the CJEU ruling on the *FMS* case overturned the rationale applied in the afore-mentioned case by the ECtHR by defining the stay of applicants in the same Hungarian transit zone as equivalent to detention; the outlook was developed through an understanding of several factors among which the conditions of the area of the stay, as the zone was enclosed within barbed wire, the accommodation provided, namely containers of less than 13 square meters, and other factors such as surveillance.[107] Nonetheless, the strive between CJEU and ECtHR for autonomy and for claiming, especially in the case of the former, the role of most efficient defender of human rights might also serve as a positive competition, as the European Union has always been able to provide for higher degrees of protection with respect to the ones provided for by the ECHR.

b. Arbitrary detention and restriction of liberty: secondary sources of law

In light of the peculiarity of European border procedures due to the development of the Schengen Area, tackling primary legislation only would account for a partial understanding of the

[104] *General Comment no. 27: Article 12 (Freedom of Movement)* [1999], Human Rights Committee, CCPR/C/21/Rev.1/Add.9, paras 12-14 and 16
[105] *Ilias and Ahmed v. Hungary* [2019], Application no. 47287/15, ECtHR (GC)
[106] *Ecthr - Ilias And Ahmed V. Hungary, Application No. 47287/15, 21 November 2019,* European Database Of Asylum Law (Asylumlawdatabase.eu) <https://www.asylumlawdatabase.eu/en/content/ecthr-ilias-and-ahmed-v-hungary-application-no-4728715-21-november-2019-0>
[107] *FMS, FNZ, SA and SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatósá* [2020], Joined Cases C-924/19 PPU and C-925/19 PPU, CJEU

matter at hand. Hence, secondary legislation shall be taken into consideration for a clearer sight of the procedures enforced. This paragraph will provide for an outline of the secondary sources of law regulating restriction of liberty, namely the Schengen Borders Code, the Return Directive, and a quick glimpse into the Asylum Procedure Directive and the Reception Procedure Directive. The Schengen Borders Code (SBC) is one of the main relevant regulations on border checks and surveillance at the borders. In Art. 6(1), the Code outlines the entry conditions for nationals of third countries to the EU, admitted that the stay does not extend over 90 days; the approval of the stay is hence conditional to the possession of a valid travel document, of a valid visa, of sufficient means of subsistence or of the position to lawfully acquire such means, the absence of any alert issued by the Schengen Information System and a clearance concerning the possibility for the individual of posing a threat to the public security, health and international relations. Art. 6(5) provides grounds for exception to Art. 6(1) in three cases: derogation is provided when the individual does not possess a visa but is admitted for transit to other Member States which issued a long-stay visa, when the visa is issued at the border in accordance with Art. 35-36 of Regulation N.810/2009,[108] and on "*humanitarian grounds, on grounds of national interests or because of international obligations*".[109] While Art. 14(1) stipulates that any individual which does not respect the criteria outlined under Art. 6(1) and does not pertain to the categories of Art. 6(5) shall be refused the right to entry in the Schengen Area territories, Art. 4 provides that the Schengen Borders Code is still subordinated to other obligations, namely EU law, international law and obligations related to international protection and human rights, in particular related to the right of non-refoulment.[110] Under Article 14(2), entrance may only be denied by a reasoned judgment made by a relevant authority which outlines the specific grounds for rejection and communicates it following specific procedures highlighted in the Annex V to the SBC. Those whose entry is denied are granted the possibility to appeal, in conformity with domestic law, under Art. 14(3).

While the SBC mainly regulates rejection of admission, the complementary relevant document is the Return Directive (RD), which in turn provides the procedures for return of persons and regulates detention. The scope of the Directive stretches over third country nationals irregularly staying in the territory of the Member States; the word "irregularly" is defined by referencing the afore-mentioned Art. 6 of the SBC, hence including all those individuals not fulfilling the criteria

[108] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2009], Art. 35-36
[109] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016], Art. 6
[110] *Asylum Procedures At The Border: European Implementation Assessment* [2020], EPRS, p. 63

therein outlined. One of the main items differentiating the Return Directive from the SBC Is the higher level of guarantees offered by the former, as the individual can appeal under Art.13 to an authority that could temporarily suspend the decision, can request legal advice and linguistic assistance.

Another matter of differentiation within the two documents revolves around the issue of detention, regulated by the RD but not by the SBC. In Art. 15(1) of the RD, it is highlighted how detention, which shall always respect the principle of proportionality, is only applicable in cases of individuals which are subject to return procedures, in particular in cases of risk of absconding and when the individual hampers the return procedures from being correctly carried out.[111] I n the Commission's proposal for recasting the Directive in 2018 one more ground for pre-removal detention was proposed: the case in which the individual might pose a threat to public policy, public security or national security, further adding specificities on the limb regarding the risk of absconding.[112] The RD stipulates in Art. 15 and 16 that the detention should follow precise criteria, namely being ordered in writing and being the result of a reasoned judgment, being reviewed in reasonable amounts of time, amounting for a maximum of 6 months with the possibility of extending it to 18 in case of lack of cooperation, being provided in adequate detention facilities with attention to vulnerable and ill persons.

The reason why the Return Directive is particularly relevant to the matter at hand and is correlated to the SBC and borders in general lies in what can be considered a voluntary legal void, meaning that as the RD does not provide clarification on the spatial dimension of the return processing, part of such procedures, including detention, can and are allowed to take place at the borders. Only two limitations to the application of the Directive in the context of borders exist, namely in cases where individuals are refused entry under Art. 14 of the SBC (an interaction which proves particularly harmful for individuals, as the refusal of entry under SBC entails less guarantees with respect to being subject to return procedures under the RD), and in cases where individuals "*who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State."*[113] The spatial dimension of the latter case, outlined in Art. 2(2)(a) of the Return Directive, has been traditionally

[111] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008]

[112] Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast) [2018]

[113] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008], Art. 2(a)

followed narrowly to guarantee a prompt removal of third-country nationals which are intercepted at the crossing of the afore-mentioned borders. While this derogation is traditionally not employed by countries such as Croatia and Finland, according to the EU Agency for Fundamental Rights the majority of the EU Member States apply refusal of entry under Art. 2(2)(a) rather than applying the Return Directive, hence carrying out procedures under the SBC with lower levels of guarantees with respect to the ones provided by the RD.[114]

The relevance of borders comes once again into play throughout the discourse surrounding asylum procedures. While this dissertation will not directly address the wholeness of asylum procedures and of their normative, legal and sociological ramifications, such procedures are still relevant for the matters at hand in light of the role of borders and the strong link with detention and restriction on freedom of movement retained as a consequence of the application for international protection. More specifically, it is the EU Asylum Procedures Directive (APD) which, in Art. 43 (1) and 43(2) which allows Member States to establish procedures for deciding on applications for international protection at the borders, meaning that under specific circumstances highlighted in the Directive the States are able to examine the application prior to the factual entry of the individual in the territory.[115] The APD further regulates mass arrivals of applicants, in which case Member States are allowed to carry out procedures in the location where such applicants will be accommodated, usually close to transit zones and borders. Another instrument restricting freedom of movement is the EU Reception Conditions Directive (RCD), which under Art.7 provides two grounds of constraint. In Art. 7(1), the Directive allows States to restrict the applicant's freedom to a restricted area, failing to provide any further limb or provision which explicitly provides, or complains with, the human rights stemming by human rights documents and instruments. Under Art.7(2), on the other hand, States can decide the residence of the applicant on the basis of public order concerns or for the sake of promptly processing the application. The latter justification for restriction of movement does not find any parallel provision in international law; additionally, Art.7 does not display any degree of proportionality, a requirement clearly set for such restrictions by international law.[116]

While the 2016 recast of the RCD aimed at including the necessity clause for such provisions, two more grounds for movement restriction were added. Such grounds revolve around

[114] *Sélina Affum v. Préfet du Pas-de-Calais and Procureur general de la Cour d'appel de Douai* [2016], CJEU, paras 72 and 172
[115] *FMS, FNZ, SA and SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatósá* [2020], Joined Cases C-924/19 PPU and C-925/19 PPU, CJEU
[116] AIDA, "*Boundaries Of Liberty: Asylum And De Facto Detention In Europe'*, ECRE (2017)

the Dublin Regulation systems, namely concerning the possibility to restrict freedom of residence in order to carry out the procedures for determining States' responsibility, and to prevent the applicant from absconding; such justifications, deemed as "administrative convenience", find no parallel in international law or refugee law.

In conclusion, this overview of secondary legislation aimed at providing not only a more comprehensive look to provisions proscribing arbitrary detention and restrictions of liberty, but also at highlighting the extent to which human rights-related obligations have penetrated the legal order of the European Union also in further and more specific attempts with respect to primary law.

c. Regulating the principle of non-refoulement

The other goal of this dissertation is to consider the misalignment between theory and practice on the matter of reception and return of migrants and asylum seekers. The definition principle of *non-refoulement* has been outlined in other subchapters; the current one will focus on developing on the legal framework regulating such principle. Globally, States are compelled to safeguard the rights of migrants and asylum seekers alike. However, what has been identified as a common trend is the common practice of relocation of migrants before they are able to enter a State jurisdiction; one of the several empirical manifestation of this trend is the rise in the building of anti-immigrant walls, such as in Spain or Hungary.[117] Such practices immediately raise questions of compatibility and compliance with the principles inscribed in the 1951 Geneva Convention, especially concerning the right to entry a territory for migrants, particularly due to the possibility of such migrants proving to be potential asylum seekers, and the principle of *non-refoulement*.

Throughout the last decade, violations of such principle have increased in frequency, as proven by an Amnesty International investigation which highlighted how Poland was returning migrants and asylums seekers to the borders with Belarus.[118] Poland was already under scrutiny for alleged illegal deportations, after being accused and then condemned by the ECtHR in 2020; however, the matter at hand has not been peculiar to Poland, rather representing a symptom of an

[117] Ancelin, J. (2019), " Le principe de non-refoulement et l'Union européenne à l'épreuve de la crise syrienne." *Études internationales.* Jan 15. 49(2). pp.355-389

[118] Amnesty International. (2021). *Pologne. Une investigation numérique établit que les autorités ont bafoué les droits de réfugié·e·s*.

ongoing trend.[119] In order to grasp the extent of the principle of *non-refoulment* in Europe, the same principle's extent shall be understood through the eyes of the international discourse, and more specifically of international law. The principle of *non-refoulement* is enshrined in the 1951 Convention Relating to the Status of Refugees, as Art. 31(1) proscribes the return of refugees "*in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."* Due to the declaratory nature of the criteria of refugees of Art. 1A(2) of the same Convention, the principle both applies to refugees whose status has been officially recognized but also to those whose status awaits a formal declaration.[120] The scope of the provision proves quite broad as "whatsoever" is able to encompass any form of forcible removal to any country or place where the individual risks his or her life.[121] Some exceptions are provided under Art. 33(2) of the Convention, which allows States to refoul individuals which represent a risk to the security of the country.[122] Such obligations apply to, and is binding for, all the States parties to the 1951 Convention or the 1967 Protocol, for any entity acting in their name and wherever the jurisdiction of the State extends.

International Human Rights Law provides further *non-refoulement* obligations in multiple instances; several provisions do entail an implicit *non-refoulement* clause (as in Art. 4 of the African Charter on Human and People's Rights and Art. 6 and 7 ICCPR, where right to life is protected and for extension any voluntary exposure of individuals to related risk would imply a violation of this principle), while others explicitly provide strict guidelines on the matter, as in the case of Art. 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[123] Furthermore, the 1966 Covenant on Civil and Political Rights was interpreted by the Human Rights Committee so to encompass the prohibition of *refoulement* in Art. 6 and Art. 7, namely right to life and to be free from torture and inhuman treatments, of the Covenant, as the return of individuals to risky territories represents a threat to their life. Similarly, customary international law provides human rights-based *non-refoulement* obligations; due to the

[119] France-terre-asile. (2020). *Les pratiques de refoulement de la Pologne condamnées par la Cour européenne des droits de l'homme.*

[120] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para 28.
[121] Weis, P., *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), p. 341.
[122] *Suresh v. Canada* [2002], Supreme Court of Canada, 2002 SCC 1.
[123] The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987

proscription of torture and arbitrary killing as part of the *jus cogens*,[124] the forcible return of individuals to countries where individuals might risk inhumane treatment, torture or killing became part of the customs of international law.[125] Additionally, the European Convention on Human Rights stands in a role of particular relevance for the European legal order. Art. 3 provides an "implicit" *non-refoulement* principle, as the text reads that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*". While other treaties, documents and provisions do provide some room for a certain degree of restrictions and limitations for the principles, Article 15(2) ECHR explicitly prohibits any derogation or exception for Art. 3 ECHR; hence, Art.3 ECHR delivers an absolute right to *non-refoulement*. Similarly, to the understanding developed for Art.7 ICCPR, which also protects individuals from torture and similar inhuman treatment, any forcible exposure by States and their corollary bodies of individuals to displacement or return to countries where they might encounter such risk is to be considered under the scope of the provision, thus representing a breach of the obligations.

In the first place, it is important to note the peculiarities of the European legal system before international legal obligations. All the Member States of the European Union are party to the relevant international instruments, namely the 1951 Refugee Convention, the following 1967 Protocol, the ECHR, the ICCPR and the Convention Against Torture (CAT). On the contrary, the European Union as an international organization is not party to any international treaty, protocol or binding instrument providing the principle of *non-refoulement*; hence, it cannot be formally subject to the responsibility of violation of the principle under this framework. The EU cannot be brought before any international court or other relevant body, as the Human Rights Committee of the ICCPR,[126] the ECtHR or the Committee Against Torture of the CAT;[127] conversely, the single Member States can be brought before such bodies following violations of the principle of *non-refoulement* of the single State in relation to the implementation of obligations deriving by their membership of the European Union or in relation to EU acts.[128] This complex landscape provides a tricky interplay which is triggered anytime international obligations conflict with EU norms; such interplay has historically called for guidelines and regulations which have been developed

[124] Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11

[125] Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8
[126] International Covenant on Civil and Political Rights, (1998), Art.28
[127] Convention Against Torture, (1984), Art. 17
[128] *Senator Lines GmbH v. The Fifteen Member States of the EU* [2004] Application No. 56672/00, ECtHR

throughout the years. In particular, the Articles on Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on Responsibility of International Organizations for Internationally Wrongful Acts (ARIO) have advanced a common understanding which conceives international wrongful responsibility as subject to breaching an international obligation to which the State or the international organization was party.[129] In Art. 12 ASR and Art. 10 ARIO, the two documents stipulate that the afore-mentioned obligation can differ in nature, meaning that any international obligation shall be respected regardless of its origin, including treaty law, customary rules and general principles of international law. Hence, while States are already to be considered as bound to international law due to them being parties to such international obligations, the EU can be held accountable for violations of the principle of *non-refoulement* as a rule enshrined in customary international law. This consideration has been further proved by the CJEU which, due to the EU possessing an international legal personality,[130] has recognized that the organization is required to respect customary international law and the overall obligations stemming from the *jus cogens*, aligning with the scholars' shared view that IOs shall, at least, respect the fundamental human rights.[131]

In light of the absence of the European Union from the most relevant human rights treaties concerning the principle of *non-refoulement*, the legal setting of the European Union is able to connect the international dimension with the EU level through Art.78 TFEU, which affirms the need to develop asylum policies in compliance with the *non-refoulement* principle, the 1951 Refugee Convention and the related documents. The CJEU further reinforced such narrative through two main cases, namely the *B and D* case, whose ruling affirmed the need for the EU Qualification Directive to be interpreted according to the 1951 Refugee Convention,[132] and the *N.S. and M.E.* cases which, interpreting the EU Dublin Regulation, guaranteed for the aforementioned article to be interpreted with respect for the Geneva Convention and the following Protocol.[133] The European Union legal setting guarantees the principle of *non-refoulement* on several levels. Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU) explicitly protects and provides the rights stemming from the 1951 Refugee Convention,[134] connecting international sources to the EU legal framework. Art.19 of the Charter of Fundamental Rights of the European

[129] Yearbook of the International Law Commission, (2011), Vol. II, Part Two, p. 31, para 2
[130] Giannelli, A. '*Customary International Law in the European Union*' in Cannizzaro, E., Palchetti, P. and Wessel, R. (eds.), International Law as Law of the European Union (Brill Nijhoff, 2011)
[131] Von Bogdandy. A. and Steinbrück Platise, M. '*ARIO and Human Rights Protection: Leaving the Individual in the Cold*' (2012) 9 International Organizations Law Review 67, 69.
[132] *Bundesrepublik Deutschland v B and D* [2010], Joined Cases C-57/09 and C-101/09, CJEU
[133] *N.S. v. Secretary of State and Home Department* and *M.E. and Others v. Refugee Application Commissioner and another* [2012], Joined Cases C-411 and C-493/10, CJEU
[134] Consolidated Version of the Treaty on European Union [2008] OJ C115/13

Union protects individuals from collective expulsion in its first subparagraph, while Art. 19(2) clearly embodies the principle of *non-refoulement*.[135] Furthermore, the afore-mentioned principle is also to be considered as a source of EU customary law and a general principle of EU law, especially in light of alleged violations which repeatedly occurred throughout the operations carried out by Frontex in the context of border management which prompted the development of further legislation on refoulement.

While Art.78(1) provides for the relevance of international treaties in the European legal order, the international level further penetrates the EU legal dimension through customary international law. The responsibility of the Union to fulfil international obligations is mainly expressed in Art. 3(5) and 21(1) TEU, which highlights how the EU is bound to observe the full body of international law, including customary law. The jurisprudence, however, further evolved and developed on the matter through two main cases ruled by the CJEU: the *Opel Austria* case and the *Racke* case. The *Opel Austria* case saw the company Opel Austria GmbH contesting the adoption of Council Regulation (EC) No. 3607/93 as conflicting with the principles inscribed in the Vienna Convention, particularly those expressed under Art. 18, namely "not to defeat the object and purpose of a treaty prior to its entry into force".[136] The *Racke* case, on the other hand, witnessed the questioning of the *pacta sunt servanda* principle's applicability against a Council decision. In both cases, the CJEU ruled that principles of international customary law shall be respected, and that EU legislation shall comply with such principles, especially in light of their recognition by the International Court of Justice.[137] While the interplay between the two legal orders is still somehow vague, as the position of customs of international law towards the EU primary law has not been clarified by the two previously mentioned cases, what is relevant for the issue at stake is that the principle of *non-refoulement* as deriving from customary law and stemming from general principles of IL has to constitute part of the Union's legal order.

The EU Charter of Fundamental Rights develops on the right to asylum, on prohibition of mass expulsion and of refoulement in Articles 18, 19(1) and 19(2) respectively. In particular, Art. 19(2) states that "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment." It is necessary to note how Art.19(2) is linked to but does not exactly replicate Article 3 ECHR; the latter is repeated in Article 4 of the EU Charter, while Art.19(2) adds

[135] Charter of Fundamental Rights of the European Union OJ 2010 No. C83, p. 1.
[136] Vienna Convention on the Law of Treaties, 1969, Art. 18
[137] *Opel Austria GmbH v. Council of the European Union* [1997], Case T-115/94, CJEU, para. 90; *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998], Case C-162/96, CJEU, paras 45-46

on the matter by adding the *non-refoulment* specificity. The reasons why Art. 3 ECHR was somehow duplicated is explained in the Charter's preamble, which stipulates that the Charter's fundamental rights are based on the necessity of strengthening their protection; thus, the two provisions are complementary and needed in light of providing the maximum degree of human rights protection. The interplay between Art.3 ECHR and Art.19(2) proves peculiar when analyzing the matter of limitations and restrictions to the latter. In the *Karlsson and Others* case the CJEU ruled that limitations to human rights might be consider if, and only if, such restrictions overlap with the objectives and interests of the Union.[138] Article 52(1) of the EU Charter reinforces such consideration by stipulating that limitations to individual rights shall be provided for by the law and still be in compliance with the very provisions protecting human rights. However, due to Art. 52(1) functions more as a rule of interpretation and to the clear ECtHR case law inspiration provided in Article 19(2), Article 3 ECHR shall be taken into account when deliberating on potential limitations. Article 3 ECHR prohibition, as previously mentioned, is an absolute prohibition with no limitation whatsoever, even in presence of criminal activities. As Article 19(2) strongly derives from Art. 3 ECHR's case law, it has to be understood that also the former shall not enshrine any possibility for limitation. This position has been further reinforced by the conflict in which the EU Member States, parties to the ECHR, would incur into by placing any limitation to the rights provided under the ECHR.[139]

d. Concluding remarks

In conclusion to this chapter, some preliminary remarks are due before moving to understanding how the practice substantially differentiates from the legal framework provided for by the European Union and the relevant body of international law. The subchapters analyzed the extent of the provisions related to both arbitrary detention and the principle of *non-refoulement*, providing for a complex picture with intercorrelates and makes reference to one another; as international law is a source of inspiration for Community and national law, the latter also serve as an extension of the corollary of human rights law, expanding the protection of human rights and allowing higher degrees of safeguards to constitute a constraint for mistreatment of individuals. The

[138] *Karlsson and Others* [2000], Case C-292/97, CJEU
[139] Peers, S. (2001). *Immigration, Asylum and the European Union Charter of Fundamental Rights*. European Journal of Migration and Law - EUR J MIGR LAW. 3. 141-169.

first takeaway from this analysis is, thus, the vertical branching of human rights, stemming from the very principles that originated the first written bodies of international law which in turn were re-codified to surge to sources of law, both primary and customary. The expansion of human rights law and its penetration in the more particular areas of law, namely supranational and national legal orders, is clearly visible in the developments of protection of migrants and asylum seekers at the ECHR level, the Community primary law and Union secondary law shows, among other considerations, the commitment that the European Union has undertaken to respect, upheld and foster human rights. The European *acquis* allowed for the expansion of the rights discussed and a more precise design, which in legal terms usually equals to more justice and equality due to lower degrees of interpretation and more stringent obligations to avoid freeriding and misled readings of the general principles of law. The interaction among these frameworks, especially the interplay between the ECHR and the CFREU, has yielded increasingly high degrees of protection, in a positive competition which could, notwithstanding bumps, obstacles and challenges such as in the case of the European Union's accession to the ECHR, effectively bolster the case of migrants and asylum-seekers human rights. At the same time, it would be naïve not to consider also the interests of the countries composing the Union, which all have a strive for security which is perceived through the management of border control and migration management. This other side of the coin undoubtedly contributed to the development of the documents discussed and the overall political discourse of check and control at the borders.

For the sake of the argument, it would be unfair not to consider that the constellation of provisions and regulations could indeed well manage the issues addressed therein. The Union proves, thus, virtuous in developing an at least adequate legal acquis on the matter. Nonetheless, two main critiques emerge from these subchapters. The first revolves around the matter of specificity: while precise criteria are usually provided for by the provisions analyzed, in more than one case there is a legal void which allows Member States to escape responsibility. An example would be the requisite of promptness, or the "reasonability" of the duration of the detention. Too much vagueness allows for caveats to be exploited, and while case law attempted at compensating such void, the disagreement and the "pick and choose" attitude between the ECtHR and the CJEU definitely did hinder the homogenization process at the European level. The second critique is the one that opens to the rest of the dissertation, namely the practical dimension and the discrepancy found therein with respect to a sufficiently well-established legal mechanism. Obligations such as the ones deriving from the principle of *non-refoulement* do not allow for any derogation; this reality collides however with the alleged breaches of the aforementioned principle, hinting to what will in

the end result as a multilayered failure in effectively connecting different dimension of national practice, also due to the Union's attitude with regards to specific events, operations and policies. Even if the European Union is not part to the ECHR, not only its Member States are still under duties deriving from the latter, but the very Union is obliged to respect such provisions in light of its legal personality, which subjects it to upholding relevant obligations. The very fact that the European, both voluntarily and involuntarily as most would say, fails to comply with its very own provisions highlights a fracture from the efficiency dimension which results in both eroding principles of Community and international law, and in endangering thousands of lives. The following chapters would hence discuss the practice of European Member States, more specifically developing on a case study on the Greek borders, in order to ultimately highlight the degrees of stark contrast between a sufficiently satisfying body of human rights regulation and the reality of self-interested realities and foggy behaviors by the European Union.

3. The gap between theory and practice

As previously noted, the aim of this dissertation is to understand whether the theory, i.e., the European legal framework, is reflected also in the practice, i.e., the policies and measures effectively enforced by Member States of the European Union. A well-oiled machine, an effective mechanism, would ensure the perfect applicability and application of provisions and regulations, entailing the absolute overriding role and respect for human rights in spite of other considerations, be them economic, cultural or political. This conception, however, implies a degree of naiveté in its development. Before actually diving into the analysis of the practices of the Member States of the EU, it is paramount to note that, as applicable in many other dimensions of daily life, it is easier to respect rules in times where no external pressure is imposed. Thus, it is at least acceptable to question whether the EU is able to maintain its obligations not only in moments of relative political calm and in absence of turmoil, if ever, but also in light of international mayhems and disrupting events whose fringes impact the Union. Secondly, it is only with an exaggerated degree of candor that would be acceptable to argue that no other interest plays a factor in decisions undertaken by governments in light of migratory flows and related migrants. While migrants have notoriously played an important role in the development of national economies, as low-skilled labor force with little-to-none bargaining power vis-à-vis firms proved instrumental in exploiting such occasion for expansionary economic maneuvers.

The approach of the European Union with respect to migration is well encapsulated in Huysmans' considerations on the securitization of migration in the European Union. Huysmans is able to draft a sufficiently accurate generalization of European countries' migration policies, starting from the 1950s and 1960s. The need for flexible and inexpensive labor force was met through the development of promotional and permissive migration policies, at a time in which the political discussion over the legal status of migrants did not enjoy from the relevance that currently holds in both the national and international arena.[140] The switch mainly took place between the last years of the 60s decade into the 1970s, as migrations took the form of a matter of public concern. The promotional and permissive policies transformed into more restrictive and controlled ones, triggered by the will to protect the rights of national workforce and following shifts in the composition of the labor market.[141] At the same time, the free movement of persons was still not a

[140] Marie, C.V. (1988), "*Entre économie et politique: le "clandestin", une figure sociale à géométrie variable",* Pouvoirs, No. 47, pp. 75-92

[141] Blotevogel, H.H., Müller-ter Jung, U. and Wood, G. (1993), *From Itinerant Worker to Immigrant? The Geography of Guestworkers in Germany",* in King, R. (ed.), pp. 83-100

priority for the European Communities, much less of a concern was the free movement of individuals and workers from third countries.[142] The 1980s and 1990s decades were characterized by the correspondence between the Europeanization of migration policy and the securitization of it. Migratory concerns assumed more political relevance and resulted in a crystallization of the concept of migrations in the EU constitutional construction. The problematization of migration stemming from political debate characterizing it as a challenge to public order, to the welfare state and to the social unity of the nation resulted in the first connection between immigration and asylum with transnational criminal activities, terrorist threats and border control.[143] The natural consequence is the framing of migrants and asylum-seekers as a security matter and a security concern; here the shift occurs, from a matter of human rights to a matter of security, reproducing political myths of national unity and homogeneity which can only be preserved by "cultural aliens". The struggle of the European Union vis-à-vis migration is tripartite, from the cultural significant of borders and their control in light of limitation of free movement by third countries, to the integration of third-country individuals into the national societies to the fact that multicultural societies seem to clash with the ideal of promoting national homogeneity and the universal achievement of social and economic rights. The stigmatization concerning the socio-economic dimension emerges as a consequence of welfare chauvinism, portraying migrants and "aliens" as illegitimate individuals competing for welfare and taking advantage of the welfare state, ultimately straining both the system and the society.[144]

The ultimate result is the construction of migrants and asylum-seekers as scapegoats for the diversionary aim of distracting from socio-political and economic struggles, which transcends considerations associated with political alignments and proves as an evergreen strategy affecting the development of migratory policies.[145] For the sake of the argument at hand, this brief note allowed for an overview of why and how migration has been stigmatized over the years, the grounds for which Member States do have an interest in maintaining border control enforcement and to sometimes act outside their obligations. When these considerations combine with instances of crisis, like the Covid-19 pandemic, the results are way more pervasive and result in a more common disrespect of human rights obligations.

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[142] Ugur, M. (1995), "*Freedom of Movement vs. Exclusion: A Reinterpretation of the Insider-Outsider Divide in the European Union",* International Migration Review, Vol. 29, No. 4, pp. 964-999

[143] Bigo, D., (1996), *Police en réseaux. L'expérience européenne*, Paris, Presses de Sciences Po.

[144] Faist, T. (1994), "*How to define a foreigner? The symbolic politics of immigration in German partisan discourse, 1978-1992",* In Baldwin-Edwards, M. and Schain, M.A. (eds), pp. 50-71

[145] Leander, A. and Guzzini, S. (1997), *European Economic and Monetary Union and the Crisis of European Social Contracts*, in Minkinnen, P. and Patomaki, H. (eds.), The Politics of Economic and Monetary Union (Finnish Institute of International Affairs), pp. 131-161

The following subchapters will thus dive into the matter of the disconnect between theory and practice by focusing on the second limb, framing Member States praxis in contrast with the EU legal framework and the obligations analyzed, firstly by overseeing the interplay of detention praxis at the border and ensuing with a case study on the Greek borders with Turkey.

a. Detention praxis: custom practices and absence of legal safeguards

The border environment represents a particularly interesting case with regards to analyzing detention and overall restrictions. The cause is mainly to be found in the plethora of intersecting legal regimes, many of which have been discussed previously, which more than seldom intertwine and alternate one another throughout the stay. Borders further prove more disruptive than other spatial contexts: the main reasons revolve around the usually remote location and the related higher degree of difficulty of access to civil society organizations. This puzzle of complications contributes to the establishment of a setting where the agreed definitions of detention and movement restriction happen to be blurrier, allowing for caveats and exceptions which might sometimes escape to legal compliance. The common procedures put in place in relation to movement restriction and border detention will be analyzed according to the following categorization: border detention facilities, first reception facilities and hotspots.

In order to prevent unauthorized entry into a State's own territory, what is put into work is often the so-called "legal fiction of non-entry", meaning that as long as the entry was not legally authorized and/or granted, from a legal point of view the individual cannot be considered as having entered the territory. This construct is applied by countries such as Austria, Belgium, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Romania and Spain, whereas Bulgaria, Croatia, Cyprus, Ireland, Malta, Poland, Slovenia and Sweden do not apply it but instead maintain the possibility of carrying out procedures at the border.[146] The procedure revolving around Art. 43 APD on border asylum procedure is more homogenously applied throughout the European Union, with all countries applying such procedure at the borders with the exception of Austria and Germany, which only apply it in case the application is submitted at airports, Greece, which presents a dual procedure for regular borders and exceptional borders (the Aegean islands, considered as hotspots), and Lithuania, which only provides accelerated procedures for border

[146] AIDA, "*Boundaries Of Liberty: Asylum And De Facto Detention In Europe'*, ECRE (2017), pp. 16-18

applications.[147] As such, border asylum procedure allows Member States to decide on international protection applications, a temporary prohibition of access and restriction of movement is automatically entailed.[148] The legal framework proves confusing in more than one instance. The RCD contradicts itself to an extent when comparing Art. 8(2) and Art. 18(1)(a), as the former allows border detention only in cases where no less coercive measure was available, while the latter allows States to provide housing for cases of processing asylum requests.[149] The outcome is an inevitable contrast in domestic policies and practices; so while the European Union Agency of Fundamental Rights (FRA) stressed the importance of "avoiding prison-like environments"[150], both the European Union Agency for Asylum (EASO) and the European Parliament Research Service (EPRS) recognized that refusal to entry at borders accounts for detention in practice in the majority of cases.[151][152] Such vagueness and lack of clarity are clearly exemplified in the European Council on Refugees and Exiles (ECRE) research assessing detention at borders in seven countries (France, Germany, Greece, Hungary, Italy, Portugal and Spain). The study provided evidence that applicants for international protection at borders incurred in all the countries observed in either recognized detention or de facto detention.

