

Maja Haugum Svendsen

The Drowning of Human Rights in the Sea?

Assessing the European Union's compliance with its humanitarian principles in the handling of the refugee crisis in the Mediterranean

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Supervisor: Carine Germond
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Maja Haugum Svendsen
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List of abbreviations

CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EUNAFOR Med	European Union Naval Force Mediterranean
IMO	International Maritime Organization
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NPE	Normative Power Europe
SOLAS	Safety of Life at Sea
TEU	Treaty on European Union
UAM	Unaccompanied minors
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees

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1 Introduction

The ongoing refugee crisis in Europe is the result of a dramatic influx of refugees to the European Union (EU) in recent years. This is caused by conflicts in third countries, most importantly in the Middle East and Africa. The location of these conflicted areas has made the Mediterranean region one of the main migratory routes to Europe. But the Mediterranean is also one of the most dangerous routes, and it has gained much attention due to the high number of refugees dying during the journey. In 2016 alone the number of fatalities reached 5096 people, the highest number of fatalities ever recorded (UNHCR, 2017b). The escalating humanitarian crisis outside Europe has now reached European shores. Due to the logic of the Dublin system¹, a disproportionate amount of pressure has been put on the EU member states with an external border. The countries at the EU's Mediterranean border do not have sufficient resources to cope with the situation at hand. The EU has therefore initiated several measures to assist these member states in their tasks.

The EU agency Frontex is responsible for managing the EU's external border. Frontex has increased its efforts, and expanded its operations at sea to improve the security of the EU's external borders. The EU has set up a hotspot approach to help member states to swiftly identify, register and fingerprint incoming migrants. In an additional attempt to prevent migrants from reaching Europe, the EU has made various agreements with third countries, including the EU-Turkey agreement. Scholars and non-governmental organizations (NGO) have shown lot of attention to these EU initiatives, and they criticize the EU for lacking a focus on human rights in its response (see for example: Amnesty International, 2016b; Tazzioli, 2016; UNHCR, 2014; Sarah Wolff, 2015). Critics see these initiatives as primarily reflecting security concerns, and neglecting the humanitarian implication it has on the refugees. This research seeks to explore the following: *to what extent does the way in which the EU has handled the refugee crisis in the Mediterranean comply with its humanitarian principles?*

European states have been leading in ratifying human right treaties. These include, among others, the European Convention on Human Rights (ECHR) (European Court of Human Rights, 1950) and the Convention and Protocol Relating to the Status of Refugees² (United Nations General Assembly, 1967). When signing these documents, countries are committing

¹ The Dublin system set out the criteria for which member state are to be responsible for processing an asylum application. The responsibility for processing an asylum claim falls on the member state which the applicant first entered the EU (European Commission, 2017e).

² This convention will hereby be referred to as the 1951 Refugee Convention.

themselves to defend the specific rights of asylum seekers, refugees and migrants, outlined in these documents. However, the EU has been criticized for not adhering by national, EU and international legislation on human rights³ (Amnesty International, 2017a; Campesi, 2014). The EU is often referred to as ‘fortress Europe’, implying that the access to Europe is increasingly restricted. There has been a lack of legal routes to reach the EU, and as security measures have evolved and borders have been closed, refugees are forced to choose more dangerous routes. It is at these irregular border crossings that much of the human rights violations take place (UNHCR, 2015b, p. 3).

The humanitarian aspect of the refugee crisis is important for several reasons. First, the EU was founded on a set of common values as stated in the Treaty of the European Union (TEU):

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (Art. 2, European Union, 1992).

If the EU were to violate these founding principles, the image of the EU might be significantly weakened. Furthermore, the EU might also risk losing its position and legitimacy both in Europe and on the global scene (Schmidt, 2016). Second, the current refugee crisis and how it is handled might affect other problems facing the EU. The British decision to leave the EU and the rise of populist parties across Europe are threatening the future of the Union. Populist parties often use the refugee crisis to argue their case, and to take back control of their borders and immigration laws. This is also reflected in the campaigns of populist parties, where they often appeal to xenophobia, and sometimes even racism and anti-Semitism and broadly speaking tend to go against the grain of key European values and principles (Balfour et al., 2016, p. 42). Third, the refugee crisis is also threatening the functioning of the Schengen area. The Schengen agreement has abolished border control and enabled the free movement of European citizens⁴.

³ This paper will focus mainly on EU and international law.

⁴ In 1985 five countries (Belgium, Germany, France, Luxembourg and the Netherlands) signed the first Schengen agreement. It incorporated other countries gradually, and was integrated into the European legal framework in 1999. Today 26 countries with over 400 million citizens enjoy the benefits of this agreement (Luecke, Breemersch, & Vanhove, 2016, p. 5).

But in a response to the refugee crisis and several terrorist attacks, various European countries have temporarily reinstated ID-checks at their borders. If the Schengen agreement were to be dissolved, this would harm the free movement of its citizens and have negative economic effects (Luecke et al., 2016, p. 4). For these reasons, amongst others, it is important that the EU manages to resolve the crisis in an effective manner. It is further important that the EU find solutions that are in accordance with European and international legal obligations, including human rights.

The refugee crisis in the EU has raised a lot of attention among scholars, and there is a wide research literature on the issue. Here I will elaborate on some of the most relevant literature for this topic. Many scholars focus on the political and economic aspect of the refugee crisis. They see how the Schengen area, which in turn affects the internal market, is at risk because of the crisis (Alkopher & Blanc, 2016; Babones, 2015; Fijnaut, 2015; Hampshire, 2016). Other researchers have focused on how the crisis has led to problems of burden-sharing and solidarity in the EU (Bendel, 2015; Rijpma, 2010; Uçarer, 2006). Further there are scholars who focus on the connection between populism and immigration. Many of these studies focus on how the rise of populism affects migration policy, which in turn leads to a more restrictive immigration policy (Lazaridis, Campani, & Benveniste, 2016; Lazaridis & Konsta, 2015; Mudde, 2013). This literature however tends to focus on the political consequences of the crisis, thus often overlooking the effect that the policies has on the human rights of the refugees.

Among the scholars who focus on the humanitarian consequences of the crisis, there seems to be a general agreement that human rights implications caused by the EU's handling of the crisis is problematic. The securitization discourse is about how the EU is mainly concerned with securing its external borders. Migration has in this context been constructed as a question of security, which has led to a restrictive migration policy (Campesi, 2014; Huysmans, 2000; Jeandesboz & Pallister-Wilkins, 2016; Léonard, 2010; J. Rijpma & Vermeulen, 2015; Triandafyllidou & Dimitriadi, 2013; Sarah Wolff, 2008). The authors argue that this securitization of the EU's external borders has a negative impact on the human rights of the refugees. Other scholars look at the externalization of the EU's migration and asylum policy. The literature focus both on the agreements to prevent refugees from reaching Europe in the first place, and to send them back once they have arrived (Andersson, 2016; Bialasiewicz, 2012; Klepp, 2011; Triandafyllidou & Dimitriadi, 2013; Sarah Wolff, 2008). These authors argue that the EU's externalization strategy is more about achieving results and effectiveness, than it is about the human rights of those affected. Last, we have a limited number of studies

focusing on the conditions for the refugees who have managed to reach Europe (Casolari, 2016; Pichou, 2016; Trauner, 2016). Their research focus on how the refugees are being received and treated in the EU, arguing that the respect for human rights is not fully respected. This paper will complement this literature by looking at the most recent developments, were there is limited research.

In an attempt to explain the EU's handling of the refugee crisis, I will draw upon two theories, namely securitization and normative power Europe (NPE). The theory of securitization explains how the use of exceptional methods is legitimized when something is considered a security threat (Balzacq, 2010, p. 1). These security threats are socially constructed, either through securitization speech or securitization acts. The first refers to the articulation of security, a claim that something poses a threat. This articulation is usually expressed by governmental leaders, which causes the population to recognise it as a threat. The second refers to use of security measures⁵ to tackle a specific problem. This in turn leads the population to perceive the problem as a security threat. When something is perceived as a security threat, this allows actors to use whatever measures deemed necessary to tackle the problem (Wæver, 1995, p. 55). Several studies have applied this theory in their research on EU's handling of the refugee crisis (Huysmans, 2000; Léonard, 2010; Neal, 2009). These scholars argue that by portraying the refugee crisis as a security threat, the EU can prioritize other concerns over those of human rights. Consequently, the EU's external border control has been strengthened and its migration and asylum policy has become more restrictive. This in turn has led to a deteriorating of the human rights of refugees (Léonard, 2010, p. 232).

Normative power Europe is a theory which explain how the EU can shape what is considered normal on the international scene (Manners, 2002, p. 239). The EU is neither a civilian nor military power, but a normative power through its ideational impact. Put in other words, the EU's international role is that of a promoter of norms and values. Manners has identified five "core" norms that constitutes the EU's normative basis, the respect for human rights being one of them (Ibid, p. 242). The EU can be perceived as a normative power in two ways. First one can say that the EU is a normative power just by being what it is and standing as an example. Second, the EU can act as a normative power, which is to say in an ethically

⁵ Security measures include two practices. First, there are the practices that are usually used to tackle a security threat, such as armed conflicts or terror. Second, we have extraordinary practices, which implies that the problem is exceptional and cannot be tackled with ordinary measures (Léonard, 2010, p. 237).

good way (Manners, 2008, p. 45). The normative power act is mostly used to explain how the EU projects its own norms and values on third countries. Research show that the EU has actively been promoting its human rights values globally (Lerch & Schweltnus, 2006, p. 308). This paper will not explore how the EU project its own values, but whether or not it is following them itself. If the EU is not following the values it is promoting externally, this would entail that the EU has a double standard. An essential part of the NPE theory is that for Europe to be a normative power, it has to follow its own principles (Manners, 2008, p. 56). Put in other words, there needs to be consistency between the norms the EU is promoting and its internal policies and actions. The question is therefore whether the EU is persistent in upholding its human right values, or whether the concern for security prevail when a problem arises. Using these two competing theories can improve our understanding of how the EU legitimizes its actions.

To explore whether and, if so, to what extent, the EU's handling of the refugee crisis abides by EU and international human rights legislation, I will use a qualitative case study. I will analyse three cases; the EU's operations at sea, the conditions in the "hotspots", and the EU-Turkey agreement. These three cases represent the three main measures the EU has taken to handle the refugee crisis; the securing of the EU's external borders, the management of refugees in Europe, and the externalization of migration policy and repatriation of refugees. I have also chosen these three cases because they are considerably interconnected, as each case affects the others. By looking at a few specific cases it will be easier to analyse human rights compliance, and thus create a higher level of validity (George & Bennett, 2005, p. 19). I will use legal documents relating to human rights to analyse the EU's compliance (see section 2.3). The analysis will be limited to the period between 2011 and 2017, because of the high influx of refugees to Europe during this period. Geographically, this study is limited to the Mediterranean region due to the large number of refugees choosing this route and the amount of criticism it has received⁶. I will draw special attention to Greece and Italy as they are the countries currently experiencing the most pressure.

In this paper, I will use a mixed methods approach for data triangulation. I will use a combination of two approaches, discourse analysis and interviews, to increase validity of results. The discourse analysis is very useful when using a case study research design (George

⁶ More precisely, this paper will focus on the eastern and central Mediterranean routes (se appendix 1).

& Bennett, 2005, p. 9). The benefit of choosing to use a discourse analysis, is that you can analyse and interpret the documents. The discourse analysis conducted in this paper is based on a systematic interpretation of official EU documents such as progress reports and Commission communications. The discourse can also give insight to the main priorities of the EU. This approach can further help explain how the discourse is shaping the EU as a global actor, and how it legitimates its external policy (Crespy, 2015, p. 103). The choice of method is also very applicable to the two theories that I have chosen. Discourse is often used in the normative power Europe theory, and it is an essential part to the theory of securitization.

The fact that my primary sources are written by the EU and its agencies, does not necessarily mean that they present an impartial description of the situation. To complement these documents, I have therefore also chosen to use reports from international organizations such as United Nations High Commissioner for Refugees (UNHCR), Human Rights Watch and Amnesty International. These documents provide updated information on the human rights conditions of refugees, and highlight more negative aspects, which the EU might be reluctant to present. I have also conducted semi-structured interviews, to obtain additional information about the situation. Out of the four people contacted with the intention to conduct an interview, two agreed to the proposal⁷. The interviewees were selected to reflect both the perspective of the “EU” (Frontex) and the human rights defenders (Amnesty International). The interviewees have also been chosen because of the interviewees extended knowledge about the cases of Frontex and EU-Turkey agreement (for more information see appendix 2 and 3).

The focus of this paper is on the specific topic of the treatment of refugees entering, or trying to enter, the EU by the Mediterranean Sea. Chapter two starts by briefly explaining the origin and development of the crisis, how the EU has responded to it, and the legal obligations by which the EU is bound. The third chapter will analyse if the EU’s sea operations are in accordance with these laws, by analysing the two operations, Triton and Poseidon. In the fourth chapter I will discuss the reception conditions in the EU’s hotspots in Greece and Italy, by focusing on the identification process and the living conditions in these camps. The fifth chapter will consider how the EU-Turkey agreement has impacted the human rights of the refugees. In the final chapter of this paper I will present the main findings and draw a conclusion to the research question. The conclusion derived from this analysis is that the EU has disregarded

⁷ The first interviewee is a former Frontex officer, with whom I discussed the Frontex sea operations. The second interviewee is a political advisor from Amnesty international, with whom the topic was the EU-Turkey agreement.

several of its human rights principles in its handling of the refugee crisis. I argue that the EU's lack of a consistent humanitarian approach to the crisis, is due to the EU's strong desire to secure its borders and prevent refugees from reaching Europe. The study shows that the EU is more intent on securing its own borders than to safeguard the human rights of the refugees. It seems that when there is a conflict between security interests and human rights values, the former tends to prevail over the later. Although the EU has taken measures to improve the human rights of the refugees, the main focus of the EU is still to secure its borders.

