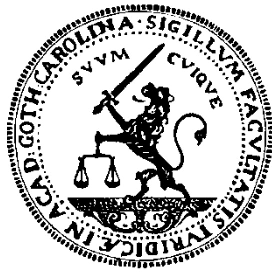

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Sweden and Frontex
- A discussion of coherency within the European asylum system

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Summary

This paper addresses whether the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) through their work causes obstacles for refugees in exercising their right to seek asylum. As the European Union (EU) has an ongoing effort to harmonize the national asylum systems of the Member States it is interesting to examine whether the system is coherent. Since both the national states and the EU as an entity is bound by EU regulations as well as international instruments it should be aspired for coherency in the system as well as the actual treatment a potential refugee would meet at the various borders within the Union. As a measurement of coherency I use the principle of the Formal Justice, which assumes that all individuals that can be categorized as belonging to the same group, in this case a group with the same legal status, also should be treated equally, if the treatment is to be considered just. The selected situation of the investigation of coherency is the possibly most severe sanction a potential refugee may face when coming in contact with the Swedish border and other borders in the EU area. Concerning Sweden it was shown that the most invasive sanction was that the individual would be forced to leave the country without first having access to a review of his or hers application. This can happen in two cases, if an application is found manifestly ill founded or abusive, or in so-called Dublin-cases. In the first case, a re-categorization of the applicant is made when it is considered obvious that the applicant has no potential grounds for protection. In the second case no decision is made regarding the applicant's potential grounds for protection but only regarding which state is responsible for processing the application. These sanctions cannot be considered to lack coherency with the existing legal framework.

Regarding the EU area, the investigation showed that Frontex in their work of prohibiting individuals who try to cross the EU's external borders possibly could prevent potential refugees from presenting an application for asylum. In these cases the aliens suffer risk of rejection without having the opportunity to present an application for asylum and having it assessed by the proper authorities. There is a lack of clear instructions and rules about how the categorization of individuals should be made, which is crucial for maintaining the individuals access to their rights, especially the right to seek asylum. Since these procedures are lacking, there is a problem with the rule of law in the system, which means that all individuals cannot be guaranteed neither being given access to a judicial process or equitable treatment. Consequently, there is a lack of coherency in the system. This may have to do with a change of discourse within the EU where potential refugees mainly is seen as illegal and thus potential threats, which leads to ensuring that no one can cross the external borders illegally takes priority over maintaining and providing individuals the right to seek asylum. However, the lack of regulations on how this should be done in real situations is one of the major problems and should be addressed urgently.

Sammanfattning

Den här uppsatsen behandlar huruvida den Europeiska byrån för förvaltningen av det operativa samarbetet vid Europeiska Unionens medlemsstaters yttre gränser (Frontex) genom sitt arbete orsakar hinder för flyktingars möjlighet att utnyttja sin rättighet att söka asyl. Då den Europeiska Unionen (EU) har ett pågående arbete för att harmonisera de nationella asylsystemen i medlemsstaterna blir det intressant att undersöka huruvida det finns koherens inom systemet. Eftersom både de nationella staterna samt EU som enhet är bundna av EU-regleringar såväl som internationella instrument bör man därför kunna efterfråga koherens mellan de olika behandlingsmöjligheterna en potentiell flykting kan komma att möta vid olika gränser inom unionen. Som mått för koherens används Principen om den Formella Rättvisan, vilken utgår från att alla individer som kan bli kategoriserade som tillhörande en och samma grupp då också bör behandlas lika för att behandlingen skall vara rättvis. Den valda situationen för att undersöka måttet av koherens är vilken potentiell mest ingripande sanktion som en möjlig flykting kan utsättas för vid kontakt med Sveriges gräns respektive någon annan gräns inom EU-området. Rörande Sverige visade det sig att den mest ingripande sanktionen var att individen får lämna landet utan att få tillgång till en prövning av sin ansökan. Detta kan ske i två fall, vid uppenbart ogrundade ansökningar eller vid så kallade Dublin-fall. I det första fallet sker en omkategorisering av den sökande eftersom det anses uppenbart att personen saknar skyddsskäl. I det andra fallet fattas inget beslut rörande den sökandes potentiella skyddsskäl utan enbart rörande vilken stat som är ansvarig för att pröva ansökan. I dessa två fall kan det därför inte anses att koherens saknas med det gällande regelverket.