The term "*de facto* detention" is used by ECRE as a non-legal term to define situations in which individuals reside in centers (or similar housing arrangements) which they are not free to leave unless for leaving the country, while having the State not recognizing such coercion of as deprivation of liberty. *De facto* detention asserts its relevance in the understanding of human rights' respect at the borders due to its lack of legal backing, entailing the absence of legal guarantees or possibility for judicial review of the detention.[153] Here, the fracture within the Union is even more evident as France, Portugal and Spain recognize detention while Hungary, Germany, Greece and Italy do not, hence not applying the relevant legal guarantees.[154] Such fracture is also observable in the terminology used in border context: from France often defining border detention as being "held in a waiting zone", to Netherland's "requirement to stay in a designated place" to Greece's "subjection to restriction of movement", many are the euphemism used in the discourse to avoid

[147] EASO, "*Border procedures for asylum applicants in EU+ countries*", (2020), p. 9.
[148] EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, (2020), p. 13, 201-202
[149] AIDA, "*Boundaries Of Liberty: Asylum And De Facto Detention In Europe'*, ECRE (2017), pp. 14-15
[150] FRA, *Initial-reception facilities at external borders: fundamental rights issues to consider* (2021), pp. 3-4.
[151] EPRS, *Asylum Procedures at the Border: European Implementation Assessment* (2020), pp. 16 and 76.
[152] EASO, *Border procedures for asylum applicants in EU+ countries* (2020), p. 11.
[153] ECRE, *Crossing a red line, how EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers Upon Entry: Case studies on Bulgaria, Greece, Hungary and* Italy (2019), p.7.
[154] EPRS, *Asylum Procedures at the Border: European Implementation Assessment* (2020), p. 203

defining detention as such.[155] The other side of the coin, however, is that international law usually disregards non-legal discourse in the development of a reasoning. Courts are used to take into consideration the degree of restriction imposed in order to determine if actions account to deprivation of liberty, as highlighted in *Amuur v. France* when the ECtHR concluded that cases where the individual's only chance to exit a transit zone is to also exit a country fall into the afore-mentioned category.[156][157] Borders do represent a challenging environment for the assessment of respect of human rights and legal compliance. Concerning detention, both recognized and *de facto* detention too often fail to meet the sufficient requirements of proportionality and necessity, providing less-then-adequate conditions of detention, disproportionate restrictions, absence of legal guarantees and little to no possibility for civil society to penetrate the environment and lend support.[158] However, while legal guarantees in recognized detention environment are often disregarded or lopsided, *de facto* detention goes to the further extent to negate such legal guarantees and any path to pursue them, including major violations such as not receiving detention order nor any explanation on the reasons behind it.[159]

Such patchwork of domestic policies is clearly visible in the practices applied throughout the different Member States of the European Union, as analyzed in the rest of the subchapter. Usually, the fiction of non-entry is applied when entry is refused in airports, especially in relation to the first category of border detention facilities. This is the case of Belgium, where people refused at the Brussels International Airport are subject to regimes regulating refusal of entry. While their application is being decided upon, they are subject to detention in the Caricole Centre or similar centers and are not considered being formally in the territory of the country.[160] A similar landscape is provided by Greece practices, as persons requesting international protection at the Athens International Airport are transported and held at the facility of the Police Directorate of the Athens Airport without being considered as formally "detained" due to the absence of a legally relevant decision of detention.[161] The Italian border procedure displays similar degrees of vagueness: the stay in transit areas for several days has not been considered detention due to being understood as being part of immediate return procedure. This has been the case in 2018 for around 300 persons

[155] AIDA, "*Boundaries Of Liberty: Asylum And De Facto Detention In Europe',* ECRE (2017), p. 19
[156] *Ecthr - Ilias And Ahmed V. Hungary, Application No. 47287/15, 21 November 2019,* European Database Of Asylum Law (Asylumlawdatabase.eu)
[157] *Amuur v. France* [1996], Application no. 19776/92, ECtHR
[158] EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, (2020), pp. 205
[159] AIDA, "*Boundaries Of Liberty: Asylum And De Facto Detention In Europe',* ECRE (2017), p.20
[160] EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment* (2020), p. 44,
AIDA, *Country Report: Belgium*, ECRE (2021), pp. 56-57.
[161] ECRE, *Crossing a red line, how EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers Upon Entry: Case studies on Bulgaria, Greece, Hungary and* Italy (2019), p.17.

held for several days at the airports of Rome Fiumicino and Milano Malpensa, according to the availability of flights for their countries of departure; due to the lack of legal premises these individuals have been deprived from access to relevant defense rights and from being considered under a regime of recognized detention. The Guarantor for Detained Persons, on the other hand, recognized that a *de facto detention* was occurring on such occasions due to automatic refoulement notification and an obliged stay in special rooms in the airports.[162] France has developed a regime of *zones d'attente,* waiting zones where persons can be held for up to 20 days and are acknowledged to be under a regime of deprivation of liberty. These zones have the peculiarity of not being fixed but rather mobile and temporary, requiring a minimum of 10 persons arriving and a distance of not more than 10km from the border crossed.[163] Other countries, such as Germany and Spain, apply distinct regimes which are contingent to the individual case (namely, whether the individual was refused entry or entered irregularly) and to the place of entry. In the case of Spain, "transit ad-hoc spaces" are set up in airports of the likes of Barcelona and Madrid, where individuals are held for a maximum of 10 days and while such measures do not legally account in the domestic system as detention, they are acknowledged as deprivation of liberty by authorities. On the other hand, persons entering Spain by boat or at Ceuta and Melilla's borders are automatically under detention regimes and place in the Centres for the Temporary Assistance of Foreigners situated in Cadiz, Malaga, Motril and Almeria or in police stations.[164]

The second category analyzed in relation to the restriction of movement is the one concerning first reception facilities, namely those infrastructures receiving individuals for their registration and identification; the peculiarity of these facilities is that, while not involving recognized detention, they do imply *de facto* detention. The First Reception Centre in Fylakio, Greece, hosts those entering from the Turkish land border and allows the carrying out of reception and identification procedures. The stay in the Centre entails a restriction of liberty for a maximum of 25 days and is not commonly referred to as "detention"; however, the structure is usually under scrutiny for its presumed overcrowding and for being considered a *de facto* detention system.[165] Slovenia presents a similar situation to be found in the Asylum Home in Ljubljana, where asylum seekers undergo medical and Eurodac screening processes. While the Asylum Home has historically been considered as a somehow virtuous example, being able not to restrict people for

[162] AIDA, *Country Report: Italy,* ECRE (2021), pp.73-75 and 152
[163] ECRE and AIDA, *Access to asylum and detention at France's borders* (2018), pp. 7-9 and 12-13.
[164] EPRS, *Asylum Procedures at the Border: European Implementation Assessment,* (2020), pp. 13, 16, 76, 201-203, 205, 309-310
[165] AIDA, *Country Report: Greece,* ECRE (2021), pp. 208-210.

more dan one day, from 2018 the combination of dysfunctional organization and lack of personnel has led to *de facto* detention spanning from seven to twenty days, confining individuals in restricted areas of the Home due to the high number of absconding attempts.[166] Malta and the Marsa Initial Reception Centre further serve as a prominent example as newly arrived individual are under a constant regime of *de facto* detention. The Marsa Centre operates medical examination and registration for international protection application under the domestic regime of restricting liberty for a maximum of seven days. The AIDA Country Report, however, has demonstrated how in 2020 individuals were held for 3 to 7 months, further disregarding procedural obligations.[167]

The third category of border facilities is the one of hotspots. Hotspots have been categorized as such in 2015 by the Commission's European Agenda on Migration with the purpose of helping manage the refugee crisis and to relief the pressure of migratory flows; more practically, these facilities have the role to receive, identify, register and sorting individual according to the following steps to be undertaken, namely under asylum, relocation or return procedures.[168] While established as somehow of an urgency measure and conceived to be flexible and agile in managing the migratory crisis, hotspots witness the presence of EU Agencies, from EASO and Europol to EBCG (European Border and Coast Guard Agency), and are by no means temporary. The solid character of the hotspots is exemplified by their inclusion in the foundational mission of agencies like Frontex, whose Regulation envisions hotspots as an area aimed at facing migratory challenges in cooperation with the Commission, relevant EU Agencies and Member States.[169] Although Member States are entitled to the creation of hotspots on the grounds of coping with "disproportionate migratory challenge", the only two countries which have established such facilities are Italy and Greece. Italy currently operates four hotspots: Lampedusa, Pozzallo, Taranto and Trapani, while Messina's hotspot has currently been discontinued.[170] These hotspots were not regulated under domestic law until 2018, and even the non-binding Standard Operating Procedures (SOPs) barely addressed the facilities despite it being issued in cooperation with the Commission. In 2017 the first efforts were produced by Italy through Decree Law 13/2017, which states that immigrants who irregularly cross borders or are rescued at sea are to be redirected to hotspots or related facilities for

[166] AIDA, *Country Report: Slovenia*, ECRE (2021), pp. 23-24 and 70
[167] AIDA, *Country Report: Malta*, ECRE (2021), pp. 25-26 and 81.
[168] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM (2015) 240, European Commission, 13 May 2015.
[169] Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 2019.
[170] Migreurop, *Locked up and Excluded, Informal and illegal detention in Spain, Greece, Italy and Germany* (2020), p.11

identification, registration and for receiving information on the relevant procedures.[171] Due to SOPs weak legal basis on the matter of detaining immigrants during the afore-mentioned procedures, Italian hotspots enforced *de facto* detention for days and weeks until the 2018 reform.[172]

Following Decree Law 113/2018, detention in hotspots was finally backed by the necessary legal basis by stating that hotspots can set up facilities to detain persons for identification reasons for a maximum of 30 days;[173] the legal background was not able, however, to bridge the gap between theory and practice as many civil society organizations pointed out practices of arbitrary detention. Several reports did indeed highlight how detention was enforced without a written act, any information on maximum detention periods or other relevant pieces of information; hence, the lack of judicial authority and the discontinuity vis-à-vis the relevant provisions, the *de facto* detention is still ongoing. The Guarantor for Detained Persons did further subscribe to the critiques addressing the Italian hotspot system, as in his opinion on Decree Law 130/2020 he outlined how the lack of oversight on detention condition, of regulation of detention, of proportionality of the measures and the inadequacy of infrastructures accounted for an overall sub-standard enforcement of human rights at border facilities.[174] Furthermore, the assessment of individual cases, aiming at sorting them in order to be transferred either to reception centers or pre-removal detention centers, is often summary, based on the sole nationality of the individual or through insufficient questionnaires or orally, resulting in classifying inappropriately excessive amounts of migrants as economic ones, entailing an automatic removal decision.[175]

The situation acquires an even more critical dimension as transfer is subject to extreme delays, causing individuals to be held at the hotspots for weeks and months. The lack of legal basis causes the hotspots to develop different internal regulations: while Taranto's regulation allows individuals to leave during the day (which still amounts to partial deprivation of liberty, constraining them to return at night), Lampedusa does not have any regulation and the military staff does not allow exit under any circumstances.[176] In conclusion, such arbitrary restrictions of movement do not only lack uniformity, homogeneity, proportionality and legal guarantees, but they even fail to comply with national and supranational layers of law, hence not being justified as lawful measures.

[171] Article 10-ter TUI, inserted by Decree Law 13/2017.
[172] AIDA, *Country Report: Italy,* ECRE (2021), p. 117
[173] Article 6(3-bis) Reception Decree, inserted by Article 3 Decree Law 113/2018 and L 132/2018.
[174] AIDA, *Country Report: Italy,* ECRE (2021), p. 147
[175] EuroMed Rights, *The new Pact on Migration and Asylum* (2020), p. 13.
[176] AIDA, *Country Report: Italy,* ECRE (2021), p. 148

Greece, on the other hand, currently operates five hotspots or Reception and Identification Centres (RICs): Lesvos, Chios, Samos, Leros and Kos. These RICs display evident critical issues, namely revolving around a serious issue of overcrowding: the combined capacity of the hotspots is 6.095 individuals, while as of September 2020 23.269 individuals were held in these structures, causing a steep degradation of material conditions.[177] The already precarious conditions were exacerbated by the destruction of the Lesvos RIC due to a fire in September 2020, which led to the relocation on a former military shooting site where there is no running water, inadequate shelter from weather conditions and the soil is contaminated by lead.[178] While the RICs were originally conceived in compliance with the registration, screening and assistance goals set out by the European Union, the EU-Turkey Statement of March 2016 converted the centers into *de facto* detention facilities, subjecting individuals to restriction of liberty for a maximum of 25 days.[179]

International law does not, as already discussed, rely on domestic definition of deprivation of liberty; hence, the lack of legal basis, the automatic imposition of the measure and the absence of legal remedy to challenge the deprivation of freedom accounts for *de facto* detention under international law. While civil society pressure was able to compel the authorities to provide for speed-track procedures, the principle of geographical restriction came into play by obliging individuals to remain on the island of registration. Due to administrative delays, such stay can last for months during which migrants and refugees are held in the RICs and subject to inadequate structures, appalling health condition and lack of care.[180] Such measure is in stark contrast with Art. 26 of the RCD, due to the lack of judicial paths to challenge the detention, and its overall lawfulness is extremely questionable in light of the absence of a decision specifically considering the individual case and the lack of periodic reassessment of the case. In 2019, the Greek government declared that the RICs were to be replaced with other facilities; in 2021, Samos, Leros and Kos' RICs have been transformed into Closed Controlled Access Centers of Islands (CCACI)[181], with Lesvos and Chios' RICs to be converted into CCACIs in 2022. While the overall capacity is expected to increase thanks to these new facilities, leading to an at-least-slight improvement in living conditions, the Greek Council of Refugees highlighted the prison-like conditions, the impossibility of individuals to leave the center for more than two months, and the

[177] EPRS, *Hotspots at EU external border* (2020)
[178] Human Rights Watch, *'Greece: Lead Contamination Threat To Migrants Unresolved'* (Human Rights Watch, 2021) https://www.hrw.org/news/2021/04/01/greece-lead-contamination-threat-migrants-unresolved
[179] European Council, 'EU-Turkey Statement' (2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>
[180] EPRS, *Hotspots at EU external border* (2020), pp. 5-6
[181] Greek Joint Ministerial Decision 25.0 / 466733/15-12-2021

lack of adequate access to healthcare, accounting for both a *de facto* detention and a violation of human rights.[182]

The main takeaway from this analysis is that Member States too often indulge in non-compliance with the principles provided for by international law, general principles of law and European law, exploiting caveats to escape legal accountability and responsibility and to bend rules on border and migration control to what suits a country best. The very existence of the framework of *de facto* detention accounts both for a violation of human rights and the empirical manifestation of the will of States not to recognize the relevant legal safeguards, from adequate housing to possibility to challenge the detention, for migrants and asylum-seekers. By not recognizing the "detainee" status for individuals, they are stripped from their rights stemming from the multilayered body of human rights, allowing for questionable practices to take place under the shelter of such individuals not being protected by any obligation. Hence, Member States avoid accountability and responsibility at the roots by adopting confusing measures and fostering vague narratives on the matter, in order to acquire and maintain higher degrees of maneuver for a flexibility which suits more the operational direction of the State. Furthermore, also in cases in which such legal safeguards are in theory provided and observed, meaning through the establishment of a clear "detainee" status, in practice such measures are not enforced: an emblematic case is the one of, among others, Italy, where automatic refoulement is too often applied without the legal safeguard of an individual assessment of threats, risks and vulnerabilities. Similarly, the legal fiction of non-entry is a tool used in the perspective of externalization and extraterritorialization of borders, as to consider border areas and infrastructures, such as airports, as a legally *sui generis* territorial dimension where human rights become blurred and is easier to circumnavigate the obligations Member States are subject to.

The development of dual/multiple approaches at the borders to differentiate border control procedures is extremely revealing of the extent of Member States' effort vis-à-vis preserving a gamut of options in dealing with fluctuating migratory flows, along with the possibility of allowing necessary migratory flows to enter and to refuse migrants on grounds which do not suit the operational, political and economic orientation of the country, allowing for an effective control of the number of individuals entering at the country's terms. Comparably, while it holds unarguable that some areas do indeed face more intense migratory flows and call for a better and more comprehensive collective management, the creation of "hotspots" is also undeniably related to

[182] Decision No AP 36 /17-12-2021 [2021], Administrative Court of Syros

situations in which claims of human rights breaches have multiplied over the years. Being the first line, hotspots are necessarily infused with a type of operational effectiveness which does not necessarily entail human rights' protection effectiveness, meaning that countries devote efforts in the control of migratory flows at the expenses of migrants' rights more easily than in other, less pressured, instances. The already, at least in the first years, shaky grounding of hotspots allowed for the proliferation of *de facto* detention practices, justified under the grounds of "extreme pressure" or for the sake of adjusting to praxis. Nonetheless, hotspots do honor their name not only as first receiving ends of flows, but also as central areas of concerns for human rights violation. Due to this consideration, the case study cannot but reflect on the events taking place in a hotspot and the related border, the one of Aegean islands vis-à-vis the Greek-Turkish border.

4. *Contextualization of the case study: Greece and Frontex vis-à-vis the Greek-Turkish border*

Before practically diving into the case study, it is important to outline a few preliminary considerations in order to set the stage. The case study will discuss practices fostered and adopted by both the Greek government and Frontex, which is to be also understood as an extension of the European Union in light of its European Agency status, vis-à-vis migratory flows across the Greek-Turkish border, both by sea and land. The study will encompass several chronological references, although the main focus will revolve around, but not limited to, 2020. The explanation for the chosen timeframe is mainly due to sudden fluctuations in migratory flows at the Greek-Turkish border: while the border witnessed incredibly high levels of pressure due to refugees fleeing the Syrian civil war, Covid suddenly halted these flows creating a practices' havoc which ultimately resulted in several wrongdoings of both Greece and Frontex towards migrants and asylum-seekers. The following subchapters will, hence, deal with the other dimensions of context of the Greek-Turkish border and its related border management operations, discussing first Frontex and its operational peculiarities and secondly the Greek-Turkish border setting.

a. Frontex framework: operational structure and liability prospects

One of the main objectives and purposes of the European Union's vision is operational cooperation: setting up mechanisms for efficiently and effectively implementing the rules and provisions developed on shared grounds. The external borders of the EU represent a valid example for such operational cooperation, to the point that in 2004 the Council Regulation 2007/2004 established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; subsequently, Regulation 2016/1624 of 2016 repealed the previous Council regulation establishing the European Border and Coast Guard Agency, Frontex. The role of the Agency has always been to assist the Member States in managing the EU's external borders, thus maintaining the States' primary responsibility on border control issues. Frontex's authority, as for all the European Union's agencies, stems from the delegation of authority and competences from Member States. While Frontex possess a legal personality and acts autonomously, it is still constrained to act under the EU's objectives through two main tools: the

control of its budget and the control of its interest. Budget management has been clearly exemplified by the role France, Finland, the Netherlands, Spain, Portugal and Iceland (not a EU Member State) played in the financing of the Triton Operation of 2014, conceived with the aim of supporting Italy's efforts in the Mediterranean with an expected cost of € 2.9 millions per month; the support of the afore mentioned states has been conditional for the operation to take place and so is for any other venture Frontex would decide to pursue. Budget control is thus strictly connected to interest control in the realm of joint operations, meaning those operations undertaken jointly by Frontex Agency and Member State(s), in the sense that political interests, stability and influences are necessary to embark in such operations and are fundamental for providing a positive outcome.[183] Frontex enjoys the maximum levels of legal personality achievable in each Member State's law, and is represented by an Executive Director. The Executive Director is appointed following the proposal of the European Commission by the Management Board, which is composed by two representatives of the Commission and one representative, well versed in matter of border control, from each Member State.[184] It is inevitable, following these considerations on the composition and structure of Frontex, that the autonomy and independence of the Agency might be less substantial than expected, as the Commission holds both material control and informal influence on Frontex.[185]

Following the progressively increasing pressure at the borders of the European Union, a body of EU secondary law has been gradually developed to cope with the matter. In particular, when looking at Frontex operations, more specifically Frontex's joint operations at the EU external borders, the relevant legal instruments are several: the Schengen Borders Code, the Frontex Regulation, the External Sea Borders Regulation and the Practical Handbook for Border Guards, all strongly connected to each other. The Frontex Regulation clearly states in Article 1(2) that the Agency's duty is to fulfill and facilitate the enforcement of the Schengen Borders Code, facilitating coordination and achieving efficient and satisfactory levels of external borders' surveillance. Furthermore, Art. 3b(3) affirms the duty of border guards to use their powers with the purpose of fostering the SBC, and in Art.3(3) Frontex is required to follow SBC guidelines for evaluation of its joint operations. Similarly, the External Sea Border Regulation polices on border surveillance and related operations, meaning the inclusion of search and rescue operation, the extent of affirming the

[183] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Article 105
[184] Chiti, E., '*An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*' (2009) 46 Common Market Law Review 1395, 1419.
[185] Carrera, S., '*The EU Border Management Strategy – Frontex and the Challenges of Irregular Migration in the Canary Islands'*, CEPS Working Document No. 261/March 2007, 13.

necessity for Frontex operations to respect the SBC and to pursue all objectives with due respect to the principle of *non-refoulement*.[186] Finally, the Schengen Handbook aims at providing rules, standards and best practices on the functioning of border control and border guards in order to provide uniformity and compliance. As the Sea External Borders Regulation has been formally adopted in 2014 (previously the Sea External Borders Decision was the relevant document for the matter, before being repealed in 2012 by the CJEU),[187] it is to be considered as equally inspired by the SBC and the Schengen Handbook, as the bodies and agencies carrying out actions and operations in the name of Member States, especially in the environment of border controls, always need to comply with both the SBC and the Handbook.

All these interconnected instruments of secondary law do provide prohibition of refoulement, thus are relevant for the case of Frontex and its joint operations. Article 3(b) of the SBC clearly states that the practice of *non-refoulement* shall be avoided in any case provided for by the Code; on the other hand, while Art. 4(3) of the same Code allows Member States to implement sanctions for illegal crossing of the States' borders, such sanctions shall not impair whatsoever the right of the individuals to *non-refoulement.* Additionally, being the Schengen Border Code a source of secondary legislation, it shall always comply with the relevant primary legislation, namely Art. 78 TFEU, Art. 19 ECHR and the general principles of EU Law. The External Border Sea Regulations further reflects the general secondary law attitude towards the principle of *non-refoulement* in Article 4 by stating that any operation carried out under the scope of the Regulation, including operations of disembark, shall affect the principle. The Regulation positively differs from the homonym repealed Decision by providing a wide definition related to the principle, thus strengthening the level of protection of human rights. The *Hirsi* case further developed on the provisions of the External Border Sea Regulation: similarly to what the Schengen Handbook regulates on the safeguards on *non-refoulement*, the ECtHR ruled on the case of individuals refouled to Libyan authorities by stating that such individuals should be given the possibility to plead their case, explain their reasons for which their forced return would be a violation of the principle.[188] The Schengen Handbook is therein referred to in the capacity in which it states that such procedural rights shall be guaranteed throughout any operation carried out at the borders,

[186] Regulation No 656/2014 of the European Parliament and of the European Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Art. 10

[187] *European Parliament v. Council of the European Union*, Opinion of Advocate General Mengozzi delivered on 18 April 2012, Case C-490/10, CJEU

[188] *Hirsi Jamaa and Others v. Italy* [2012], Application No. 27765/09, ECtHR

independently of any other circumstance. In conclusion, EU secondary legislation proves valid, effective and enforceable in any case in compliance with primary sources of law, thus serving as reinforcing mechanisms for Frontex operations at the borders.

Joint operations are particularly relevant for the matters discussed in this dissertation, as they provide several grounds for the breach of fundamental rights due to their nature, their conception and their enforcement. These operations prove relevant for the case at hand from the first step, the development of the operational plan, to the execution by Frontex assets, which will be evaluated in the second part of the case study. In order to grasp the full picture, however, some considerations shall be provided in advance. Joint operations can be initiated by both Member States, which propose the project to the Agency for evaluation, and Frontex itself in agreement with the States concerned and the host Member State(s), meaning the State in which the operation is set to initiate and/or take place. In general, not all the operations undertaken by Frontex risk interacting with the principle of *non-refoulement*; the Sea External Border Regulation outlines three circumstances that could lead to a breach of the principle: the interception, modification of a vessel's course and the escorting of it, the escort of a ship to a third country, and turning over a ship or the individuals on the vessel to third country's authorities.[189]

Interception at sea refers to actions that interdicts a vessel from proceeding towards the territory of any nation, and it may occur under a variety of legal systems. First, it may occur in a State's territorial waters, hence falling under the State's complete authority to intercept vessels, except for cases of innocent passage right. In Frontex's joint operations, the authorization for interception is only required when the interception occurs in the territorial seas of a Member State that is not participating in the operation. The second case refers to the possibility of interception in the contiguous zone, as coastal Member States can still exercise control over vessels arriving from high seas towards their lands with the aim of preventing the violation of border restrictions and regimes. Thirdly, the grounds for allowing interception can even reach the extent of validating high seas operations; however, only cases in which sufficient and reasonable grounds are presented to assume that a vessel lack nationality or when there are standing agreements between Member States and a third country in case such vessel flies the third country's flag. Finally, interceptions might occur in the territorial seas of a third nation as in the case of "Hera 2006" joint operations,

[189] Regulation No 656/2014 of the European Parliament and of the European Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

concerning surveillance operations along the Canary Islands and West Africa. The operation was carried out in compliance of the agreements developed between Spain, Senegal and Mauritania for Frontex to be able to operate in the maritime jurisdiction of these nations. The first of the three circumstances highlighted by the Sea External Border Regulation as likely to breach the principle of *non-refoulement*, namely the interception and modification of a vessel's course, does not implicitly violate the principle. The process of escorting the vessel into open water does not necessarily entail the exposure of the individuals aboard to the risk of mistreatment or persecution by third countries. The risk of incurring into a breach of the *non-refoulement* principle becomes however present when the vessel is by any means compelled to return to a location where such persecution would take place or where the individuals on board would be indirectly refouled.[190] On the other hand, the second and third possibilities previously mentioned, namely directing a ship to a third country and directing it and/or the individuals on board in the hands of the authorities of a third country, might easily represent a breach of the *non-refoulement* principle due to the process ending in the juridical sphere of third countries, which might represent a risk for the individuals in consideration. As defined by *Sale v. Haitian Centers Council*, the *Hirsi* case and the *Medvedyev* case, jurisdiction is fundamental in assessing the responsibility of the Agency or, in joint operations, of the States.[191] For the matters at hand, jurisdiction is exercised through full control over the vessel or the people on board; hence, in order to assess the violation of the *non-refoulement* principle in cases of conducting vessels towards third countries and their authorities, jurisdiction shall also be assessed.

The assessment by the ECtHR was clear-cut in the *Medvedyev* case, as France was recognized to having exercised full control over the vessel and its crew, and while the measures were allegedly "relaxed" throughout the process, this still does not constitute a mitigating factor for establishing jurisdiction. On the other hand, escorting a vessel represents a less sharp distinction, being it particularly related to the degree of physical contact involved with the vessel and the individuals on board. The representative case is the one of *Marine I*, as the operation entailed the action of towing the vessel towards the African coast. Hence, the very action of not merely escorting, entailing none to irrelevant physical contact, but exercising physical control on the vessel was established as being a relevant factor to consider when deliberating on jurisdiction.[192] Similarly, in the *Hirsi* case, the ECtHR clearly affirmed that "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants

[190] Den Heijer, M., '*Europe Beyond Its Borders: Refugee and Human Rights Protection in Ext raterritorial Migration Control*' in Ryan, B., and Mitsilegas V. (eds.)
[191] *Medvedyev and Others v. France* [2010], Application no. 3394/03, ECtHR (GC)
[192] *J.H.A. v. Spain* [2008], CAT/C/41/D/323/2007, Committee Against Torture

were under the continuous and exclusive de jure and de facto control of the Italian authorities";[193] hence, due to the capacity of the Italian forces to dispose of the individuals and hand them over to the Libyan authorities presupposes the exercise of control.[194]

International and European law consider the host Member State as responsible for possible violation of the *non-refoulement* principle throughout the joint operations it hosts. The host Member State can thus be jointly held accountable for breaches of the principles carried out by guest officers seconded by other Member States as they are occurring under its responsibility. Similarly, when a breach of the principle has been recognized in the process of joint operations, it is also possible to assess if, and to which degree, the EU is complicitly responsible and has derivative responsibility through Frontex actions. Two are the requirements needed for the EU to be considered as responsible for a violation of the principle through Frontex: the presence of a clear link between the refoulement action and the operation coordination, meaning Frontex actions, and the knowledge that Frontex's action contributed to the refoulement. For what concerns the first requirement, there are no quantitative degrees limiting the definition of a link: it is not necessary for Frontex's coordination activities to be indispensable to the refoulement action, as a simple contribution is sufficient. The creation of an operational plan at the moment of conceiving the joint operation represents the very moment in which the legal connection can be made: when the Executive Director, the host Member State and the participating Member States of a joint operation create the mission and execution of operation, oftentimes third countries' details and names are included for the sake of planning the interception at its best. Frontex's role concerns the operational coordination between Member States and non-Member States on border control; hence, two scenarios are easily possible. If the operational plan presents, includes or suggests the undertaking of the two afore-mentioned risky actions, meaning escorting the vessel and the individuals on board to a third country or bringing them into the hands of third countries' authorities, the risk of incurring into breaching the *non-refoulement* principle is possible.