2 The European Union and the refugee crisis

Before starting to analyse to what extent the EU is upholding human rights, I will briefly explain the background for the crisis. It is important to have a good understanding of the circumstances, before starting to analyse the cases. In section one I will look at what caused the crisis, and how it has unfolded. Then, in section two, I will give an overview of the most important measures taken by the EU to try and resolve the crisis. Lastly, section three will explain the European and international legal framework by which the EU must abide.

2.1 The crisis and its unfolding

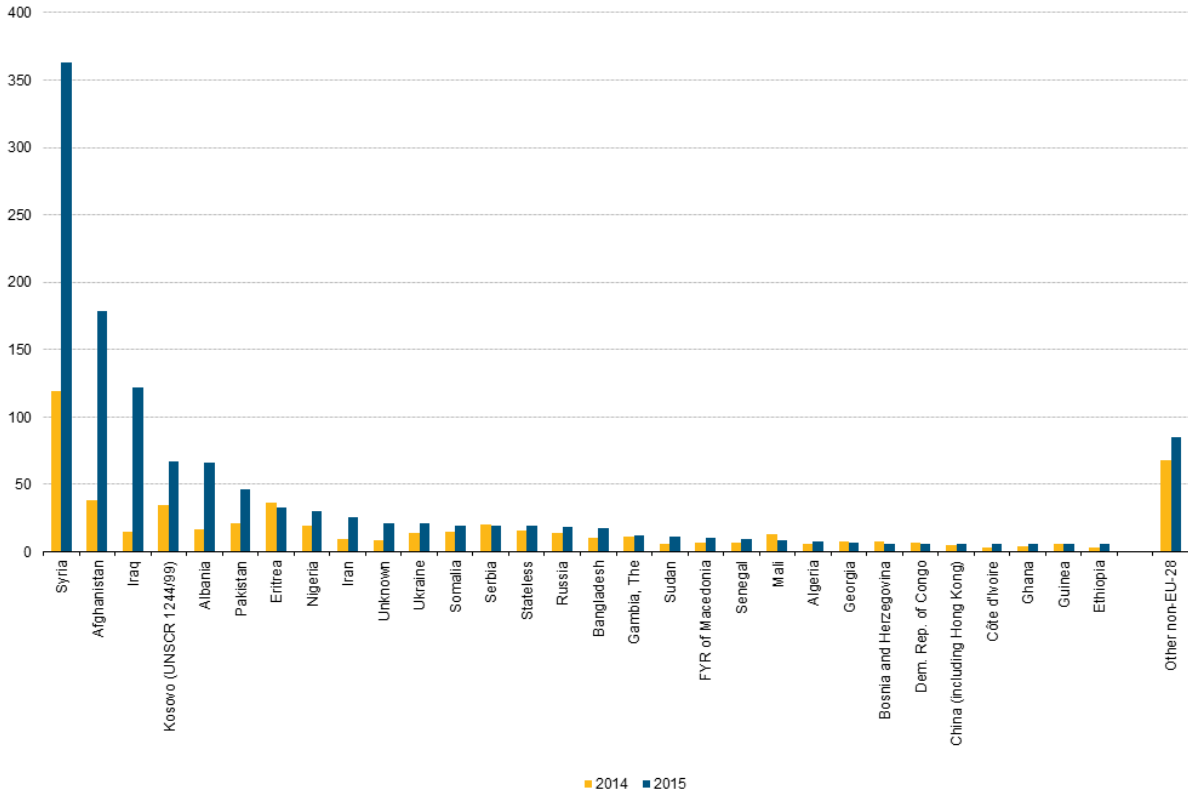
There are various reasons as to why so many people have decided to embark on the journey to Europe during the last years. Among the most common reasons we find fleeing conflict, persecution and poverty. The refugees crossing the Mediterranean Sea primarily flee from conflicted areas in the Middle East and Africa. The outbreak of the Arab Spring in 2010 has especially led to a significant increase in refugees. The Arab Spring was a revolutionary wave that swept through many Arab countries, including Syria, Iraq, Tunisia and Libya. It consisted of both violent and non-violent demonstrations against authoritarian regimes in these countries. Several of these countries are among the top nationalities of asylum seekers in Europe (see table 1). One of the most dramatic events which has caused the biggest increase in refugees, was the outbreak of the Syrian uprising in March 2011 (Encyclopedia Britannica, 2017). The uprising was initiated by pro-democracy protesters who started demonstrating against the authoritarian Assad regime. The government used police, military, and paramilitary forces to suppress the demonstrations. The creation of opposition militias led to the breakout of the civil war in 2012. Over the years, the ongoing violence in Syria has continued to escalate, forcing more people to flee the country. Over 11 million Syrians have been forced from their homes since 2011, but only 4 million of those have fled out of Syria. In 2015, a total of 383 710 asylum applications were made by Syrian nationals in the EU, making them the number one country of origin of migrants in Europe.

Violent extremist groups in several countries are causing people to flee. In Iraq, the conflict between the Islamic State of Iraq and Syria (ISIS)⁸ and the Iraqi government forces continue to escalate (European Asylum Support Office, 2016, pp. 34-35). In Afghanistan,

⁸ The extremist group is also known as the Islamic State of Iraq and the Levant (ISIL).

Taliban have continued to gain territory in the country over the last decades (Ibid, pp. 32-33). Also in Africa, we find similar problems. In Nigeria, Boko Haram is taking control over parts of the country (Ibid, pp. 36-38). These extremist groups are committing systematic violations of international human rights law. The violence they enforce cost the life of many, and force even more people to flee their countries. In Eritrea, on the other hand, it is the authoritarian government who are committing the human rights violations (Ibid, p. 36). The government has put severe restrictions on the populations freedoms and committed acts of violence against the population. In table 1 you can see these conflicts reflected by the country of origin of asylum seekers in the EU.

Table 1: Countries of origin of (non-EU) asylum seekers in the EU-28 Member States, 2014 and 2015 (thousands of first time applicants)

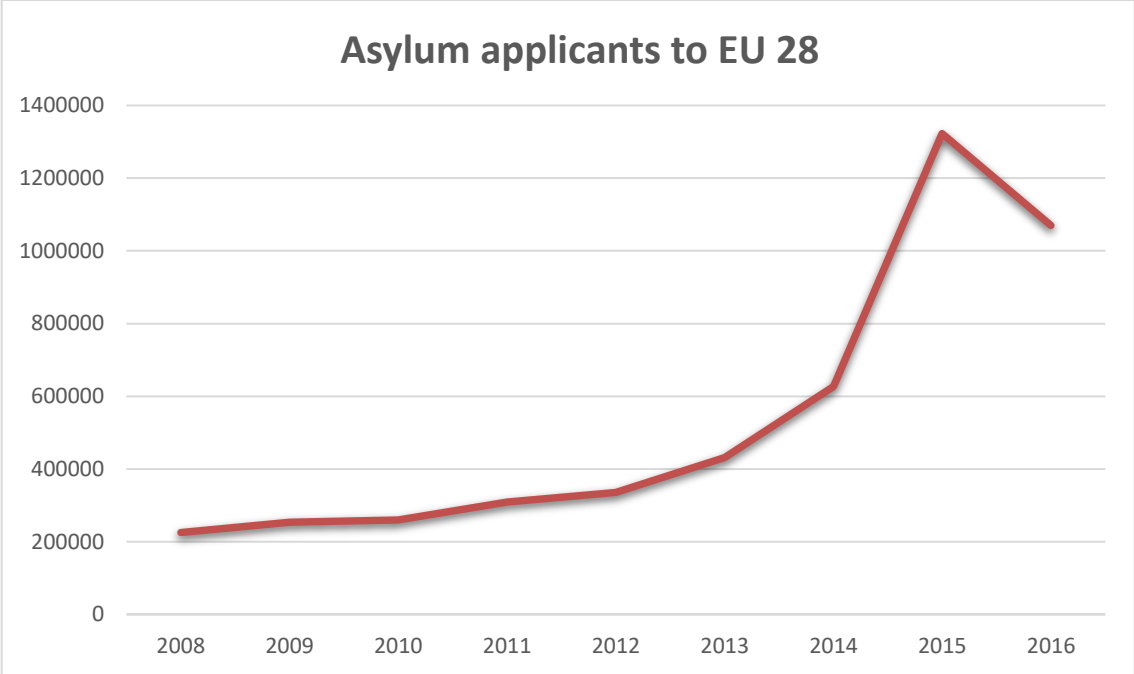


Source: Eurostat (2017)

The conflicts described above are only a few examples of why people are seeking refuge in Europe. There has been a steady growth of refugees reaching the EU since 2010, but the increase in 2015 was exceptional. Table 2 shows the influx of refugees reaching Europe

between 2008 and 2016. In 2015, the EU+⁹ received 1 392 155 applications for international protection (European Asylum Support Office, 2016, p. 8). This was an increase of 110 percent from 2014, the highest year-to-year increase since the recordings started in 2008.

Table 2: Asylum applicants to EU 28, annual aggregated data



Source: Author’s own compilation, with data collected from Eurostat (2016).

Although this is a high number, it is important to put it into the right perspective. First of all, there was a total of 65.3 million forcibly displaced people in the world in 2015 (UNHCR, 2016a). Out of these, 21.5 million are refugees. In a global context, the proportion of refugees seeking asylum in the EU is quite small. The top six receiving countries are Turkey, Pakistan, Lebanon, the Islamic Republic of Iran, Ethiopia and Jordan. These countries were housing over 7.5 million refugees in 2015. Given the EU’s wealth and resources compared to these countries, one may argue that it is not economic restrictions that are preventing the EU from accepting more refugees and responsibility. Second, immigration in Europe is not a new phenomenon. Europe and the EU have long been the destination for migrants and refugees (Hansen, 2003). After the Second World War, Western Europe experienced a significant increase of labour immigrants from South and East-Europe, as well as from former colonies. In the 1990s there was an increase of refugees in Europe, with a total number of 695 000 asylum applications in

⁹ EU+ are the 28 EU member states, and Norway and Switzerland (European Asylum Support Office, 2016, p. 8).

1992. Again in 2001 there was a peak at 424 200 applications (UNHCR, 2015b, p. 5). This underlines that although the number of refugees applying for asylum in Europe today is high, immigration is not an unknown phenomenon in Western Europe. In addition, if the EU were to accept one million refugees, this would only amount to 0,2 percent of the total population. In this view, the proportion of the crisis is not as significant as it might seem (Manrique Gil, Barna, Hakala, Rey, & Claros, 2014, p. 5). The real problem causing the crisis is that a disproportionate amount of asylum applications fall on a small number of member states. In 2014, five EU member states received 72 percent of all asylum applications in the EU (Parliamentary Assembly, 2015). It is by looking at the pressure on these countries that the severity of the crisis becomes evident.

Refugee and migrant are words that are often used interchangeably, but they have their own distinct definitions and meanings. It is therefore important to distinguish between those who are considered migrants and those who come under the definition of refugees. The definition of a refugee is, as stated in the 1951 Refugee Convention, a person who has been forced to flee his or her country because of persecution, war or violence (United Nations General Assembly, 1967). They are unwilling or unable to return to their country of origin out of fear of being persecuted on the grounds of their race, religion, nationality, membership in a particular social group or political opinion. A migrant on the other hand is someone who moves to another country to live, without fleeing his or her own country (Edwards, 2016). They do this to find work, education, family reunion, or for other reasons. They can however return safely to their own country if they want to. By choosing to use the term “refugee crisis” I therefore look at the most vulnerable people, who has the right to international protection in accordance with the law. But it is important to note that it is at times difficult to distinguish between those who are refugees and migrants. Sometimes the statistical data which is available does not distinguish these two, and when this is the case it will be properly announced in the text.

There is no clear sign that the conflicts causing the crisis will cease anytime in the near future, and that the flow of refugees will decrease. Even if these conflicts are resolved, new flows of refugees will come as a result of other possible conflicts and climate change (Kolmannskog, 2008). It is therefore no foreseeable end to the refugee crisis in Europe. The EU should therefore not only take measure to resolve the immediate crisis, but also consider long-term solutions.

2.2 The EU's response to the refugee crisis

This significant increase in refugees reaching Europe has created many challenges for the EU. How can the EU control who is arriving, and effectively send back those who are denied entry? How can the EU receive these refugees without creating more support for populist parties? And how can the EU find room in their budgets for taking the necessary measures? These are only a few of the many challenges the EU is facing, both of a political, economic and social character. The perception that the current influx of refugees to Europe constitutes a crisis has probably affected the EU's response. When a situation is labelled as a "crisis", it requires immediate and extraordinary measures to solve it (Ansems, Guild, & Carrera, 2016, p. 2). After the outbreak of the crisis the EU has developed several measures to try and handle it. Because of the extent of this thesis I will not take into consideration all of the different measures taken by the EU. I will focus on a few of those which are considered most important regarding my research question.

One of the first steps the EU took to handle the big influx of refugees was to reform the Dublin system. On the first of January 2014, the Dublin III Regulation came into force. Its revised aim was to ensure that only one member state is responsible for an asylum application. This was to prevent the abuse of asylum procedures, by applying for asylum in several EU member states, and to ensure better access to asylum procedures in the individual member states (European Commission, 2017e). The Dublin III Regulation puts the responsibility for processing a claim for international protection on the member state which the applicant first entered the EU (European Parliament & Council, 2013). But one evident outcome was that the Mediterranean countries receives an unproportionate amount of asylum applications. The refugee crisis has highlighted the deficiencies of this system, and the need for further alterations. In May 2016, the Commission proposed a new reform of the Dublin system, which seeks to improve the fairness of the system by reallocating asylum applications from member states under pressure, to other EU member states (European Commission, 2017e). This new initiative has not yet been ratified, and it is still the Dublin III regulation that is binding.