Rörande EU-området visade undersökningen att det finns en risk för att Frontex i sitt arbete kan hindra potentiella flyktingar från att framföra sin asylansökan. Detta under deras arbete med att hindra individer som försöker ta sig förbi EU:s yttre gränser. I dessa fall riskerar individer att avvisas utan att ha fått möjlighet att framföra ett anspråk på skydd eller få sin ansökan prövad av den auktoriserade myndigheten. Det saknas tydliga instruktioner och regler kring hur kategoriseringen av individerna skall göras, vilket är avgörande för att upprätthålla individernas tillgång till sina rättigheter, framförallt rätten att söka asyl. Eftersom dessa procedurer saknas föreligger ett problem med rättssäkerheten i systemet då alla individer inte kan garanteras varken tillgång till en juridisk process eller likvärdig behandling. Det föreligger alltså inte koherens inom systemet. Detta kan ha att göra med en diskursändring inom EU där potentiella flyktingar framförallt ses som illegala och därmed potentiella hot, vilket leder till att säkerställandet att ingen kan passera de yttre gränserna illegalt tar prioritet framför att upprätthålla och tillhandahålla individers rätt att söka asyl. Bristen på regelverk kring hur separationen mellan potentiella flyktingar och övriga skall hanteras i de faktiska situationerna är dock ett av de största problemen och bör åtgärdas snarast.

Preface

I have always been very interested and passionate about the rights of minority groups, especially children and refugees. These interests led me to a Bachelor in Human Rights and later to my studies of Law, of which this thesis is the final step in completing my degree. In a time where several large changes are being implemented in the asylum area I wanted to use this final thesis to immerse myself in an issue that could seem to be forgotten, but is exceedingly current. The issue that a person that may cross borders illegally, can nonetheless still be a refugee. This is something that I think is often forgotten today in the public debate.

As I now sit down with my finished thesis there are some people that deserve to be mentioned. First, I want to thank my supervisor Karol Nowak for his encouragement and interest, and not least for the shared laughs that made the supervisory-meetings fun as well as instructive and enlightening.

I also want to thank my dear neglected friends that during these years have been there, and never doubted me. Thank you for all the coffee, for forcing me to take most-needed pauses, for taking my phone-calls at all hours of the day, for always having chocolate and a hug when I needed it. And a special thanks to Sofia, Sara and Olof. You have been my biggest support team, thank you for never letting me lose sight of the goal.

Lastly, the greatest thanks goes to my family: Mum, Dad, Filip and Martin. It has been a long road, and you have been with me for every step of it.
I cannot thank you enough, but for starters: Thank you for the much needed encouragement, for all the love, and not least for extensive proof reading during the years. This could not have been done without your support and this thesis is for you.

Abbreviations

CEAS	Common European Asylum System
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
EU	European Union
ECHR	European Convention on Human Rights
Eurodac Regulation	Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
Qualification Directive	Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
RABIT	Rapid Border Intervention Team
The 1951 Geneva Convention	the 1951 Geneva Convention Relating to the Status of Refugees
The 1967 Protocol	the 1967 Protocol Relating to the Status of Refugees

UNHCR	United Nations High Commissioner for Refugees

1 Introduction

During my studies, in the spring of 2011, I had the opportunity to do an internship at the Refugee and Migration section at Amnesty Internationals Swedish Secretariat. Getting to work focused and in depth with various refugee and migration-issues not only deepened my interest for refugee-rights but also gave me further knowledge on the subject. With the current development in the European Union (EU), the aspiring efforts in creating a common reception system, questions will inevitably rise concerning how to uphold the international standards of the rights to protection/asylum. This has been the starting point of my thesis in which I am investigating part of this vast area.