Similarly, and in connection to the first scenario, if the name of countries which are known not to respect human rights, that might persecute, mistreat, and torture individuals, or that engage in activities of indirect refoulement, are present in the plan in any relevant capacity (meaning that such countries are the destination of vessel escorting), once again the legal link is established. The second requirement, on the other hand, proves trickier to demonstrate. The operational plan shall

[193] *Hirsi Jamaa and Others v. Italy* [2012], Application No. 27765/09, ECtHR
[194] Ibidem.

prove that Frontex had prior knowledge that its contribution to coordinating activities of the countries involved might entail committing an act of refoulement; sometimes the dots are harder to connect in this respect, especially in light of the ambiguity revolving around the operational plan and the constant attitude of Frontex to avoid disclosing any information on the matter. Joint actions conducted in the territorial seas of a third nation need a different evaluation. As previously mentioned, such operations need an agreement between a Member State and the third nation in whose territorial seas the operation occurs. Following these arrangements, representative staff from the third nation are present aboard the vessel of the Member State and are responsible for determining the repatriation of intercepted individuals. Operation Hera represents a perfect example; the operation was conducted in the territorial seas of Senegal and Mauritania with a law-enforcement staff member of these two countries being present on board of the Spanish ships and in charge for the direction of the boats to be intercepted.[195] The presence of the officer in itself represents to an extent the breaking of the chain of responsibility, as the accountability for the breach of the *non-refoulement* principle would fall in her hands and not in the ones of the host Member State. It is indeed true that in some cases third countries' officials are to be considered fully independent from the will of the host Member State, as the decisions and the exercise of law-enforcement by such third countries is basically an exercise of their governmental jurisdiction. This argument does, however, encounter two main limitations. The first revolves around the fact that in the majority of the cases the objectives regarding the refoulment activities are jointly decided, meaning that it would be extremely rare for Frontex and Member States to uphold decisions which clearly infringe or contrast theirs and the Union's interests; thus, the responsibility would be at least shared. Secondly, the independent decision by a third-country official does not exclude the role Frontex and the Member States have played in assisting the third country in the actions of intercepting and diverting vessels, hence applying for both the actors a derivative responsibility for breaches of the principle of *non-refoulement.*[196]

Joint operations are not solely carried out on seas; joint actions on land are generally implemented in the EU territory with the aim of employing guest officers and technical means for the purpose of tackling illegal migration. The border officers are employed in the operations of checking the borders and implementing surveillance, meaning ensuring that individuals are allowed to enter the territory of a Member States and that no individual circumvents border checks by choking the crossing points. Border officers are allowed and in charge of lawfully refusing access to

[195] Frontex, '*Hera 2008 and Nautilus 2008 Statistic'*, available at: https://frontex.europa.eu/media-centre/news/news-release/hera-2008-and-nautilus-2008-statistics-oP7kLN
[196] Den Heijer, M., (2012) *Europe and Extraterritorial Asylum*, Hart Publishing, p. 257

the territory of Member States to third country individuals which do not satisfy the necessary requirements for entry, be them related to documents or else as in cases of public security. Such border check and surveillance imply the apprehension of irregularly crossing individuals coming from third countries to the territory of Member States; the only exception for which the lawfulness of the right of border guards to refuse access is denied is in cases of asylum requests. The trigger of the procedures for international protection at the borders fall under the jurisdiction of the host Member States; thus, returning an individual requesting international protection accounts for a violation of the principle of *non-refoulement* by the Member State. Similarly, guest officers coming from Member States different than the host Member State can still be held accountable for violations of the principle in case of having participated in or supported the operations of refoulement.

Although such joint operations on land are typically performed at the internal borders of the EU, two are the exceptions to this generally shared conception. The first exception revolves around the development of smart borders, meaning the use of technologies such as radars and thermo-visors. These technologies are physically applied in the territory of EU Member States, but are indeed used to acquire relevant information on individuals who are still approaching at the borders and are currently in the territory of a third country. The second exception stems from a more fictitious, but still not impossible to conceive as a future possibility, scenario. The case would concern the deployment of border officers from EU Member States in a third country national territory, as part of a joint operation from Frontex and Member States in order to enforce border surveillance and to strengthen such borders whose porosity could lead to the trespassing and illegal entry of third country nationals. This possibility would entail for Frontex and for EU Member States the exercise of law-enforcement powers and tools in a third country, via previous agreement or consent. While this scenario remains purely hypothetical at the moment, as confirmed by the former head of the Land Border Operation Division of Frontex, the practice of Frontex has somehow proved different behavior by the Agency. In the case of the *European Roma Rights Centre*,[197] British border officers were deployed at the Airport of Prague in order to check passengers and the documentation necessary in order to enter the territory of the United Kingdom. The relevant takeaway of the case is that at the time the Czech Republic was still not a member of the European Union, and the presence of UK border officers was allowed by the signing of a bilateral agreement between the UK and Czech Republic. Hence, there is both practice and case law backing the

[197] *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003], England and Wales Court of Appeal, Civil Division, and *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004], Opinion of the Lords of Appeal, United Kingdom House of Lords.

possibility for Member States to conclude agreements with third countries, a possibility which would in turn open the door for Frontex to endorse and participate in these agreements. The Frontex Regulation allows the Agency to deploy border guards in third countries in the framework of international cooperation liaisons between Member States and non-Member States;[198] through this possibility, Frontex could be empowered to participate and launch joint operations with the support of Member States in third countries in order to prevent the penetration of illegal migrants in the territory of Member States according to concluded agreements.[199]

A peculiar role concerning potential breaches of the *non-refoulement* principle is played by the afore-mentioned technical means. Once the approach of individuals from a third country to the territory of a Member States is tracked and documented, and relevant pieces of information are gathered, such information can be passed to both third country's authorities and other relevant authorities, e.g., other Member States' authorities engaged in joint operations or continued surveillance at the borders. The role of Frontex here applies consistently with its principles: exercising the power related to coordinating joint operations also means coordinating the transmission of information. Such transmission of information might indeed represent a violation of the principle of *non-refoulement*; the breach is not inherent and implicit, as the apprehension of third country individual does not necessarily entail refoulement and so the use of technical means cannot account as having supported such breach, but it shall be rather understood through the lenses of two criteria for derivative responsibility. These criteria apply both to Member States and to Frontex exercising its power through the authority of the European Union, and concern the presence of "(1) a clear link between the transmission of information about the third-country nationals attempting to cross the EU's borders and the refoulement committed by the third country A; and (2) that refoulement is committed because of the contribution of the transmission of the information.".[200] Accordingly, in order to ascertain whether any degree of derivative responsibility is present it is needed to assess if the country or Frontex have established a practice (or are known

[198] Council Regulation (EC) 377/2004 of 19 February 2004 on the creation of an immigration liaison officer network OJ 2004 No. L64, p. 1.
[199] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union OJ 2004 No. L349, p. 1 as amended by Regulation (EC) 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams
[200] Mungianu, R. "*The EU, Frontex and Non-Refoulement: Constructing Scenarios*." In *Frontex and Non-Refoulement: The International Responsibility of the EU*, 205–21. Cambridge Studies in European Law and Policy. Cambridge: Cambridge University Press, 2016.

to) of apprehending individuals after the reception of the information in order to refoul them, and it the Member State or the Agency is in any capacity aware of the practice.[201]

Throughout the totality of considerations produced along this subchapter, jurisdiction has always served as the leitmotif of accountability. For this very reason, it is fundamental to understand how jurisdiction can in some specific cases be triggered in third country territories. The ECtHR case law provides a clear definition of jurisdictional link, especially as defined in the *Al-Skeini* case. The case concerned the relatives of six Iraqi citizens murdered throughout security operations carried out by British authorities. On 20 March 2003, military forces conjoined in a coalition commanded by the US and including a significant contingent from the UK invaded Iraq. The city of Basrah was successfully seized by British forces in early April, while the operations were (mostly) concluded with an announcement made on May, 1st 2003. One week later, the Coalition Provisional Authority (CPA) was created as a segmented entity, divided in zones with the UK acquiring responsibility over the southern portion of the country and with UK troops being installed in the zone. The relatives of the six applicants were murdered between May and November 2003, either killed by British troops during raids, assaulted and thrown into a river or being held in custody by British forces and being suffocated. The UK Secretary of State for Defence actively decided, in 2004, not to investigate the fatalities, not to accept any responsibility for the murders and not to give any reasonable compensation. Hence, the relatives of the killed civilians sought rightful reparations under Art. 2 and 3 ECHR, respectively concerning the right to life and the prohibition of torture (as in the case of the suffocated individual).

The Divisional Court rejected all the claims excepted the one related to torture; the other applicants appealed the decision and the Secretary of State cross-appealed the accepted claim, a procedure which in 2007 led the applicants to finally file an application to ECtHR for a breach of Art. 2 ECHR. The ECtHR ruled against the UK government in merit of the latter's affirmation that at the time of the killings the authority exercised was not the sovereign authority of the UK but the international authority of the Multi National Force, thus the UK as a sovereign country could not be considered responsible for any involvement in the killings. The issue of attribution, closely linked to the one of jurisdiction, was assessed differently by the ECtHR. As the coalition was able to seize the rule from the Ba'ath regime in 2003, the UK took on itself the exercise of former Iraqi public powers, hence practically assuming the capacity of a sovereign government and performing actions typical of sovereign governments such as the maintenance of order and security in the South-eastern

[201] *M.S.S v. Belgium and Greece* [2011], Application No. 30696/09, ECtHR

region.[202] This formal and effective control was held by the UK government until the Interim Government assumed the function in June 2004; hence, the ECtHR recognized that the UK did indeed have jurisdiction over the applicants' relative at the time of their death, which occurred throughout the months in which the UK was formally in power in 2003.[203] This judgment allowed the ECtHR case law to provide the understanding of jurisdiction as needing a State and/or its agents to be required to exercise public powers and sufficient control over the individuals. The ruling further affirmed the necessity for the spatial dimension to be accounted for, a conception that was later surpassed by the *Hassan* case, which on the other hand reinforced the applicability of jurisdiction in cases where States and related agencies are exercising a sufficient degree of control over the individuals.[204]

For what concerns the aim of this piece of analysis, namely to understand whether the presence and actions of Frontex officials deployed in third countries in the framework of joint operations, international law reinforces what already states by the case law of the ECtHR. The Human Rights Committee considered that jurisdiction over violations of the principle of *non-refoulement*, and as an extension all the breaches of human rights, can be established for a State wherever the breach occurs, i.e. also in the territory of third countries, and in presence of a clear relationship between the individual and the State. In the *De Lopez* case, where such definition was established for the Human Rights Committee, the threshold for considering responsibility was set at the exercise of physical control.[205] This approach has also been replicated by the Inter-American Commission on Human Rights, which recognized the non-applicability of territorial restrictions to Art. 33 of the 1951 Refugee Convention.[206] Overall, the shared understanding is that the principle of *non-refoulement* is not affected by territorial restriction, as jurisdiction still can be established as long as agents and officers belonging to States or agencies exercise a sufficient degree of control over individuals. In the case of Frontex, this would more specifically mean that in light of any operation taking place in third countries, not only in the pseudo-fictitious scenario of Frontex launching joint operations in third countries but also in the occasions where Member States engage in joint operations in agreement with third countries, the Agency could still be held accountable in

[202] *Al-Skeini and Others v. the United Kingdom* [2011, Application No. 55721/07, ECtHR
[203] European Database of Asylum Law, *ECtHR – Al-Skeini and Others v. the United Kingdom*
[204] *Hassan v. United Kingdom* [2014], Application No. 29750/09, ECtHR
[205] *Delia Saldias de Lopez v. Uruguay*, [1981], CCPR/C/13/D/52/1979 , UN Human Rights Committee, para 12.2
[206] *Haitian Centre for Human Rights v. United States of America*, [1997], Decision of the Commission as to the Merits of the Case 10-675, para 157

case any of the afore-mentioned actions which would in any case lead to a breach of the *non-refoulement* principle, even if in the territory of third countries.[207]

This subparagraph did thus aim at discerning the features of Frontex, from its operational structure to the legal implications it might incur into had the intention of laying the ground for understanding the extent to which Frontex is and might be involved in the matters discussed in this dissertation. Another purpose was to outline the fact that Frontex is not an agency that does not co-exist with other authorities, both European and national, nor enjoys from unreasonable degrees of independence from EU. By highlighting both the idea of budget and interest control, especially in the latter instance, it is possible to make a clear-cut connection between Frontex and the EU, resulting in the acknowledgment that the EU institutions do always have, to an extent, exercise control over Frontex, thus being accountable and responsible for actions carried out by the agency under the mandate and the scope provided for by the European Union. While rather than independence, political and legal scholars have rather adopted the notion of "relative autonomy" for European Union's agencies, it is without a doubt that Frontex does enjoy some autonomy. At the same time, however, this autonomy is somehow hindered by the necessity for Frontex's operation to be "interesting", in the sense that Member States shall be interested in pursuing such operations, both on joint operations and on more one-sided instances. This inevitably leads to Frontex acting under EU's orders, but not necessarily complying with the European legal framework. In the rest of the subchapter some cases in which Frontex is highly at risk of infringing rules of international and EU law, as in the case of the principle of *non-refoulement*, have been outlined, and while some actions carried out by Frontex are under blurring responsibility and accountability mechanisms, also because the borders' nature further obstacles data gathering and effective evidence consideration, some of the actions undertaken by Frontex that will be analyzed in the case study do undoubtedly provide for a breach of the provisions considered throughout the dissertation.

b. The Greek border in light of the EU-Turkey Statement

Historically, the Greek-Turkish border has held an extremely prominent role in the crossroads connecting the world to the European Union. Throughout the last decade around 1.2

[207] Mungianu, R. "*The EU, Frontex and Non-Refoulement: Constructing Scenarios*." In *Frontex and Non-Refoulement: The International Responsibility of the EU*, 205–21. Cambridge Studies in European Law and Policy. Cambridge: Cambridge University Press, 2016.

million individuals have traveled the route towards Greece, individuals whose profile had a mixed status until 2014, when Syrian refugees fleeing the civil war started attempting to cross the border, paving the way for refugees originating from Afghanistan, Iran, Iraq and Somalia aiming at entering Greek territory and accounting for more than 90% of the overall arrivals in the country through land,[208] and 89% of the total figure of arrivals through sea.[209] The role of Greece vis-à-vis border management and migratory flows has been affected by two main events: the wall on the Greek-Turkish border in 2012 and the 2016 EU-Turkey Statement. Migrants were accustomed at crossing the border in the region of Evros and through the homonym river, creating a mounting traffic of individuals which only in 2010 and 2011 amounted for more than 100.000 individuals. On the other hand, the sea border witnessed an extremely more modest number of entries, for a total of around 6.000 in the same time frame. The increasing pressure at the land border prompted Greece to create a fence along the border; the result of this intervention led the land border to witness a steep decrease (95%) of entries, while triggered an increase in entries of 53% by sea in 2013.[210] While the following years were characterized by fluctuating migratory flows, the peak of arrivals of 2015 prompted the EU-Turkey Statement of 2016 to be signed in order to put an end to irregular migration into the European through the Turkish route, with the consequence of establishing Turkey as a "safe third country", a concept which will be analyzed more in detail in the following lines. Greece stands out as a country of particular interest as being one of the main entry points in the EU transformed it into a complex reality where multiple actors interplay on border management and control tasks. Frontex is particularly involved in the operations of border management and operational support, aiding national authorities in the exercise of all powers related to border control.[211]

The role of Greece as a first line vis-à-vis migration flows allowed for allegation of pushbacks, and in general of breaches of human rights, among which the principle of *non-refoulement*, to proliferate.[212] Multiple incidents have been reported concerning cases of disembarking individuals and refouling them, intercepting vessels, arbitrary detention and non-

[208] UNHCR (2015), '*Nationality of Arrivals to Greece, Italy and Spain, January 2015– December 2015'.*
[209] UNHCR (2016a), '*Refugees & Migrants Sea Arrivals in Europe – Monthly Data Update: December 2016'.*
[210] Hellenic Police, '*Statistic Data on Illegal Immigration, Immigrants and Traffickers Arrested by for Illegal Entry and Residence Per Nationality*: 2010–2013', available at: http://www.astynomia.gr/index.php?option=ozo_content&perform=view&id=24727&Itemid=73&lang=EN
[211] Carrera, S. & Stefan, M. (2018), *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* Brussels: Centre for European Policy Studies (CEPS)
[212] Gayle, E. (2015), '*Greece's Illegal Push Backs of Asylum Boats Puts Lives at Risk, Says Amnesty International*', Euronews, 25 August, available at: www.euronews.com/2015/08/25/greece-routinely-pushes-back-immigrant-boats-out-to-sea-says-amnesty

consideration of applications for international protection both by Greek authorities and Frontex,[213] making Greece's case a particularly interesting one. As 2015 became a year with an unparalleled number of entries in the country (a symbolic figure: of the 1.015.000 individuals entering the EU in 2015, more than 856.000 accessed the territory through the Greek Aegean islands),[214] the Union decided to adopt more stringent border strategies, developing the EU-Turkey Statement which was announced on 18 March 2016 by the relevant stakeholders. The Statement encompassed three main relevant conclusions in the light of the externalization of the borders framework which was previously mentioned. It is therein provided that any irregular migrants coming from Turkey to Greece will be immediately returned to Turkey, with the latter committing to tackling illegal routes for migrants to access the EU.[215] Furthermore, for any Syrian individual being returned under this Statement, thus considering the return to Turkey from the Greek islands, the EU will receive a Syrian refugee in its territory. These procedures were enforced under the paramount framework of the Statement being a "temporary measure", to be substituted by the Voluntary Humanitarian Admission Scheme once the migratory crisis was to be deemed as sufficiently under control by EU authorities.

More practically, Turkey started enjoying a semi-official "safe third country", later unilaterally recognized as such by the Greek government, in order for the Statement not to infringe any international obligation related to the principle of *non-refoulement*. For a country to acquire the status of "safe third country, the following criteria shall be respected cumulatively: individuals' existence is not at risk on grounds of race, nationality, religion or for the belonging to specific groups, the country respects the *non-refoulement* principle both in its direct and indirect form, individuals are not subject to risk of serious harm, and the status of refugee exists and is legally safeguarded. Turkey's fulfillment of these criteria stands in quite a dubious status. For what concerns non-discrimination, Turkey does not provide for the rights and protections enshrined in the 1951 Refugee Convention; in July 2021 the country withdrew from the Istanbul Convention, and further displays several cases of violence and restrictions towards women and members of the LGBT+ community. The criterium of "serious harm" is also seriously challenged by reality. While Turkish nationals have repeatedly complained over arbitrary detention, torture and mistreatment,

[213] Pro Asyl (2013), '*Pushed Back – Systematic Human Rights Violations Against Refugees in the Aegean Sea and the Greek-Turkish Land Border'*, available at: www.proasyl.de/en/material/pushed-back-systematic-human-rights-violations-against-refugees-in-the-aegean-sea-and-the-greek-turkish-land-border/

[214] UNHCR (2016b), '*Mediterranean Sea Arrivals – 2015 Data – by Location, Country of Arrival, Demographic and Country of Origin'.*

[215] Betts, A. & Milner, J. (2006), '*The Externalisation of EU Asylum Policy: The Position of African States, Centre on Migration, Policy and Society'*, Working Paper No. 36, University of Oxford, Centre on Migration, Policy and Society

even the European Council for the Prevention of Torture was alarmed to the extent of issuing two reports, respectively in 2017 and 2019, on the mistreatment of individuals by Turkish authorities. Furthermore, the principle of *non-refoulement* cannot be considered as enforced by Turkey, as Human Rights Watch, Amnesty International and other observers have repeatedly reported that the Turkish government praxis is to refoul migrants to several areas, including Syrian conflict zones, in clear contradiction of the principle, often disguising them as "voluntary returns".

The conclusion is twofold, on the side of both Greece and human rights' dimension. The first consideration is that Greece has been turned into a buffer zone,[216] with restrictions exercised over individuals which are prevented from reaching Greek mainland and confined to the islands; similarly, the flows on the Greek-Turkish land border have increased as the Statement does not directly apply to the mainland due to the particular focus on Aegean islands. The second consideration is the erosion of human rights integrity, as the Statement has deemed Turkey worthy of an unreasonable title which negatively impacts individuals through higher chances of arbitrary detention, longer detention periods and refoulement practices. The evident shortcomings, also questioned by the UNHCR and international observers, have raised doubts over the actual degree of commitment of the European Union vis-à-vis the promotion, protection and enforcement of human rights, as the Statement clearly clashes in promoting the convergence of border management with fundamental rights.

The role of the CJEU here fosters the ending considerations of the last paragraph. Following the Statement, three asylum-seekers entering Greece did incur in the possibility of being returned to Turkey pursuing the Statement; the Pakistani and Afghani individuals brought complaints before the CJEU seeking the annulment of the Statement due to the document being an "agreement concluded between the European Council and the Republic of Turkey". The complaints materialized in cases *NF v European Council, NG v European Council, and NM v European Council*, which delivered four main aspects of interest on the matter, ultimately resulting in an erosion of the very process of judicial review and in further highlighting the shaky foundations of the Statement.[217] The first noteworthy aspect of the order delivered on 28th February 2017, later appealed with the same result, is the overview of the EU-Turkey cooperation framework on migratory matters, as the Court's account took into consideration the October 2015 meeting of the parties' leaders as the starting point of the events discussed. In doing so, the CJEU disregarded the EU-Turkey Readmission Agreement, an omission which resulted in hardships with respect to the

[216] Pro Asyl & Refugee Support Aegean (RSA) (2017), '*Refugees Trapped in a Buffer Zone'*, 17 March
[217] *NG v. European Council* [2017], T-193/16, CJEU

domain of competence. The second factor which would result in the erosion of the legal basis of the Statement is the response of European institutions vis-à-vis the Court's request to submit pertinent evidence of the effective written submission of the agreement and the parties having participated in the process.

The European Council, the Commission and the Council of the European Union backpedaled on the matter to the extent of denying any involvement in any step related to the Statement, even when disproven by media, claiming that the document's aim was never intended to "produce legally binding effects nor constitute an agreement or a treaty", but rather simply taking the form of a "political arrangement". The third and fourth aspects are not only correlated and linked, but also quite relevant for the matter of competencies. In the *NF case*, the Court did not go as in-depth as one could imagine on substance, but rather focused on the form of the Statement. Although recognizing the unclear wording of the document, the Court asserted that due to the Statement being an act of the Heads of State and the States' governments, the Court lacked the authority and jurisdiction over its review. Little did the presence of the President of the Commission and of the European Council matter in the case, as the CJEU decided that in light of the absence of a formal invitation, the Statement was still an act concluded outside of its, and of the EU, jurisdiction. The fourth factor links the third and second aspect. The Court further stated, for the sake of clarity, that even if the second factor was disregarded, i.e., if the deal had been an agreement instead, the CJEU would have still lacked the jurisdiction over the Statement's review for the reasons listed in the third factor.[218]

In order to further shed light on the separation of competencies, the common approach developed by the relevant CJEU jurisprudence revolves around the evaluation of the document's, i.e. the Statement, content and purpose.[219] The Statement's purpose and objectives fall under the realm of freedom, security and justice, which are regulated by Art. 4(2)(j) TFEU as a domain of joint responsibility between the EU and the Member States; thus, the legislative procedure applied is the ordinary one under Art. 79 TFEU. As a consequence, it is established by Art. 218(6)(a)(v) TFEU that the Council shall receive the assent of the European Parliament before concluding any agreement related to areas regulated by the ordinary legislative procedure; this consideration firstly establishes a clear violation of the relevant procedure, either be it in the narrative or in the praxis solely, which however still results in casting doubts over the compliance of the Statement under the European legal order. According to Art. 2(2) TFEU, Member States are allowed to exercise their

[218] *NF v. European Council* [2017], T-192/16, CJEU
[219] *European Parliament v. Council of the European Union* [2014], C-103/12, CJEU

competence in fields of shared competences only in the case of the EU having either not exercised or ceased to exercise its competence on the matter. Due to the Statement touching on the subject of readmission of third-country nationals, it clearly overlaps with the EU-Turkey Readmission Agreement, hence propelling the conclusion that the EU has already exercised its competences on the field. The natural legal consequence would be for the Statement to be considered invalid as for its conclusion being carried out outside of the EU pertinent procedure. These cases, and the paramount behavior of the CJEU vis-à-vis the Statement, highlights several areas of concern. The precedent set forth by the *Plaumann* decision imposes significant limitations on the Court's ability to extend its jurisdiction; if the cases were initiated by the European Parliament, the CJEU would have more easily had the jurisdiction to rule on the practical content of the Statement, rather than limiting itself to admissibility concerns.[220] The complete sidestepping of the Parliament in the negotiations demonstrated the flaws of the checks and balances system, which can be easily circumvented when there is a degree of collusion of Member States with the European Union in order for actions to be undertaken outside of the Treaty jurisdiction. The failure of the CJEU to clarify the question of competencies displayed both how important the role of individuals is in matter of judicial review, but also how fundamental is for such complaints to be able to trigger the procedure, hence highlighting how such legal voids do indeed both invalid reparation sought by individuals and impair revision of pertinent documents. It would be, henceforth, fundamental for the CJEU to address the issue in order for praxis to reflect the importance of the concept of "delegation of powers", a rule which is too-often forgotten about in times of crisis, and the very power of judicial review for the sake of the rights provided for by the European legal order to be upheld in any occasion, regardless of any caveat allowing for bypassing the issue of jurisdiction. It is important to further stress how the matter at hand does not only fall under the umbrella of national responsibility; the degree of collusion and complicity of EU institution is what further erodes the human rights *acquis* through the self-interested failure in applying relevant procedures. This consideration stands in particular relevance as it provides a preliminary remark on the fact that not only Member States' stances vis-à-vis European procedures puts the latter, and the whole European legal order, at risk; it is the very role of connivance of EU institutions in this regards which entails, as a causal link, the responsibility of the Union with respect to human rights breaches, establishing the EU as a primary responsible of such infringements.

[220] *Plaumann & Co. v Commission of the European Economic Community* [1963], Case 25-62, CJEU

By moving forward, these considerations paved the path for the case study. Border security, and more in general border issues, exhibits a particularly strong link with its territorial dimension. The case study will mainly focus on the land borders of Evros and sea borders around the Aegean islands, providing for a comprehensive understanding of the behavior of both Greece and Frontex (and the EU) with respect to migratory flows. The Evros river functions as a natural barrier between Turkey and Greece, representing an important route for irregular migrants. The conditions in which migrants attempt at crossing the border accounted for the loss of a grim number of lives, as around 400 bodies have been found on the Greek side of the river from 2000 to 2019, leaving to imagination how many other deaths the river would have collected over the years.[221] Border crossing has been increasingly made difficult by the construction of a fence in 2012, and the presence of Frontex units for the sake of border management and control.[222] One of the reasons why Greece represents an extremely relevant case study is the several allegations of pushback operations, a striking violation of human rights, on the Turkish land and sea border. Several reports, issued by researchers, lawyers, international observers and the Commissioner of Human Rights of the Council of Europe highlight how pushback are widely conceived as praxis by the Turkish government.[223] According to the documentations, stakeholders of the claimed pushback operation include the Hellenic Police and other Greek authorities, while other pieces of information also highlight the presence of Frontex and other paramilitary groups. As emphasized, the practice is systematic rather than sporadic, as pushback is usually enforced as a first instrument for management of migratory flaws, rather than enforcing the usual Greek procedure under EU law. Another element for concern is the fact that reports also refer to refoulement applied to asylum seekers, suggesting for an arbitrary and blanket praxis with scarce respect for standards provided for by international law and European law; while waiting for refoulement, migrants are usually held in unofficial detention facilities, which display almost none of the features guaranteed by Art. 5 ECHR. Such practices of detention include both official and *de facto* detention, whose impact was previously outlined. In a nutshell, Greek borders with Turkey prove for a valuable ground of assessment of the actual practices of Member States of the EU and for EU agencies, under the suspect (which will be cleared throughout the analysis) that such praxis departs so strikingly from the legal framework to the extent of blatantly infringing multilayered human rights. The sea and

[221] Pavlidis, P.; Karakasi, M.V. (2019). "*Greek land borders and migration fatalities - Humanitarian disaster described from the standpoint of Evros*". Forensic Science International, p. 302.
[222] Lee, L. (2017), '*Evros River: Tales of Death and Despair at the Edge of EU'*, Aljazeera, 10 December, available at: www.aljazeera.com/news/2017/12/desperate-journey-refugee-171216134111661.html
[223] Council of Europe, Commissioner for Human Rights, '*Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović Following Her Visit to Greece from 25 to 29 June 2018'*, CommDH (2018)24, 6 November 2018

land borders account for a comprehensive overview of how the interplay between different actors ultimately provides the short stick for migrants and asylum seekers.

5. Case Study: Greek government at the Evros border

International observers have increasingly expressed concerns over the actions and practices of the Hellenic police and the Frontex board officers in Evros, the Greek prefecture designated for the management of the Greece-Turkey border, since the Rapid Border Intervention Team (RABIT) deployment in the area in 2010.[224] Over the years both the Evros region and the Aegean islands area have witnessed a steep increase in pushbacks complaints and reports; hence, the correlation with the presence of Frontex cannot be ruled as irrelevant for such practices and raises concerns over the involvement and accountability of Frontex agents in the framework of human rights violation. From 2017 onwards, reports of pushbacks from the Greek border to the Turkish territory have multiplied; however, the issue is deeply rooted in Greek-Turkish practices that were in place even before the deployment of the Frontex RABIT in 2010.[225] The RABIT operational activities by Frontex officially started on 2nd November 2010, following the request of the Greek government.[226] The deployment included 175 officers, vehicles and other instruments; the operation was officially concluded in March 2011 while the operational activities were merged into Operation Poseidon Land, a segment of the Aegean operation called Operation Poseidon Sea, in a reduced capacity.[227] The knowledge regarding the composition of the Frontex team in Evros is extremely vague: since 2017 the Frontex press office has declared the presence of 15-30 officers in Evros, equipped with thermovision vans and other vehicles; the local police cited the presence of teams from Germany, Austria and Poland, and Netherlands.[228] Both Greek observers and international NGOs and human rights organization have compiled evidence over the year of an established practice of pushbacks,[229] with Frontex itself recognizing how pushbacks are still present and ongoing even in spite of their presence.[230]

The Greek government historically responded to the increasing pressure at the borders, particularly in the flows generated in 2020 by the opening of the Turkish border by Turkey's

[224] Fink, M., 2018. *Frontex and human rights: Responsibility in 'multi-actor situations' under the ECHR and EU public liability law*. First Edition ed. Oxford studies in European law. Oxford & New York: Oxford University Press.
[225] Frelick, B., 2008. *Stuck in a revolving door: Iraqis and other asylum seekers and migrants at the Greece/Turkey entrance to the European Union*. New York: Human Rights Watch.
[226] Carrera, S. and Guild, E., 2010. *'Joint Operation RABIT 2010': FRONTEX assistance to Greece's border with Turkey: Revealing the deficiencies of Europe's Dublin Asylum System*. CEPS Liberty and Security in Europe.
[227] Frontex, 2018d. *Annexes of operational Plan JO Flexible Operational Activities 2018 Land on border surveillance 2018/ORD/01*.
[228] Karamanidou, L., Kasparek, B., 2020. *The case of the European Border and Coast Guard Agency Frontex*, Working Paper Series Global Migration: Consequences and Responses,
[229] ARSIS, Greek Council for Refugees and HumanRights360, 2018. *The new normality: Continuous push-backs of third country nationals on the Evros river*.
[230] Frontex, 2013. *I Fundamental Rights Officer Report to Frontex Management Board and Frontex Consultative Forum on Fundamental Rights*.

government which led to a surge in individuals aiming at crossing the border, by enhancing border control and measures of deterrence. Among such practices, the resort to the use of violence such as tear gas and blank bullets, along with unlawful detentions carried out in name of such exceptional stress at the borders, was particularly echoed in the reports of human right observers.[231] The spreading of the news was harshly met by Greek authorities, which labeled the allegations as fake news and, in the time frame from March to April 2020 in which Greek border officers were being closely scrutinized due to further reports of pushbacks, the Greek government decided to suspend the submission of applications for international protection for a month.[232] 2020 represents a pivotal point in the management of the Greek-Turkish borders. The ongoing Syrian civil war, and the major attacks led by the Syrian governments against rebel groups in Idlib, causing around 200.000 refugees to flee the country with the majority of them being directed towards Turkey,[233] led Turkish President Erdogan to open the borders towards the West on the 27th February 2020. The declaration triggered significant flows of asylum seekers and migrants to attempt entering Greece and Europe[234], which in turn prompted the Greek government to take two main counteractions: firstly, the already mentioned suspension of the right to seek asylum for one month, starting March the 2nd, and the solicit for further assistance from Frontex, more specifically consisting in the request for a RABIT deployment at the border.[235] The Agency agreed to grant 100 border guards and technical equipment, whose deployment was effective within 10 days from the decision.[236] Each of these two dimensions, the one related to the Greek government and the one related to Frontex, need further deepening as they involve different actors and create an overwhelmingly widespread violation of human rights.

a. The evolution of the Evros border

The case study takes as a starting point the announcement of President Erdogan to open the border. From the first day that the Greek border was put under pressure by migrants and refugees, smoke grenades, rubber bullets, gas shells and other weapons were employed by Greek border

[231] Stevis-Gridneff, M., Kingsley, P., Willis, H., Almukhtar, S. and Browne, M., 2020. 'We Are Like Animals': Inside Greece's Secret Site for Migrants. *The New York Times: World*.
[232] Schmitz, F., Kalaitzi, A. and Karakaş, B., 2020. Migrants accuse Greece of forced deportations. *DW.COM*
[233] Berger, M. 2019. "*Idlib could become the worst humanitarian crisis in Syria's civil war*". The Washington Post
[234] UNHCR (2020), Turkey Operational Update
[235] To Vima, 2020. *Rapid response from FRONTEX to Greek request of aid to guard eastern borders*. Το Βήμα Online: International, available at: https://www.tovima.gr/2020/03/02/international/rapid-response-from-frontex-to-greek-request-of-aid-to-guard-eastern-borders/
[236] Frontex, 2020. *Frontex to launch rapid border intervention at Greece's external borders*. Press Release.

officers in order to prevent entry in Greece. The Human Rights Center Refugee Rights Working Group thoroughly details the several violations of human rights performed by Greek authorities; the report produced spanned up to 5 March 2020, meaning that the timeframe taken into consideration spans across the first week starting from the announcement of President Erdogan. Throughout the week considered, the individuals amassed at the Pazarkule check point, in the north of the border, increased up to twenty thousand, many of which undocumented as a consequence of being refugees from other countries and awaiting international protection to be granted in Turkey; a relevant contributing factor is the organization of busses and other means of transport by Turkish municipalities in order to transfer migrants and refugees towards Edirne, the closest city to the Pazarkule border. Human rights organization have recognized the use of firearms, tear gas, stun, plastic and metal bullets from the Greek side; in the first week, one Pakistani citizen died as a result of a bullet and more than 30 were hospitalized following Greek attacks. The pushbacks and the attacks from Greek border officers further aggravated already harsh conditions: the healthcare tents were insufficient for the purpose of taking care all injured and ill individuals, a condition that became preponderant over the days also due to the poor hygiene conditions, the lack of food and heating caused by the obstructionism of the Greek government.