The refugee crisis has caused the EU to reinforce its external borders. This has been achieved primarily through the expansion of Frontex. In 2016, the EU decided to extend Frontex's mandate and to transform the old agency into the European Border and Coast Guard¹⁰

¹⁰ When Frontex was established in 2004, the full title of the agency was the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (European

(European Commission, 2016d). It was a strengthening of Frontex, which significantly expanded its role and activities. The agency has now a stronger role in supporting member states, than Frontex had before. Although this new agency started its activities in October 2016, it is still not fully operational (as of May 2017). When at full operational capacity, the agency will have its own equipment, and draw upon a permanent pool of member states experts. JO Triton and Poseidon are two of the ongoing operations Frontex has in the Mediterranean Sea, which will be further discussed in chapter three. In addition, Frontex has a military crisis management operation in the Mediterranean, operation Sophia¹¹. Launched in 2015, its mission is to stop human smuggling and trafficking networks in the central Mediterranean (European Commission, 2016d). Frontex is also cooperating with the North Atlantic Treaty Organization (NATO) to stop illegal trafficking and irregular migration in the Aegean Sea. Frontex and NATO cooperates on gathering real-time information through intelligence, surveillance and reconnaissance. This information is then shared with the Greek and Turkish coast guards.

In addition to the securing its external borders, the EU has created new initiatives to manage the refugees already within the Union. In 2015, the EU created the European Agenda on Migration (European Commission, 2015a). This was done in an effort to outline a coordinated EU response, with medium and long-term solutions to the challenges posed by the refugee crisis. It sets out to make the management of the refugee crisis a shared responsibility within the EU. Most importantly, it created an emergency relocation mechanism to alleviate the southern member states. The agenda also includes a resettlement scheme to provide safe and legal ways for refugees to reach Europe. These mechanisms set out to remove some of the disproportionate pressure on Greece and Italy caused by the Dublin system. The EU hotspots approach was set up to help the member states receiving the most refugees. This will be further elaborated in chapter four. The agenda also increased the responsibilities of Europol, which is the EU's law enforcement agency. Europol's tasks include the investigation of human smuggling networks and assisting member states in the new hotspot approach (Ibid, p. 6).

The EU's attempt to externalize its border control is not a new phenomenon, but with the emergence of the refugee crisis their effort has increased. The EU uses different forms of cooperation to block its borders, and to return refugees who have reached Europe. Among the different types of cooperation we find the EU's readmission agreements with 17

Commission, 2016d).

¹¹ Operation Sophia is officially named EUNAVFOR Med (European Commission, 2016d).

countries/regions¹² (European Commission, 2017f), the New Migration Partnership Framework with third countries (European Commission, 2016a) and border guard training in Libya (Zurutuza, 2017). But the most important and controversial agreement has been the one between the EU and Turkey, which will be discussed in chapter five of this paper. These examples show that the EU is trying to externalize its migration problems to its neighbouring countries. All of the EU's initiatives have to be in full respect of EU and international legislation.

2.3 Legal basis for the EU's humanitarian intervention

Human rights can be defined and interpreted in various ways. To operationalize my use of the concept of human rights, I will look at the most relevant international and EU documents relating to human rights. These are the European Convention on Human Rights, the EU Charter of Fundamental Rights, the 1951 Refugee Convention and the Universal Declaration on Human Rights. The basic definition of human rights is that they are rights inherent to all human beings. In the Universal Declaration of Human Rights, it states that these rights shall apply to all without distinction of any kind (Art 2, United Nations General Assembly, 1948). This includes distinction by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The human rights vary from the right to life to the right to intellectual property¹³. In this paper, I will only consider the human rights which are most relevant for this paper.

The EU and its member states are bound to uphold human rights by having signed several European and international legal documents. First, the EU has created its own legislation through the EU Charter of Fundamental Rights and the European Convention on Human Rights. The first Charter entered into force with the Lisbon treaty in 2009. The aim of the charter was to create a single document proclaiming the fundamental rights to be protected in the EU. The rights included in this charter are divided into six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice (European Union, 2012a). The ECHR came into force in 1953. It was intended as an instrument to make certain rights in the Universal Declaration on Human Rights binding. The convention has been amended several times since

¹² The EU has readmission agreements with; Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, former Yugoslav Republic of Macedonia, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde (European Commission, 2017f).

¹³ To access the complete list of human rights, see Universal Declaration of Human Rights (United Nations General Assembly, 1948) and ECHR (European Court of Human Rights, 1950).

its original version. Both legal documents are binding for all EU member states as well as for the Union itself. Potentially new member states must accept these values as a part of the *acquis communautaire*¹⁴ (European Commission, 2017g).

Second, both the EU and its member states have declared their commitment to pursue the values stated in international laws. The most important international documents regarding human rights are the 1951 Refugee Convention and the Universal Declaration of Human Rights. The 1951 Refugee Convention was created by the United Nations High Commissioner for Refugees in 1951. It was created as a post-Second World War instrument, but with the 1967 Protocol it gained universal coverage¹⁵. The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in 1948. Most of the Union's member states has long been bound to these obligations by signing the legal documents. In addition, the EU has chosen to ensure that all member states comply with these principles, by incorporating their commitment to them in the EU's treaty. In article 78(1) of the Treaty on the Functioning of the European Union, the EU affirms its commitment to the 1951 Refugee Convention. The TEU also declares that the charter of Fundamental rights has the same legal value as the Treaties (Art, 6(1), European Union, 1992).

The four legal documents named above to a large extent contain the same rights. As stated earlier, the rights embedded in these four legal documents shall apply to all without distinction of any kind (Art. 1(12), European Court of Human Rights, 1950; Art. 21, European Union, 2012a; Art. 3, United Nations General Assembly, 1967; Art. 2, United Nations General Assembly, 1948). I will highlight some of the rights that are most important for the refugees who are trying to reach Europe to seek asylum. There are five rights of special importance, which make up the cornerstones of human rights. First, the legal charters declare the right to life, liberty and security of person (Art. 2 & 5, European Court of Human Rights, 1950; Art. 2 & 6, European Union, 2012a; Art. 3, United Nations General Assembly, 1948). The right to life includes the obligation to rescue refugees and migrants in distress at sea. Also stated in these documents is the right that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 3, European Court of Human Rights, 1950; Art. 4, European Union, 2012a; Art. 5, United Nations General Assembly, 1948). The right to seek asylum in

¹⁴ The *Acquis communautaire* is “the body of common rights and obligations that is binding on all the EU member states” (European Commission, 2017g).

¹⁵ Before the 1967 Protocol came into place, the Convention only applied to persons who had become refugees as a result of events occurring in Europe (United Nations General Assembly, 1967).

other countries is also one of the most basic human rights (Art. 18, European Union, 2012a; Art. 14, United Nations General Assembly, 1948). Another very important principle is non-refoulement, which prohibits the expulsion or return of refugees to a state where their human rights might be violated (Art. 19, European Union, 2012a; Art. 78(1), European Union, 1992; Art. 33, United Nations General Assembly, 1967). Collective expulsion of aliens is prohibited under article 4 of protocol no. 4 (European Court of Human Rights, 1950).

The Universal Declaration of Human Rights has some additional rights, that the other documents do not state as explicitly. Article 9 states that “No one shall be subjected to arbitrary arrest, detention or exile”. Article 25 declare that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”. These articles are important for the evaluation of the situation in the hotspots.

Human rights obligations can be both positive and negative. The latter is the most common perception of human rights obligations. Negative obligations are those that prohibits a state from engaging in certain activities which violate human rights. The positive obligations on the other hand, imposes the duty on the state to take action to prevent that human rights are violated (Kirchner, Geler-Noch, & Frese, 2015, p. 73). Securing human rights therefore means that actors must follow both the positive and negative obligations.

As noted in section 2.2, the fact that a specific situation is considered to be a crisis can cause it to be perceived as a threat, and therefore lead to a crisis-led policy-making (Ansems et al., 2016, p. 4). It can also cause the use of “rapid, informal and flexible policy instruments and legislative proposals, which often are at odds with democratic rule of law and fundamental rights and personal circumstances of individuals on the move” (Ansems et al., 2016, p. 2). In the next chapters I will further analyse the EU’s handling of the crisis, by looking at three cases, to find out whether they are in accordance with this legal framework.

3 The EU's sea operations and the difficult upholding of refugees' human rights

As mentioned in section 2.2, the EU's sea operations are organised by the EU agency Frontex. The agency was established in 2004 to coordinate intelligence driven operational cooperation at EU level to strengthen security at the external borders (Neal, 2009). Frontex does not replace national border control activities, but provides additional resources to the member states at the EU's external border. The resources include technical equipment, border guards and financial assistance. The personnel and equipment at Frontex's disposal are provided by other EU member states.

Since its launch, Frontex has coordinated several operations in the Mediterranean Sea¹⁶. At the present moment Frontex has three ongoing operations in the Mediterranean, operation Sophia, Triton and Poseidon. Operation Sophia will not be included in this analysis, as all the operational phases have not been concluded, and because its main objective is to disrupt the business model of criminal networks (European Commission, 2016d). Operation Poseidon is conducted in the eastern Mediterranean to assist Greece, while Triton is operating in the central Mediterranean to support Italy.

All Frontex operations have to follow the regulations set out by the EU, including the respect for human rights. Frontex "shall guarantee the protection of fundamental rights in the performance of its tasks" (Art. 34, European Parliament & Council, 2016). The Code of Conduct further states that "Participants in Frontex activities [...] shall comply with international law, European Union law, the national law of both home and host Member States and the present Code of Conduct" (Art. 3, Frontex, 2011a).

Despite these regulations on human rights, Frontex has received a lot of criticism since its operations started in 2005. Both scholars and international organizations have criticised Frontex for focusing too much on securing the EU's external borders and therefore overlooking the humanitarian needs of the refugees (Human Rights Watch, 2011; Tardif, 2017). The criticism of Frontex is directed at its contribution to the securitization of migration and exposing migrants to inhuman and degrading treatment.

¹⁶ Previous operations include operation Hera, Indalo, Minerva, Nautilus, Hermes and Aeneas. These operations were concluded as the migration routes changed (Campesi, 2014, p. 129).

In this chapter I will analyse to what extent the EU agency Frontex upholds human rights. In section 3.1, I will discuss the operation Triton. In section 3.2, I will analyse operation Poseidon. I will focus on what the priorities of the agency are, and whether Frontex is violating human rights. I will further discuss to what degree the EU is to be held accountable for the operations.

3.1 Frontex operation Triton

Operation Triton was launched in 2014 to support Italy with border control, surveillance and search and rescue in the central Mediterranean. The operation was initiated at the request of the Italian government, who saw that it could not finance their national operation Mare Nostrum in the long run¹⁷. Although the intention was not to replace Mare Nostrum (Malmström, 2014), this was the result when the Italian operation terminated in November 2014 (Tazzioli, 2016, p. 2). 26 EU countries participate in the operation by deploying equipment or personnel (Frontex, 2016b). The operation has a total of 350 officers, eleven vessels and five aircrafts. Tritons has a range of different tasks both on sea and land, including border control and surveillance, and search and rescue¹⁸.

When comparing the Italian and the Frontex led operations there are some clear distinctions between the two. First, operation Triton had a much smaller budget than Mare Nostrum. While the Italian operation had a monthly budget of around 9 million euros (Brady, 2014, p. 2), operation Triton's monthly budget only amounted to 2,9 million euros (Frontex, 2014). The size of the Frontex budget might be explained by the fact that it was not intended to replace Mare Nostrum, but to complement it. Still, the Italian government managed to initiate the operation Mare Nostrum while it was under a challenging economic situation. The EU did not manage to allocate the same amount to its operation Triton, and this budgetary decrease limited the means available to conduct search and rescue operations and to save those in distress at sea. Second, operation Triton reduced the territorial extent of the mission compared to Mare Nostrum. Mare Nostrum operated very close to Libyan territorial waters, while Triton was limited to operate within 30 nautical miles from the Italian coast (Tazzioli, 2016, p. 2).

¹⁷ Mare Nostrum is an Italian operation initiated after the tragedy where over 360 migrants died on the outskirts of the island of Lampedusa in 2013. The operation ended one year later, when operation Triton took over its tasks (Tazzioli, 2015, p. 63).

¹⁸ Border control and surveillance is the main task, but search and rescue remains a priority. Other tasks include; detections and intelligence about smuggling networks, illegal fishing, maritime pollution, registration of migrants (Frontex, 2016b).

In 2015, the EU decided to increase the budget of Frontex, and to expand its geographical scope. The budget for the Frontex operations was to be tripled to match that provided for Mare Nostrum. The EU provided additional equipment and personnel for the operation, and its operational zone was extended to 138 nautical miles south of Sicilia (Frontex, 2015). This means that it not only covers the territorial waters of Italy, but also parts of the search and rescue zones of Italy and Malta. Despite the territorial extension of the operation, it is still substantially smaller than its precursor, Mare Nostrum. Still, Frontex vessels, and aircrafts, have been redirected to assist refugees in distress at sea far away from the operational area of Triton (European Commission, 2016d).

The fact that operation Triton's territorial scope still is a lot smaller than its precursor can be used as an argument that the Frontex operation was mainly concerned with securing the EU's borders. The limited territorial scope shows that the main priority of the operation was to secure the Italian coast, while less resources were allocated to search for people in need outside this territory. The operational territory of operation Triton ends 70 nautical miles outside of the Libyan coast waters. This means that to reach the point where the Libyan territorial waters begins, this would take them roughly four to five hours (Former Frontex officer, 2017). It is in this area, close to Libyan waters, where most of the shipwrecks happen. The ships participating in operation Triton are the last to arrive to nearly every rescue missions close to Libya. As indicated by a former Frontex officer, "Frontex is quite strict on this, as it is the EU's border control agency"¹⁹ (Former Frontex officer, 2017, [authors own translation]).

The limited operational zone might also be partly due to the perception that search and rescue operations close to Libya can function as a pull factor for migrants. The suspected pull factor consists of giving migrants the impression that they will be picked up by European vessels shortly after their departure from Libya, and that this will cause more people to embark on the journey. The UK made their opinion clear when the UK Foreign Office Minister Lady Anelay, announced that the UK would not support the search and rescue operations in the Mediterranean (Anelay, 2014). Frontex's director, Fabrice Leggeri, has expressed the same opinion, but in a less direct way. He said that Frontex should not pick up refugees closer to Libya as this can support human traffickers (Campbell, 2017).

¹⁹ Original quote in Norwegian: «Frontex er jo ganske nøye på dette, det er jo EUs grensekontrollorgan».

However, both NGO ships and operation Sophia are operating close to Libyan territorial waters (Tardy, 2015; Wintour, 2017). The NGO ships conduct rescue missions, and often transfer the refugees to the ships participating in operation Triton, who then brings them back to Italy. But because of this practice, the Frontex ships are often referred to as ‘ferries’, bringing migrants to Europe (Campbell, 2017). According to the former Frontex officer, this reputation caused Frontex to implement a new rule at the end of 2016. Triton vessels were no longer to admit migrants from NGO boats onto their ships (Former Frontex officer, 2017). The NGO ships have to take the migrants they rescue to Italy themselves. This new norm implies that there will be less rescue boats available close to Libya. This can be seen as another way in which Frontex are prioritizing securing the borders, over humanitarian intervention. Some Triton ships do nevertheless transfer migrants onto their ships on occasion, in emergency situations or when they are already destined for Italy. In addition, Frontex ships have in emergency situations entered Libya’s territorial waters to rescue people in distress. This shows that there is some flexibility in the rules posed by Frontex, and that when required it provides the help and resources that are needed. The interviewee said that he had never experienced any conflict between securing the borders and humanitarian intervention. When the Italian maritime rescue coordination center was in need of assistance from Frontex ships, he had never experienced that Frontex had refused this request (Former Frontex officer, 2017). If Frontex were to resist participating in rescue operations it would not only be violating the right to life, but also several maritime laws. The duty to rescue people in distress at sea is firmly integrated in the laws of the sea. This is stated in article 98 of the United Nations Convention on the Law of the Sea (UNCLOS) (United Nations General Assembly, 1982), and in Chapter V, Regulation 10 of the International Convention for the Safety of Life at Sea (SOLAS) (International Maritime Organization, 1974). The obligation to render assistance to those in distress at sea apply to all ships, and the Frontex vessels are no exception.

This increment in the budget, operational area and equipment that has been provided for the operation Triton shows that the EU is increasingly concerned with the situation in the Mediterranean Sea. However, the question is what the EU is most concerned about. Is the EU primarily concerned with preventing refugees from losing their lives at sea, or about preventing the refugees from reaching the shores of Europe?

The UNHCR explains the distinction between search and rescue operations and border control and surveillance operations (UNHCR, 2015a). Both types of operations can save lives at sea, as all vessels are bound to by law (see above). But whereas the first one is designed

explicitly to save lives at sea, the second is not. The main goal of border control and surveillance operations are to control and surveil the borders, and to stop those who are attempting to enter illegally. The people Frontex save at sea are therefore just a by-product of their main goal. This is because, as described above, when Frontex ships are patrolling the border, they have no choice but to rescue those in need. The Italian operation Mare Nostrum was a search and rescue operation, whereas its successor, operation Triton has been judged a border control and surveillance operation (Fernández, 2016). Triton has contributed to search and rescue operations, but it does not have the resources, scope or mandate required to carry out these operations (UNHCR, 2015a). Frontex itself reaffirms this, by stating that “While the primary focus of Operation Triton [...] is border control and surveillance, search and rescue remains a priority for the agency” (Frontex, 2016b). While operation Triton has a positive effect on the protection of the refugees’ right to life, the operations’ limited mandate still makes this effort insufficient (UNHCR, 2015b, p. 7).

The discussion above shows that Frontex has not provided the necessary tools to deal with the humanitarian crisis in the Mediterranean Sea. Although the search and rescue operations conducted by Frontex might be insufficient, they do contribute to protecting refugees. This is demonstrated by data showing that the operation has contributed to the rescue of many migrants in the Mediterranean²⁰. As the external pressure from NGOs and other commentators has increased, Frontex has adopted a more humanitarian line. After the most deadly shipwreck in April 2015, where over 600 people lost their lives, the European Council held a special meeting on the refugee crisis (Carrera, Blockmans, Gros, & Guild, 2015, p. 3). In a statement after the meeting, the Council affirmed the EU’s commitment to improve the search and rescue capabilities of Frontex (European Council, 2015).

One thing that is noticeable when looking at the different measures Frontex have taken to improve its humanitarian line is the time of their creation. There seems to be a correlation between tragic incidents at sea and the creation of new humanitarian initiatives. One example of this was the expansion of operation Triton in May 2015. The expansion happened shortly after several hundred migrants died in shipwrecks, and Frontex being criticized in the media (Bonomolo & Kirchgaessner, 2015; Tazzioli, 2016, p. 11). Most importantly, this expansion formally extended Triton’s tasks to include search and rescue (Carrera & Den Hertog, 2016, p.

²⁰ Between January and August of 2016 alone, 38,750 people were rescued with the involvement of operation Triton (European Commission, 2016d).

5; Pallister-Wilkins, 2015, p. 60). This, and other examples²¹ show that the humanitarian improvements made by the EU have mostly been a reaction to human tragedy. When there is pressure to reform the system, this is accomplished, but seldom as a pre-emptive measure to protect refugees. The changes made by Frontex can therefore be perceived more as a response to the criticism than a genuine desire to improve the humanitarian role of Frontex.

However, the attempts and pressure to embed Frontex with more humanitarian tasks has been met with a lot of resistance. As Frontex's Executive Director, Fabrice Leggeri, said in an interview:

Triton cannot be a search-and-rescue operation. I mean, in our operational plan, we cannot have provisions for proactive search-and-rescue action. This is not in Frontex's mandate, and this is in my understanding not in the mandate of the European Union (Kingsley & Traynor, 2015).

This clearly shows how Frontex perceives itself and its mandate, and more so, that of the EU. The agency's main priority therefore seems to still be border security.

Frontex's operations are a good example of how difficult it can be to determine who is responsible, the EU or the member states. The Schengen Borders Code clearly states that the primary responsibility of border control lies with those Schengen countries who have external borders (Art. 14, European Parliament & Council, 2006). In accordance with this, Frontex has been determined on placing the responsibility of the operation on Italy. Frontex has stated that border control is exclusively the responsibility of the member states, and that the role of Frontex is merely to "coordinate the deployment of additional experts and technical equipment to those border areas which find themselves under significant pressure" (Frontex, 2017). Although the EU has stated that "The Mediterranean is a European sea and a European responsibility", the EU has also described the operation as a way that "the EU can show concrete solidarity to Italy, by reinforcing its border surveillance and supporting its humanitarian efforts" (Malmström, 2014). These statements also show how the EU is mostly concerned about, and willing to assist in surveilling and securing the border. The EU is more reluctant to take responsibility for search and rescue, leaving this responsibility to the member states.

²¹ The "special" European Council meeting on the refugee crisis was held shortly after the deadliest shipwreck in the Mediterranean (Carrera et al., 2015, p. 3). Operation Sophia was initiated after 800 died after capsizing in 2015 (Tardy, 2015).

Formally, Italy is responsible for the operation, including the personnel and resources provided by Frontex. Still it is Frontex and thereby the EU who sets the agenda. Frontex conducts risk analysis, which later goes on to form the common European agenda. This agenda is important in shaping how the Frontex operations are to be conducted (Frontex, 2017). The equipment and personnel provided to the member states by Frontex is also based on the needs that the EU finds the most important in the risk analysis. Frontex then develops plans which clearly defines the aims of each of their operations. The deployed border guards must carry out their duties according to the operational plan. This is a way in which the EU and Frontex are trying to promote a common standard of border management across the EU. This implies that the EU has a great influence over the supposed Italian controlled operation. This shows that although Italy is responsible for the personnel and equipment deployed for the operation, it is Frontex who determine what resources it gets and how these are to be used. Italy has little to say in the management of their external border, but is to be held accountable for measures imposed by Frontex. This supports the argument that the EU should have some degree of accountability for the Frontex operations.

3.2 Frontex operation Poseidon

Operation Poseidon Sea was an extension of the Poseidon operation on land²². It was established in 2014 to assist Greece in controlling illegal immigration and to combat cross-border crime in the eastern Mediterranean Sea (Frontex, 2016a). In addition, the operation has additional tasks including, amongst others, identification and registration of migrants, debriefing and screening, search and rescue, and smuggling of illegal items. After the EU-Turkey agreement entered into force, operation Poseidon has also assisted Greece in return and readmission from the hotspots. Operation Poseidon has 700 guest officers from 23 participating countries.

Operation Poseidon has also received a lot of criticism regarding its tasks. One of the operation's tasks is to assist Greece in rescuing refugees lost at sea, and then transporting them to Greece. This is however problematic, as the deplorable conditions for refugees in Greece are well known. In 2011, the European Court of Human Rights (ECtHR) made its judgement in the case of *M.S.S. v. Belgium and Greece* (European Court of Human Rights, 2011). The court

²² Joint Operation Poseidon Land was initiated in March 2011. Its aim was to stop illegal immigration from Turkey to Greece in the Evros region (Frontex, 2012).

judged Belgium for having violated the ECHR by returning asylum seekers to Greece under the Dublin system. The judgment was based on the fact that Belgium returned these asylum seekers knowing that they could face the risk of serious breach of their fundamental rights in Greece²³. This case illustrates that the conditions in Greece are in violation of the ECHR and that returning refugees to Greece is also in breach of human rights. As stated in the Frontex Fundamental Rights Strategy, Frontex should “take into account the relevant ECtHR case-law in its activities” (Para. 6, Frontex, 2011b, p. 3). As shown with the ruling on *M.S.S. v. Belgium and Greece*, and Frontex’s continued activities, this has not been the case. Although this ruling demonstrates that this practice is in violation of human rights, Frontex continues to bring the refugees to Greece. A Frontex official has confirmed Frontex’s knowledge of the situation in Greece, still Frontex decided to continue the operation (Human Rights Watch, 2011, p. 23). The same verdict has been reached by the ECtHR and the Court of Justice of the European Union (CJEU)²⁴ in several other cases, including the case of *Sharifi and Others v. Italy and Greece* and the joined cases of *N.S. v United Kingdom and M.E. v Ireland* (for more information see: CJEU, 2011; ECtHR, 2014). These verdicts clearly state that to send refugees back to Greece under the Dublin system is a violation of human rights. The question is whether there is a violation of human rights when Frontex are rescuing migrants at sea and then sending them to Greece.

When migrants are rescued at sea by ships participating in operation Poseidon, they are on the territorial grounds of the state that the ship sails under (Former Frontex officer, 2017). This means that when for example the Norwegian ship Peter Henry von Koss rescues migrants in distress, these migrants are on Norwegian soil while being on board the ship. This would entail, according to the rulings mentioned above, that Norway in this case, is in violation of human rights. But choosing to hold the flag state responsible overlooks the fact that these national ships are participating in a Frontex led operation. The assistance from these officers has been requested by Frontex. When it is Frontex that are coordinating the operations, and making guidelines for the operations, it should be held at least partly accountable.

However, when conducting search and rescue missions, these ships are formally released from the Frontex system and over to the Greek maritime rescue coordination center.

²³ The ECHR also judged Greece in the same case, for having asylum conditions that were so bad that they violated the ECHR (European Court of Human Rights, 2011).

²⁴ The CJEU is not to be confused with the European Court of Justice (ECJ). The CJEU consists of the ECJ and the General Court (European Union, 2017a).

In this way, the rescue operations conducted by Poseidon ships are not under the command or responsibility of the operation. Nevertheless, I posit that these operations are a shared responsibility between Frontex, the participating member states and the country hosting the operation. Therefore, Frontex are an accomplice in violating human right by sending refugees to Greece. Frontex are committing the same violation on human rights as Belgium (and Italy, Ireland and the United Kingdom) was judged for. Frontex is in this case in violation of the European Charter of Fundamental Rights.

Furthermore, the Frontex officers who participate in bringing the refugees to Greece are also in violation of the Frontex's code of conduct. It clearly states that: "Participants in Frontex activities shall: a) promote and respect human dignity and the fundamental rights of every individual" (Frontex, 2011a). This is arguably not the case when sending the refugees to Greece. However, the code of conduct does not lay out what the consequences of non-compliance are, which leaves an accountability gap (Human Rights Watch, 2011, p. 15).

Another task that operation Poseidon has is assisting Greece in returning refugees to Turkey under the EU-Turkey agreement. As will be explained in more detail in chapter five, Turkey should not be considered a safe third country. Frontex is violating the principle of non-refoulement due to its participation in the return of refugees to countries where there is a risk that their human rights might be violated. I therefore claim that when Frontex is participating in the return operations under the EU-Turkey agreement, it is complicit in violating human rights.

These examples show that it is difficult to analyse the accountability of Frontex. There is a legal paradox in the founding Frontex Regulation itself. First it states that "the responsibility for the control and surveillance of external borders lies with the member states" (Art. 1(2), European Council, 2004). At the same time the Frontex Regulation states that Frontex is an agency with "full autonomy and independence", and that it has a "legal personality and exercising the implementing powers" (Preamble, para. 14 and 16, European Council, 2004). Frontex has adopted a Human Rights Strategy, which sets out to clarify the agency's obligations and accountability. As stated in the document:

Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations (JOs) and therefore also for the respect of fundamental rights during these activities. This does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must

particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all its activities (Para. 13, Frontex, 2011b, p. 4).

This document shows the same paradox as the previous Regulation. Frontex continues to claim that it is the member states who are responsible for managing their external borders, while at the same time expressing that also Frontex itself has a responsibility. The Strategy also acknowledges that Frontex's activities can be reviewed by both the ECtHR and the CJEU (Para. 6 & 7, Frontex, 2011b, p. 3). Although to date, this has not yet happened. Another example to illustrate the lack of clarity about accountability is the uniforms used by the Frontex officers. The officers still use their national uniforms, but they are not under command of their national authorities. When supposedly under Greek command, they do not wear any symbol on their uniforms to illustrate this. The officers do however wear a Frontex band around their upper arm (Frontex, 2013). This can be seen as a way, by all parties, to avoid responsibility for the personnel and their actions. This reflects the difficulties with multi-actor situations. In situations where several actors cooperate in or contribute to an operation which violates international laws, who are to be held liable?