The interferences and hard obstacles enforced by Greece caused the Pazarkule checkpoint to both became extremely busy in the first days, but also to lead several migrants and asylum-seekers to attempt crossing the border in other territories, mainly the Meriç River, the Doyran and Gemini villages of Uzunköprü and the İpsala villages. International organizations and non-governmental actors have observed that the pushbacks taking place in the vicinities of the Doyran village and across the Meriç River have involved around 5000 individuals. The heterogenous groups which resulted in being pushed back to Turkey further lamented being detained by Greek police officers, with no explanation whatsoever concerning the grounds for detention, for undetermined time periods and suffering violence by the same officers; human rights organizations additionally determined sexual assaults and injuries inflicted towards both men and women and several instances of inhuman treatment of children. The night of the 5th March 2020 on the Meriç River was also the scene of an alleged multiple murder by the Greek government: as five stranded individuals attempting to cross the river jumped into the water due to attacks coming from the side of Greece, the latter's forces continued opening fire at them while concurrently preventing Disaster and Emergency Management authority from rescuing the individuals. There is no information on the

fate of such individuals, which prompts further questioning and suspects on the number of unidentified deaths and killings in the Meriç River.[237]

As previously mentioned, the Greek government rapidly dismissed any accusation of violation of human rights. Along with the leak of information on cases of detention in unofficial facilities and mistreatment carried out by Greek police officers, the government justified alleged practices by affirming that Greece was "under an illegal, mass and orchestrated attempt to raze our borders", claiming to being protecting both Greek and European borders.[238] Such reasoning was also applied on March 2nd, when the Greek government adopted the Decree suspending the possibility to apply for international protection for one month by citing "extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to the national security, which prevails over the reasoning for applying the rules of European law and international law on asylum procedure".[239] The European Union did not immediately condemn the practice enforced by Greece, avoiding any chance to address violence and abuses accusation on migrants and asylum seekers; this approach was particularly evident in President von der Leyen's statement during her visit on the 3rd March 2020 when she affirmed that Greece was acting as a shield for the European Union as a whole.[240] In the second week after the announcement of the opening of the Turkish-Greek borders from the Turkish side, President Erdogan accepted to commit to releasing the pressure from the border, resulting in a remarkable drop in border crossing attempts. The spreading of the then-new Covid-19 virus played an incredibly relevant role in the management of the border: while stating that the Turkish government would not prevent anybody from attempting to cross the borders, on the 18th of March Turkey closed its borders with Greece.[241] While one would conclude that the release of pressure on the land borders of Greece did indeed solve the migrant crisis, or at least that it served national and European interest to an extent, such an assessment would exclude the human rights dimension. Several report were produced by human rights organizations covering pushback episodes, cases of sabotage of migrants boats and instances of violence by Greek border officers.[242]

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[237] Istanbul Bar, 2020, *Report on Istanbul Bar Association Human Rights Center's Visit to Pazarkule Checkpoint on 4-5 March 2020.*

[238]Stevis-Gridneff, M., Kingsley, P., Willis, H. Browne, M. and Almukhtar, S. 2020. "*'We are like animals': inside Greece's secret site for migrants*", The New York Times

[239] Council of Europe, 2020. Opinion on the Greek Act of legislative content from 2 March 2020 on the suspension of the submission of asylum applications.

[240] Stamouli, N. and Herszenhorn, D.M., 2020. "*EU leaders deploy to help Greece seal Turkish border*", Politico Europe

[241] European Commission, 2020, Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of Regions, *2020 Communication on EU enlargement policy*.

[242] Oxfam International, 2020. *Rights groups press European Commission to investigate violations of EU law in Greece over treatment of* migrants, p.40

Similarly, the European Union's asylum standards in Greece were not restored as a consequence of the commitment of the Turkish government; conversely, the administrative service for requesting asylum protection was suspended for another month (from March 13th to April 10th) due to Covid concerns,[243] then further extending it until May 18th.[244] Data provided from Frontex highlights how the months from April to June 2020 have witnessed the lowest rates of illegal crossing in the Eastern Mediterranean area since 2009;[245] these figures are clearly embedded in the overall shared response by the European Union's Member States to the pandemic: restricting cross-border mobility, establishing internal border checks, intra-EU and extra-EU travel bans are the most widespread practices which contributed to a fragmented landscape of EU policies.[246]

The Commission and the European Council issued a communication on the 16th of March 2020 in which non-essential travel was placed under temporary restriction, later releasing a clarifying statement for guidance which shed light on the individuals requesting asylum protection or persons under other grounds of humanitarian statuses of concern, as in the case of being subject to provisions relevant to the principle of *non-refoulement.*[247] Greece, however, along with other EU States, did not provide any exemption whatsoever for asylum seekers under Covid-19 restriction regimes, hence violating the Commission decisions (along with UNHCR recommendations on the matter).[248] The previously cited suspension of administrative services for requesting asylum by the Greek government was generally received as extending the response caused by the border pressure at the Turkish border, implying a *de facto* prevention for asylum seekers to access asylum procedures. Similarly, such measures also prompted a *de facto* suspension of the EU-Turkey Statement. The suspension of readmission practices for migrants and asylum seekers to Turkey has formally been ascribed to Turkish technical and logistical difficulties to receive and process such flows in the context of the pandemic. However, the implementation of return activities under the EU-Turkey Statement have been evident from the very launch of the agreement, as throughout almost four years (from April 2016 to March 2020) the returns effectively concluded were only

[243] Hellenic Republic Ministry of Migration and Asylum, 2020. Important announcement of Greek Asylum Service, Temporary suspension of administrative services to the public.
[244] Ibidem.
[245] Frontex, 2021. *Irregular migration into EU last year lowest since 2013 due to Covid-19*, available at: https://frontex.europa.eu/media-centre/news/news-release/irregular-migration-into-eu-last-year-lowest-since-%202013-due-to-covid-19-j34zp2
[246] Carrera, S. and Luk, N.C., 2020. "*Love Thy Neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area*", CEPS Paper in Liberty and Security in Europe series, No. 2020-04.
[247] Communication from the Commission. Covid-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, C(2020) 2050 final.
[248] Carrera & Luk, op. cit., p. 85; UNHCR, Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic, 9 April 2020

2140,[249] the reason of which is also related to the legal implication of the definition of Turkey as being considered a "safe third country".[250] As the impact of Covid-19 does not inherently belong to the scope of this case study, the harshness and impact of European measures on migrants flows will not be discussed as in-depth as other dimension; however, it is to be maintained that these measures did indeed provide an additional layer of containment and restrictive measures by the Greek government, legitimizing to an extend the evasion of EU, and international for extension, asylum standards.

b. Human rights violations in light of the praxis on Evros border's management

The adoption of the 2nd March 2020 Decree by the Greek government had the effect of allowing the practice of undiscriminated detention. During the period in which the Decree was in effect, the Greek islands became the site of choice for unofficial detainment of asylum seekers and migrants: the Greek premises on Samos island hosted around 100 individuals, the site of Leros received around 250 persons and around 450 individuals were confined in the area of Mytilene Port, before being detained in the *Rhodes* vessel.[251] In mid-March 2020 the Greek government opted for establishing two detention facilities, in Kleidi and Malakasa respectively, with the purpose of detaining these individuals before returning them to Turkey. These cases clearly represent a striking violation of legal standards under European and domestic law. The Reception Conditions Directive, in Art. 2(b) clearly states that all the individuals applying for international protection enjoy the rights stemming from the status of asylum seekers from the moment such desire is expressed; such rights do include freedom from detention.[252] When detention is preliminary to return of the individual, as would be in the case of the Decree, the detention is lawful only when the individual represents a threat to national security or is at risk of absconding.[253] Greece did not, however, grant any of these procedural guarantees; conversely, blanket detention would be performed and all the individuals reaching the territory of the Eastern Aegean Islands and trying to cross the border were

[249] UNHCR (2020), *Returns from Greece to Turkey (under EU-Turkey Statement) as of 31 March 2020*.
[250] Gkliati,M., 2017. "*The Application of the EU-Turkey Agreement: a critical analysis of the decisions of the Greek Appeals Committees*", European journal of legal studies, 10(1), pp. 80-123.
[251] Human Rights Watch, 2020. *Greece/EU: Allow New Arrivals to Claim Asylum*. Available at: https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum
[252] ECRE, 2015, *Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection*, pp.6-8
[253] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Art. 15

automatically put under detention. On arrival, the migrants and asylum seekers did not undergo the necessary identification procedures, including the assessment of vulnerability, but rather orders of detention and deportation were automatically issued. In Lesvos, the Police Directorate "issued uniform deportation decisions based on readmission procedures to Turkey"[254] and detention orders on grounds of irregular entry. The justifications referenced the bilateral agreement signed by Greece and Turkey, which was suspended by Turkey in 2018,[255] the EU-Turkey Statement, which has not been ratified by Greece as having binding legal power on the country, and the risk for the detained individuals of absconding. Such decisions were, on the other hand, extremely vague on, i.e. did not reference, any individual and specific case, the International Protection Act but also any intention whatsoever by the individuals to present application for international protection; the decisions were further notified to the individuals in Greek, without interpreters for the languages spoken by the detained individuals. The lack of individual assessment by the Greek government went as far as contradicting its own domestic law, as in Article 79(1) Law 3386/2005 and Article 41 Law 3907/2011 pregnant women and unaccompanied children are shielded from deportation.[256] When the effect of the Decree expired in April, Greek authorities started registering asylum applications, allowing individuals detained to seek protection. Notes recovered from these applications mention that these persons were not anymore under detention; nonetheless, the new facilities of Kleidi and Malakasa established for the containment and detention of migrants and asylum seekers did not allow the individuals to leave the facility until the end of the month.

These new facilities, being the recipient of the notable flows coming from Turkey, presented extreme conditions. Overcrowding gained a new dimension of risk in light of the Covid-19 pandemic, not allowing for social distancing and affecting already critical health conditions. Limited-to-no access to heating, unstable and intermittent access to water, paucity of hygienic items and lack of medical care were being referred to as a "ticking bomb" due to the extreme degree of inhumanity of detention.[257] Migrants and asylum-seekers placed under detention in Greece can pursue the path of legal challenging their deportation decision via an administrative appeal and their

[254] Refugee Support Aegean, (2020), *Rights denied during Greek Asylum Procedure Suspension*
[255] Reuters (2018), *Turkey suspends migrant readmission deal with Greece: Anadolu*, available at: https://www.reuters.com/article/us-turkey-security-greece-idUSKCN1J31OO
[256] Greek Government Gazette, Law No. 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, Art. 79(1)(e) and Greek Government Gazette, Law No.3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions, Art. 41
[257] Frelick, B., 2020. *Greek Vessel Takes Syrians, Afghans to Closed Camp*, Human Rights Watch, available at: https://www.hrw.org/news/2020/03/16/greek-vessel-takes-syrians-afghans-closed-camp

restriction to liberty via an appeal against detention.[258] These objections procedures have been systematically panned by international observers and the ECtHR due to their ineffectiveness. A clear example is portrayed by the *Rahimi v. Greece* case, where the applicant was a 15-year-old Afghan citizen which escaped the country due to ongoing armed conflicts. Once arrived in Greece, he was detained and a deportation order was issued: upon his release, he was offered no assistance whatsoever by Greece and had to resort to the aid of NGOs. Thus, the complaint mainly revolved around the absence of support and the inappropriate assessment devoted both to his asylum application and his status of minor. For the sake of the argument, what will be specifically considered is the ruling of ECtHR on the matter of domestic remedies. The Court found that the applicant was indeed provided with a brochure containing information on the complaint remedies; however, the brochure only provided partial explanation and lacked any specificities concerning the procedure to follow or the time period for filing the complaint. Similarly, Greek laws were found to have failed to develop an adequate assessment of Rahimi's situation and his detention conditions. Due to Rahimi being a minor with no legal representation during his period of detention, being inadequately detained with adults and due to the brochure being provided in a language which was incomprehensible to the applicant (the language of the brochure was Arabic while Rahimi spoke Farsi), led the Court to rule that Greece's domestic objection procedures were in violation of Art. 13 ECHR, guaranteeing the right to an effective remedy.[259]

From another viewpoint, the ECtHR renewed its criticism of Greek objection procedures in the *O.S.A. and Others v. Greece* case. Once the applicants left Afghanistan, their native country, and reached the island of Chios, they were immediately apprehended and detained in the Vial center. The complaint concerned the inhuman conditions and mistreatment they were subjected to in the center, along with the lack of access to legal remedies. In this case, the Court founds a clear violation of Article 5(4) ECHR, protecting the right to a speedy decision on the lawfulness of detention. As in the *Rahimi* case, the brochure containing pieces of information was not written in a language which was understandable to the applicants who were Farsi speakers; differently than the afore-mentioned case, however, in the instance at hand the brochure was provided in Greek, proving how practice did not only prompt the Greek government to enhance its objection procedures, but rather how such procedures "folded" on themselves failing to provide the necessary knowledge. The applicants did not possess the sufficient legal knowledge to discern information on the "administrative court" the brochure very loosely referred to; furthermore, no lawyer was

[258] Greek Government Gazette, Law No. 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, Art. 76(3) and International Protection Act 2015, Art. 46(6).
[259] *Rahimi v. Greece* [2011], Application No. 8687/05, ECtHR.

supplied to the applicants and the Greek government did not provide any detail on the legal procedure nor the adequate number of legal personnel in the center. Hence, this ruling did not go as far as questioning the real effectiveness of the objection procedures, which was largely criticized by the *Rahimi* case and related ones, but rather highlighted how the applicants were prevented from exercising such remedies regardless of their quality. Thus, a violation of Art. 5(4) was found by the Court.[260] Both cases exemplified how the Greek government appeal procedures are not efficient in providing legal guarantees against detention, proving that the objections in themselves and the general approach of the Greek authorities combined result in an empirical obstacle for persons subjects to detention to challenge the decision. The Administrative Court of Athens received several appeals against detention in Lesvos and Malakasa in the framework of the restrictions provided by the Decree in 2020; all the appeals were rejected. The assessment carried out by the Court ruled against the objections on several grounds which fail to meet the standard for sufficiently exhaustive evaluation of the cases. The Court mainly redirected the narrative of the appeals from questioning detention orders to the authorities' failure to register asylum claims; the strategy proved particularly successful for the purpose of rejecting the claims as the Court was then able to justify the discarding of the applications on three grounds: by claiming that the individuals were at risk of absconding, by highlighting the absence of identity documents and by emphasizing the irregularity of their entrance amid a situation of particular emergency where the future was unforeseeable.[261]

The main takeaway resulting from the Court's practices is an overall failure to examine and evaluate the legality of the detentions considered in the framework of both national and European law. The five factors that lead to this conclusion are the following. Firstly, the restrictions to liberty imposed on individuals were not assessed on their compliance with the standards and criteria established by the domestic legal order. The status of "asylum seekers" was incorrectly gauged by the Court, resulting in the latter's failure to correctly engage with it under Art.2(b) of the Reception Conditions Directive which, as previously mentioned, grants to all individuals the status of asylum seekers as soon as their desire to apply for international protection is expressed. The examination of the cases was carried out through the prism of return legislation, thus misplacing the status of the individuals in consideration and deliberately disregarding their application for asylum, notwithstanding the acknowledgment of their desire. In second place, the Court failed to appropriately consider the concerns of refoulement, even indirect, in violation of the relevant

[260] *O.S.A. v. Greece* [2019], Application No 39065/16, ECtHR.

[261] Decisions 358/2020, 359/2020 and 360/2020 (2020), Administrative Court of Athens, para 4

documents, among which the Refugee Convention and the ECHR. Previously mentioned reports produced by international observers underlined how Turkey enforces the praxis of refouling individuals to conflict areas, including Syrian war zones, in clear conflict with the principle of *non-refoulement*. Thirdly, no clear and adequate consideration of evident hurdles to the possibility of reasonably returning individuals to Turkey was carried out by the Court, omitting the recognition of evident limits (including those posed by Covid) and other obstacles which were presented and put forward by petitioners for the matter. The prolongation of the detention did, thus, not pursue or fulfill the primary objective of its imposition, disregarding the necessity and the proportionality of the detention itself. The fourth factor concerns the incorrect relying of the Court on the absence of information and documentation in order to demonstrate unrealistic and unreal chances of absconding. The use of the ground of the risk of absconding served as a legal justification for the prolongation of the individuals' detention, without effectively proving that such risk was real or, for what matters, extended to all individuals. This consideration is strictly linked to the last point. Many individuals could not pose a risk of absconding due to personal situations (such as being 8 months pregnant); however, the fact that such individuals were not exempted from detention is clearly a symptom of a phenomenon of "carpet detention" even against domestic legislation, which clearly spares the expulsion of pregnant women under domestic law,[262] and the interim order of the Council of State which prevented the removal of two mothers pursuant the Decree due to their fragile status.

By enlarging the judiciary scope, the European Court of Human Rights has also been the recipient of applications related to violations of human rights concerning the detention of minors in the framework of the Decree, which gives further depth to the behavior adopted by Greece vis-à-vis migrants' entry and border management. The main case for reference is the *R.H.* and *R.A.* case, involving unaccompanied minors from Syria which entered Greece after the enforcement of the Decree which resulted in their detention first in Mytilene, secondly on the *Rhodes* vessel and then in the center of Malakasa. Due to the children being detained in adult reception facilities, an application before the ECtHR was issued with the purpose of transferring them towards more suitable facilities.[263] The Court requested clarifications over the conditions of the Malakasa's center and of the individuals detained therein through four questions:

[262] Greek Government Gazette, Law No. 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, Art. 79(1)(e) and Greek Government Gazette, Law No.3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions, Art. 41

[263] *R.H and R.A. v. Greece* [2020], Application No 15463/20, ECtHR.

- whether the applicants were not at risk, questioning the conditions of their detention, the separate detention in a safe zone, the planning of adequate activities for minors and information on the transfer to more adequate facilities;
- the appointment of a guardian for the minors and an assessment of the minors' interests;
- whether returning them to Turkey would have consisted into putting them at risk and questions over the asylum application;
- whether anti-Covid measures were put in place in the Malakasa center.

The Greek government later responded with an observation stating that minors were not put at risk due to the undercrowding of the center and the forthcoming transfer, that the legal guardian would be soon appointed without any further information, further recalling the role of the Decree in preventing asylum applications to be registered and dismissing Covid concerns on the basis of the implementation of provisional measures in the Malakasa center. While the ECtHR did indeed rule in favor of the Greek government, the Court recognized that, at the time of the application, the grounds for justification by the government over the case of the two minors were insufficient; it decided, however, not to adopt punitive measures in light of the alleged commitment by Greece to comply with Article 3 ECHR and to provide necessary treatment accordingly. Thus, while the case does not blatantly condemn Greece and the minors' detention in the Malakasa center, it does indeed show that fallacies and flaws were present, but simply decided to act in good faith and grant Greece the possibility to comply with ECHR. The Decree was, in these cases, conceived as an exceptionality which however represents a flagrant violation of refugee and human rights law, both concerning the impossibility for asylum seekers to ask for international protection and the irregular detention of these individuals. Such approach provides for the setting of a dangerous precedent for the credibility of international law and the integrity of Greek and EU asylum procedures. While acknowledging the state's sovereign power to regulate under international law the entry of non-nationals is paramount, it is also evident that any decision contravening in any shape or form the principle of *non-refoulement,* as in the case of preventing individuals from seeking asylum, is predominant.).[264]

Taking a step back and re-focusing on Greek authorities' behavior, Greece repeatedly framed the adoption of the restrictions of March 2020 and the following months as a necessary response to the weaponization of border and of international mobility by Turkey as part of its geopolitical objectives. Turkey's aggressive practices on cross-border mobility was lamented as one of the main threats the Eastern Mediterranean faced from the security standpoint, to the point of

[264] Refugee Support Aegean, (2020), *Rights denied during Greek Asylum Procedure Suspension*

raising concerns over such hybrid threats at the November 2020 extraordinary meeting of the Frontex Management Board.[265] On the other hand, Greece faces alleged serious breaches of rights towards migrants and asylum seekers, from violence to abuse, detention and refoulement; these practices stand in stark contrast with national responsibilities in light of the European and international legal framework.[266]

Specifically, the refusal to entry without the presence of an individual assessment of the status of the person, of her needs and situation constitutes a clear breach of the principle of *non-refoulement*, both accounting for the creation of the risk of returning them to a country where such individuals would face persecution, ill-treatment and torture, and for the risk of indirect or chain refoulement.[267] The *non-refoulement* principle is guaranteed, as previously mentioned, by Art.2 and 3 ECHR as an absolute obligation, allowing no derogation or exception even in cases of mass arrivals or emergency situations, e.g. the spread of the Covid-19 virus.[268] Pushbacks also violate the proscription of collective expulsion entrenched in Art. 4 of Protocol No.4 of the ECHR, imposing the necessity for individual evaluation of all the subjects involved.[269] Such provision is a fundamental part of the corollary of the *non-refoulement* principle as it allows all persons to proclaim the presence of risks and dangers of ill-treatment that would prove their situation incompatible with refoulement practices.[270] The legal positioning of Greece stands in a peculiar spot due to the country never signing or ratifying Protocol No. 4, hence preventing the possibility for Greece to be held responsible for breaches of the Protocol's provision before the ECtHR. On the other hand, the belonging of Greece to the European Union entails a fundamental obligation under the ECHR, which includes the responsibility to uphold and respect, among others, of Art. 18 and 19 which extend the right to asylum and the proscription on collective expulsion. It is fundamental to mention that Greece's pushbacks are also inconsistent and in violation of the provisions of the European asylum *acquis.* Under obligations stemming from the EU Asylum Procedures Directive, in particular Art. 6, the possibility for individuals to be able to access asylum procedures should be

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[265] European Commission Press, (2020) "*Extraordinary meeting of Frontex Management Board on the alleged push backs on 10 November 2020*"

[266] Dicle Ergin, A., (2020) "*What Happened at the Greece-Turkey Border in early 2020? A Legal Analysis*", Verfassungsblog

[267] European Union Agency for Fundamental Rights, Council of Europe (2020), *Fundamental rights of refugees, asylum applicants and migrants at the European borders*, p. 5

[268] UNHCR (2020), *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*

[269] Council of Europe, *'Protocol No. 4 To The Convention For The Protection Of Human Rights And Fundamental Freedoms, Securing Certain Rights And Freedoms Other Than Those Already Included In The Convention And In The First Protocol Thereto, As Amended By Protocol No. 11*' (1963).

[270] Carrera, S., (2020) *"The Strasbourg Court Judgement N.D and N.T v Spain. A Carte Blanche to Push Backs at EU external borders?",* EUI Working Paper

granted in any case or situation an application for asylum is submitted, including at the borders; additionally, Article 8 of the APD obliges States to provide relevant information related to international protection application to all applicants for asylum, regardless of their location and status (hence, including detained asylum applicants or applicants at the border).[271] Article 35 and 38 of the APD respectively provide for the possibility of transferring asylum seekers; in the first case asylum seekers can be relocated to "safe countries of asylum", while the second allows transferring individuals to "safe third countries". Formally, this would allow Greece to pushback individuals towards Turkey, in light of the latter being considered as a safe third country. However, these provisions always need to be implemented in compliance of formal procedures which permit to the individuals to plead their case and manifest potential threats, a requirement which has been repeatedly disregarded by Greece throughout the cases analyzed;[272] the same fate was reserved to the individual assessment of all cases, whose absence directly entails a breach of the procedures stemming from the framework of the *non-refoulement* principle.[273]

The room allowed for derogation under the European law is indeed less than what exploited by the Greek government, hence highlighting of the country voluntarily overstepped established legal boundaries. Greece claimed to be acting under Art. 78(3) of the TFEU when the suspension of asylum services was issued in March 2020. Nonetheless, as highlighted by international and human rights observers, including UNHCR, Art. 78(3) only enshrines the possibility for the Council to implement measures with a provisionary and temporary status to aid a Member State which has been suddenly pressured by unexpected mass flows of third country citizens; thus, the possibility for Member States or related bodies to derogate from human rights, including *non-refoulement*, under European law is not available in any case.[274] This understanding of fundamental human rights was further developed in three cases submitted to the Court of Justice of the EU, where Poland, Hungary and the Czech Republic respectively were held accountable for their failure in complying with their obligations; the judgments agreed on the strictness of the derogation possibility under TFEU, which further demonstrated how unilateral decision regarding derogations from EU law are

[271] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), L 180/60, 29.6.2013.
[272] Tan, N.F. and Vedsted-Hansen, J. "*Inventory and Typology of EU Arrangements with Third Countries*", ASILE Forum, p. 19.
[273] European Union Agency for Fundamental Rights (2020), *Migration: Fundamental Rights Issues at Land Borders*, p. 21.
[274] UNHCR (2020), *UNHCR statement on the situation at the Turkey-EU border*, available at: https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html

not tolerated by the Court as a relevant degree of consideration shall always be devoted to law and to the check and control of EU institutions.[275]

These cases were triggered by the non-compliance of the afore-mentioned countries with their migrant relocation obligations, occurred as a consequence of the migratory crisis of 2015, whose massive impact on Europe as a whole and on first-entry countries such as Italy and Greece were already outlined in precedent chapters. Henceforth, it was without surprise that the Council of the EU decided to adopt Decision 2015/1601, calling for the establishment of provisional measures to support Italy and Greece in a time of exceptional distress through the relocation of 120.000 asylum-seekers from the latter countries according to a quota scheme.[276] Hungary, Poland and the Czech Republic notably opposed the decision from its initial steps. The three countries did already circumvent compliance in the previous Decision 2015/1523, providing for the relocation of 40.000 asylum seekers in a similar framework to the one of Decision 2015/1601. In the latter instance, however, Hungary legally challenged the validity of the decision before the CJEU, only for the Court to confirm the legitimacy of the Council's decision.[277] Nonetheless, Hungary proceeded not to submit any relevant data, information or number for the relocation scheme, promptly followed by Poland, which adopted the same approach, and the Czech Republic, which allowed for the relocation of only 12 out of the established number of 50 migrants. As the countries avoided compliance for the following years, up to 2017, the European Commission chose to bring the case before the CJEU on December 7th, 2017. The countries' defense took place on several layers, firstly contesting the admissibility of the case in light of the expiration on September 26th, 2017 of the relevant obligation set forth by Decision 2015/1601. Secondly, the defendants invoked the principle of equal treatment, claiming that the failure in complying with the obligations stemming from the decision was shared across all Member States of the EU, hence claiming inadmissibility on the matter. The third pertinent argument set forth by the three countries, among other claims related to procedural grounds, concerned the defendants' decision to invoke Art.72 TFEU, which states that Member States' responsibility to maintain law, order and internal security shall not be impaired by EU obligations, thus opening for derogation from the decision. Nonetheless, the Court dismissed all the claims by stating that public safety concerns had not been adequately assessed and considered by the States, and that the obligations did not deprive the States from any degree of discretion in

[275] *European Commission v Republic of Poland, Commission v Hungary, Commission v Czech Republic* (Joined Cases C-715/17, C-718/17 and C-719/17) [2020], par. 144-147
[276] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece
[277] *Slovak Republic and Hungary v. Council of the European Union* [2017], Joined Cases C-643/15 and C-647/15, CJEU

implementing the measures through an approach which would ensure the protection of law and order.