In attempts to ensure the respect for human rights in Frontex operations, Frontex has developed several initiatives to achieve this goal. First, Frontex has developed two codes of conduct, one for 'all persons participating in Frontex Activities', and one for 'Joint Return Operations coordinated by Frontex'. These are to be followed by all Frontex personnel to ensure the upholding of human rights during Frontex operations. Second, Frontex has also developed a Fundamental Rights Strategy in 2011 to "strengthen the commitment of Frontex [...] to respect and promote the fundamental rights in their activities" (Frontex, 2011b, p. 2). The rules and aims set out in these documents are to be followed by all Frontex personnel. Nevertheless, as my interviewee informed me, it is not a requirement that Frontex personnel actually read these documents (Former Frontex officer, 2017). He expressed that it is expected of Frontex chiefs that they read a lot of the Frontex documents, but because of the vast number of documents they rarely read them all. This begs the question of what the intention of these documents is. One possibility is that these documents have been made as a response to the criticism Frontex has received. Frontex has also claimed that in the training Frontex has put more emphasis on fundamental rights issues. However, as the former Frontex officer explained, the personnel on his ship did not get any form of training or instructions from Frontex before

participating in the operations (Ibid). The only information provided directly from Frontex is a short brief, of half an hour to an hour, before leaving the mainland.

The case of Frontex shows that there have been some positive developments concerning human rights. The EU has taken several measures to protect and improve the human rights of refugees. Still, the continued high number of fatalities in the Mediterranean Sea show that there still is a lack of a human rights-based approach to migration by the EU. Thus, there continues to be a focus on security in the way the EU manages its external border. This shows that the securing of borders and the rescue of migrants are being addressed simultaneously. The EU's choice to tackle the refugee crisis with Frontex, the European border and coast guard, is according to the securitization theory a securitization act. By using a security actor to tackle the problem, the problem itself is perceived as a security threat.

We also see that security is dominating the rhetoric that the EU is using. This is what the securitization theory refers to as securitization speech. When managing the refugee crisis, the EU is focusing on securing the borders, securing the welfare state, and preventing terrorists from entering the EU. With Frontex, the EU is especially focusing on combatting criminal networks and stopping human smugglers. Frontex has expressed its desire to stop human smugglers from exploiting refugees and putting their lives at stake, and in this way, protect the refugees. But human smugglers are there because there is a demand, and this demand is caused by the lack of safe and legal routes to the EU. In order to seek asylum in the EU, refugees have no other choice than to resort to human smugglers. Because of the current system, refugees fleeing conflicts have to risk their lives in order to seek protection. I argue that the main reason for trying to stop human smugglers is not to improve the conditions of the refugees, but that it is another way of preventing them from reaching Europe. This is an example of the problem with linking arguments directly to actor's motivation. The fact is that actors may use a type of argument to justify his or her actions, while this is not the primary motive behind the action (Lerch & Schweltnus, 2006, p. 307). The example above shows how the EU has chosen to use a value based argument, the protection of refugees, to legitimize the fight against illegal human smugglers. Although the EU uses this humanitarian argument, the main goal is still that of preventing refugees from reaching Europe.

Both operation Triton and Poseidon are temporary missions, which are likely to cease once the crisis comes to an end (Barbulescu, 2016, p. 2). What will be considered the end of the crisis is uncertain, but even if it is once deemed over, this does not mean the end of all migrants and refugees crossing the Mediterranean. This temporal nature of the missions is

another example of how the main goal of Frontex is to secure the EU's borders. It also strengthens the aforementioned argument, that the EU's handling the crisis is based on a reactionary approach. The EU usually only take action after a crisis has occurred, and never as a pre-emptive measure to prevent further loss of life at sea.

When studying this topic, it is important to have a clear separation between which actions, or initiatives, the EU has taken, and which the member states are behind. This can be challenging as this divide is not always clear, and can cause blame shifting between the EU and its member states (J. J. Rijpma, 2010, p. 1; Sarah Wolff, 2015, p. 3). However, the perception of who is accountable, depends on how one views the EU. In my view the EU is the sum of its member states. The position of the EU is therefore a reflection of the position of its member states and vice versa. This means that both the EU and the member states are responsible for the measures taken to resolve the refugee crisis.

4 Human rights in the European Union's hotspots: contested treatment and living conditions

The hotspot approach was first presented by the EU in May 2015, as a part of the European Agenda on Migration (European Commission, 2015a). The purpose of setting up these hotspots is to help the southern border countries, Greece and Italy, handle the large number of refugee arrivals. When rescued at sea, migrants are brought to the hotspots for identification, processing and first assistance. The hotspots are arrival centres, which aim is to “swiftly identify, register and fingerprint incoming migrants”. This approach will increase the effectiveness of deciding who has the right to seek asylum, and who will be returned. These centres are administered by the European Asylum Support Office, Frontex, Europol and the frontline member states. These participating actors coordinate their activities through the European Regional Task Force (EURTF) which has been set up in Catania (Italy) and Piraeus (Greece) (Carrera et al., 2015, p. 7). The EU were to allocate 60 million euro in emergency funding for the hotspots (European Commission, 2015a, p. 6).

As of January 2017, there are four hotspots in Italy and five in Greece, with a total capacity of 7050 people (European Commission, 2017b). The hotspots are built on existing reception centres in the hosting countries, but the EU has implemented new ways for processing people. There is no EU legislation that regulates how the hotspots are to be set up, or how procedures are to be carried out (Amnesty International, 2016a). The hosting states are therefore free to organize and manage the camps in the manner they want.

The hotspots have received a lot of criticism for overcrowding in the camps, which has led to deplorable conditions. The hotspots have also received criticism for not providing the refugees with information and treating them in an inhumane manner. In addition, the hotspots are increasingly seen as centres for detention and push back, instead of centres of reception and first assistance.

In this chapter I will analyse to what extent the hotspot approach is upholding the EU's human right principles. I will discuss whether the hotspots were established to reduce the pressure on the reception countries, and to improve the humanitarian conditions in these camps, or if it was established to ensure that all migrants arriving in the EU are fingerprinted, and to improve the swift return of those rejected. I will focus on the conditions in the hotspot, and the registration and identification process. I will also discuss who should be held accountable for

the hotspot approach, the EU or the hosting member states. In section 4.1, I will analyse the Greek hotspots, and in section 4.2 the hotspots in Italy.

4.1 Greek hotspots

In Greece, there are five hotspots, situated in Lesbos, Chios, Samos, Leros and Kos, with a total reception capacity of 5450 people (European Commission, 2017b). All five hotspots are located on islands close to Turkey, where Lesbos is the biggest hotspot, with a capacity of 1500 people. The hotspots were set up to alleviate the pressure on these Greek islands. Since its establishment however, the Greek hotspots have been wildly criticized for their deplorable conditions (Amnesty International, 2016b; Human Rights Watch, 2017; UNHCR, 2016b).

Much of the criticism is about the living conditions which the refugees have to endure in the camps. Overcrowding is a problem in most camps, as even daily arrivals can exceed the capacity in the camps. At times the number of refugees residing in the camps is almost double that of its total capacity (Amnesty International, 2017a, p. 22). This overcrowding has led to deteriorating conditions in the hotspots. The lack of adequate housing is a big problem, leading many refugees to resort to sleeping on the floor or in tents. During one week in January 2017 three refugees died in the Moria camp, due to the cold and failed attempts to get heating in the tents²⁵ (Tagaris, 2017). The temperature in Greece can at times be freezing, and the hotspots are not equipped to provide the necessary heating. These deaths highlight the grave humanitarian conditions in the hotspots. Still, there has been no immediate response to these deaths, and the refugees in Greece continue to live under the same conditions.

Other problems that have been reported in the camps include poor hygiene in the facilities. There is not a sufficient number of bathrooms and showers in the camps, and many of them are in bad condition or broken and unsanitary (Amnesty International, 2016b, p. 19). There is also often a lack of hot water, which makes the hygiene of those living there poor. Furthermore, the medical care in the camps is considered inadequate. Both physical illness and psychological trauma are common problems which often does not get treated. It is the Greek First Reception Service who is responsible for identifying vulnerable groups, and giving them the necessary treatment. People with health problems, single parents with children and people at risk of sexual violence do therefore not get the protection they need and are entitled to.

²⁵ Other deaths have occurred in the camps, including two people who died after a gas canister used for cooking in a tent exploded in the Moria camp (Amnesty International, 2017a, p. 23).

Reports show that except for unaccompanied children, the identification of vulnerable people rarely happens. The director of the Moria camp have confirmed that it did not identify vulnerable groups in the camp (Amnesty International, 2016b, p. 29). This in itself amounts to a human right violation, as these vulnerable groups do not get to enjoy the rights they are entitled to (Art. 24, 25 & 26, European Union, 2012a).

There have been many reports on the food that is served. The food has bad nutrition, it has at times gone bad, and there is often not enough food. This may further affect the health of the refugees. There has also been a consistent problem in many camps that fights break out in the food lines (Human Rights Watch, 2017, pp. 4-7). In article 25 of the Universal Declaration of Human Rights it states that adequate living conditions includes “food, clothing, housing and medical care and necessary social services” (United Nations General Assembly, 1948). The conditions in the camps described above can hardly be considered to meet the minimal human rights standards. The living conditions in the hotspots are therefore a violation of the human rights of the refugees. Although there is a certain diversity between the five hotspots in Greece, reports show that they all have similar conditions but with varying degrees of severity (Human Rights Watch, 2011, p. 3).

Lastly, there are often violence and crimes committed in the camps. Refugees have testified that when violent outbreaks occur, the police officers who are in the hotspots usually flee to ensure their own safety (Human Rights Watch, 2016, p. 3). This gives the impression that the police officers in the hotspots are not there to protect the refugees, but rather are there to guard them. This can be seen as a securitization act, were the refugees are considered as a security threat. Every refugee is therefore left to fend for their own safety when under protection in the EU. The crowding has also led to problems of designating separate areas for men and women. Having to share living quarters and other facilities with other men, are causing many women to feel insecure and afraid. Reports show that refugee women are being sexually harassed and violated in the camps (Human Rights Watch, 2016). In addition to not protecting the refugees in the camps, there has also been reports that the guards have treated the refugees in an inhumane manner, including violence (Human Rights Watch, 2011, p. 3).

There is also a lack of information provided to the refugees residing in the hotspot. When arriving to the hotspots, the Greek government is obliged to inform the refugees about their rights and obligations (Amnesty International, 2016b, p. 24). This information is however rarely provided, which causes insecurity and suffering for the refugees. Refugees report that

during their stay they get almost no information about their status or possible fate, and that they do not have access to any legal aid (Amnesty International, 2017a, p. 9).

The most important question is who are to be held accountable for the human right violations in the hotspots. The safety of the refugees (and everyone under Greece's jurisdiction) is formally the responsibility of Greece. The same can be said about the living conditions in the camps. The EU has been persistent in criticizing Greece, while at the same time avoiding any responsibility for the deplorable reception conditions in Greece (Carrera & Guild, 2015, p. 9). Despite this, many argue that the EU is also to be held partly accountable. Human Rights Watch (2011, p. 3) argued in one report that EU agencies are complicit when they continue participating in a human right violating system, even though the hotspots are being run by the Greek government. The fact is that Frontex, by providing manpower and material support, are facilitating the detention of refugees in the Greek hotspots. While Frontex does not have any formal decision making power in the hotspots, observations made by Human Rights Watch (2011, pp. 38-40) show that this is not always the case. They report that Frontex personnel were making decisions in the hotspots, and conducting activities which are formally the responsibility of Greece.

The EU is aware of the conditions in the Greek hotspots. As described above, the ECtHR and the CJEU have in several cases ruled the conditions in Greece, so deplorable that they are in violation of human rights. This has in practice caused the Dublin system to lose its function. European countries have decided that they do not wish to utilize the Dublin system and send refugees back to Greece, even though they could according to the Dublin agreement. If they choose to do this, they might also be convicted for violating human rights, as the abovementioned cases demonstrate.

In addition, the Greek hotspots underwent an extreme transformation after the EU-Turkey agreement was signed (Amnesty International, 2017a). The day after the signing, on the 19 March 2016, the refugees residing in the hotspots were evacuated to the mainland. This was done to separate those who had arrived before the agreement came into force, and those subject to the agreement. The hotspots in Greece, previously perceived as reception centres were transformed into detention centres overnight. New arrivals would now be detained in the hotspots, pending a decision on deportation back to Turkey. Many have argued that this violates the prohibition of arbitrary detention, as stated in Article 9 on the Universal Declaration of Human Rights (Amnesty International, 2016b, 2017a; Human Rights Watch, 2017). This is on the grounds that blanket detention of all the refugees arriving to Greece is unjustified. There is

a requirement that detention has to be decided on a case-by-case basis (Art. 5(1), European Court of Human Rights, 1950). The reality in the Greek hotspots is that nearly all migrants are detained without an individual assessment. In addition, there is no legal basis for the detentions, which is also a requirement (European Court of Human Rights, 2015). According to these legal documents, detention is only allowed if there is no possibility to apply less restrictive options (Casolari, 2016, p. 118). In the case of the hotspots, the less restrictive possible option is to have open camps so that the refugees can venture outside. The fact that there is a less restrictive option available makes the detention of refugees arbitrary detention according to international law. There is no evidence to indicate that those with intention to seek asylum in Europe pose a security threat, which would justify their detention. These assessments would have to be conducted for every individual, not collectively.