The sentence bears a relevant political weight in light of the spotlight provided by President von der Leyen, which in 2020 underlined the importance of the ruling as a blueprint for the future. Similarly pertinent is the response of the Czech and Polish government, which openly stated that the univocal derogation from the obligations stemming from the decision were triggered by a peculiar climate deriving from the migratory crisis, a narrative which has been notoriously employed also by the Greek government in several instances.[278]

While it is without a doubt that Greece has played such an important role, it is also true that the country shall be considered one of the main responsible actor for the matter; on the other hand, the repetition of pushback practices and severe allegations of breaches of human rights did not only pertain to the sphere of national responsibility, as the EU responsibility needs to be further taken into consideration as well for the implicit and silent acceptance of such violations. The European Union, as previously mentioned, did not harshly condemn the Greek pushbacks in the first months of 2020, to the extent that the Commission was called out upon upholding its duty of human right defender by international observers, asking for investigation over the breaches and the providing of sanctions and remedy in case of actual violations.[279] To date, the European Union failed in establishing adequate accountability, especially towards its institution. In September 2020 the Commission included in the New Pact on Migration and Asylum provisions related to preventing and tackling the potential breach of human rights throughout the process of treating people, especially asylum seekers, at the borders; such legislation proposed the establishment of independent mechanisms for the monitoring of human right to be created in all Member States. This proposal, however, would only concern State accountability towards potential breaches at the moment of pre-entry screening.[280] Henceforth, the European Union failed to both take accountability for breaches of human rights and for not condemning them, perpetuating dubiously effective measures which do not live up to the necessity of tackling situations which are either specifically designed for escaping accountability or whose gathering of related information is

[278] Library of the Congress, 2020. *European Union: Court of Justice Rules against Poland, Czech Republic, and Hungary for Noncompliance with Migrant Relocation Obligations.*
[279] European Parliament Press, (2020), "*Investigate alleged pushbacks of asylum-seekers at the Greek-Turkish border"*, MEPs demand, 6 July, available at: https://www.europarl.europa.eu/news/en/press-room/20200703IPR82627/ investigate-pushbacks-of-asylum-seekers-at-the-greek-turkish-border-meps-demand
[280] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612

extremely difficult, underlining the gaps in the fundamental rights accountability mechanism of the European Union.[281]

The plethora of violations taking place under Greek national border management policies, analyzed in a framework which both took into consideration a degree of political cunning and voluntary breaches and hindrances, serves as a first outline of the gap between theory and practice, which here becomes praxis. What allows for this change into the wording is the fact that, as previously mentioned, the practice of automatic refoulement has been referred to as so widespread that it actually has penetrated the framework of Greek responsive policies as a custom, as a first resource action which, also from afar, blatantly breaches the obligations to which Greece is a party of. From the very prevention of entry to the indiscriminate and disproportional use of force, migrants and asylum seekers are, regardless of which category they might actually fall into, subject to a blanket policy of border impenetrability, a response which exemplifies the perfect opposite of a border (the one between Greece and Turkey) which has historically been defined as extremely porous. For those migrants and asylum seekers which were able to penetrate the borders and enter into Greek territory, the breaches of international, Community obligations and human rights law have carried on. The first step in the procedure of violations is usually arbitrary detention, with no explanation whatsoever of the reasoning behind the imprisonment. In many cases procedural safeguards were disregarded, as in not providing a translator or in avoiding to effectively obtain and follow a proper order of a court, which further propels the understanding of these practices to take place in such a way that is widely recognized as the praxis. Similarly, the positioning of migrants and asylum-seekers also raises concerns over human rights breaches. The inadequate infrastructures provided for by the Greek government represents, on its very own, a deficiency which shall not be tolerated vis-à-vis international and Community obligations.

Last, but certainly not least, refugee law is constantly being infringed as Greek authorities do not ensure whatsoever the adequate reception and individual consideration of application for international protection, which are either subject to association with other asylum applications, resulting in mass decisions and thus violating the safeguard of having individual assessments being carried out, or simply disregarded. This was blatantly the case of March 2020, as Greece decided to violate Community and international obligations by unilaterally suspend asylum procedures. Henceforth, Greece is a perfect example of how practice differs from the theory, of how the high

[281] Stefan, M. and Cortinovis, R., (2020), *"Setting the right priorities: is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders?"* ASILE Forum, available at: https://www.asileproject.eu/setting-the-right-priorities-is-the-new-pact-on-migration-and-asylum-addressing-the-issue-of-pushbacks-at-eu-external-borders/

principles of law and the provisions set by relevant documents are constantly disregarded, with impunity by the State but also with the connivance of the European Union, whose efforts have been weirdly scarce. European investigations had been prompted by international observers, external sources of concern which pressured the Commission into tackling the issue at hand due. These investigations have been late, with no particular link with effective actions undertaken by the EU, which has been sluggish in reacting and preferred comforting local authorities. The overall display of solidarity by the European Union has surely provided for the strengthening of political unity: it was undoubtedly overriding to display a unified front vis-à-vis a migratory crisis. By acting differently, and choosing a harsher approach with respect to Greece due to the claims of human rights breaches could have prompted Greece to act accordingly to two paths, the first being requesting the European Union for more support, a request which the EU could have hardly refused, the second being the possibility of opening the internal border with the rest of the Union, allowing for migrants and asylum-seekers to continue their wonderings in Europe for the sake of redistribution of individuals, a choice which would have faced strong political opposition. Hence, EU political authorities were forced, to an extent, to demonstrate solidarity to Greece. The other side of the coin, however, entails the sacrifice of human rights and individuals for the sake of political unity. The European Union and other institutions, such as the ECtHR, have consciously adopted softer approaches vis-à-vis these violations, allowing for both impunity of Greece and the relevant national stakeholders and the following erosion of judicial accountability and, for extension, of principles of human rights. Case law sets precedents, customs are established also through national praxis and the inability of institutions to denounce and effectively tackle the issue propagates the deterioration of human rights law and the whole European acquis, setting dangerous models for future measures and practices.

6. *Case Study: Frontex teams at the Greek-Turkish border*

The European dimension takes further relevance in light of the actions carried out at the Greek-Turkish border by Frontex, the European Border and Coast Guard Agency. The Agency, as previously outlined, acts in conformity with the EU mandate, although falling into the trap of needing States' interests to be involved for carrying out joint operations. Similarly, the composition of the Agency hinted that a certain degree of influence over the allegedly autonomous Frontex will always be exercised. Hence, the violations carried out by Frontex at the Greek-Turkish border (be it land or sea border) are to be ascribed to EU responsibility, which further puts into perspective how the gap between theory and practice/praxis is further deepened and widened by the very European Union.

a. Frontex activities at the land border: detaching from the human rights dimension

Since the deployment of Frontex units in Greece, and more specifically in Evros, the management of the Agency has been aware of the pushbacks taking place; the main actions undertaken by Frontex, however, were limited to contacting the government with the aim of receiving information on the matter, with scarce results and responsivity by the Greek authorities.[282] Track of the pushbacks has been kept by the Frontex's Serious Incident Reporting system, which receives Serious Incident Reports (SIRs) and acts on the matter, whether by reporting to the EU institutions or reassessing its own practices. Studies have shown how only six SIRs have reached the Agency's desk since 2017, all involving Greek security forces, to which Frontex has negated any responsibility due to the lack of formal accusation towards the Agency and its personnel in the framework of pushbacks in SIRs.[283] While the first three SIRs are respectively based on a Greek human rights organizations and Turkish media sources, the other three were indeed submitted by Frontex staff members operating in Evros. The report, released to the researchers conducting the study, shed light on a case of pushback by showing how the procedural safeguards and the lack of clarity did negatively affect the exercise of human rights of the subject to the pushback practice. The extremely low number of SIRs conflicts with the high number of allegations regarding

[282] Frontex, 2018, 16th Meeting Frontex Consultative Forum on Fundamental Rights.
[283] Kartali, S.E., (2019*). Turkey's 'Ghosts': Silent Exodus from Erdogan's 'Prison State'*. Balkan Insight, available at: https://balkaninsight.com/2019/10/30/turkeys-ghosts-silent- exodus-from-erdogans-prison-state/

pushbacks by the Greek government, leading to the questioning of Frontex's overall transparency on operational procedures. The Agency stated that such discrepancy was mainly due to the assigned location of deployed officers, which are placed on main roads instead of the proximate area of the border, where the majority of pushbacks take place.[284] According to Frontex, patrolling in the area of borders is excluded as a rule, hence causing the Greek police to coordinate Frontex forces for their deployment to take place outside the frontline zone. The immediate consequence from the accountability point of view is that Frontex herein implies the impossibility for the Agency to witness, thus, to have a complicit role or even to display elements of accountability and responsibility, in the pushback operations carried out by the Hellenic Police in the border area. This affirmation does, however, conflict with a series of sources which on the other hand suggest the involvement of Frontex officers at the border. The Agency's operational plans does indeed provide for the presence of Frontex agents at the border, by stating that patrolling shall be carried out in the military zone in the immediate area of the border, at the condition that the team is accompanied or in presence by the Hellenic Police with the aim of carrying out tasks related to border surveillance and similar.[285]

While the possibility for Frontex teams to be allowed at the borders does not necessarily imply their factual presence, it does however contrast previous allegations on the deployment of Frontex personnel at the borderline, hence casting doubts on the clarity of events and practices. Hellenic authorities' statements seem to confirm that patrolling activities by Frontex were indeed carried out at the Greek borders. An example is given by the declaration of the Greek Ministry for Public Order in occasion of the 2018 Council of Europe, which stated that the Hellenic Police did indeed supervise officials from the Frontex teams to participate in both entry prevention operations and in the following procedures, namely management of immigrants over identification, information, interpretation and other procedures. The affirmation of Frontex's participation in operations of entry prevention clearly entails the partaking of officials in patrolling of the borders, as confirmed by statements made by the Press Office of Hellenic Police and authorities of the Police Directorate; the deployment of Frontex teams to the borders was apparently confirmed in 2020, as demonstrated by the fact that Frontex team members were shot by Turkish guards at the borders of Tychero, a village in the immediate area of the Greek-Turkish border.[286] The overall

[284] Soguel, D., (2018). *Are Greek and EU officials illegally deporting migrants to Turkey?* Christian Science Monitor, available at: https://www.csmonitor.com/World/Europe/2018/1221/Are-Greek-and-EU-officials-illegally-deporting-migrants-to-Turkey

[285] Frontex, 2015. Specific annex of the Operational Plan JO Flexible operational activities, 2015/SBS/02

[286] Christides, G., Lüdke, S. and Popp, M., (2020). *The Turkish Woman Who Fled Her Country only To Get Sent Back*. Spiegel Online., available at: https://www.spiegel.de/international/europe/the-turkish-woman-who-fled-her-country-only-to-get-sent-back-a-fd2989c7-0439-4ecb-9263-597c46ba306e

uncertainty and lack of clarity over the practices adopted clearly shows, from first sight, how particular attention shall be devoted to the analysis of official documents provided by Frontex and related institutions, as the Agency might indeed have an interest in maintaining such level of discretion and vagueness for the purpose of reducing or avoiding international scrutiny over practices which might attract allegations of human rights violations.

The vagueness revolving around the extent of operational involvement of Frontex at the borders in general, and in the pushbacks in particular, hence implies hardships in accountability assessment. Due to the operations of pushbacks being carried out in the immediate proximities of the border area, unauthorized personnel's access to the area is restricted and assessing whether Frontex agents are actually employed in the border encounters several difficulties. What figuratively tipped the scales towards the recognition of Frontex's involvement in the operation was firstly the testimonies of migrants who were subject to pushbacks, and secondly fieldwork conducted by researchers, effectively demonstrating how Frontex officers did indeed participate to the operations.[287] The testimonies reported that pushback operations were carried out by officers speaking both Greek and German, which beat the migrants and stopped the boats crossing the river coming into Greek territory.[288] Reports which confirm the participation of German-speaking officers multiplied over the years: accounts of German personnel being involved in pushback operation date back to 2014,[289] while Human Rights Watch report dated 2020 testimonies for the presence of German and Swedish officers, recognizable by the flags wore on their sleeves, being present and involved in the afore-mentioned operations.[290] While some doubts could be indeed raised over the effective belonging of these officers to the bodies of Frontex, the participation of non-Greek police officers could extensively be logically stemming by Frontex task enforcement, as migrants report suggest; further considerations concerned the perfect color matching of uniforms worn by Frontex German police officers with the testimonies provided by migrants. One of the common patterns encountered throughout the reports on the operations is the participation of masked individuals, speaking English, German and Italian, which easily fits into the explanation of why not one Serious Incident Reporting seems to directly denounce Frontex's involvement. The SIRs taken into consideration were domestically investigated by the Hellenic Police, the responsible

[287] Karamanidou, L. and Kasparek, B., 2018. *A Field Trip to North Evros*. RESPOND, available at: https://respondmigration.com/blog-1/sanliurfa-gzynz-rh3gn-rzyss-dx24e-kr6wm-y6tcb-szgrr-g6ddk-lldhr-42l9n-aw8wh
[288] Mobile Info Team, (2019). *Illegal Pushbacks at Evros*. available at: https://www.mobileinfoteam.org/pushbacks-en
[289] Frontex, 2014, Second Annual Report - Frontex Consultative Forum on Fundamental Rights.
[290] Human Rights Watch, (2020). *Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported*., available at: https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border

authority for human rights violations. Among all six SIRs, no wrongdoing was attributed as no credible evidence was, according to Frontex, provided over the incidents, which in some cases were judged as not having even took place; parallel investigations carried out solely by the Hellenic Police similarly disproved any evidence of wrongdoing, leading all cases to be closed and complaints to be dismissed.

Nonetheless, the systemic flaws of Greek investigating authorities had already been a matter of discussion in Frontex reports at least in two instances,[291] with Frontex itself calling for the enhancement of national investigation measures concerning fundamental rights violations. A strikingly obscure feature, clearly hindering the independence of the investigating units and authorities, revolves around the investigating tasks being carried out by the same forces and units under scrutiny for such alleged violations.[292] The lack of accountability stemming from these long-standing issues evidently led to the Police consistently dismissing claims of violations of fundamental rights, especially towards migrants and asylum-seekers.[293] The accountability issue, however, does not solely concern Greek authorities. Member States have the duty to investigate over alleged violations of human rights carried under their jurisdiction; this would include personnel from Member States currently participating in Frontex operations. Thus, the reports of migrants witnessing breaches of their fundamental rights by German speaking officers, which would belong to either German or Austrian jurisdiction, shall be investigated by their own country. Needless to say, to date no investigation by these countries has been started. Henceforth, accountability mechanisms both on Frontex and the Member States' side continues to prove extremely flawed, to the extent that in many cases such mechanisms are never put in action. The Hellenic Police was able to prevent allegations of human rights to represent an issue at the organizational level thanks to the exercise of its power and authority, an operation of concealment which surely raises concerns over the potential allegations and breaches of human rights of which no knowledge is available. In a similar fashion, the Frontex SIR mechanism demonstrated clear fallacies, being triggered solely by reports which did not involve in any case Frontex personnel; the vagueness surrounding Frontex operations and the related operational plans conflicts with reality, which revealed how in several instances the Agency's presence, involvement and responsibility is

[291] Frontex, 2015, Third Annual Report - Frontex Consultative Forum on Fundamental Rights.
[292] Mijatovic, D., 2018. *Response to the Report of the Commissioner for Human Rights of the Council of Europe Following Her Visit to Greece from 25 to 29 June 2018*.
[293] Christopoulos, D., 2014. *The Hellenic Police*. In: Christopoulos, D. ed. *Mapping Ultra-Right Extremism, Xenophobia and Racism within the Greek State Apparatus*. pp.20–42.

exerted in an arguably fraudulent framework which chops the limbs of accountability from its starting steps.

The issue of the Agency's accountability through an independent body has not been confined to academic literature. The debate revolving around the matter clearly highlighted how, over the years, the growing scope of Frontex operations should have been accompanied by an effective external organism which would be equipped to correctly investigate and report on the Agency's actions; this holds true in particular as Frontex is perfectly able to exercise different degrees of coercion, as hinted in the past subparagraphs and as will be discussed in the following chapters. Matters related to the unchecked exercise of power are not indeed new to the European legal order: both the ECtHR and the CJEU have repeatedly overseen the activities and powers of European and EU agencies and corollary bodies, for the purpose of maintain such actions under the spectrum of legality provided for by the European legal order. More specifically, the CJEU notably delved into the issue of the oversight of corollary bodies' coercive actions; although the two cases judged upon in 2020 do not specifically relate to Frontex, they touch upon relevant key points and takeaways which might not only as well be applied with respect to the Agency, but that are very pertinent in the framework of the European legal order as they serve as a judicial blueprint on the matter. The two judgments are the *PI case* and the *La Quadrature du Net case*, both relating to data security issues vis-à-vis the concession of the access of personal data to national security services. The Court seized the occasion not only to deliver on the subject-matter, but also to develop guidelines on what effective accountability should resemble to in relations to the exercise of coercive actions by agencies; although the domain of security services and the Frontex sphere clearly differ from one another, what they do share is the pressing necessity for oversight and accountability in relations to human rights being put at risk (respectively, the right to privacy and the proscription of collective expulsion). In both cases, CJEU did not only re-assert the importance for corollary agencies to comply with both European law and general principles of international law, but further required for agencies to submit themselves, in case needed, to impartial, external and independent review of their actions. In the *La Quadrature du Net* case, the CJEU clearly requires for agencies to be subject to review process by either a Court or an independent administrative body, at the condition that the latter would fulfil the condition of being able to upheld the obligations stemming from Art. 47 CFREU, granting the right to "effective remedy and to a fair trial".[294]

[294] *La Quadrature du Net and Others v. Premier Ministre and Others* [2020], Joined Cases C-511/18, C-512/18 and C-520/18, CJEU.

This requirement was further enhanced in the 2021 *HK case*, also relating to the processing of personal data in the electronic communications sector, by adding to the necessity for the body to enforce Art.47 CFREU also the condition of being able to exercise the powers necessary for reconciliation of the discrepant interests and rights at stake. The ruling requires for the administrative body to enjoy a status of impartiality, freed from external influence and, as a consequence, representing a third party with respect to the agency at hand. It is, henceforth, clear how Frontex's accountability mechanisms do fail to meet the requirements set forth by relevant CJEU jurisprudence. The presence of internal, cumbersome oversight apparatuses, as in the case of the SIR, does not reach the minimum threshold required by the Court, and the very inactivity of the Court and of EU institutions on the matter accounts for a major structural failure for Frontex and a hint of the extent of connivance, complicity and indifference that the EU institution seem to apply to the Agency, ultimately ending in the exposure of human rights to a vulnerability which does not encounter the possibility for an effective remedy to be produced.[295]

The deployment of RABIT teams occurred in March 2020 rekindled the already existing fire of concerns on fundamental rights violations. In order to develop operational plans and to launch an operation, the Executive Director is expected to clearly assess the risks of the operation concerning potential human rights violations with the Fundamental Rights Officer: this procedure is enshrined in Regulation 2019/1886,[296] both in Art. 31 and 46 where respectively the FRO is expect to cooperate with the Agency in assessing human rights implications for operational plans, and to stop operations in case of disproportionate risk of human rights violations. The existing situation at the Greek-Turkish border in Evros did already display critic features, to the point of prompting the Fundamental Rights Officer to clearly recommended Frontex to stop the operation in the area due to concerns over the human rights dimension of operations carried out at the borders. International observers already raised an incredible amount of concerns over the pushbacks practices, the violence exercised by the Hellenic Police, illegal and *de facto* detention and the employment of vehicles with no registration plates or any other mark which would allow recognition.[297] The perceived inactivity of European institutions has reached the extent to which such international observers, as in the case of Front-Lex, famously submitted the first action against Frontex ever to the CJEU, calling for sanctioning and remedy with respect to those beaten, mistreated and forcibly

[295] *Criminal proceedings against H.K.* [2021], Case C-746/18, CJEU
[296] Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 2019
[297] Amnesty International, (2020). *Caught in a Political Game: Asylum-Seekers and Migrants on the Greece/Turkey Border pay the price for Europe's failures*, EUR 01/2077/2020, Amnestyinternational.org

returned in the context of Greek pushback. The application, made on behalf of a minor asylum seeker and a now-recognized refugee, claims a fundamental participation of Frontex assets in the framework of Joint Operation Poseidon in the fundamental rights violation suffered by individuals, explicitly violating Art. 46 of the Frontex Regulation and of Art.265 TFEU, as the Agency is allegedly acting in constant infringement of the Treaties under the latter Article. Notably, the CJEU rejected the case on procedural grounds. The ruling, or absence of such, does not only entail the impossibility for the applicants to seek judicial remedy and compensation, but also a missed opportunity for the CJEU to still provide guidance on the matter. Notoriously, the CJEU is no stranger to develop guidelines and provide relevant reasoning on issues regardless of their admissibility or the ruling itself; this case does however demonstrate how the Court avoided assuming a trailblazing role due to, allegedly, the incredibly extensive political implications a firmer stance would have implied. Nonetheless, for the account of facts relevant for the research question to be answered, the general attitude of the CJEU vis-à-vis Frontex accountability cannot but compound already existing doubts on the Agency's compliance with its obligations, also considering the fact that the case represented the very first action brought against Frontex before the CJEU.[298]

In addition to that, the previously discussed suspension of asylum services on March 2020, in clear violation of European and international law, added an extra layer to the considerations to be made by the Executive Director in the developing of operational plans and Frontex missions in the area; the deployment of Frontex agents, in such a complex, fragmented and framework, seriously posed a threat to the legality of its own actions in the framework of human rights. The conclusion would be that such operations would have either to be reconsidered to be more structured, i.e., to receive clear orders to abstain from involvement in pushback practices or border surveillance, locations at a higher risks of involving breaches of fundamental rights, or simply to reconsider the whole operation and provide different support paths to a country, Greece, which was asking for the deployment of a RABIT team to contrast the mounting pressure at the borders.[299] While no evidence is provided with regards to the real and factual consideration of such hardships concerning the protection of human rights in the framework of the early steps of the operation, the short time passed between the request made by the Greek government for a RABIT team (1st March 2020), and the effective approval by the Management Board (3rd March 2020), casts doubt over the

[298] *SS and ST v. Frontex* [2021], Case T-282/21, CJEU
[299] Monella, L.M., (2020). *Frontex border operation in Greece 'lacks legal basis' after Greece suspends asylum law*, euronews, available at: https://www.euronews.com/2020/03/10/frontex-border-operation-in-greece-lacks-legal-basis-after-greece-suspends-asylum-law

extensiveness of contemplation devoted to the issue of human rights in the Turkish-Greek border landscape. With such an extensive body of allegations, concerns and extremely detailed reports provided by, among others, civil society, and not forgetting the extremely relevant role that the Fundamental Rights Officer's 2019 report should have played, due to the recommendation of suspending or terminating operations in case of conflict with human rights law, it appears implausible that full consideration has been given to the issue of human rights; the prospective chance is that such fundamental rights concerns were overlooked by Frontex by simply considering them beyond the responsibility of the Agency, as "Frontex is not in charge of asylum procedures. The European Commission is currently in discussions with Greece about this matter. We continue to refer all asylum requests to national authorities as required by law".[300] This affirmation clearly dismisses the view that Frontex should always be considerate of human rights matter, disregarding internal procedures such as the set up of the FRO and the role it should play in the development of operational plans. By stating so, Frontex entails that, due to its mandate being linked to other areas than human rights protection, it shall be given somehow of a "pass", prioritizing border security and its mandate over fundamental rights protection, a clearly problematic assessment.

b. Frontex at sea: complicity and agency in pushback operations

As previously mentioned, the role of Frontex does not limit to operations taking place on EU land, but rather expands to sea and all borders under EU jurisdiction. Hence, an analysis of Frontex activities and alleged pushback will be instrumental for the sake of the argument of the dissertation. The case analyzed is framed within the activities of Operation Poseidon, mainly in the timeframe of 2020, to follow on the time context used for the cases at hand; the incidents taken into consideration throughout this subchapter will be later evaluated in the light of the principle of search and rescue, which provides for the duties of Frontex vis-à-vis saving human lives at sea and for the breach of such fundamental rights.

The set of operations carried out in the Aegean Sea, covering the sea borders between Greece and Turkey along the Greek Islands, falls under the umbrella of Operation Poseidon. The Joint Operation Poseidon was launched in 2006 with the aim of supporting Greece in managing the

[300] Monella, L.M., (2020). *Frontex border operation in Greece 'lacks legal basis' after Greece suspends asylum law*, euronews, available at: https://www.euronews.com/2020/03/10/frontex-border-operation-in-greece-lacks-legal-basis-after-greece-suspends-asylum-law

migrants flow coming both from land and sea; for the purpose of this dissertation Joint Operation Poseidon Sea will receive particular attention. Table 1 shows how over the years the Operation has become increasingly important in the framework of Frontex Operation, as an initial number of operational days of 11 and 60, respectively in 2006 and 2007, sharply increased to covering the full year from 2009 to 2011.

TABLE 1

Operational information (days and cost) of Joint Operation Poseidon, Sea

	JO POSEIDON Sea	
	Operational days	Cost
2006	11	255,064
2007	60	2,250,000
2008	292	7,982,506
2009	365	12,886,993
2010	365	12,430,000
2011	365	11,588,926
2012	275	n.a.

[301]

Source: Campesi, 2014

While the Operation resulted ongoing for years, a pivotal point is represented by the year of 2015. The unprecedented migratory crisis caused hundreds of thousands of migrants to move towards EU territory; in particular, Greece was flooded by an influx of around 821.000 individuals, most of them which came through maritime paths (816.000). October 2015 embodies the perfect example of pressure to which the Greek borders where subject: in this single month, more than 200.000 migrants reached Greek Islands. Such pressure was further impacted by the obstructionism opposed to the "open door" policy, advanced by the government of Germany and strongly contrasted by other Member States. These political, technical and logistical hindrances to the flow of migrants across Greece and into the European Union caused such flows to stagnate in Greece, where migrants continued arriving without receiving the possibility to move across other routes. The combination of the burden of heavy migratory flows, an economic, political and institutional crisis and the refusal by fellow Member States to lend a helping hand, motivated the Greek

[301] Campesi, G., (2014), *Frontex, the Euro-Mediterranean Border and the Paradoxes of Humanitarian Rhetoric*, South East European Journal of Political Science, II, 3, 2014, pp. 126-134

government to ask for enhanced cooperation with Frontex.[302] The result was the development on an operational plan, to be launched on 28th December 2015, renaming Joint Operation Poseidon Sea to Joint Operations Poseidon Rapid Intervention. The deployment of the Operation included 300 Frontex agents provided by Member States and a total of 15 ships; the figures however fluctuated over the years according to the necessity, as increasing pressure of migratory flows led Frontex to deploy as much as 700 agents. As previously mentioned, Frontex officers work in close contact with Greek coastguard and other relevant authorities with the aim of carrying out preliminary operations of registration and identification and Search and Rescue (SAR) operations. Early-stage divergences and critiques to the development of Operation Poseidon propagated to the extent in which the European Parliament and the Council brought their dispute before the CJEU in 2010; the matter at stake revolved around the degree of politicization of rules and measures agreed upon for sea border surveillance, questioning the democratic legitimacy of provisions governing the management of maritime borders.[303] Regulation 656/2014 solved the disagreement in developing an agreed system of competencies and legal legitimacy of Frontex Joint Operations;[304] the resolution of the dispute allowed both the Frontex framework and the sea management to move forwards. The Joint Operation Poseidon Rapid Intervention exercised its duties uninterruptedly to date; for our interests, however, the period considered will be the year 2020 as it fits the overall disruption with regards to the respect of fundamental rights in light of the culmination of merging crisis, namely the Covid pandemic and new migration flows.

The understanding of the development and the reasoning behind operation Poseidon is instrumental in providing a much fuller picture of the alleged abetment and participation of Frontex in sea pushbacks. An investigation advanced by Bellingcat, Der Spiegel, TV Asahi, Lighthouse Reports and ARD attempted to provide a snapshot of the involvement of Frontex forces in the operations carried out by the Greek government, indeed proving that assets belonging to the Agency were indeed involved to different extent. The main trigger for employing maritime pushbacks is, most commonly, the sighting of dinghies in the Aegean Sea. The Greek Coast Guard usually intervenes either by physically blocking the vessels for the purpose of exhausting the dinghy's fuel, or by practically sabotaging their engines. Once the dinghy is no longer able to sail on its own

[302] Stribis, I. (2020), *Operation Poseidon in the Aegean Sea and the developments in the governance of EU's maritime border*, in Sobrino Heredia, J.M. and Oanta, G.A., (2020), *La construcción jurídica de un espacio marítimo común europeo*, J.M. Bosch Editor.
[303] *European Parliament v. Council of the European Union* [2012], Case C-355/10, CJEU
[304] Regulation No 656/2014 of the European Parliament and of the European Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

terms, the pushback either is attained by waiting for waves to push it back into Turkish territorial waters, or in other instances where unfavorable conditions delay or prevents the operation, the dinghy can be towed. As mentioned throughout the whole dissertation, such pushbacks clearly violate provisions of international and Community law, adding to the fact that, as previously mentioned, Turkey as the receiving end country of these pushbacks does not clearly fall into the category of "safe third country". Frontex has a duty to immediately rescue the individuals on board of these often-overcrowded dinghies, a duty which will be later analyzed more in detail; avoiding this obligation by changing direction and leaving the task to Greek forces, or making waves to even slightly assist the redirection of the boat towards Turkish seas entails a direct involvement into the pushback.

In order to record the role of Frontex in Greek operations, the investigation assessed the assets employed at the time. The tracking undertaken considered sources coming from data provided by Frontex, open sources and questions posed to the European Parliament; the combination of all these data resulted in a total of 259 officers, one offshore patrol vessel, ten coastal patrol boats, three coastal patrol vessel, seven thermal vision vehicles, one helicopter and three patrol cars.[305] Although the investigation has been carefully drafted and has considered all relevant sources, it is important to note that probably these figures shall be revised into a higher number, as many assets did rotate in and out of the sight of the investigators; however, these numbers are useful for establishing a starting standpoint for the understanding of these forces in the pushback incidents. The second step of the investigation dealt with the tracking of the instruments involved in the operations. While some vessels' movements were scrupulously followed thanks to open sources, as in the case of two vessels from Romania and Bulgaria respectively whose rotation was possible to individuate and track, other pieces of information were more difficult to be retrieved; hence, sites such as Flight Radar and Marine Traffic were used in combination with data obtained from the ships' transponders.[306] Once this data was combined with other granular data obtained from tracking companies and NGOs for the dates relevant for the investigation, the researchers were able to draft a specific insight over the incidents analyzed. Six are the events taken into consideration; the timeframe accounted for spans from March to August 2020 and the incidents are divided into two "confirmed incidents", meaning that Frontex personnel and/or assets were present in the location where the pushback took place, and four "proximity incidents", defined as

[305] European Commission Directorate-General for Migration and Home Affairs, (2020), *Frontex Operations in Greece,* Reply to question E-1650/2020.
[306] Marine Traffic, MAI 1103 Voyage Information, available at: https://www.marinetraffic.com/en/ais/details/ships/shipid:319617/mmsi:264900162/imo:0/vessel:MAI_11O3

events where Frontex personnel and/or assets were in the range of five kilometers from the incident. Starting from the latter, the proximity incidents considered in the report are divided as follows. The first incident took place in the night between the 28th and 29th of April on the Island of Samos, where several migrants landed and were later detained, then given a propulsion-less life-raft and towed towards the Mycale Strait, separating the Samos Island from Turkey. The researchers noted how the pushback was witnessed by a surveillance plane which flew over the area twice throughout the duration of the event. The second incident took place on the 4th of June in the northern area of Lesbos. The Nortada vessel, flying Portuguese flag, was reportedly as close as slightly more than one kilometer to the incident concerning two dinghies being pushed back in the area. The following day, June 5th, witnessed another pushback of a dinghy whose distance from the Nortada vessel amounted to two to three kilometers. The last proximity incident considered took place on August 19th, with Northern Lesbos serving yet once more as the scenario. A dinghy was reported as being pushed back from the area while the Molivos vessel, also flying Portugues flag, was reported to be as close as five kilometers from the site; Molivos was also reported to have changed its direction to converge towards the site of the pushback, precisely before losing signal from the transponder, an event which could easily entail that the personnel of the vessel decided to turn the transponder off. These cases concern instances in which the Frontex assets are not clearly reported as having participated to the operations of pushback, and their involvement proves quite easy to ascertain with absolutes degree of certainty. The vessels and aircrafts pertaining to Operation Poseidon, however, are highly involved in surveillance task and are equipped with extremely powerful instruments, as in the case of the Molivos being in possess of a highly technological FLIR camera able to reach exceptionally degrees of magnification. While the structure of the dinghies might pose a barrier to their effective tracking on radar, the behavior of both dinghies and of coast guards plays a facilitating role for Frontex assets. Dinghies are oftentimes found in small groups, and even in the instances where a single dinghy is attempting to cross the border on its own, the pushback operation for definition entails the presence of at least one other vessel. As shown by evidence retained from surveillance videos and other sources, pushbacks are usually carried out in the presence of several vessels, usually belonging to the Greek and Turkish coast guard, whose purpose is to maneuver in such a pattern and speed which allows waves to push back the dinghies. Hence, not only operating in such a manner poses serious threats to the dinghy due to relatively high chances of collision, but also the fragile and overcrowded dinghies risk succumbing to the waves created. These operations do indeed demonstrate how, while single dinghies might not be visible on Frontex assets' radars, such surrounding operations would clearly be detectable instead, leaving what can be referred to as a very visible "signature of the pushback".