These changes in the hotspots as the result of the EU-Turkey agreement caused many human rights organization to withdraw from the Greek hotspots. Organizations such as UNHCR, Médecins Sans Frontières, Save the Children and the Norwegian Refugee Council suspended their activities in opposition to the mandatory detention (Médecins Sans Frontières, 2016; Norwegian Refugee Council, 2016; Save the Children, 2016; UNHCR, 2016c). This was probably a decision these organizations took because they were afraid that continuing their presence in the hotspots could be perceived as a legitimization of the agreement and the effects it had on the hotspots in Greece (Ekeløve-Slydal, 2017). This decision directly affected the refugees, by further deteriorating the conditions in the camps. The detention of refugees can further be seen as a securitization act. The detention of people is generally perceived as a security measure. Dangerous people are detained to ensure the safety of the citizens. By using the same measure on refugees, the refugees are perceived as a threat against society.

A few months after the agreement came into force, the detention practices in the hotspots were relaxed. Most of the new arrivals were allowed to leave the camps after they had been registered. However, the Greek government still tends to restrict the refugees' movement, by not allowing them to leave the islands. These decisions were taken by the Greek government not by the EU. Though this was formally a Greek initiative, it was both facilitated and encouraged by the EU. In the latest progress report on the implementation of the EU-Turkey agreement, the EU encouraged the geographical restrictions to ensure efficient return operations of these refugees (European Commission, 2017a, p. 5). This illustrates how the EU is encouraging human rights violating activities in its member states, which is not in accordance to the NPE theory.

Before the agreement was signed, few of the refugees who came to Greece would apply for asylum there. After their arrival in Greece the refugees would try to reach northern Europe before applying for asylum. But after the closure of Greece's northern borders, the number of asylum applications increased dramatically. In 2015 only 13197 of the total 856723 arrivals applied for asylum in Greece (Amnesty International, 2017a, p. 11). In 2016, this number rose to 51091 asylum applications out of only 173450 arrivals. This has caused a further deterioration of the already difficult conditions in the hotspots. Furthermore, for those refugees who choose to apply for asylum, the duration of their detention is prolonged (Human Rights Watch, 2011, p. 37). This means that those in need of international protection have to endure the deplorable conditions in the hotspots for an even longer period of time.

The EU-Turkey agreement has also caused the refugees not to have real access to asylum procedures. Although the refugees still have the right to log their asylum application in Greece, the Greek authorities does not have to process the application if it sees that a refugee comes from a safe third country, and can therefore be returned to Turkey. This means that most refugees in Greece will not have their asylum applications individually accessed, which is a requirement by law (European Court of Human Rights, 2015). There will be a further elaboration on the effects of the EU-Turkey agreement in chapter five of this paper. But this example is important to demonstrate that the EU is partly responsible for the conditions in the Greek hotspots.

One way in which the EU has tried to improve the conditions in Greece is through relocating some of the refugees to other EU member states. The relocation scheme that was put in place to alleviate the pressure on Greece (and Italy) has however been highly unsuccessful. A year after the European Agenda on Migration put forward the emergency relocation scheme, only 615 of the proposed 66400 asylum seekers had been relocated to other EU countries (Amnesty International, 2016b, p. 12). This constitutes a failure on part of the EU to create a solidarity mechanism amongst the members. EU member states who share a border with Greece are continuing to raise fences along the border, further preventing refugees from leaving Greece²⁶ (Amnesty International, 2016b, p. 8). This leads to the continued entrapment of a vast number of refugees in Greece, which contributes to the overcrowding. Even the UNHCR has concluded that “[r]eception arrangements in the country can be summarised as insufficient and,

²⁶ Fences and other border measures have been raised between Greece and Macedonia, and Greece and Bulgaria (Amnesty International, 2016b, p. 8; Chrysopoulos, 2016).

if provided, considerably below the standards set out by EU and national law” (UNHCR, 2014, p. 19).

This analysis has shown that the conditions in the Greek hotspots are clearly in violation of both European and international human right legislation. It has further shown that the EU plays a big role in the hotspots and that the EU has caused many of the changes in the hotspots due to its own policies. This implies that the EU should also be held partly accountable for the human rights violations that are occurring in the Greek hotspots.

4.2 Italian hotspots

In Italy, there are four hotspots, which are located on the islands of Lampedusa, Pozzallo, Taranto and Trapani. Together they have a total reception capacity of 1600 people. The island of Lampedusa is the biggest of these with the capacity of 500 people (European Commission, 2017b). The Italian hotspots have many of the same problems as the Greek hotspots, including overcrowding and deplorable conditions. But as to not repeat these arguments, I will focus on other aspects of the Italian hotspots. Many of these arguments can also be applied for the Greek hotspots.

One may wonder what the EU’s main reason is for choosing the hotspot approach. One of the possibilities is that the EU wanted to uphold the allocation responsibilities as set out in the Dublin Regulation. Eurodac²⁷ is a means to achieve this, through establishing a database for sharing fingerprints. The Eurodac Regulation states that member states must collect the fingerprints from all migrants arriving at their territory (European Commission, 2017c). The EU’s southern countries have however not been very successful in implementing this requirement. Taking fingerprints is becoming even more difficult because migrants are reluctant, or even refusing to give their fingerprints. This is because the refugees are aware that if their fingerprints are registered in Greece, they will be unable to seek asylum in other EU countries. The European Agenda on Migration emphasized the need for the members to fully comply with these obligations.

Member States must also implement fully the rules on taking migrants' fingerprints at the borders. Member States under particular pressure will

²⁷ Eurodac is the EU asylum fingerprint database, where the fingerprints of migrants arriving in the EU are shared between the member states. It was established in 2003, with the aim of making it easier to determine which member state is responsible for processing an asylum application (European Commission, 2017c).

benefit from the Hotspot system for providing operational support on the ground (European Commission, 2015a, p. 13).

By implementing the hotspot approach, the member states can no longer choose to overlook the rules on fingerprinting in the Eurodac regulation. With several EU agencies present in the hotspot, they will ensure that Italy are following the rules. This shows how the EU is concerned about preventing the refugees from spreading across Europe and the function of the Dublin System. Little attention was paid to the humanitarian needs of the refugees in the description of the hotspot approach in the European Agenda on Migration. Thus, yet again, the security concerns of the EU have prevailed over the concerns for the human rights of the refugees.

This is further underpinned by other statements made by the EU about the hotspot approach. One of the most evident examples is that the EU has recommended member states to use force to ensure fingerprinting of all refugees reaching Europe.

Further efforts, also at legislative level, should be accelerated by the Italian authorities in order to provide a more solid legal framework to perform hotspot activities and in particular to allow the use of force for fingerprinting and to include provisions on longer term retention for those migrants that resist fingerprinting. The target of a 100% fingerprinting rate for arriving migrants needs to be achieved without delay (European Commission, 2015b, p. 4).

This was the recommendation the EU gave Italy when it was violating the Eurodac Regulation. This shows that one of the main objectives when establishing the hotspot approach was to ensure that the fingerprints of all migrants are taken when arriving in Europe. Italy is also one of the EU member states who have legally allowed the use of force to register the fingerprints of arriving migrants (UNHCR, 2015b, p. 11). Amnesty International reported that the police had used excessive force when registering the fingerprints of migrants. It included allegations of inhuman and degrading treatment, which in cases amounted to torture (Amnesty International, 2016a, p. 17). This quote also shows that the EU is encouraging Italy to extend their use of detention. As discussed in section 4.1, arbitrary detention is a violation of human rights. This is to say that the EU is encouraging human rights violating activities. This is a clear contradiction to the NPE theory, which sees the EU as a promoter of human rights. The human right values of the EU are clearly not the main priority of the EU when faced with a security issue. The hotspots in Italy have almost achieved their goal of fingerprinting all migrants arriving in Italy (European Commission, 2016h, p. 3). But the EU has not achieved the same success in improving the rights and conditions for the refugees in the hotspots.

This process of identification, registration and fingerprint takes place as soon as the migrants arrive at the hotspot. For many migrants, the journey to Europe has been long and dangerous. When arriving at the hotspots, the refugees are often exhausted, scared and traumatized (Amnesty International, 2016a, p. 34). One can argue that the refugees are not in the condition to answer any questions that will have major consequences on their future at this time. Organizations are also reporting that the police, who are questioning the migrants upon arrival, ask misleading questions. According to their sources, the police have on occasions also changed the information provided by the migrants to facilitate their expulsion. These practises can be seen as a means to limit the migrants' rights to apply for asylum (Amnesty International, 2016a, p. 39). After the short screening process after arrival, many refugees are issued expulsion orders to countries where they might be subject to human rights violations. The EU has put pressure on Italy (and Greece) to improve the speed and number of expulsions (European Commission, 2016j, p. 7). To achieve this, the EU has further recommended Italy to cooperate with the countries of origin of the migrants to facilitate their return (European Commission, 2015b, p. 8). Cooperation with third countries can be problematic with regards to human rights, which will be further demonstrated in chapter five of this paper.

The personnel who are running the hotspots mainly consists of national security personnel, police and semi-military groups²⁸. The fact that these security actors play such a big role in the hotspots can be seen as a securitization act. This also includes the involvement of Frontex officers, who usually have similar positions in their home countries. The perception that the situation in the hotspots require almost military control, makes the situation feel like a security threat. The hotspot approach itself can be seen as a securitizing act, because it can be perceived as an extraordinary practice. Situations that require this kind of extraordinary response are usually situations which poses a threat. The security discourse about migration mainly started after 9/11, and was further fouled by several terrorist attacks in Europe (Triandafyllidou & Dimitriadi, 2013, p. 599). The focus has been on controlling irregular migrants, as they might pose a threat to the security of a state. Terrorist attacks has provided an opportunity for the EU to link terrorism and migration. This has contributed to the social construction of migration as a security issue, and has contributed to the securitization of migration in the form of a more restrictive migration policy (Neal, 2009, p. 338). This view is

²⁸ This category includes coast guards and paramilitary police.

harmful, as it overlooks the fact that it is the same perpetrators of these terrorist attacks whom the refugees are fleeing from. As terrorist attacks continue to happen in Europe, this contributes to the ongoing security discourse in Europe.

However, in addition to these security actors, there are several human rights agencies present at the hotspots, including organizations such as UNHCR, International Maritime Organization (IMO) and Save the Children. The organizations assist the member states and EU agencies to receive the migrants arriving in Europe. But their task is only to assist, and they do not have any power in the decision on the migrants' status. There are also human rights organizations in the hotspots who are not providing humanitarian aid, but are trying to document the human rights conditions in the hotspots. Although human rights organizations are present in the hotspots, they are often denied access to parts of the centres and its procedures. These include reception ports and buildings where the refugees are housed (Ansems et al., 2016, p. 5). The fact that these organizations do not have access to all parts of the hotspots makes it difficult to monitor all the effects of the hotspot mechanism. This denial of access also leads to suspicions about the conditions and procedures taking place in these restricted areas. This lack of clarity and transparency is found in several of the EU's measures to handle the refugee crisis, including in the Frontex operations. This also gives the impression that the refugee crisis is a security issue, as withholding information is most commonly used when confronted with security threats.

The hotspots are transit point of passage and temporal residence, but they are also increasingly used for detention and push-backs (Ansems et al., 2016). As with the Greek hotspots, detention of refugees is also a common practice in the Italian hotspots. The case of *Khlaifia and Others v. Italy* demonstrates that detention of migrants in Italy have previously been conducted in violation of human rights (European Court of Human Rights, 2015). The ECtHR judged that the detention of Tunisian migrants in Lampedusa was unlawful. At this time, the reception centre at Lampedusa was still under Italian authority, and not yet an EU coordinated hotspot. But the EU did not take measures to address the problems pointed out in the verdict. The hotspot approach is said to have increased detention time, rather than reduce it. In the hotspots, Italy uses detention as a means to persuade migrants to register their fingerprints. This might be a response to the recommendations made by the EU, which were discussed above. The detention time is limited to the time between arrival, and when the refugees' fingerprints are registered. After this they can move freely in and out of the hotspot. But when refusing to register their fingerprint, refugees can be held in detention for weeks. This

is also troublesome, because it conflicts with both international and European law. As per article 9 of the Universal Declaration of Human Rights (United Nations General Assembly, 1948) and article 5(1) of the ECHR (European Court of Human Rights, 1950), one cannot be detained without any legal basis as this is seen as a deprivation of liberty. This emphasis on restriction and control in the hotspots can create a negative portrayal of the migrants and refugees.

One group of special concern are unaccompanied minors (UAM) who arrive at the hotspots. UAM are considered as a vulnerable group of applicants, which are in need of special care. The rising number of UAM in the last years have caused a lack of space in the more adequate reception centres intended for minors (Amnesty International, 2016a, p. 29). This has caused many minors to be detained in the hotspots over a long period of time. The EU has also expressed the need to improve the conditions and relocation of UAM, but the EU have thus far been unsuccessful in achieving this (European Commission, 2016i, p. 7). The rights of the child is clearly stated in several human rights documents (Art. 24, European Union, 2012a; Art. 25, United Nations General Assembly, 1948). The UAMs rights include “the protection and care as is necessary for their well-being” and that “the child’s best interest must be a primary consideration” (Art. 24, European Union, 2012a). The treatment of UAM in the hotspots does not provide the necessary care and protection these children need. The case of UAM is therefore another example of how the EU are not upholding their own principles.

I argue that the EU should be held partly responsible for the conditions and human right violations in the hotspots. This has been demonstrated both by the EU’s extensive involvement in the Italian and Greek hotspots, and the pressure the EU puts on its member states. Perhaps the most compelling argument for the EU’s accountability is that the hotspot approach was an EU initiative. It was neither Italy or Greece, but the Commission who was responsible for setting up the hotspot approach (European Commission, 2015a, p. 6). The EU must be held accountable for its own initiatives. This is also reflected in the Frontex Regulation, where it states that “the Commission, in cooperation with the other relevant agencies, should ensure the compliance of activities in the hotspot areas with the relevant Union acquis, including the Common European Asylum System and fundamental rights” (Preamble, para. 27., European Parliament & Council, 2016). As we have seen, the EU has not managed to ensure compliance with human rights. I further argue that the hotspots were set up by the EU to facilitate the deportation of irregular migrant, and not as a means to improve the conditions of the refugees.

The conclusion that the EU should be held partly accountable is not an attempt to exempt Italy or Greece from their responsibilities. The responsibility of the hosting states is undisputed,

but there are a large number of other actors who are involved in the relevant activities. Most importantly, the EU has many agency's which forms part of the EURTF. It is the EURTF who is "in charge of implementing the hotspot approach in administrative and operational terms, [EURTF] is vested of the necessary authority to exercise an effective influence on the host State" (Casolari, 2016, p. 126). However, the hotspots represent a complicated structure, without any clear specification of the roles and the responsibilities of the different actors (Casolari, 2016, p. 127). As I have argued, the hotspots are a shared responsibility among the participating actors.

As we have seen, the human right situation of the refugees in the hotspots are deteriorating. In an attempt to alleviate the countries in the Mediterranean which are struggling with a high number of refugees, the EU has made agreements with its neighbouring countries in order to reduce the number of refugees in Europe. The EU-Turkey agreement is one of these, and it will be discussed in the next chapter.

5 The repatriation of refugees to third countries and the externalization of migration; the EU-Turkey agreement

One of the EU's most prominent strategies to tackle the refugee crisis has been to cooperate with third countries on issues of border control and migration. When faced with internal challenges, the EU has increasingly chosen to cooperate with its neighbouring countries to resolve these challenges (Sarah Wolff, 2008, p. 261). Many of the EU's cooperation's with third countries have been criticized for their human rights implications. Likely the most controversial agreement has been the EU-Turkey agreement, which is the last case to be examined in this paper. I will analyse the agreement and the effect it has had on the refugees to find the answer to whether the EU-Turkey agreement fully complies with human rights.

The EU-Turkey agreement was signed on 18 March 2016, after years of negotiating and a heated public debate. The intention was to end all irregular migration from Turkey to the EU (European Council, 2016). To achieve this goal the agreement set out to “break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk” (European Council, 2016). In order to achieve this goal Turkey agreed to accept the return of all new irregular migrants crossing from Turkey to the Greek islands as of the 20 March 2016. In addition, the agreement obliges Turkey to “take any necessary measures to prevent new sea or land routes for illegal migration opening between Turkey and the EU” (European Council, 2016). According to the EU, the readmission clause is in accordance with both EU and international law. This includes respecting the principle of non-refoulement and refraining from collective expulsion. Still, both scholars and international organizations has criticised the agreement for being inconsistent with human right legislation (Amnesty International, 2017a; Barbulescu, 2016; UNHCR, 2015b; Wolff, 2014).

The agreement has been controversial since the negotiations began. And even now, a year after the agreement was made, it is still in danger of dissolution (Herszenhorn & Barigazzi, 2017). This is caused by feuds between the Turkish government and European leaders, and discontent about the agreement. In order to conclude this agreement, the EU had to make several commitments to Turkey in return. First, the 1:1 framework sets out that for every refugee who is returned to Turkey, the EU will resettle one Syrian refugee from Turkey to the EU (European Council, 2016). The visa liberalization²⁹, which has been one of the hot topics, was said to be

²⁹ The EU-Turkey agreement included a visa liberalization roadmap, which set to the process of lifting visa

lifted at the latest by June 2016. However, the negotiations are still ongoing, and Turkey has been threatening to suspend the agreement if the EU does not grant Turkish citizens visa-free travel (Evans, 2017). The EU will further work on upgrading the Customs Union, and re-energise the accession process. The two parties have also made a commitment to improve the humanitarian conditions inside Syria (European Council, 2016).

The EU has also provided financial aid to Turkey, through the Facility for Refugees³⁰ (European Council, 2016). Initially, the EU provided three billion euros to the Turkish government, with the aim is to improve the humanitarian conditions for Syrian refugees in Turkey. It is however very difficult to trace this money and to see on what specific initiatives the money has been spent (Ekeløve-Slydal, 2017). The lack of transparency raises the question of whether all the money has actually been spent on improving the conditions for the refugees. The EU will provide an additional three billion euros before the end of 2018 if Turkey upholds its commitments. The financial aid provided to Turkey from the EU can be seen as a form of “humanitarianism at a distance” (Tazzioli, 2016, p. 3). This means that instead of improving the refugees’ possibility of reaching Europe, the EU has chosen to support its neighbouring countries in taking care of the refugees. The aid provided to this agreement is allocated not only from the Asylum, Migration and Integration Fund, but also the Internal Security Fund (European Union, 2017, p. 66). This is a clear indicator that the issue at hand is seen as a security threat by the EU. Funding the EU-Turkey agreement through the Internal Security Fund can be seen as a security act according to the theory of securitization.

The EU-Turkey agreement has been proclaimed a success by the EU (European Commission, 2016b). The EU has based this conclusion on the fact that it has reduced the number of migrants crossing to Greece, and the number of deaths at sea after the agreement came into force. Before the implementation of the EU-Turkey agreement the average arrivals of migrants in Greece was around 1740 each day (European Commission, 2016c). After the agreement entered force, the average daily arrivals have fallen to 94. The number of fatalities at sea has also fallen from over 270 in 2015, to only 11 after the implementation of the agreement. These numbers seem to reflect a positive development, as the agreement has

requirements for Turkish citizens entering the EU (European Council, 2016).

³⁰ The Facility for Refugees in Turkey was established by the EU to “ensure that the needs of refugees and host communities are addressed in a comprehensive and coordinated manner” (European Commission, 2017h) by providing Turkey with humanitarian aid.

prevented the death of many migrants. But apart from the decreasing number of deaths at sea, how has the agreement affected the refugees?

I now want to discuss the proclaimed success of the EU-Turkey agreement. Although the number of arrivals from Turkey to Greece have decreased significantly after the agreement entered force, does this mean that the number of refugees entering the EU as a whole has decreased? As has been explained previously, the flows of refugees are very flexible. When one migration route is strengthened, or closed, refugees choose another route to reach Europe. Evidence show that this to some degree has also been the case with the closing of the Greek-Turkish border. When arrivals to Greece started dropping, there was a subsequent increase in arrivals to Italy³¹ (UNHCR, 2016b). In 2015, the total number of arrivals to Italy were 142 205, in 2016 this number had risen to 181 436 (UNHCR, 2017a). But still the most concerning statistic is that as of 1 April 2017, compared to the first three months in 2016, we see an increase in arrivals of almost 50 percent (Former Frontex officer, 2017).

The increase in refugees arriving to Italy from Turkey has also been noticed by the ships participating in operation Triton. Although the number of arrivals from Turkey is small in relation to the overall arrivals, it is clear that the refugees do not want to go to Greece because of the EU-Turkey agreement. Still, over 95 percent of the refugees reaching Italy come from Libya. This means that the number of refugees crossing from Turkey to Italy is still small. But as the implementation of the EU-Turkey agreement is still recently new, time will tell whether it will cause a higher rise in arrivals to Italy in the future. As more refugees are trying to reach Italy from Turkey, the effort to stop these boats while still in Greek territorial waters has increased (Former Frontex officer, 2017). In addition, the central Mediterranean route to Italy is both longer and more dangerous than the eastern Mediterranean route to Greece. This means that although the EU-Turkey agreement has managed to reduce the flow of refugees reaching Greece, it has also forced the refugees to undertake even more dangerous journeys to reach Europe.

I argue that the EU-Turkey agreement has also partly been a failure for the EU, because it has so far resettled more Syrian refugees from Turkey than it has returned. At the end of 2016, 748 persons had been returned to Turkey from Greece under the EU-Turkey agreement (European Commission, 2016e, pp. 5, 9), whereas a total of 2761 Syrians was resettled from

³¹ This paper will only look at the affect the EU-Turkey agreement has had on Greece and Italy. There might however also be other countries that has experienced an increase of refugee arrivals after the agreement was made.

Turkey to the EU (and Norway) under the 1:1 framework. This framework is a way for the EU to show solidarity with other countries who are heavily affected by the refugee crisis. Although this has positive effects for the refugees, the framework is still quite problematic. The problem arises because the resettlement program only benefits Syrian refugees. Refugees from other countries, such as Iran, Iraq and Afghanistan, do not benefit from the 1:1 framework. This constitutes a systematic discrimination of refugees based on their nationality, which is in violation of all the legal documents considered in this paper (European Court of Human Rights, 1950, pp. Art. 1(2), ; Art. 21, European Union, 2012a; Art. 3, United Nations General Assembly, 1967; Art. 2, United Nations General Assembly, 1948). One of the reasons why the EU has accepted more refugees from Turkey than have been sent back is that the Greek asylum appeals committees have on many occasions ruled that Turkey cannot be considered a safe third country that will protect the rights of the refugees who are returned (European Council of Refugees and Exiles, 2016). Greece has therefore on several occasions decided to examine the asylum applications itself. But with increasing pressure from the EU, Greece has shifted their stance on the question and has ruled Turkey as a safe third country in their latest cases (Human Rights Watch, 2017). The EU is also encouraging Greece to remove the exemption on return of vulnerable applicant, so that they can also be returned to Turkey (European Commission, 2016f, p. 2). The pressure and recommendations the EU has given to Greece are contradictory with promoting the EU's human rights values. This is therefore a contradiction of the NPE theory.

Amnesty international is but one who argue that Turkey should not be considered a safe third country. Turkey has on many occasions violated human rights, both those of its own citizens and those of third country nationals. Turkey itself has big problems related to the freedom of speech, organizational freedom, police violence and the rule of law is withering (Amnesty International, 2017b, pp. 367-370). Turkey has signed the 1951 Refugee Convention, but not the 1967 protocol which makes the content of the convention universal (European Database of Asylum Law, 2016). This means that the content of the convention only applies to refugees fleeing from persecution in Europe, and not to third country nationals arriving from Europe. Those who are sent back to Turkey are therefore not considered as refugees. This means that they do not enjoy their full rights as refugees, including the right to seek asylum. Although Turkey still has to respect the principle of non-refoulement, research has shown that Turkey has returned refugees to countries such as Syria, Iraq and Afghanistan, therefore violating this principle (Amnesty International, 2017a, p. 13).

According to the principle of non-refoulement, no country can be automatically considered safe. Repatriation can only be conducted after an individual assessment of the risk which each person might face once returned. If this assessment concludes that a person might risk human rights violations if returned, the principle of non-refoulement is activated. Non-refoulement is enshrined in both international and EU law (Art. 19(2), European Union, 2012a; Art. 33, United Nations General Assembly, 1967). The return of refugees and migrants to Turkey is also a case of collective expulsion, which is prohibited by law (Art. 4, Protocol. 4, European Court of Human Rights, 1950; Art. 19(1), European Union, 2012a). Out of fear that the country would be filled with third country nationals, Turkey decided to create its own readmission agreements with third countries (Sarah Wolff, 2014, p. 90). Turkey has signed readmission agreements with countries such as Syria and Pakistan. Turkey is also negotiating agreements with Libya and Bangladesh among others. Thus, when the EU are returning refugees to Turkey, the refugees could face the risk of being sent back to Syria. Despite all of this, the EU has chosen to deem Turkey as a safe country, to where it can return refugees. This is not compatible with neither the EU's humanitarian values nor obligations.

The EU-Turkey agreement can be seen as an attempt by the EU to circumvent the obligations imposed by the principle of non-refoulement (Bialasiewicz, 2012, p. 855; Kirchner et al., 2015, p. 61). First, by preventing refugees from reaching Europe, the principle does not apply. This aim is demonstrated with the part of the agreement that reinforces the border control. Second, the principle of non-refoulement can also incentivize states to designate other states as safe third countries, thereby allowing the return of refugees to these countries. But the problem is that it has also caused states to label unsafe countries as safe third countries. This, I argue, is the case of the EU-Turkey agreement. By presenting Turkey as a safe country, the EU believes it can return refugees without violating international law.

The perception that a bilateral agreement can legalize the return of refugees without violating the principle of non-refoulement is nonetheless incorrect. In 2012, the ECtHR ruled that Italy had violated article 3, article 4 of Protocol No. 4 and 14 of the ECHR in the case of *Hirsi Jamaa and Others v. Italy* (ECtHR, 2012). The case was against Italy, who had returned several migrants to Libya, which is generally not considered a safe third country. Italy claimed that this was lawful due to a bilateral readmission agreement between Italy and Libya. The court ruled against Italy, demonstrating that bilateral agreements do not justify practices that are in violation of human rights. The circumstances surrounding this case have several similarities to the EU-Turkey agreement and its functioning. The EU-Turkey agreement is as the

abovementioned, a bilateral agreement. And as with Libya, Turkey is usually not considered a safe country for refugees. As the *Hirsi Jamaa and Others v. Italy* case shows, the EU-Turkey bilateral agreement cannot be used as a means to exempt guilt of human rights violations. This means that by sending refugees to Turkey, the EU is in violation of article 3 of the ECtHR. This rule applies regardless of whether the EU has an agreement with Turkey or not.

A report from Amnesty International (2017a) reveals how the agreement has had negative impact on the rights and protection of the refugees. In the report, the authors argue that the agreement can only be seen as a success if you do not take into account the effect it has on the refugees. The agreement affects both the refugees staying in Greece, and those who are returned to Turkey. Previously in this paper I have discussed how the EU-Turkey agreement has affected the conditions in the hotspots in Greece. But are the conditions for refugees in Turkey more appropriate? Observations by human rights organizations show that the refugees in Turkey are living in difficult conditions. While there are almost 3 million Syrian refugees in Turkey alone, the reception capacity is at around 200 000 people. This has left most of the refugees in Turkey to fend for themselves. Those who are admitted to the reception centres, formally known as detention centres are not much better off. Amnesty International has both observed the detention centres and conducted interviews with refugees, which both paint the picture of prisons. There are reports of refugees having been restrained with chains on their arms and legs, forced to sign papers in Turkish, agreeing to their return to Syria. Several EU progress reports on Turkey show that the EU is aware that Turkey has many flaws (European Commission, 2016g). To return refugees to countries with degrading detention and living conditions is also a violation of the principle of non-refoulement (European Court of Human Rights, 2011). This is another argument which contributes to the conclusion that the EU is in fact violating human rights, and that the EU is not primarily concerned with the humanitarian conditions of the refugees.