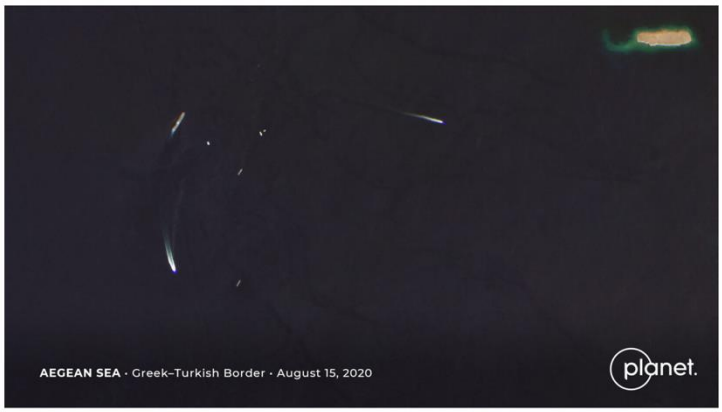
FIGURE 2

Aegean Sea dinghy's point of view on 15th August

Multiple vessels, large and small can be seen surrounding this dinghy that was pushed-back on 15th August

FIGURE 3

Radar detecting vessels and dinghies on 15th August in the Aegean Sea



Satellite imagery from Planet Labs Inc. taken on August 15 at 11:38 AM showing the pushback in progress

Source: Waters, Freudenthal and Williams for Bellingcat, 2020.[307]

Additionally, as visible in IMAGE 3, not only the radars are able to detect the position of dinghies and related vessels, but coast guards' ships are indeed visible to a range, proving that Frontex's assets cannot be completely blind to events that occur in the range of a maximum of five kilometers, as the proximity cases individuated above. By taking a step back and analyzing more in-depth the case of the first incident, the one taking place on Samos islands between the 28th and 29th of April, it is possible to capture the full extent of the magnitude of the surveillance equipment of the Frontex assets, in order to establish that even if the ships and the aircrafts considered did not fully participate to the incidents, they witnessed it to an extent and have a responsibility over the pushback. The pushback of 22 migrants landing on April 28th on the Island of Samos, subject to

[307] Waters, N., Freudenthal, E. and Williams, L., (2020) *Frontex at fault: European Border Force Complicit in "Illegal" Pushbacks"*, Bellingcat, available at: https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks

detention by Greek authorities and then towed in the Mycale Strait with no means of propulsion, was publicly denied by the Greek government in spite of the several sources documenting the events.[308] In the early hours of April 29th, while the raft was floating in the Mycale Strait, the G-WKTH private surveillance plane overflew the area at 02.41 AM and 03:18 AM respectively. The G-WKTH aircraft is reportedly of property of DEA Aviation, a provider of services of aerial surveillance to the Frontex Agency, which asserted that the surveillance tasks carried out by these assets are live-streamed in Warsaw, at the headquarters of the Agency.[309] Being employed for aerial surveillance operations, the G-WKTH is equipped with efficient equipment and highly technological camera, which makes hard to believe that such advanced technological means were not able to detect the presence of not only the life raft, but also of the Greek and Turkish ships participating in the pushback operations, hence questioning the indirect complicity of the Agency.

In addition to the proximity incidents, as previously stated, the investigation took into consideration two active incidents, meaning that Frontex assets was either aware of pushback activities or directly participated. While the two cases occurred respectively on June 8th and August 15th, the latter will be analyzed first as the former concerns an incident in which Frontex assets were directly participating; hence, the first analysis will be devoted to the incident with relatively less Frontex implications. On the 15th of August, the Consolidated Rescue Group (CRG), the Monitoring Rescue Cell (MRC) and other NGOs involved in monitoring activities in the Aegean Sea reported a pushback involving a confrontation between the Greek and Turkish coast guards. Videos provided by CRG and MRC show that the dinghy subject to the pushback operation lacked a starter cord in the engine, a sabotage operation claimed to be carried out by the Greek Coast Guard, a claim backed by what has been widely recognized as common practice employed by Greek authorities.[310] While some of the images provided for the incidents seem unclear, in several stills and other pictures taken of the incident the presence of a vessel flying Romanian flag, MAI1102, is clearly visible. As shown in the picture (IMAGE 4), MAI1102 was certainly in visual range and had perfect sight of the confrontation which was happening in front of it, taking place among the other vessels present in the picture

[308] Deeb, B., (2020), *Samos and the Anatomy of a Maritime Push-back*, Bellingcat, available at: https://www.bellingcat.com/news/uk-and-europe/2020/05/20/samos-and-the-anatomy-of-a-maritime-push-back/
[309] Poland-Warsaw: Aerial Surveillance Services for Border and Coast Guard Functions, Contract Award Notice, 2020.
[310] Deeb, B., Hadavi, L., (2020), *Masked Men on a Hellenic Coast Guard Boat Involved in Pushback Incident*, Bellingcat, available at: https://www.bellingcat.com/news/uk-and-europe/2020/06/23/masked-men-on-a-hellenic-coast-guard-boat-involved-in-pushback-incident/

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FIGURE 4

Top: 15th August 2020 Pushback Operation. Bottom Left: MAI1102 on a sunny day. Bottom Right: Still from the 15th August Pushback Operation zooming on MAI1102

Source: Waters, Freudenthal and Williams for Bellingcat, 2020.[311]

The other pushback accounted for by the researchers took place on the morning of 8th June. 47 migrants, pushed back by Greek authorities, were rescued by the Turkish Coast Guard in their territorial waters. The press agency Anadolu reported that the MAI1103, a Romanian Frontex ship, did actively participate in the operation by actively blocking a dinghy.[312] By crossing several sources, including videos from the Turkish Coast Guard, tracking information from ships that happened to be in the vicinities of the incident as in the case of Berlin, a NATO vessel, the picture provided did indeed demonstrate that MAI1103 was physically blocking the ship and that the personnel on the vessel was exchanging communications with the raft. The events rapidly take a different turn as MAI1103 swiftly changes course in order to generate waves, an operation which has been previously demonstrated to having been performed by Hellenic and Turkish Coast Guards in spite of the risks it poses to such overcrowded and fragile vessels. As soon as the Hellenic personnel reaches the site, MAI1103 parts ways with the dinghy which is left in the hands of the Coast Guards of Greece and Turkey. The incident evolved into a stalemate between the two Coast

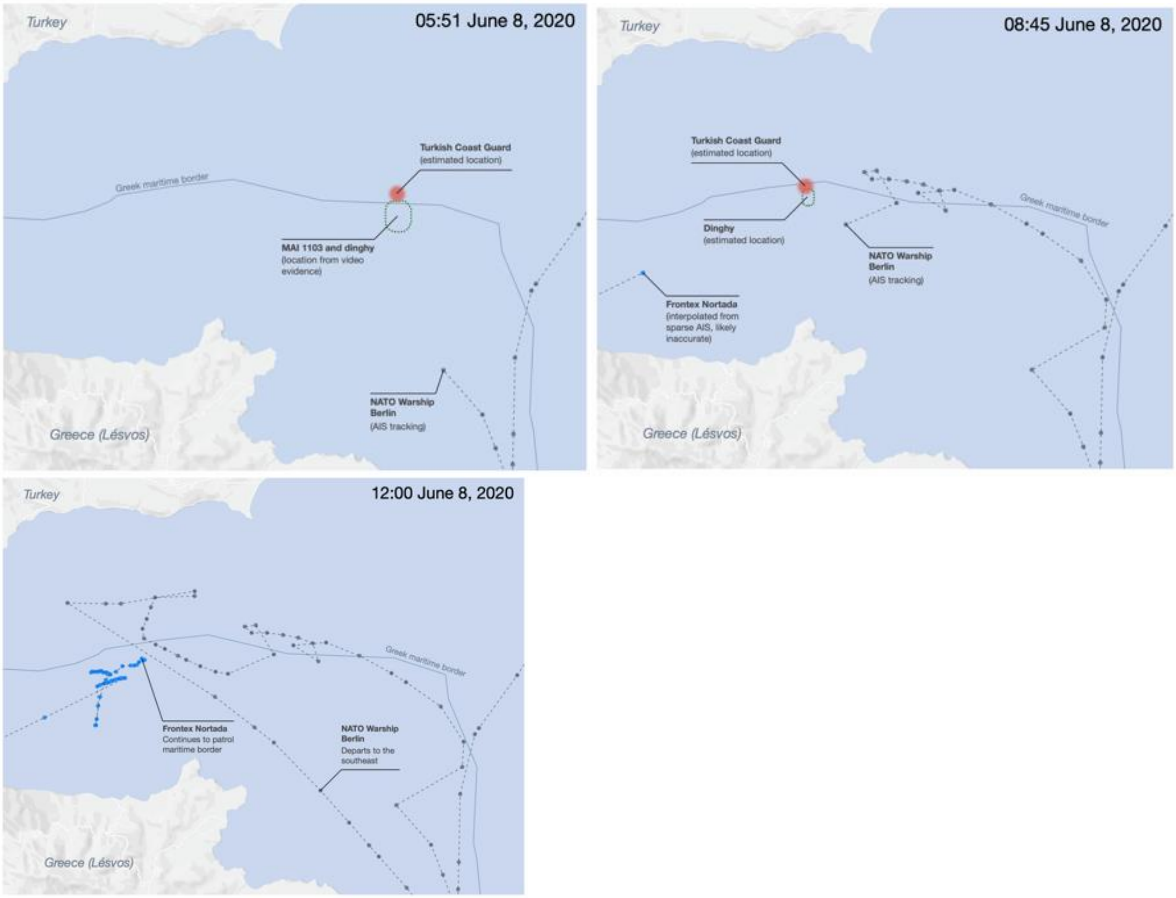
[311] Waters, N., Freudenthal, E. and Williams, L., (2020) *Frontex at fault: European Border Force Complicit in "Illegal" Pushbacks"*, Bellingcat, available at: https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks

[312] Cetin, S., (2020), *EU border force helps Greece violate asylum seekers*, Anadolu Agency, available at: https://www.aa.com.tr/en/europe/eu-border-force-helps-greece-violate-asylum-seekers-/1924458

Guards, moving along the north-western area of the maritime borders, as observed by the NATO vessel Berlin. Hence, the incredible amount of sources considered for this incident contributes to the evident affirmation that Frontex vessels did indeed actively participate in pushback activities; as the scope of the research was limited in means and time, a certain degree of generalization is allowed thus permitting to uphold the hypothesis that Frontex assets in the Aegean Sea do indeed participate in pushback operations. The closing piece of information relevant under the umbrella of events taking place on the morning of June 8th is that another Frontex ship, the Portuguese Nortada, was reported to having been in the proximities, i.e., less than 5 kilometers, of the events involving the MAI1103 and the dinghy, thus making this active incident also a proximity one.[313]

FIGURE 5

Reconstruction of the pusbhack incident of 8th June 2020, respectively at 05:51 AM, 08:45 AM and 12.00 PM.



Source: Waters, Freudenthal and Williams for Bellingcat, 2020.[314]

[313] Waters, N., Freudenthal, E. and Williams, L., (2020) *Frontex at fault: European Border Force Complicit in "Illegal" Pushbacks"*, Bellingcat, available at: https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks

[314] Waters, N., Freudenthal, E. and Williams, L., (2020) *Frontex at fault: European Border Force Complicit in "Illegal" Pushbacks"*, Bellingcat, available at: https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks

All these incidents highlight some critical features of Frontex operations at sea. Firstly, the hardships encountered by the researchers in retrieving information and evidence related to Frontex ships clearly highlights an issue of transparency, which easily adds up to the broader concept of the Agency enjoying sufficiently high degrees of vagueness which allow for carrying out of operations which might not always comply with human rights provisions. While when this concept was first suggested in the dissertation the actual violation of fundamental rights by Frontex was not already proven, the presence of evidence regarding participation, either indirect or direct, in pushback operations in the Aegean Sea does provide for a link, as illegal operations and behaviors are indeed practiced. Vagueness and lack of transparency do already represent a problematic stance to be adopted by Frontex and by EU agencies in general, but they assume a whole new dimension when violations of human rights do indeed take place. In addition to violations of the principle of *non-refoulement*, practices carried out by Frontex in this context gain a new meaning when considered in light of the principle of search and rescue, a norm of international customary law which is visibly disregarded by the Agency in the cases just presented. By taking a closer look to the duty of search and rescue (SAR), the incidents further highlight how the European Union is indeed failing in upholding its own standards and practices vis-à-vis migrants and asylum-seekers.

c. The Search and Rescue dimension vis-à-vis Frontex operations in the Aegean Sea

The search and rescue duty constitutes one of the oldest features of both international law and law of the sea, coming to constitute a widely accepted norm of customary law.[315] Hence, as customary law is widely accepted as part of the European legal order, it shall be borne into consideration to understand the responsibilities of States and related agencies, e.g. Frontex, which will be considered in order to understand the extent of violation of fundamental rights by EU institutions. The most relevant obligations for understanding the international approach to search and rescue are the Law of the Seas Convention, the Safety of Life at Sea Convention of 1974 and the Search and Rescue Convention of 1979, whose compound serves as a general guideline which applies globally. The 1982 Law of the Seas Convention (LOSC) provides that "every State shall

[315] International Law Commission (1956), '*Commentary on Draft Art. 12 of the United Nations Convention on the High Seas*', UN doc. A/3179

require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers . . . to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress"[316] in Article 98(1). This provision is mirrored by the Safety of Life at Sea Convention (SOLAS), establishing that any signal, deriving from any source, denoting that persons are in distress at sea triggers the duty for rescue for the chief of any vessel at sea.[317] The SOLAS Convention further compels coastal states to set up any needed arrangement or procedure, therein including the ensuring of the full functioning of search and rescue operations from their establishment to their operative phases.[318] The LOSC, in Art. 98(2) further enlarges the territorial scope of the SOLAS provisions to high seas, extending the rescue obligation to virtually be applied in any situation. Thirdly, the SAR Convention establishes the SAR regions and coordinates inter-state cooperation across the Parties to the Convention.[319] All these legal obligations have a virtually global scope of application, meaning that any individual found in the afore-mentioned situation of distress shall be rescued throughout all seas and oceans, with no exception or derogation and regardless of the status of the individual.[320] The notion of "distress" stands in particular relevance for the analysis of Frontex's responsibilities towards human rights at sea, as the SAR Convention defines "distress" as any instance in which individuals or ships is in grave danger and need assistance. Due to the fragile nature of the overwhelming majority of vessels, usually dinghies and cayucos, crossing the Mediterranean Sea, such unseaworthy means of transportation have been considered as *a priori* needing assistance; the EU Guidelines for Frontex operations do indeed confirm such an extensive interpretation, allowing for any uncertainty related to the capabilities of the vessel and to its survival warrants the necessary grounds for being considered objectively in danger.[321]

In light of the relevance of these international obligations, not only applying to States but extending to including captains of the vessels, Frontex's SAR operational duties are enshrined in Regulation 2016/1624, which develops on the assisting role Frontex assets are obliged to provide to the countries involved, not necessarily belonging to the European Union, in the framework of SAR operations. Paragraph 47 of the Regulation clearly states that "The European Border and Coast Guard, which includes the Agency and the national authorities of Member States which are

[316] Law of the Sea Convention, 1982, Art. 98(1).
[317] International Convention for the Safety of Life at Sea, 1974, ch. V, Regulation 33(1)
[318] Ibid., Regulation 7(1).
[319] SAR Annex, chs. 2 and 3.
[320] Nandan, S.N., and Rosenne, S., (1995), *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. III (The Hague: Martinus Nijhoff), p. 177.
[321] Frontex Guidelines Decision, Annex, Part II, para. 1.2.

responsible for border management, including coast guards to the extent that they carry out border control tasks, should fulfil its tasks in full respect for fundamental rights, in particular [….], the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue".[322] The extent and magnitude of this body of legal obligations concerning rescue-at-sea operations clearly pictures how Frontex operations is under the legal responsibility of rescuing individuals which are in distress, a category where the fragile vessels in general, and the dinghies analyzed in the case study more in particular, fall without any doubt. The legal responsibility stemming from this multilayered framework clearly impacts Frontex, as the avoidance of individuals in need of assistance in the seas would prompt a breach of legal obligations under, at least, LOSC, the SOLAS and the SAR Convention and the very Frontex Regulation 2016/1624. Thus, the international framework and the role of customary law, whose extent of penetration into the European legal framework has been previously assessed, applies also to Frontex operations. The wording "Frontex operations" includes all types of tasks, from those strictly conducted under time constraints, to ongoing duties of border surveillance such as the ones carried out in the Aegean Sea in the framework of Joint Operation Poseidon Rapid Intervention. Consequently, the indirect or direct involvement in the cases previously analyzed concerning proximity or active incidents in the timeframe of March to August 2020 constitutes a breach of international law of the sea, infringements of customary law and of the Frontex Regulations, emerging as a violation of the SAR responsibilities to aid individuals in evident status of distress at sea. The responsibility of such violation is indeed tricky to assess from several points of view: firstly, the order to avoid and ignore the dinghies taken into consideration in the investigation is to be ascertained, with the purpose of understanding if the responsibility would fall on the shoulders of the captain of the vessel, on the State whose flag the vessel is flying, or Frontex itself for having framed the operational procedures without properly taking into consideration the humanitarian stakes and concern. Secondly, the incidents covered in this dissertation prove the hardships of researchers in properly documenting such violations with sufficient and irrefutable evidence for them to be properly considered by the mechanisms available.

In conclusion, for the sake of the argument the responsibility issue would not wholly pertain to the scope of this analysis; what is relevant, however, is the fact that indeed the praxis of Frontex clashes with the relevant legal framework, highlighting issues of transparency, responsibility and

[322] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC

striking lack of respect for any fringe of international law. The shortcomings compounding into the fallacies of Frontex in the case at hand are multilayered, from the ambiguity of Frontex's behavior and the tendency to over-rely on internal guidelines, to the framework of monitoring and accountability and the failure to effectively implement well-established obligations.

Frontex's commitment to safeguarding fundamental rights is indeed questionable, especially as to why only six SIRS in the umbrella of the Greek events occurring in 2020 in contrast with the fact that the incidents to be considered shall reflect a much higher number, entailing a disconnection between the reality and the accountability process vis-à-vis identification and report of violations, as in the case of the total impunity for the participation of Frontex to pushback practices in the Aegean Sea.[323] What further exemplifies Frontex's fallacies is the possibility for the Executive Director, as in the case of the events of Evros, to basically disregard the view of the Fundamental Rights Officer, a mechanism clearly designed to advise the Agency on fundamental rights matters. The total absence of outside independent processes capable of constraining decisions and procedures enforced by Frontex which violate basic rights is further aggravated by the opaqueness of the Agency's operations, which prevents independent authorities from serving as whistleblowers in cases of human rights violations. A further consideration, which leaves room for thought, is the extent to which the European Commission is embedded and is able to influence Frontex's decision, clearly visible from the composition of the Management Board and the appointment of the Executive Director. The authority the Commission exercises over the composition process of Frontex, notwithstanding the very fact that Frontex's duty is to pursue the interests of the European Union as a whole, entails a certain degree of responsibility of the Union over the decision of the leaders of Frontex in blatantly disregarding the importance of human rights violations in favor of effectively pursuing interests which might be less morally-compliant with the international narrative of human rights protection.

Frontex is able to evade accountability from the public through operations of deflection, claiming absence in operational areas (as shown in the case of Evros' border zones), deflecting responsibility to Member States and governments and curbing the possibility for the public to access information on Frontex's practices. Indeed, the very reason behind Frontex's creation, namely to control the external border of EU, is the trigger for political pressure, as duty to manage borders had already clashed in several instances with the duty of respecting fundamental rights;[324] the consideration stemming from the practice analyzed in the case of Greece clearly demonstrate

[323] Perkowski, N., 2018. *Frontex and the convergence of humanitarianism, human rights and security*. Security Dialogue, 49(6), pp.457–475

[324] Hruschka, C., (2020). *Frontex and the Duty to Respect and Protect Human Rights*. Verfassungsblog, available at: https://verfassungsblog.de/frontex-and-the-duty-to-respect-and-protect-human-rights/

the prioritization by the Agency of border management over concerns of human rights. The very deployment of Frontex assets following the March 2020 request by the Greek government has raised objections over the lack of legal basis for the operation to take place. As Art. 27 of Regulation 1624/2016 clearly establishes that Frontex shall operate in compliance with human rights law and the European legal order, the deployment of Frontex assets in support of a country currently suspending asylum procedures did indeed provide for a breach of the Regulation; the support in managing incoming flows without any guarantee for the protection of human rights including the right to asylum represented an overstep of Frontex with regards to international law, nonetheless collimating with the overall approach adopted by European authorities such as President Von Der Leyen in avoiding the clear sanctioning of Greece's actions.

An additional layer to the "dark side" of Frontex, or the collision between interest and responsibilities, would be rounded up in summarizing the considerations disseminated over the last paragraphs, revolving around the dual illegality of pushbacks in light of the inability to correctly receive and process international protection applications and of the risk of indirect refoulement, to which migrants crossing the Turkish-Greek border are either directly subjected or potentially subjected, meaning that without any individual assessment of the situation of the individuals any clear evaluation of mistreatment risks from countries they are returned to cannot be ruled out. Participating to the Greek operations of pushbacks hence entails Frontex repeatedly failing to uphold its international and European obligations on fundamental rights by supporting and taking active part in practices violating the principle of *non-refoulement.* The fundamental rights complaint mechanism of 2016, whose aim was to hold Frontex responsible and provide for an effective access to accountability mechanisms, fell short of expectations as the complaints did not receive any review and were simply passed to Member States, failing once again to constitute an instrument of responsibility for Frontex. Even in light of the Art. 104 of the EBCG Regulation, outlining remedy mechanisms, the complaint and responsibility mechanisms concerning Frontex are still below the threshold set by Art. 47 of the Charter of Fundamental Rights for effective remedies, due to the nature of the complaint mechanisms being non-judicial and internal to the Agency.[325]

In order to provide Frontex with a more adequate legal equipment, in the sense of providing a clear and strong corollary framework for Frontex operations, the considerations to develop are the following. Firstly, the European Council shall revise the liaison between the operational pattern and

[325] Fink, M. (2020), *Frontex: Human Rights Responsibility and Access to Justice*, EU Immigration and Asylum Law and Policy, available at: https://eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/

the legal mandate of the Agency for it to include human rights violations in the risk analysis assessment in a more structured, analytical fashion. A valuable option might entail enhancing the CIRAM, the Common Integrated Risk Analysis Model, the risk analysis approach adopted by Frontex in order to evaluate threats, vulnerabilities and impact of the operational procedures breaking down indicators in order to provide an assessment of the consequences involved in the preparing steps of an operation. By including more statistically relevant quantitative and qualitative variables and data, i.e., revising the indicators employed in the CIRAM, will provide a more comprehensive and accurate evaluation of the risks stemming from border management procedures.

This first dimension would tackle the fallacies of Frontex to the extent where they derive from a failure to capture the magnitude of the risk factors at stake, a somehow voluntary bias which might stem from the absence of adequate indicators resulting in an incomplete picture. Secondly, improving the role of the internal whistleblowers and authorities in charge of evaluating human rights implications vis-à-vis the operations, e.g. the Fundamental Rights Officer. By considering previously issued recommendations by the latter and other relevant consultative fora, the European Union will be able to provide a legally binding framework regulating operations and their possible suspension in case of surpassing a chosen threshold. This framework would indeed solve the conflict of interest which is too often left in the hand of individuals, with their fallacies and biases, and with the political pressure stemming from the mandate's implications; the development of binding obligations could reliably serve as a criteria reference for the purpose of constantly being backed by legal basis. Thirdly, one of the most common and relevant critiques moved towards Frontex's border management has dealt with the opaqueness of Frontex documentation. Henceforth, developing a database available to more than Frontex itself would partially solve the transparency issue, allowing for the establishment of independent authorities such as the European Ombudsperson which would be able to merge the need for transparency with the purpose of the mandate and the operational features of Frontex.

Another feature that proves extremely relevant in this context is the need for a stronger constitutional framework of accountability, allowing for EU institutions to extend their supervisory role and for independent mechanisms of adjudication to provide for consistent, comprehensive and effective remedies. The Agency would need to be subject to internal and external monitoring, preventing it from the vagueness that too often was encountered in the cases analyzed throughout these chapters. Finally, Frontex shall receive impulse and inputs to commit to the development of a comprehensive strategy and regulations concerning human rights and their eventual violations. This strategy shall be able to address crisis situations and to standardize the operations in order to

prevent breaches of human rights law; the regulation shall hence take center stage in the Agency role and mandate as to follow what is included in the very Frontex regulations stating that all operations are to be carried out according to the respect of human rights.[326]

[326] Karamanidou, L., Kasparek, B., 2020. *The case of the European Border and Coast Guard Agency Frontex*, Working Paper Series Global Migration: Consequences and Responses, pp. 44-67

7. Findings and concluding remarks

In moving towards the conclusion, drawing from the whole body of the dissertation is necessary to fully comprehend the picture provided. The European Union has historically projected and fostered, both voluntarily and involuntarily, the view of the EU being among the finest and most effective defenders of human rights. By tackling the involuntary dimension, it is indeed true that the Union has provided, over the years, an extensive body of human rights obligations. The Member States are under a hardly-comparable fundamental rights acquis with respect to other States and regional or supranational organization. Human rights have been conceived as part of the Union DNA, which is laudable, and this DNA has been extensively expanded over the years, both actively, through the development of the Charter, and somehow passively, by allowing international law and general principles of law to penetrate the European legal framework. The result is a *de jure* complex interplay of provisions which does provide for a commendable and grounded protection of human rights. On the other hand, the certainly has an interest in portraying itself as such, in a virtuous circle that permitted many violations to go undetected throughout the years. The role that the EU holds in the international arena allows for the organization to be a trend-setter, in an unbalanced environment where its peers, i.e., fellow regional organization or other countries, rarely have the influence or the power to check its actions. The shared belief that the Union "cannot do wrong" as its grounds are laying on an incommensurable human rights acquis prevented broad scrutiny over the Community's actions, which in many cases have been claimed to violate the very principle the Union subscribed to. By taking into consideration as a test two widely accepted rights, such as the freedom from arbitrary detention and the respect of the *principle of non-refoulement,* the question of the dissertation, namely whether such a complex legal framework is really able to be sustained in practice, is more easily answered. Similarly, the context of borders proves instrumental in the analysis for two main reasons. Firstly, borders themselves represent a pillar in the geographical dimension of human rights protection, meaning that due to their nature they do provide for multiple situations in which human rights are at stake, hence entailing more possibilities for them to be violated. Due to the externalization of the EU borders, several tasks regarding the two rights at hand are enforced, or decided upon to some extent as in the case of international protection applications, at the borders. The straightforward conclusion would thus be for the European Union to concentrate HR protection in these zones, as acting on the first line allows for a decentralization of the migratory pressure, one of the main aims of the externalization strategy. Secondly, borders are

porous, and are porous in themselves. The conception of borders, from their very enshrinement in the concept of sovereign State, necessarily entails a porosity which is necessary for flows (of capital, of services, of individuals…) to occur. Due to their porousness and their commonly remote location, borders represent a blurred environment for the enforcement of human rights, once again both voluntarily and involuntarily. The latter dimension is intrinsic to the definition of border, especially as many individuals crossing it flee from conflicts, wars and other instances where their human rights were already put at risk. The former conception lies in the desire, as seen throughout the dissertation, of the Union to maintain a degree of vagueness which is necessary to ensure that the Community's interests are respected. Here the crack in the picture opens: the Member States of the European Union are not solely selfness protectors of human rights; they do have their interests and managing migration to their will is part of them. While it already appears evident how human rights might be infringed by the EU and Member States, it is only through the framing of the practices and praxis that this evidence really comes to life, allowing for outlining the different grounds on which the afore-mentioned actors do disrespect the obligations they are subject to.

a. Fostering invisibility through detention: a first rift between theory and praxis

The first confirmation of the thesis is proven by understanding practices of (arbitrary) detention. A preliminary consideration shall be produced: unauthorized immigration has no grounds for being encouraged whatsoever; hence, managing illegal entry into a State's territory does not in itself disprove the human rights commitment of the European Union, as no scholar would argue that migration shall be in any case unregulated and unmanaged. The corruption of this conception does however occur when regulation and management of migratory flows results in unnecessary and harmful restrictions, carried out improperly on three main grounds. The first ground is the equation of illegal migrants to legal ones, meaning possessing regular documents or pursuing regular paths for entering the territory. A stark example is related to the role of asylum-seekers, which are expected not to possess all necessary documents to enter as a migrant and have a right to pursue a different path from the latter, which shall be provided for under the adequate legal safeguards. In more than several instances, Member States have been guilty of "blanket association", meaning treating all the individuals in the same, usually harmful, fashion, preventing them from exercising their rights. The second ground revolves around unnecessary procrastination and/or hindering of the

individual's path to entry a territory. By arbitrarily detaining migrants, imprisoning them over the period prescribed for by European law, not only is the latter breached and disregarded, but the human dimension is further eroded, providing for a confirmation of the discrepancies between theory and practice. Thirdly, the altogether hindering of migrants and asylum-seekers' possibility to enjoy both legal safeguards and a possibility to pursue legal paths of entry represents the most striking feature; as shown in the case study, individuals are oftentimes completely prevented from crossing a border, even legally, obliging them to recur to illegal pathways resulting in a blind and blanket refusal of entry. These three dimensions of the distortion of the concept of migratory management is a complete negative alteration of an otherwise acceptable notion. Managing the borders and the flows across them is under the paramount necessity for legal safeguards and legal possibilities for migrants to entry to be guaranteed; contrariwise, the gap between theory and praxis is witnessed.

Before even diving into the actual practices, the established praxis of the "legal fiction of non-entry" shared by many Member States, among which Italy, Hungary, Greece and Spain, top destination for migratory flows, highlights the general behavior and attitude vis-à-vis immigration. Praxis has shown how the fiction of non-entry is employed to curtail individuals' rights on the grounds that due to the migrants not having officially entered EU territory, Member States do not exercise jurisdiction over the territory or the individuals. This legal fiction disentangles and detaches the link between the border and its physical grounds, allowing Member States to bypass the impossibility to physically exclude migrants from territory and to enforce a legal alteration of their territorial status, namely considering them outside of a territory with the purpose of excluding them from the enjoyment of the rights at hand. The result is a creation of an invisibility pattern, creating dynamics of exclusion on the grounds of illegality of the individuals attempting to cross the border. On the other hand, as discussed throughout Chapter 3.a, it lays the grounds for indiscriminate detention, potentially allowing States to bend their border inward to an indefinite degree for the sake of excluding migrants from acquiring the legal safeguards that shall be provided under EU law. This extraterritorialization of internal territory proves however disingenuous, as the scope of the rights at hand, more specifically being free from and restriction of movement, do not have any spatial constraint; thus, Member States are compelled to enforce their duties not to enforce arbitrary detention and to respect migrants' rights regardless of this tool. Due to the scope of general principles of international law and *jus cogens* being global, the legal foundation of this fiction is indeed shaky, and the extent to which it is used for actual restriction of freedom of movement on arbitrary grounds, entailing arbitrary detention and potential refoulement, represents a

clear violations of human rights. This view is further supported in light of Art.5(f) ECHR and following ECtHR case law on the matter. The previously analyzed case of *Thimothawes v. Belgium* case developed on the Court requiring for the external lawfulness dimension to be satisfied in order for the detention to be considered lawful; thus, blanket detention and any law allowing for such blanket and/or arbitrary detention to take place at the borders represents a violation of ECHR and ICCPR, from which Art. 5 ECHR stems. For detention to be blindly applied at the borders as a follow-up praxis to the fiction of non-entry it does represent an arbitrary measure of detention, employing the caveat of detention being allowed with a view to deportation or extradition under the afore-mentioned subparagraph (f) and completely disregarding the principle of proportionality and the necessity for individual assessment to be carried out, as also highlighted by ECtHR.

The causal consequence of the fiction of non-entry is, as previously asserted, detention, either lawfully recognized or *de facto* detention. Two are the considerations to be drawn on the matter: firstly, praxis varies across Member States; secondly: the majority of Member States apply detention measures. This first understanding allows us to outline a comparison among States, by considering that while practices and policies might differ across countries, the overall approach remains similar. It holds true that the reports provided by ECRE and analyzed in this dissertation do not cover the totality of Member States of the European Union; it is also true that the states considered (France, Germany, Greece, Hungary, Italy, Portugal and Spain) are the most actively involved, either by reassignment or by direct crossing at the borders, by migratory flows. They do, thus, provide for a clear and quite representative picture of the commonalities of the Union. The landscape provided by France, Portugal and Spain appears rosier, as the recognition of detention allows for detainees to enjoy the relevant rights provided by EU Law and the ECHR, as in the case of the right to judicial remedy and ensuing compensation. It is not to be ruled out of question that these countries do not exercise arbitrary detention; however, the judicial safeguards provided under the legally recognized status of "detainee" are far more protective than not being ascribed to it. This view holds particularly relevant vis-à-vis the approach of international law, which usually does not consider non-legal discourse into its judgments. As previously seen in *Amuur v. France*, the jurisprudence has evolved to the extent that not being under a recognized regime of detention does not necessarily devoid the individual of the official status of detainee under international law; being *de facto* detained does, however, provide a further obstacle and hardship with respect to the enjoyment of fundamental rights under Art.5, among which the possibility to effectively challenge the detention decision and to earn compensation for wrongful praxis. These countries are not freed from criticism, as in the case of France's *zones d'attente* or Spain's *ad hoc spaces*: lack of

safeguards and lopsided application of the same is constantly under scrutiny by human rights observers; they are perceived, however, as much more virtuous in their comparison with the considered States which do not formally recognize detention, as in the case of Hungary, Germany, Greece and Italy. What acquires particular relevance, specifically in light of the case study, is that the two countries which have demanded for hotspots to be established on their territory are under this category: Greece and Italy. The lack of legal recognition of formal detention in these two countries is extremely worrying in the understanding of the gap between theory and praxis within the European Union due to the volume of incoming migrants they witness every year. On account of the disproportionate, comparatively, pressure Greece and Italy experience at their borders, matched probably only by Spain, the perturbing realization is that these two countries might have an interest in maintaining higher levels of legal flexibility in order to better manage migration flows, by not ruling out measures and practices that are at the very best unethical and disrespectful of European and international law. Other countries are no stranger to arbitrary restrictions of movement and detention, as in the case of the Ljubljana Asylum Home, the Caricole Centre in Brussels or the Marsa Centre in Malta, which have been recognized to detain individuals for up to 7 months; the practice has indeed become practice all around Europe. Italy and Greece do, however, display higher level of exploitation of this device, which disproportionately affects both the human dimension and the legal one.

From the Italian border porosity leading to the airports of Fiumicino and Malpensa being *de facto* used as detention infrastructure, to the Italian hotspots of Taranto and Lampedusa, where detainees experience few to none degrees of liberty of movement and are usually arbitrarily detained with lack of uniformity, homogeneity, proportionality and absence of legal guarantees, the country has actively participated in what is a disproportionately negative impact on human lives of already distressed individuals. The case study on Greek land borders allows for an expansion on the matter. The paramount conclusion, which will be drawn in the following lines, is that Greece (and countries experiencing parallel situations at the borders) do have an interest in circumnavigating legal obligations. The analysis carried out in Chapter 5 allowed for an understanding of the extent of the exploitation of such device, namely not recognizing detention, especially throughout 2020 and the witnessing of an unprecedented (to some extent) crisis. While it holds true that the Covid crisis following massive migratory inflows linked to Syrian internal turmoil, they represent no justification for the Greek government as unlawful detention practices have been documented across the years. Human rights observer have notoriously denounced instances of indiscriminate detention of individuals attempting to cross the Evros river, incarcerated on grounds of illegality.

The Greek government has repeatedly tackled the issue from the political dimension by denouncing a worryingly increase in the trend of individuals aiming at illegally crossing the border; the other side of the coin, however, is that Greece has been continuously strengthened its border management measures, making them more stringent to the extent of *de facto* closing them when President Erdogan announced the "open-border policy" in late February 2020. The elevation of the threshold for individuals to be able to cross the border inevitably led to a higher percentage of illegal migrants; in order to correctly frame the picture, however, it would be deceiving to use the Greek narrative lens without taking into any consideration the behavior of the very State, which represents, in turn, the real reason why illegal crossing has increased so exponentially over the years. Here, before diving into the specific detainment praxis, patterns can be understood from another dimension, namely the one of the political narrative. Greece, supported by the European Union both actively and passively (respectively, as shown by the visit and statements of authorities of the caliber of President Von Der Leyen and by refusing to actively condemn Greek violations of human rights), has pushed this account of the facts in order to enjoy higher degrees of tolerance vis-à-vis the inhumane praxis carried out at the borders and the stripping of legal safeguards in detainment facilities. Henceforth, there is indeed cohesion between the legal praxis and the political discourse as it should be. However, the link to connect the corrupted versions of what ought to be: while it is the European Union's political discourse on human rights that shall be reflected at the national legal level, it is the disregarding of measure of protection of human rights that results echoed by national authorities and across the European Union, resulting in the justification of the practices analyzed throughout the chapters.

The political consideration does, thus, open the way for impunity to be allowed for unlawful practices of arbitrary detention. While already taking place before the Greek Decree of the 2nd March 2020, it is indeed the adoption of the latter which propelled new violations of the European human rights *acquis* and a general disregard of the provisions discussed in the dissertation. Measures of detention in the country do constantly breach relevant provisions, in particular Art. 5 ECHR and, as an extension, Art. 9 ICCPR and Art. 6 CFREU. More specifically, "blanket detention" and the overall idea of incarcerating all individuals without any order emitted by relevant Courts represents a clear violation of Art. 5(1)(a) ECHR, as competent Courts are rarely solicited in these cases. The scapegoat for Member States and for Greece is provided, in this regards, by the emergency nature of the migratory pressure at their borders; by invoking the need for extraordinary measures, human rights are easily sacrificed for the sake of security, who gains the upper hand even in face of international conventions and legal obligations, as in this case. While conclusions on

breaches related Art. 5(1)(b) become quite self-explanatory in this landscape, as the indiscriminate nature of the detention measures do not necessarily consider nor entail the rational enshrined in the subparagraph, thus making praxis redundantly worrying, Art. 5(1)(c) provides ulterior grounds which confirm the extent of the discrepancy between theory and practice. In order to ascertain whether the individuals represent a threat to national security or are at risk of absconding, individual assessment shall be carried out. Individuals need to be identified and go through the necessary procedures in order for the government to assess whether they might represent at risk; however, as all migrants and asylum-seekers are incarcerated from the moment they attempt the crossing of the border, it would be naïve to imagine that Greece, or any other State applying the same practices, carries out such an incredible amount of assessment every day. Hence, the Greek practice carpet detention proves unlawful on the ground of suspicion of threatening the national security, as does detention on grounds of risk of absconding in this case. Heavily militarized infrastructures, the presence of individuals which are practically unable to abscond (i.e., pregnant women and minors) results once again in proving the point that Greece operates measures of carpet detention disregarding any lawful ground under Art.5 ECHR, in this case specifically under subparagraph (c).

Following on Art.5 subparagraphs, the *Rahimi v. Greece* case outlined in Chapter 5 (b) provides evidence of further, systematic violations by Greece vis-à-vis Art.5(d) ECHR, highlighting how not even minors are sparred by the national interests of States taking form as blatant breaches of human rights, to the extent that even the ECtHR has been called upon acting over the *R.H. and R.A.* case, proving that Greek infrastructure and Greek practices do not provide satisfying guarantees for minors. Here, the duality of the obligations is instrumental in understanding the degree of detachment between theory and practice: as the rights enshrined in the ECHR and CFREU do not only consider obligations to be negative, but also as positive (meaning that not only active violations of human rights constitute breaches of European law, but also failing to adopt and implement necessary policies for such rights to be preserved), failing to provide detention infrastructures with adequate equipment, whatever it might be, results in a violation of Art.5. In conclusion, the Greek government could not even resort to the grounds provided in Art.5(f) ECHR, as this would spark a fire over the possibility, which has been prevented in many cases both by praxis and by government's orders in the case of March 2020, of individuals to submit an application for international protection. What is most worrying is, perhaps, that these measures do not fall under the umbrella of "practices" but under the one of "praxis", a word that has been repeatedly used throughout the dissertation as to exemplify how these measures are not one-time

mistakes, but rather the first choice as to responding to migratory issue and managing border security.

The thorny consequences of Greek border management praxis are, thus, able to be framed in the understanding of the *de facto* detention implications discussed a couple pages prior. By not recognizing to immigrants and asylum-seekers the status of detainee, the Greek government prompts and triggers a cloak of invisibility over the individuals at hand, which are formally not entitled to any of the afore mentioned rights and, subsequently, unable to challenge measures of arbitrary detention. This is the case of the following paragraphs of Art.5 ECHR, referring to legal guarantees and safeguards spanning from the right of being informed in an understandable language of the arrest and its grounds, to the exercise of judicial revision and a right to remedy and compensation enshrined in Art.5(2) to (5). The *Rahimi* case is one of the many highlighting how detainees do not enjoy any right to understanding the reasons for their detention, nor are educated in a known language on how to possibly challenge an allegedly arbitrary detention. The differentiation between *de facto* and recognized detention here assumes its full realization and problematization, emphasizing how the recognition of detainee status represents the very dimension of human rights protection and enforcement. Detention is indeed allowed by all conventions, treaties and sources of primary and secondary law, and its use is permitted (on lawful grounds) without any doubt whatsoever. It is so, however, also in light of the procedural and legal guarantees that are entailed in the concept, such as those of Art.5 ECHR, which allow for human rights to be respected even vis-à-vis security issues. In the instances analyzed, Greece, among others, strips the individuals from their human rights and deprives them from any status, be it either of detainee, asylum-seeker or individual waiting for return, drowning them in a purgatory where multilayered violations of human rights are exercised daily and there is no path to escape or challenge the breach of such rights. *De facto* detention, thus, represent a formidable instrument for border management, with the downside of completely disregarding human rights and eroding the European *acquis*, especially in light of the caliber of States performing practices under this regime, namely those receiving a hardly-matched number of migrants.

For the sake of the argument, namely to discern whether there is a gap between theory and practice/praxis at the EU level, detention in the framework of the case study does provide a clear cut answer: the gap is present, visible and long-standing. While some scholars would argue that the number of States guaranteeing legal safeguards throughout detention regimes, thus implying that countries such as Greece are simply free riders, the reality of the picture is that among those receiving the highest numbers of immigrants and asylum-seekers and those whose external borders

are the most pressured, the majority of Member States do apply the legal fiction of non-entry and do practice *de facto* detention. This consideration strongly alters the balance, worryingly tipping the needle in favor of a general detachment from the human rights enshrined in European law. The weight of countries like Italy and Greece, among others, is beyond disproportionate in statistically understanding that the overwhelming majority of migrants crossing external EU borders are subjected, or are at risk of being subjected, to measures and praxis of violation of human rights. What further raises concerns is the role of the European Union in acting as a watchdog and checking the States' degree of legal enforcement. One of the main empirical manifestation of the EU attitude vis-à-vis the gross violations of human rights taking place in Greece has been the demand by human rights observers and NGOs to investigate and act on the breaches and providing sanctions and remedies.

While it is logical that Courts need for a violation to have at least allegedly occurred in order to sanction wrongdoings, the European Union can and shall act preventively. After incredible amounts of allegations, complaints, lawsuits and reports it is unforgivable for the Union to be reminded of its duties by external actors, not even for sanctions but for a preliminary investigation, which in a supranational framework priding itself for its astounding record of human rights protection and enforcement clearly clashes with such an ideal. Not only the overall behavior of EU authorities has become overly permissive, allowing for exceptions to become the praxis and turning a blind eye over mounting reports of fundamental rights' breaches, and not only the Union has supported and pushed Greek (and others') political narrative vis-à-vis migration at the external borders; the European Union has profusely failed over the years to effectively ascertain whether such rights in border zones and detention facilities are indeed protected and guaranteed, acting only if beyond necessary and rarely addressing the totally of the issues discussed. This permissive behavior is displayed in *R.H and R.A.* case, where although finding several grounds of human rights violation, the ECtHR decided to not condemn or sanction the Greek government in good faith, laying case-law foundations for them to impact also on CJEU decisions. Henceforth, while it has been widely highlighted how Member States praxis does not reflect the European legal framework, the behavior of the Union itself and of the bodies which exercise a relevant role in its order regardless from their status, from EU authorities to ECtHR to CJEU, provides a further ground for concern. Member States might indeed try, in a somehow nationalist push for independence and sovereignty, to freeride from human rights obligations for the sake of protecting national security or simply for their national interests; however, when the watchdog fails to effectively check such menacing behaviors, it becomes complicit. By allowing the perpetration of human rights violation, with the exception of uncommon complaints to the Courts, the European Union is indeed

developing its own praxis: a lax approach with respect to checking, sanctioning and providing remedies which, on the other hand, encourages and validates the Member States' freeriding attitude. The magnitude of the impact related to the content of this consideration is what makes the rift between theory and practice particularly harmful, as both Member States and the European Union do provide a certain degree of human rights façadism while, even if on different levels, the praxis is in stark contrast with the legal basis of the European human rights corpus.

The lens of detention does, hence, accurately serve as a litmus test for describing how the gap is present and harmful. The extent of the split is, however, more expanded than that, as it does not only affect individuals coming to the country but rather actively impacts and puts at risk the life of the same groups through refoulement. The role of the European Union vis-à-vis refoulement practices also acquires a new dimension, instrumental in providing a full picture, and ultimately a conclusion and an answer to the research question; thus, the following subchapter will tackle the considerations stemming from the second lens used throughout the dissertation.

b. Widening the gap: refoulement and the associated political considerations

The conclusions drawn with regards to the dimension related to detention might be satisfactory as to provide the answer to the question at hand, as such a relevant body of violations shall have the power to disprove the narrative of perfectionism the EU sometimes aims to foster, at least for the sake of constructive criticism. One faulty cog prevents the full functioning of the whole machine, and shall at least prompt the Union to revise its enforcement and accountability mechanism, or at least the Member States' degree of adherence to Community law. The dissertation, however, aimed at compounding two different lenses, one of which is detention and the other refoulement, in order to provide for a bigger picture which would include two layers which are often combined and sometimes exclusionary. While detention might be exercised as a temporary measure in order to either accept individuals (as in the case of processing asylum applications) or return them, refoulement represents a blunt violation of human rights that in many cases is also subsequent to detention. The degree of fundamental rights breaches represented by the infringement of the principle of *non-refoulement* does, hence, represent an undeniable evidence of a gap between theory and practice, the "ultimate violation" which would indeed demonstrate a failure of the Union and its Member States in upholding the rights they so strongly committed to throughout the years.

The EU Member States have repeatedly accused of violating the principle of *non-refoulement*. While some might blame the fault of political tendencies fostering the narrative of preventing entry from all migrants and asylum-seekers to extremist fringes of the States' rightist parties, this account would be misleading and partial, dismissing at best and preventing the public from correctly framing the extent to which the issue has been a prominent part of States' praxis for years. News channels periodically bring up the stories of migrants being returned to countries currently witnessing political turmoil: this has been the case also in early 2000s, as Italy was passing the 30 July 2002, n. 189 Law (or the Bossi-Fini Law) which opened the door for Italy returning more than a thousand individuals to Libya, a country being under constant international scrutiny for its practice of mistreatment, arbitrary violence and detention. While the European Union, as previously stated, is not part to any Treaty protecting the right to be protected from refoulement, it is undeniable both that such principles of international law cannot but have an impact in the European legal order and that still, Member States are subject to them. Henceforth, while the case study being considered on the States' side (namely, Greece) proves a clear violation of European and international law, the dimension related to Frontex was instrumental not only in proving how Member States' participation in the Agency's Joint Operations conceals practices of refoulement, but also in demonstrating how the European Union itself allows for these action to take place under the mandate of one of its agencies, proving guilty of not only allowing for Member States to violate European law, but participating in the said infringements. Frontex itself, as seen in Chapter 4(a) is subject to the respect of the principle of *non-refoulement* as enshrined in its relevant regulations, meaning that no actor participating in a Joint Operation is freed from upholding the principle. Greece does violate the principle of several levels, along the lines of EU participation and permissibility.

Due to Greece mainly pushing back individuals to Turkey, a matter of primary interest with regards to refoulement is the fact that Turkey has been notoriously refouling and returning migrants and asylum-seekers back to countries which are usually in conditions of political instability and/or war, as in the case of Afghanistan, Iran, Iraq and more. Hence, in light of the ECHR proscription of exposing, both in the positive and negative legal sense, individuals to inhuman treatments, torture and violence, returning individuals to a country known to indulge in refoulement practices entails and implies indirectly exposing said people to inhumane treatment, thus breaching the principle. This consideration would be powerful and visible enough on this own to confirm once again the presence of the gap; however, a further layer to the matter is provided under the problematic definition of Turkey as a safe third country, considering that the overwhelming majority of

individuals pushed back from Greece are returning to the former. It is indeed challenging to apply the definition of "safe third country" to Turkey, in light of the several violations of human rights discussed through the paragraphs; the EU-Turkey Statement proves, thus, to be another caveat to create a political narrative (namely revolving around the EU returning people only to safe countries) for the sake of border security and border management. The Statement was an urgent tool to conceive, as the pressure on the borders took the shape of an imperative matter and the return of migrants to a country violating human rights would have put both Greece and the European Union in a situation where the principle of *non-refoulement* was blatantly breached. Thus, the Statement was instrumental in order to lay the basis for the legalization of illegal praxis. The matter of the fact is that Turkey *de facto* still violates human rights and does not represent a safe third country; however, the country is *de jure* a safe haven for those returned to its territory. The political dimension tackles, once again, the illegalities of the stakeholders, widening the rift between theory and practice once more. While such practice would be already concerning if put into force by a single country, it is the active participation of the Union in negotiating such an agreement and its willingness to compromise blatant violations of human rights for the security of its borders and for maintaining and upholding national interests. Due to such an extensive agency by the EU, as in the case of detention the Union proves as disruptive as States in establishing and fostering a praxis which conflicts with the European *acquis* on the matter. The consequence is basically a legalization of the erosion of the principle of *non-refoulement* and, by not taking into consideration the ECHR in light of EU not formally being a part of it, although being influenced by it, of Art. 78 TFEU, eroding the very basis of the European legal order and allowing for a dangerous precedent. It is, thus, fundamental to stress the responsibility of EU institutions in this respect, as allowing for such Statement to be concluded and, indeed, directly participating in its negotiations establishes a clear link between the latter and the violations of human rights which have arisen from it.

The extent of the political discourse linked to refoulement practices proves a gap that is further fostered by what has been highlighted on the empirical dimension of pushbacks at the Greek-Turkish border. While the participation of Greece in pushback operations at its borders shall not be discredited whatsoever as it exhibits the very cracks in the picture, what draws particular relevance is Frontex's active and passive participation as a proxy, due to its status of EU Agency, of the European Union behavior vis-à-vis refoulement. In light of the consequences of pushbacks towards Turkey, highlighted in the previous pages, any involvement in such operations, or for the matter at hand even any knowledge of these operations being carried out, would fundamentally prove a worrying degree of hypocrisy and detachment from the principles inscribed in the heart of

European human rights *acquis*. Henceforth, retrieving and gathering several pieces of information, evidence and proof that Frontex is not only aware of such practices becoming praxis at the Greek-Turkish border, but the very participation in the pushback operation accounts for a striking violation of the principle of *non-refoulement* on several steps. From the very beginning, it is to be kept into consideration that the Commission exerts high degrees of influence on the appointment on the Executive Director, and as an Agency it is also logical that a corollary body of the Union shall devote particular attention to fostering the Union's interests and follow the mandate established by the latter. The natural consequence is that it is highly improbable for Union's authorities to be completely unaware of possible Frontex practices violating human rights, whose irreproachability shall be beyond doubt; any reservation over the operations shall prompt investigations and checking measures, and the immobility of the Union with respect to the matter fosters impunity through permissibility and inactivity.

This consideration related to the role of the Commission being involved in the steps through which an operation is given birth to is paramount for all the following remarks, as not only the very violations committed by a EU Agency widens the gap, but the very knowledge by the authorities (and for extension, the allegations made by international human rights observers), entails that all the afore-mentioned breaches amount both for an infringement of fundamental rights and for a lack of accountability and intervention by the EU, doubling down on the prominence of the theory-praxis rift. The failure for SIRs mechanisms to adequately tackle the responsibility dimension prove how the Frontex machine is extremely cumbersome, propelling the view that everybody shall be accountable, except for Frontex itself. While the findings scattered across the dissertation demonstrate how not even Member States are always held accountable, the main takeaway is that Frontex's accountability dimension is an overall failure. The discrepancy between the number of SIRs received and recorder over the years analyzed and the factual evidence of human rights infringements display a praxis of concealment, and eventually of covering-up, that prevents the gap from being closed, due to the fact that as of records Frontex has been irreprehensible throughout the operations. While the Agency, in its 2015 Third Annual Report, called for Greek authorities to fix their systematic flaws related to human rights, it has been proven how Frontex does indeed engage in supporting the same authorities in carrying out border management operations, casting doubts over the complicity of the Agency in such infringements. The very effort of concealing the presence of Frontex teams at the border, contradicted by the Greek Ministry for Public Order, shows how disingenuous the Agency might get in these occasions; thus, the inactivity of the European Union vis-à-vis the link between human rights infringement allegation and the Agency's participation is duplicitous and harmful.

What is seen on land is confirmed by the maritime environment: not only the RABIT teams participate in the operations at the Evros border, but do actively join Greek forces in the Aegean Sea as shown in Chapter 6. By demonstrating how Frontex teams take an active role in pushbacks, the link with the previous considerations of returns to Turkey is logically provided for. As pushbacks represent a violation of the *non-refoulement* principle, both in the case of the well-documented practice of chain refoulement by Turkey and in the case of Turkey itself, the Agency's participation entails a joining Greece in infringing the principle. As a limb of the European Union, as an agency whose mandate and power stems directly from it, allowing for operations such as the incidents of the 8th June and 15th August to take place under EU mandate is to condone and endorse violations of the *non-refoulement* principle. Once again, for States to free-ride in some occasions is almost to be expected (nonetheless, it shall always be sanctioned and corrected), entailing lower levels of division between theory and practice. However, when the EU does not only participate in diverting from its legal order, but also refuses to make amends and attempts at concealing its tracks, backing from such gross violations is way more difficult. Hence, the mixture between the political and practical discourse proves lethal, literally, in combining political instruments such as the EU-Turkey Statement, an effort to hide iniquitous behavior displayed by Greece in order to return migrants and asylum-seekers to it, and praxis and practical measures for the interests of the Union and of Member States, contradicting an apparently less-powerful-than-thought legal framework, weakened by non-compliance and indulgence by the Union itself. This consideration is produced also in light of the unilateral decision by the Greek government of the 7th June 2021 to declare Turkey as a safe-third country, in a much formally recognizable manner than what the EU did (although sufficient to grant the status of such), practicing not only free-riding with respect to EU positions, but also a goofy attempt at concealing again the crimes and violation of human rights and relevant legal obligations, such as the infringement of Art. 33(2)(c) of the Asylum Procedure Directive, committed throughout the years. In light of these reflections, at this point it is impossible not to confirm the thesis that the gap between theory and practice is extended to such harmful degrees, that the European *acquis* seems a mere formality rather than a proper legal order, whose laws are to uphold only in cases of convenience to the States. It would, in conclusion, be unwise not to stress once again the importance of such connivance. Member States do for sure carry heavy responsibilities with respect to human rights violations and in particular to those analyzed in the previous chapters; however, the participation of the European Union in eroding mechanisms, procedures and the very foundations of the European legal order on matter of human rights cannot

but establish a clear link between the EU institutions and the responsibility for such striking violations of human rights.

c. Concluding Remarks

As for the last, concluding remarks, the main takeaway, as previously highlighted, is that the European legal framework stands in a much weaker position than what one would have thought by analyzing just the first two Chapters, which discussed a legal order apparently strong, coherent and a beacon for other international actors. For the matters related to this dissertation, the two lenses used throughout the chapters have served well enough in proving the "gap"; nonetheless, there are many other lenses that could have used as a replacement for detention and *non-refoulement*, some of which have been already hinted across the pages. Four are the main ones discussed, to whom attention has been devoted as corollary to the main concepts of the dissertation but that could stand on their own as further evidence of the corruption of the concept of the EU as a human rights defense success. The first of these being the inhumane conditions of detention, spanning from the lack of hygienic devices, to the mistreatment of individuals, to the lack of special protection for women and minors, to the structures' inadequateness and overcrowding. Individuals' dignity is only one of the consequences of detention practices, leading to thousands of death each year and in stories only rarely documented and much with obstructionism by governments. The second one relates to the paramount use of violence, which shall be taken into consideration as being a constant of the practices discussed. From violence in detention structures, to the violence used across borders, as in the case of the Meriç River or the Evros border, where individuals were respectively shot at on a dinghy and in the attempt of crossing the land border. A blatant violation of the individuals' right to life, the infringement of such proves the extent to which governments and related forces are able to reach in order to achieve their interests. The third factor concerns the suspension of asylum procedure by Greece in 2020, another spin on the invisibility creation which fosters despair among migrants and asylum-seekers who see their chance of freedom vanishing through a measure that finds no allowed-for precedent in European law. The fourth dimension is related to the subchapter on the Search and Rescue obligation, a duty which applies to all actors with legal personality, including commanders of the ships, which inevitably leads Frontex ships avoiding the rescue of distressed individuals at sea to incur into violation of such general principle

of international law. Once again, the lenses adopted through the dissertation have been chosen as such as particularly relevant in understanding the whole picture of the gap between theory and praxis; nonetheless, these four dimensions further display how wide the gap is, and how it easily spills over to other realms and domains of human rights law.

While the thesis was indeed proven, the picture provided is a quite discomforting one, outlining the cracks in what is portrayed as one of the most solid political realities of our times. And while the considerations drawn are already worrying as they are, what must be further pondered upon is the consequences such erosion of human rights might entail. Hence, an "ouverture" is to be provided for further contemplation and enquiry. To what extent the praxis can erode, from an inductive approach's point of view, the whole European and international fundamental rights protection framework? The creation of precedents, and their related impunity, creates a pattern that can be replicated across the Union and the globe, propelling the primacy of security and national interests over human rights. The praxis highlighted in the chapter can easily cause a bottom-up rift in global theory/practice, making the international HR discourse incompatible with reality and thwarting any benefit produced by the international legal framework. In the long term, the consequence would be an inevitable erosion of the very principle of the rule of law, with accountability and responsibility being seriously undermined and human rights being at the mercy of statist sentiments and the moods of governments, able to benefit from the exemption from sanctions. Questioning the rule of law equates to questioning the very roots of the national, regional and international order, a dimension that acquires further depth in light of the EU accession to the ECHR, a framework that, to this point, seems already undermined by the widespread disrespect of the rights and provisions enshrined therein. The flaws of EU States, and of the EU itself, are thus not to be taken into consideration lightly, as the propagation of the waves of impunity might have quite a long range. The inability to recognize these flaws is, as already discussed, one of the many dimensions and facets the issue at hands presents: from the political discourse to the attempts of concealing wrongdoings, from the States' refusing to obey European law to the very Union proving to fail vis-à-vis a body of human rights law which has been so thoroughly, although not perfectly, developed throughout the years and through the eyes of visionaries which devoted their life to the cause. Henceforth, what is needed is a total revision of the practices enforced by both States and the European Union, a revolutionary approach which would be able to make the Union join once again the commitment to human rights protection, developing new and innovative common grounds to foster security while not sacrificing the rights of others in the effort of protecting internal peace of mind.

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Summary

1. Introduction

This dissertation's purpose revolves around the framing of the dichotomy between theory and practice on the matter of human rights at the EU external borders, more specifically adopting arbitrary detention and breaches of the principle of *non-refoulement* as criteria to ascertain the answer. The picture developed firstly highlights the overall laudable commitment of the European Union vis-à-vis the protection of human rights. Fundamental rights have always represented one of the leitmotivs of the European Union; from the moment the ECHR was signed and included in the *acquis communautaire*, the European Union and its preceding configurations submitted themselves to the role of defenders of human rights, as a beacon that would not only respect and enforce fundamental rights, but rather expand on them. On this last sentence, the intention took practical form in 2009 with the Treaty of Lisbon, which allowed for the Charter of Fundamental Rights of the European Union to become binding on EU Member States, allowing for an expansion of the rights enshrined in the ECHR. The presence of two courts, the ECtHR and the CJEU, although sometimes conflicting, has proven to represent a tool with elevated potential, especially in light of the EU accession to the ECHR, currently experiencing a setback due to the CJEU resistance. Furthermore, the possibility for international law, general principles of law and *jus cogens* to easily serve as a source of inspiration thanks to provisions like Art.78 TFEU, and to an extent to legally bind Member States, allows the European Union to be an allegedly extremely functioning supranational organization, at least for what concerns matters of fundamental rights.

All these factors and interlaying dimensions would suggest for the EU legal framework to be a highly complex but functioning environment for the proliferation of these rights; this view is also supported by the high degrees of effectiveness of the European Union vis-à-vis other dimensions, e.g. its internal market, with respect to other supranational and regional organizations. This dissertation aims at discerning whether such ideal concept of the European Union HR framework being functioning and effective was observable and verifiable, taking into consideration as a "litmus test" two principles and rights which have been widely recognized as part of general principles of international law, meaning that their protection is broadly accepted and enforced. The analysis does

hence revolve around the right to be freed from arbitrary detention, and the related legal safeguards, and the enforcement of the principle of *non-refoulement*, two long standing pillars of international and European law; failing to enforce these two rights would clearly reveal a gap between theory and practice within the European Union legal framework.