The EU-Turkey agreement has been especially criticised for violating one human right, the right to seek asylum. First, the agreement prevents refugees from reaching Europe to log their asylum application. Second, the refugees right to seek asylum is not ensured in Turkey. Third, if refugees manage to reach Greece, most of them are denied real access to asylum procedures and refugee protection. Even though asylum applications are evaluated individually in Greece, the EU-Turkey agreement allows for asylum applications to be considered inadmissible. This means that the Greek First Reception Service does not have to examine the substance of the application if either the applicant has already been given refugee status in a

safe third country or if that person comes from a safe third country. The EU should be cautious about the implementation of the EU-Turkey agreement to ensure that it does not violate the right to seek asylum.

The EU-Turkey agreement is one of the factors that are contributing to the perception of a fortress Europe. My interviewee said that “never in history, except from the Berlin wall, has the term [fortress Europe] had such a real political and human significance as it has now”³² (Ekeløve-Slydal, 2017, [authors own translation]). The EU is actively preventing refugees from reaching Europe by creating obstacles along the EU’s external border to prevent refugees from entering Europe. These measures include making agreements with third countries, setting up physical barriers (walls and fences) and by guarding the borders of Europe. By building this fortress Europe, the EU is violating one of the most basic human rights, the right to seek asylum. When preventing refugees from reaching Europe, the EU has to a large extent deprived the refugees of their ability and right to seek asylum. The EU is therefore in violation of article 18 of the Charter of Fundamental Rights of the European Union and article 14 of the Universal Declaration of Human Rights (European Union, 2012a; United Nations General Assembly, 1948). Some see the EU-Turkey agreement as the creation of “humanitarian spaces of containment” (Tazzioli, 2016, p. 13). This implies that the only way to keep the refugees safe is to detain them in Turkey. This is because the journey to Europe is so dangerous and has claimed the lives of uncountable refugees. This demonstrates how the EU is increasingly using a humanitarian rhetoric to legitimize its actions. This leads to a paradox that the EU is proclaiming that the EU-Turkey agreement is humanitarian, while at the same time depriving the refugees of their right to seek asylum. But as this analysis has shown, there is nothing humanitarian about the situation the refugees are facing in Turkey. Based on the discussion above, the EU-Turkey agreement can be described as a failure for the EU.

The EU-Turkey agreement clearly shows how the EU is prioritizing border security over humanitarian intervention. The EU’s dependence on Turkey to handle the refugee crisis has caused the EU to be reluctant to speak out against possible human rights violations on the part of Turkey. The EU has been careful to criticize Turkey for the deterioration of civil liberties and freedom, and the rule of law. This case therefore supports the classic critique that the EU is willing to give up its normative commitments in exchange for effective cooperation with

³² Original quote in Norwegian: «Aldri noen gang i historien, utenom Berlin muren, har det begrepet [festning Europa] hatt en så konkret reel politisk og menneskelig betydning som det faktisk har nå».

third countries when other interests are at stake (Storey, 2006, p. 340). While NGOs, and even Greece, are harshly opposed to considering Turkey a safe third country, the EU is not. This shows that the EU is more intent on preventing refugees from reaching Europe, than it is about the humanitarian consequences this has on the refugees in both Greece and Turkey. Continuing down this road can cause the loss of the EU's credibility both internally and externally. This is also a contradiction to the logic of the theory of NPE, according to which the EU should be promoting human rights in Turkey. How much of a normative power is the EU, if it is selling out its values when it is most convenient?

This analysis has demonstrated that the EU-Turkey agreement is in violation of several human rights. Furthermore, it has shown how the EU is more concerned about securing its external borders, than it is about preserving and protecting the human rights of the refugees. What is even more worrisome is that the EU is negotiating similar agreements with other countries such as Sudan, Eritrea and Libya (European Commission, 2016k). How far is the EU willing to go in selling out its human rights values in order to prevent refugees from reaching Europe?

6 Conclusion

The aim of this thesis has been to find out to what extent the EU's handling of the refugee crisis in the Mediterranean has complied with the EU's human rights principles. I have done this by investigating three different measures taken by the EU to handle the refugee crisis, the cases of Frontex, the hotspots and the EU-Turkey agreement. I have focused on the human rights which have been most affected by the three cases, such as the right to seek asylum and non-refoulement. The conclusion derived from the analysis is that the EU has disregarded several of its own human rights principles in its handling of the refugee crisis.

The case of Frontex has demonstrated how the EU is mainly concerned with securing its border. The agency lacks a humanitarian approach, and is contributing to the exposure of refugees to human rights violations. We have seen this through Frontex's participation in the return of refugees to Greece and Turkey. The second case of the hotspots shows how refugees who have reached Europe are subjected to degrading and inhuman treatment and conditions. I argue that the EU's main reason for choosing this approach is to ensure compliance with the Eurodac regulation and to facilitate the repatriation of migrants and refugees. The EU participated in these activities, and contributed to this, by giving recommendations to the member states, such as the use of force to take fingerprints. The last case, the EU-Turkey agreement, has demonstrated how the EU is outsourcing the problem to its neighbouring countries and trying to externalize its migration and asylum policies. The main goal of the agreement has been to prevent refugees from reaching Europe and to send back those who have reached Europe. The EU does this without respecting human rights, most importantly the right to seek asylum and the principle of non-refoulement.

The three cases demonstrate how the EU has disregarded and violated several of its human rights principles. The EU has violated its negative obligations regarding human rights by directly subjecting refugees to human rights violations. In addition, the EU has also violated its positive human rights obligations because the EU knows, or should know, about many of these human rights violations, but have not taken any measures to prevent it. This can be perceived as another human rights violation by the EU (Fink, 2015, p. 5).

The cases further show that the EU has given priority to its security interests, over ensuring full compliance with human rights in its handling of the refugee crisis. The EU has strived to secure its borders and prevent people from reaching Europe, while not always taking into account the humanitarian consequences it has on the refugees. New policies have been aimed at improving

border control, return and readmission, and the fight against illegal smugglers. The EU is contributing to the perception of a fortress Europe by continuing to construct obstacles to prevent refugees from reaching Europe. The EU has been largely successful in achieving its main goal to prevent refugees from reaching Europe, but as we have seen, this has had a grave impact on the human rights of the refugees. The EU prioritizes effectiveness and results of its initiatives, over the impact it has on the human rights of the refugees.

Still it is important to note that the EU has taken several measures over the last years to improve its humanitarian approach. But as we have seen, these initiatives have had limited success. The humanitarian goals of the EU have always come secondary to its security interests. Although there have been some positive developments regarding the human rights of the refugees, the EU is still lacking a human rights-based approach to the refugee crisis. This is demonstrated in the analysis of the cases and by the number of refugees losing their lives in the Mediterranean Sea. The EU does not place human rights at the centre of its effort to respond to the refugee crisis. We also see that the EU is working on new initiatives that will probably further harm the rights of the refugees. This implies that security concerns are likely to continue to be the driving factor for the EU in the future.

This analysis has demonstrated how the EU is experiencing a conflict of interests between its core values in its handling of the refugee crisis. On the one hand, the EU wants to protect its human right values, while at the same time securing its borders and restricting its immigration laws. This has caused a paradox, were in order for refugees to seek protection and asylum in the EU they have to risk their lives and be subjected to human rights violations. Furthermore, the analysis has shown that when a conflict between humanitarian values and security interests occur, the latter tends to prevail over the former. The main priority of the EU has been to secure the borders, while compliance with human rights has been a secondary concern.

This conclusion is reflected in the discourse in the EU. The EU documents that have been analysed for this paper all show that there is a predominance of security rhetoric. The EU is mainly using security concerns to legitimize its policies. However, there has been a constant increase in the use of humanitarian rhetoric on part of the EU. References to human rights are now included in almost all of the EU's official documents. The increase in the humanitarian discourse in the EU over the last years has usually come as a reaction to humanitarian tragedies, and the subsequent criticism. The use of humanitarian rhetoric is therefore not a pre-emptive measure taken by the EU to improve the conditions for the refugees, but as an additional means

to legitimize its actions. Despite this increase the discourse still revolves mainly around the security issue.

This paper has further explored the responsibility of the different actors who are participating in the activities. As multiple actors have contributed to the different measures taken to resolve the crisis, it can be difficult to know who is to be held accountable. With regard to the European refugee crisis there is clearly a fragmentation of responsibility among the different national and EU actors, especially in the cases of the hotspots and the EU-Turkey agreement. As I have argued throughout this paper, the EU should be held partly accountable for the human rights violations. The EU plays a big role in both the planning and implementation of these initiatives. Furthermore, the EU is exerting a big amount of pressure on the member states. This conclusion is not meant to exempt Italy or Greece of their responsibility, as they are also to be held accountable. But as I have argued, the member states are part of the EU, and the EU consists of its member states. The crisis therefore has to be seen as a shared responsibility.

The normative power Europe theory cannot explain why the EU has chosen to respond in this way. This paper has demonstrated how the EU is not acting as a normative power in its handling of the refugee crisis. To be a normative power “depends heavily on the interaction between its policy goals, means and justifications” (Lerch & Schweltnus, 2006, p. 318). As we have seen, the EU’s response to the crisis has not been driven by its normative concerns. It has been based on the defence of self-interest, which in this case is security. This analysis has shown that not only does the EU not practice what it preaches, it is also disinclined to promote human rights, as this may harm other interests. According to the NPE theory, the EU cannot be a true normative power if it does not follow its own principles. This theory therefore loses some of its explanatory power.

The theory of securitization is better suited to explain the EU’s handling of the refugee crisis. The analysis has shown how the EU has extensively used both securitization speech and securitization acts. The EU has portrayed the crisis as a security problem, and uses security concerns to legitimize its actions. The EU has also used security measures in all of the cases this paper has analysed. The EU has integrated migration policy into the framework of internal security, which constitutes a securitization of migration. Migration has increasingly been seen as a security threat, both to internal security, cultural security and the welfare state. By portraying the refugee crisis as a security threat, the EU has been able to prioritize other

concerns over those of human rights. The securitization of migration has had a negative impact on the protection of refugees' human rights.

The situation in the Mediterranean is clearly a complicated one. There needs to be a equilibrium between securing the EU's border, the fight against human trafficking and the respect for human rights. As we have seen, this has been difficult to accomplish for the EU. If the EU loses sight of its values in the handling of the refugee crisis, this is synonymous of losing sight of what the EU stands for. This can have a great impact on the future of the Union. It might affect the legitimacy of the Union, both to its member states and on the global scene. Without its legitimacy, the EU is likely to lose much of its influence and power.

In this paper, I have used a discourse analysis, which requires a selection of materials to analyse. This poses a risk, that one may leave out documents or material that has been important in shaping the discourse. I have only focused on the discourse in the EU, however this discourse is not detached from other discourses. For further research, it would be interesting to look at the discourses in the different member states, and how these might have affected the discourse in the EU. It is further interesting to research what might be the consequences for the EU if it continues to disregard its human rights values. How will this change how the EU is perceived and its role in the world?

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8 Appendixes

Appendix 1: Main Unauthorized Border Crossing Routes into the European Union



Source: (Katsiaficas, 2016)

Appendix 2. Interview with political advisor at Amnesty International, Beate Ekeløve-Slydal.

The interview was conducted on the 7 April 2017, at the interviewee's office in Oslo. The interview was conducted in Norwegian, and the translations are made by the author. The interview was recorded, and later transcribed. The interview was mainly intended to get more information about the EU-Turkey agreement. Below is the interview guide used to structure the interview.

1. What do you feel are the most important humanitarian consequences of the refugee crisis in the Mediterranean?
2. How do you feel that the EU and its member states have been most concerned about the human rights, security, economy or other interests in their handling of the crisis?
3. In your opinion, how has the human rights of the refugees been affected by the EU-Turkey agreement?
4. Do you think that Turkey should be considered as a safe country for refugees?
5. How has the 1:1 framework affected the refugees?
6. Do you think that the Facility for Refugees in Turkey has improved the conditions for the refugees in Turkey?
7. Do you think that the financial aid given to Turkey from the EU is a good way to improve the conditions for the refugees?
8. What do you think are the most important measures that should be taken in order to improve the conditions for the refugees?
9. Do you consider the EU to be upholding its human rights values in its handling of the refugee crisis?
10. Who do you feel have the main responsibility for handling the crisis?
11. How has the hotspots affected the conditions for the refugees?
12. How are Frontex's joint operations affecting the refugees?

Appendix 3. Interview with former Frontex officer

The interview was conducted on the 7 April 2017, at the interviewee's office. The interview was conducted in Norwegian, and the translations are made by the author. The interview was recorded, and later transcribed. The intention of the interview was to obtain more information about Frontex's sea operations. The interviewee wished to maintain anonymous, and all revealing information have therefore been excluded. Below is the interview guide used to structure the interview.

1. Can you tell me about how it was to work on [the interviewee's Frontex ship]?
2. How did you work and cooperate with Italy, Frontex or other actors?
3. What kind of training or information have you received from Frontex?
4. Do you know if there are any differences between your ship and other Frontex ships?
5. Which services do you have onboard your ship? Medical personnel, translators, legal help?
6. What tasks have your ship conducted?
7. Where do you take the refugees who you rescue at sea?
8. Have you noticed any changes in the number of refugees in your operational area after the EU-Turkey agreement came into force?
9. How do you perceive your role, as a border guard or as a lifeguard?
10. has there ever arisen a situation in which there has been a conflict between securing the borders and humanitarian assistance?
11. Do you feel that it is the EU and Frontex or Italy who are responsible for operation Triton?
12. Do you feel that operation Triton has the necessary resources and operational scope to prevent refugees from losing their lives at sea?