2. Setting the scenario: detention, refoulement and borders

The scenario set concerns, thus, three main concepts: detention, refoulement and, for the territorial scope of the analysis, borders. Over the decades, especially in light of the Union's rising to a status of appealing destination for migrants and asylum-seekers fleeing conflicts and life-threatening environments, the EU has developed an arsenal of measures on the legislative and administrative dimension for the reception and management of migrants. Among these, some are more employed than others, and some do not necessarily extend the totality of their related practices in the realm of legality, spilling over into what has become a cumbersome mechanism which more than seldom threatens the protection of the afore-mentioned individuals' human rights. Henceforth, the first lens, namely the point of view of detention and its arbitrary corollary measures, proves instrumental in understanding the corruption of border management policies. Protected by several international instruments, the most stringent ones, namely the International Covenant on Civil and Political Rights, the European Convention of Human Rights and the Charter of Fundamental Rights of the EU, all gather around two main concepts: the proscription of arbitrary detention and the provision of legal safeguards for detainees. The ECHR clearly highlights the importance for restriction of liberty to follow rules and exception provided by the relevant legal framework, providing reasonable grounds for detention while, at the same time, ensuring the necessary protective measures of human rights; among these, the possibility for individuals to seek judicial remedy and compensation, ensuring that no detainment occurs under arbitrary grounds. Sheltered by the afore-mentioned legal documents, the right to liberty related to freedom from arbitrary detention is not only protected by international law, but also by EU Regulations and Directives, as in the case of the Schengen Borders Code, the Return Directive and other relevant instruments.

The complexity of the system of legal documents protecting this right clearly demonstrates a strong commitment by the Union in fostering human rights' protection, a picture which is also

sustained by the interplay of legal instruments protecting the principle of *non-refoulement*. Part of the widely recognized *jus cogens*, the principle provides an obligation not to return individuals to territories where they might be subject to risk of torture, mistreatment and other serious harm. Originally protected by the 1951 Geneva Convention, the principle of *non-refoulement* enters the European Union, which is not a party to several of the human rights treaties concerning the principle, *acquis* through Art.78 TFEU; it is further to be noted that the EU is obliged to comply with the principle due to its nature of general principle of international law. Overall, the picture emerging from these considerations is that the European Union is indeed strongly committed to the protection of these principles and provides a comprehensive web of provisions whose interplay allows for such protection and legal safeguards to be wide and specific at the same time, with the aim of efficiently tackling the issues at hand. This research aims to determine whether the theory, i.e., the EU legal framework, is mirrored in the practice. An effective system would assure perfect applicability and application of statutes and regulations, requiring the absolute overriding role and respect for human rights notwithstanding economic, cultural, or political reasons. The application of this concept to the European legal order would, however, be too naïve, as state interests do often play an extremely important role vis-à-vis migration and reception policies.

Huysmans' reflections on EU migration securitization capture the EU's approach to migration, understanding European migration policies from the 1950s and 1960s as liberal and permissive due to the necessity of flexible and inexpensive labor. Migration became a public concern in the late 1960s and 1970s, triggering the need to defend the rights of the national worker and switching to more restrictive laws. In the 1980s and 1990s, migration policies underwent the process of securitization, as framing it as a threat to public order, the welfare state, and national unity led to the first connection between immigration and asylum with transnational crime, terrorism, and border control. The inevitable result has been the portraying of migrants and asylum-seekers as a security issue, developing a threefold struggle of the European Union vis-à-vis migration: the cultural significance of borders and their control in light of limited free movement by third countries, the integration of third-country individuals into national societies, and the fact that multicultural societies seem to clash with the ideal of promoting national homogeneity and universal social and economic rights. The upshot is the construction of migrants and asylum-seekers as scapegoats to divert from sociopolitical and economic challenges, which transcends party alignments and affects migratory policies. The empirical manifestation of the, for now alleged, gap between theory and practice is particularly visible at the border, an environment which proves more disruptive with respect to reception, detention and refoulement procedures due to its geographical status and due to

borders being the first place of contact between the Member State and third-country individuals. Member States have developed a plethora of measures to manage entry, and prevent its unauthorized fringes, at the borders, one of the most common being the "legal fiction of non-entry". While not necessarily impairing the rights of migrants and asylum-seekers at the borders, it first provides a scent of vagueness which will become way more solid throughout the analysis. This holds particularly true in the case where such vagueness is applied , following the afore-mentioned legal fiction, to restrict individuals' freedom of movement through recognized or *de facto* detention. While both recognized and *de facto* detention too often fail to meet the sufficient requirements of proportionality and necessity, providing less-then-adequate conditions of detention, disproportionate restrictions, absence of legal guarantees and little to no possibility for civil society to penetrate the environment and lend support, *de facto* detention goes to the further extent of negating such legal guarantees and any path to pursue them. Henceforth, this type of detention has been instrumental in its addressing throughout the different border facilities set up for migrants and asylum-seekers protection, be them airports, first reception facilities or hotspots. More particularly, the emergency nature of hotspots has repeatedly triggered concerns over the respect of the relevant human rights provisions in both the countries that have established them: Italy and Greece.

The very existence of the framework of *de facto* detention accounts both for a violation of human rights and the empirical manifestation of the will of States not to recognize the relevant legal safeguards, from adequate housing to the possibility of challenging the detention, for migrants and asylum-seekers. Similarly, the legal fiction of non-entry is a tool used in the perspective of externalization and extraterritorialization of borders, as to consider border areas and infrastructures, such as airports, as a legally *sui generis* territorial dimension where human rights become blurred and it is easier to circumnavigate the obligations Member States are subject to. These considerations can only open the door for further inquiry, carried out in the case studies related to the Greek-Turkish border by taking into consideration both the agency of national and European authorities vis-à-vis the two lenses adopted, i.e., detention and *non-refoulement.*

3. Case Study: Greek practice at the Greek-Turkish border

The Greek-Turkish border has historically been a major gateway to the EU, witnessing the crossing of millions of individuals with different origins. The increasing strain at the land border caused Greece to build a border barrier in 2012, resulting in a 95% drop in land border admissions and a 53% rise in sea border entries in 2013. As one of the key EU entry ports, Greece has become a complicated reality where various parties interact on border management and control, as in the case of Frontex, which helps national authorities execute all border control through border management and operational support. As Greece's first barrier against migration flows, allegations of pushbacks and human rights violations, including *non-refoulement*, proliferated. Multiple incidents including disembarking and refouling persons, intercepting vessels, arbitrary imprisonment, and non-consideration of international protection applications by Greek authorities and Frontex make Greece's situation relevant for the matter at hand. As 2015 became a year with an unprecedented number of entries in the country, the Union decided to adopt more stringent border strategies, developing the EU-Turkey Statement of 2016 which enshrined three main principles: any irregular migrants from Turkey to Greece will be quickly repatriated, Turkey will tackle unlawful pathways to the EU, and for any Syrian returned under this Statement, the EU will receive a Syrian refugee. Practically, Turkey became a semi-official "safe third country," later acknowledged as such by the Greek government, so the Statement would not violate any international obligations connected to *non-refoulement*.

For a country to be considered a "safe third country," criteria such as non-discrimination, respect of *non-refoulement* provisions, respect of freedom of individuals and respect of refugee status shall be respected. Turkey's compliance with these requirements has historically been dubious. The country does not guarantee the non-discrimination rights and protections provided in the 1951 Refugee Convention; in July 2021, the government withdrew from the Istanbul Convention, and Turkey has repeatedly demonstrated brutality and discriminatory behavior towards minorities, along with refoulment practices and arbitrary detention. The natural consequence is the loss of human rights integrity, since the Statement has given Turkey an unjustifiable title that negatively impacts persons via the unlawful practices the country enforces. The case study focuses on the land borders of Evros and maritime borders around the Aegean islands, providing a full understanding of Greece and Frontex (and the EU) behavior in relation to migrant movements. The Evros river is a natural barrier between Turkey and Greece and a major migration route. Several

reports by researchers, attorneys, international observers, and the Council of Europe's Human Rights Commissioner emphasize how the border constantly witnesses pushback operations and related practices which account for the violation of human rights, more specifically those paramount to this analysis. Such documents highlight how pushback operations are nowadays praxis, being frequently used to control migratory flows rather than the usual Greek procedure under EU legislation. Reports also mention refoulement of asylum seekers, which suggests an arbitrary and blanket practice with little respect for international and European law. In a nutshell, Greek borders with Turkey provide a valuable ground for assessing the actual practices of EU Member States and EU agencies, under the suspicion that such praxis departs so strikingly from the legal framework as to blatantly violate human rights.

The case study begins with President Erdogan's border-opening proclamation on the 27th February 2020: throughout the first following week, the number of people at the Pazarkule checkpoint increased to 20,000, only to further rise with time. International organizations estimate that Greek authorities have pushed back 5000 people in the afore-mentioned timeframe, with incidents resulting in the deaths of several individuals. The Greek administration quickly denied any human rights violations. Along with the release of information about imprisonment in unofficial facilities and maltreatment by Greek police personnel, the administration justified such activities by claiming to be safeguarding both Greek and European borders. On March 2nd, the Greek government suspended the possibility to apply for international protection for one month, citing "extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to the national security". Following the Covid-19 emergency, the administrative service for claiming asylum protection was further halted until May 18th. The result of the suspension of asylum applications *de facto* allowed unjustified detention, violating Art. 2(b) of the Reception Conditions Directive which specifies that all individuals applying for international protection enjoy the rights deriving from their status as asylum seekers, including freedom from imprisonment. When detention is preliminary to return, as per the Decree, it is lawful only if the subject threatens national security or is at risk of absconding. Greece did not provide any of these procedural assurances; all those reaching the Eastern Aegean Islands and seeking to cross the border were promptly detained. The newly-created ad-hoc facilities, receiving Turkish flows, faced harsh conditions, from overcrowding to hygiene issues and little-to-no respect for individual medical situations. A fundamental point of the critique towards the management by Greek authorities is the lack of objection procedures, also panned by the ECtHR as in the *Rahimi v. Greece* case.

With the exception of blatant violations of human rights, the Courts and the European Union as a whole have been widely recognized to have failed to analyze and evaluate the legitimacy of detentions under national and European law. Five considerations led to this result. First, individual freedom constraints were not evaluated based on domestic legal standards and criteria. The Court misjudged the position of "asylum seekers," causing it to fail to properly deal with it under Art.2(b) of the Reception Conditions Directive, which accords all individuals the status of asylum seekers when they declare a desire for international protection. Secondly, the Court failed to examine concerns of indirect refoulement, in breach of the Refugee Convention and ECHR. Thirdly, the Court did not adequately assess the manifest impediments to returning individuals to Turkey, omitting the acknowledgement of evident constraints (including those posed by Covid) and other obstacles provided by petitioners. Fourth, the court relied incorrectly on a lack of information and documentation to show implausible absconding odds; and fifth, many individuals' situation was not properly assessed and taken care of, as in the case of minors and pregnant women. While the ECtHR did, also in other instances, recognize the flaws of the Greek approach to the crisis and migration management, it repeatedly decided not to adopt punitive measures in light of Greece's alleged commitment to comply with European and international law. The detention measures and the automatic refoulement claims do strongly undermine the European legal order; recognizing the state's sovereign ability to regulate the entry of non-nationals under international law is fundamental, but any decision contravening the norm of *non-refoulement*, as in blocking individuals from claiming refuge, is a blatant violation of human rights which shall be promptly addressed.

Automatic pushbacks and detention measures entailing no legal safeguards whatsoever clearly violate the EU *acquis*. Under EU Asylum Procedures Directive, Art. 6, individuals shall be able to access asylum procedures in any case or situation an application for asylum is submitted, including at the borders, while Art. 35 and 38 of the APD allow the transfer of asylum seekers to "safe countries of asylum" and "safe third countries," respectively. The crack in the picture is clearly detectable in this case, as doubts casted over the definition of Turkey as a safe third country have already been demonstrated. The repetition of pushback practices and severe allegations of human rights violations did not only pertain to the sphere of national responsibility; the EU's implicit and silent acceptance of such violations must also be considered. The EU did not condemn Greek pushbacks in the first months of 2020, to the extent that international observers called out the Commission for maintaining its duty as a human rights protector, asking for an inquiry into the breaches and sanctions and remedies in case of confirmed violations. The EU has not established appropriate accountability, nor has it developed an adequate framework to prevent and tackle

potential human rights violations in the process of treating people, especially asylum seekers, at borders. Henceforth, the European Union failed to both take ownership for human rights violations and condemn them, perpetuating dubious measures that do not live up to the necessity of tackling situations designed to evade responsibility or whose information gathering is difficult, highlighting gaps in the EU's fundamental rights accountability mechanism.

The multitude of violations under Greek national border management rules, studied in a framework that considered political cunning, voluntary breaches and hindrances, serves as a first outline of the gap between theory and practice, which here becomes praxis. As indicated, the practice of automatic refoulement is so pervasive that it has permeated the framework of Greek responsive policies as a norm, as a first resource action that brazenly defies Greece's commitments under European and international law. From arbitrary detention, to the overlooking of legal safeguards, to the violations of refugee-related legislation, reality clearly illustrates how practice differs from theory, of how high principles of law and pertinent documents are regularly disregarded, along with State impunity and the connivance of the European Union, whose efforts to tackle the issue have been oddly scant. The natural worrying consequence is that case law creates precedents, national praxis develops conventions, and institutions' hesitation to condemn and effectively manage the issue erodes human rights law and the EU *acquis*, fostering negative patterns for future policies and practices.

4. Case Study: Frontex involvement and EU responsibility

The second part of the case study revolves around the EU's responsibility vis-à-vis the respect of the afore-mentioned principles, namely through the actions carried out by Frontex. Frontex benefits from legal personality and functions autonomously, although it is bound by the EU's aims through budget and interest control. The Executive Director of the Agency is appointed by the Management Board, which is consisting of two Commission representatives and one border control-savvy member state representative. Following these considerations on Frontex's composition and structure, the Agency's autonomy and independence may be weaker than expected, as the Commission has both legal and informal authority over Frontex. The Agency acts under the European legal order and follows *ad hoc* secondary legislation, as the Schengen Borders Code, the

Frontex Regulation, the External Sea Borders Regulation, and the Practical Handbook for Border Guards. The plurality of legal instruments regulating Frontex activities do hence demonstrate how the Agency is bound both by internal and external regulations to comply with the European legal order and the principles adopted as lenses in the dissertation.

Not all Frontex operations risk interacting with the principle of *non-refoulement*; the Sea External Border Regulation outlines three circumstances that could lead to a breach of the principle: the interception, modification of a vessel's course and conducting it, escorting a ship to a third country, and turning over a ship or the individuals on it to third country's authorities. The first of the three situations mentioned by the Sea External Border Regulation as likely to infringe *non-refoulement* provisions, interception and course adjustment, does not inherently violate the principle. Escorting a ship into open water does not expose its passengers to maltreatment or persecution by third governments. The risk of violating the principle arises when the ship is forced to return to an area where persecution would occur or where the passengers would be indirectly refouled. The second and third possibilities, directing a ship to a third country and directing it and/or the individuals on board to the authorities of a third country, could easily represent a breach of the principle due to the process ending in the juridical sphere of third countries, which could pose a risk to the individuals in question. While international and European law primarily hold the host member state accountable for *non-refoulement* infringements in its joint activities, when a breach of the principle is recognized during joint operations, it is possible to examine if and to what extent the EU is involved and has derivative responsibility through Frontex actions. For the EU to be accountable for a violation of the principle through Frontex, there must be a clear relationship between the refoulement action and the operation coordination, or Frontex actions, and knowledge that Frontex contributed to the refoulement. Firstly, there are no quantitative degrees restricting the definition of a link: Frontex's coordination efforts do not need to be crucial to the refoulement operations; a simple contribution is enough. When the Executive Director, the host Member State, and the participating Member States in a joint operation create the mission and execution of operation, third country details and names are often included to plan the interception effectively. If the operational plan contains or implies the risky options of escorting the vessel and the passengers on board to a third country or handing them over to third country authorities, a breach of the *non-refoulement* principle is likely. Similarly, if the names of countries known to not respect human rights, persecute, mistreat, or torture individuals, or engage in indirect refoulement, is present in the operational plan, a legal link is formed. The second prerequisite relates to evidence, collected in the operational plan stage, proving that Frontex knew its contribution to coordinating activities of the

involved countries might entail refoulement; sometimes the dots are harder to connect in this respect, especially given the operational plan's ambiguity and Frontex's refusal to disclose any information on the matter, but not impossible as will be subsequently shown. Hence, the goal of this paragraph was to show that Frontex coexists with European and national authorities and is not overly independent from the EU. By highlighting both budget and interest control, especially in the latter case, it is possible to make a clear-cut connection between Frontex and the EU, resulting in the acknowledgment that the EU institutions do always, to an extent, exercise control over Frontex, being accountable and responsible for actions carried out by the agency under the mandate and scope provided by the EU.

Since the deployment of Frontex units in Greece, the Agency's management has been aware of the pushbacks; nonetheless, Frontex's major measures have been limited to contacting the government for information, with few results and responsiveness by the Greek authorities. Frontex has notoriously established a system, called the Serious Incident Reporting, in order to track pushbacks and reports them to EU institutions or reassesses its own processes. Only six SIRs have reached the Agency's desk since 2017, all involving Greek security forces; the low number of SIRs and high number of Greek government pushback claims call Frontex's operational transparency into doubt. While the Agency stated that its operations at the Evros border were taking place only in non-border area, the Hellenic Police counterclaimed such statement, fostering the claim that the Agency may have an interest in maintaining such discretion and vagueness to reduce or avoid international scrutiny over practices that could attract human rights violations allegations. Vagueness about Frontex's operational role at the frontiers and in pushbacks makes accountability assessment difficult. However, due to continued several testimonies reporting mistreatment by German, English and Italian speaking police officers, the thesis that Frontex operations are transparently carried out far from the borders clearly crumbles. March 2020's deployment of Frontex troops at the Greek border reignited worries about human rights breaches; this holds particularly true in light of the role of the Fundamental Rights Officer at Frontex, which following the procedure enshrined in Art. 31 and 46 of Regulation 2019/1886 is able to advice the Executive Director on whether an operation shall be carried out vis-à-vis possible concerns related to human rights. By disregarding the FRO’s opinion on the Evros border, reportedly calling for an abandonment of the operation due to grave human rights breaches risks, it is clear how Frontex does not prioritize human rights over national interests and security matters, entailing the emergence and the solidification of harmful patterns.

Similarly, the framework of the Joint Operation Poseidon Sea by Frontex provides relevant purport to the concerns of the Agency, and for extension of the EU, behavior at the Greek border. Initiated in 2006 to help Greece manage land and maritime migrants, the operation gained increased relevance in the operational migratory framework of the EU in 2015, when the extraordinary migration crisis forced around 821 000 people, most of whom came by sea (816.000), to reach Greek borders. Heavy migrant flows, an economic, political, and institutional crisis, and the refusal of fellow Member States to lend support prompted the Greek government to urge for stronger collaboration with Frontex. After being renamed Joint Operations Poseidon Rapid Intervention, the Joint Operation functioned without interruptions to our days, attracting criticism on alleged participation of the Agency in pushback operations, an action which would trigger the violation of the principle of *non-refoulement* towards Turkey and related chain refoulement, as previously discussed.

Bellingcat, Der Spiegel, TV Asahi, Lighthouse Reports, and ARD conducted an investigation to determine the extent to which the Agency was involved in Greek government pushback operations. Through the tracking of Frontex assets and the understanding of relevant instruments used, six are the events which the investigation found to be pertinent for the matter at hand, spanning from March to August 2020. The incidents are divided into two "confirmed incidents", meaning that Frontex personnel and/or assets were present in the location where the pushback took place, and four "proximity incidents", defined as events where Frontex personnel and/or assets were in the range of five kilometers from the incident. From there, the report considers proximity incidents. The first event occurred between April 28 and 29 on the island of Samos, where migrants arrived and were later imprisoned, given a propulsion-less life-raft, and dragged towards the Mycale Strait, dividing Samos from Turkey, while a Frontex surveillance plane flew twice over the region during the pushback without lending support. The second and third event occurred June 4 and 5 in Northern Lesbos, when Portuguese-flagged Nortada was reportedly 1 km from the incidents involving two dinghies; no action was reported. The last incident was on August 19, with Northern Lesbos being the scenario, when a dinghy was pushed back from the area while the Molivos vessel, also flying Portuguese flag, was as close as five kilometers away; Molivos was also reported to have changed its direction to converge towards the pushback site before losing transponder signal, which could mean the crew turned off the transponder. Surveillance recordings and other sources demonstrate that pushbacks are frequently carried out in the presence of several coast guard vessels, whose objective is to maneuver in a pattern and speed creating waves to push back the dinghies. These operations show how, while single dinghies may not be seen on Frontex radars, surrounding

actions would be, leaving a very apparent "pushback signature." In addition to proximity incidents, the investigation covered two instances in which Frontex assets either knew about pushback efforts or directly participated, respectively occurred on June 8 and August 15. Among the two, the most relevant is the one taking place on 8th June morning, as Greek authorities forced back 47 migrants with the aid of Romanian Frontex ship MAI1103 actively blocking a dinghy, according to Anadolu. By combining different sources, including Turkish Coast Guard videos and monitoring information from ships in the area, such as the NATO vessel Berlin, the picture given showed that MAI1103 was physically obstructing the ship and that the crew was communicating with the raft. MAI1103 quickly changes direction to make waves, an action more than seldom practiced by Hellenic and Turkish Coast Guards despite the risks it poses to overcrowded and weak vessels. These instances showcase how Frontex's, and the EU for extension, foster the very gap between theory and practice vis-à-vis refoulement. First, the difficulties researchers had retrieving information and evidence related to Frontex ships highlights an issue of transparency, which easily adds to the broader concept of the Agency enjoying sufficient vagueness to carry out operations that may not always comply with human rights provisions. When this notion was first stated in the dissertation, Frontex had not yet been demonstrated to violate fundamental rights. However, proof of indirect or direct participation in pushback operations in the Aegean Sea provides a link, as illegal activities and behaviors are practiced. Vagueness and lack of openness are already problems for Frontex and EU agencies, but they take on a new dimension when human rights are violated. In addition to violating the principle of non-refoulement, Frontex's tactics in this context also violate the concept of search and rescue, a standard of international customary law that was ignored in the circumstances just recounted.

5. Concluding remarks

In conclusion, the EU has long portrayed itself as one of the best and most effective defenders of human rights; its fundamental rights *acquis* is incomparable to other states and regional or supranational organizations, but at the same time the Union has an interest in portraying itself as righteous, allowing several transgressions to go undetected over the years, resulting in a confirmation of the research question: whether the legal complexity is mirrored in the effectiveness of the practice. Understanding (arbitrary) detention practices proves the theory hinted at throughout

the paragraphs. Managing illegal entry into a state's territory does not refute the European Union's human rights commitment, but this paradigm is corrupted when legislation and management of migration movements result in unnecessary and damaging restrictions. First, illegal migrants are equated with legal ones who have documents and follow authorized entry routes. In multiple cases, Member States have committed "blanket association," or treating all individuals the same, typically damaging way, prohibiting them from exercising their rights. The second ground is unnecessary delays or hindrance of entry into a region. By arbitrarily detaining migrants, imprisoning them over the period specified by European law, not only is the latter breached and neglected, but the human dimension is undermined, confirming the inconsistencies between theory and practice. Thirdly, migrants and asylum-seekers are often completely prevented from crossing a border, even legally, forcing them to revert to illegal pathways and resulting in a blind and blanket refusal of entry.

Legal safeguards and legal admission for migrants must be maintained while managing borders and flows; otherwise, a gap exists between theory and praxis. The very "legal fiction of non-entry" shared by many Member States, including Italy, Hungary, Greece, and Spain, highlights the general behavior and attitude toward immigration. Praxis has illustrated how the illusion of non-entry is used to constrain individual rights on the basis that Member States do not have authority over the land or the individuals because the migrants have not legally entered EU territory. This legal fiction disentangles and detaches the link between the border and its physical grounds, allowing Member States to bypass the inability to physically exclude migrants from territory and enforce a legal alteration of their territorial status, creating an invisibility pattern which fosters violation of human rights, among which indiscriminate detention. Due to the global breadth of international law and jus cogens, the legal foundation of this fiction is fragile, and the extent to which it is utilized to restrict freedom of movement on arbitrary grounds, entailing arbitrary detention and probable refoulement, is a blatant violation of human rights, as Art.5(f) ECHR and ECtHR case law support this perspective. The recognition of detention further highlights discrepancies: while in France, Portugal, and Spain the acknowledgement of detention permits detainees to enjoy EU and ECHR rights, such as the right to legal recourse and compensation, countries such as Hungary, Germany, Greece and Italy do indulge in *de facto* detention. From the Italian hotspots of Taranto and Lampedusa, to the Aegean Islands where detainees have little to no freedom of movement and are arbitrarily detained with lack of uniformity, homogeneity, proportionality, and legal guarantees, these countries have actively participated in a disproportionately negative impact on human lives. The Greek case study expands on the topic. Human rights observers have criticized indiscriminate detention of illegal immigrants across the Evros river, while the passing of the Greek Decree of 2

March 2020 propelled further infractions of the EU human rights acquis and a general disrespect for the dissertation's criteria of analysis. The country's detention measures consistently violate Art. 5 ECHR, Art. 9 ICCPR, and Art. 6 CFREU. "Blanket detention" clearly violates Art. 5(1)(a) ECHR, as competent courts are rarely consulted in these circumstances. Invoking the need for extreme measures, human rights are easily abandoned for the sake of security, which takes the upper hand even in the face of international agreements and legal duties. Detention in the case study provides a clear answer to whether there is a gap between theory and practice/praxis at the EU level: the gap is present, obvious, and long-standing. Some scholars argue that the number of States guaranteeing legal safeguards throughout detention regimes implies that countries like Greece are free riders, but the reality is that among those receiving the most immigrants and asylum-seekers and whose external borders are most pressured, the majority of Member States apply the legal fiction of non-entry and practice de facto detention. This shifts the balance, worryingly favoring a broad dissociation from EU human rights.

The conclusions drawn in relation to imprisonment may be sufficient to answer the topic at hand, since a relevant body of infractions shall invalidate the story of perfectionism the EU sometimes seeks to build, at least for constructive criticism. One faulty cog prevents the whole machine from working and should prompt the Union to revise its enforcement and accountability mechanism or the member states' adherence to European law. Infringement of the principle of *non-refoulement* is an undeniable gap between theory and reality, the "ultimate violation" that would reveal a failure of the Union and its Member States to defend the rights they so fiercely pledged to over the years. While the EU is not a party to any treaty preserving the right to be protected from refoulement, it is evident that international law principles have an impact on European law and that member states are subject to them. Hence, while the case study being considered on the States' side (namely, Greece) proves a clear violation of European and international law, the dimension related to Frontex was instrumental not only in proving how Member States' participation in the Agency's Joint Operations conceals refoulement practices, but also in demonstrating how the European Union itself allows these actions to take place under the mandate of one of its agencies.

In view of the ECHR's prohibition on exposing individuals to cruel treatments, torture, and violence, returning them to a nation, i.e., Turkey, known to engage in chain refoulement violates the principle. This consideration would be powerful and visible enough on its own to confirm the gap; however, a further layer is provided under the problematic definition of Turkey as a safe third country, as the EU-Turkey Statement is another caveat to create a beneficial political narrative (EU returning people only to safe countries) for the sake of justifying border security and border

management concerns. While such a practice would be sufficiently alarming if implemented by a single country, it is the Union's active engagement in drafting such an accord and its willingness to overlook flagrant human rights breaches for border security and national objectives. Due to its extensive agency, the EU proves as disruptive as States in establishing and fostering a detention praxis that conflicts with EU acquis. The result is a legalization of the erosion of the *non-refoulement* principle and, of Art. 78 TFEU, eroding the very basis of the European legal order and setting a dangerous precedent.

Frontex's active and passive engagement as a proxy, due to its status as an EU Agency, of the European Union's behavior vis-à-vis refoulement is of further relevance. In view of the repercussions of pushbacks against Turkey, any engagement in such activities, or even knowledge of them being carried out, would reveal a troubling degree of hypocrisy and alienation from EU human rights ideals. From the start, it must be remembered that the Commission has a great deal of power on the appointment of the Executive Director. As a corollary body of the Union, it is therefore logical that the Agency promote the Union's interests and follow its mandate. The natural consequence is that it is highly improbable for Union's authorities to be unaware of possible Frontex practices violating human rights, whose irreproachability shall be beyond doubt; any reservation over the operations shall prompt investigations and checking measures, and the Union's immobility in the matter fosters impunity through permissibility and inactivity. Failure of SIRs mechanisms to adequately address responsibility proves Frontex's cumbersomeness, promoting the view that everyone should be accountable except the Agency, and the maritime ventures confirm what is already visible on land. By showing how Frontex teams participate in pushbacks, the relationship to Turkey returns is rationally established. As pushbacks violate the *non-refoulement* principle, both in the case of Turkey's well-documented chain refoulement and in Turkey itself, the Agency's participation violates the principle alongside Greece. As a European Union agency, allowing operations like the 8th June and 15th August to take place under EU mandate is to condone and endorse violations of the *non-refoulement* principle. Again, states free-riding is almost expected (but must always be sanctioned and corrected), resulting in a different degree of separation between theory and practice. However, when the EU not only diverts from its lawful order but also conceals its records, backtracking from such egregious infractions is much harder.

The mixture of political and practical discourse proves lethal in combining political instruments like the EU-Turkey Statement, an effort to hide Greece's iniquitous behavior in order to return migrants and asylum-seekers to it, and praxis for the interests of the Union and of Member States, contradicting an apparently less-powerful-than-thought legal framework which has been weakened

by non-compliance and indulgence by Member States. In light of these considerations, it is impossible not to confirm the thesis that the gap between theory and practice is so large that the EU *acquis* resembles a simple formality rather than a true legal order, whose laws are to be upheld only when convenient to the States.

As for the final, concluding observations, the key lesson is that the EU legal framework is far weaker than one would have imagined based on the complexity of provisions alone, which detailed a legal order that seemed robust, cohesive, and a beacon for other international actors. For this dissertation, the two lenses utilized throughout the chapters have proven the "gap"; nonetheless, many alternative lenses may have replaced complemented and *non-refoulement*, some of which have been hinted across the pages. While the thesis was verified, the picture offered is extremely uncomfortable, highlighting fissures in one of the allegedly most solid political realities of our day. The implications of human rights loss must also be considered. Henceforth, an *overture* for reflection and inquiry is needed. How much can praxis degrade the EU and international fundamental rights protection framework? Precedents and impunity form a pattern that can be duplicated across the Union and the globe, elevating security and national interests over human rights. The practices enforced by states have the ability to induce a bottom-up divide in global theory/practice, rendering international human rights rhetoric incompatible with reality and undermining the international legal framework. On the long-term, accountability and responsibility would be gravely compromised, and human rights would be at the whim of statist emotions and government moods. Questioning the rule of law means questioning the national, regional, and international order, a dimension that is heightened by the EU's perspective accession to the ECHR, a framework that is already undercut by widespread contempt for its rights and rules. The shortcomings of EU states and the EU itself should not be taken lightly, as impunity might spread far. The inability to recognize these flaws is one of the many dimensions and facets of the issue at hand: from the political discourse to the attempts to conceal wrongdoings, from the States' refusal to obey European law to the Union proving to fail vis-à-vis a body of human rights law which has been so thoroughly, although not perfectly, developed over the years and through the eyes of visionaries. What is needed is a total revision of the practices enforced by both states and the European Union, a revolutionary approach that would make the Union join once again the commitment to human rights protection, developing new and innovative common grounds to foster security while not sacrificing others' rights to protect internal peace of mind.