In the EU, as well as large parts of the world, a change has arisen in the way refugees and migrants are discussed. I have noticed that states and politicians tend to focus on threats against the state and the nations borders. When discussing terrorism, trafficking and other issues that involve illegal border crossings, refugees seem to be lumped together with these groups in terms of seeing all interference with the national borders first and foremost as a threat. As a result of this, control of the borders seems to be more focused on keeping the borders closed. It is assumed that individuals primarily are potential threats that should be kept out if not proven otherwise. This made me wonder how this effects the development of new policies on migration- and refugee questions. It is especially interesting to look at the EU on this matter, since it is now an outspoken goal of the union to form common standards and systems for managing refugees and migrants. While doing so, it is important that the difference between the groups considered threats and groups in need of protection, such as refugees, is kept ever so clear. Even though they may share common elements such as travelling across borders. The policy today seem to be moving more and more towards categorizing aliens as illegal simply by the possible ways he or she tries to access a territory, or just by lacking proper documentation. No exception is made in regards that refugees, by international standards, cannot be punished for such border crossing violations. Nor does there seem to be any effort made to distinguish refugees from the “illegal” group.

1.1 Purpose

In this thesis the discussion is based on the right to protection in the form of the right to seek asylum. Following this I pose the question of whether or not the direction of Frontex and the way they carry out their work in some way poses a hindrance of the possibility for refugees to obtain their right to seek protection. And if so, if this obstacle affect the asylum process in the EU.

This is examined by the use of theories of norm coherence, which is discussed in depth in chapter 1.2 Theory and Method. By using the most invasive sanction found in each of the examined systems as a measurement I discuss whether Frontex pose an obstacle for refugees in their exercise of their human rights. The agency does undeniably make it more difficult for refugees to reach a country and seek asylum. What is interesting to consider is whether this difficulty also implies a direct obstacle to the execution of certain rights. States do have the prerogative to determine what rules should apply for persons seeking permission to cross the states borders and reside within the states territory. The right to seek asylum however is a basic and universal human right that falls outside of the scope of what states are free to regulate alone. To ensure that execution of these rights are upheld is therefore of the upmost importance.

I take my starting point in the fact that the national states as well as the EU have agreed to a common standard, meaning that people have a right to seek protection. This standard should be upheld and applied in the same way in the national states as well as on an international level. Therefore, it should not matter which country's border or authorities a refugee comes in contact with first, the assessment and treatment they meet should be uniform. I examine which of the available sanctions that can be considered as the most intrusive against the individual, in Sweden as well as in the area that Frontex operates in. Since the same legal norms are the grounds for the rules regulating these sanctions, the real effect of these sanctions should be the same for individuals even if the form of the sanction are different. If it can be shown that a difference in the sanction nevertheless exists, a further discussion takes place on why this is the case, and how this affects the availability of the right to seek protection.

1.2 Theory and Method

1.2.1 Theory

The hypothesis for this thesis is to investigate if Frontex, in any way, cause difficulties for aliens to exercise their right to apply for asylum. This hypothesis is tested through the use of an analogy of coherency theory. Since the national state, which in this thesis primarily is Sweden, and the rest of the EU-area is governed by the same set of rules it is natural to expect and strive after a certain coherence in norms and actual practicing of the rules throughout the entire EU. If this is not the case, we must question what the reason for this disruption in coherence comes from. I am primarily be basing my analogy on coherence theory as it is expressed by Aleksander Peczenik[1].

Coherentism is essentially build through three components; a) Absence of Logical contradictions, b) Extensive range and lastly c) Support of other components in the system. Range means that for an opinion or theory to be coherent, it must entail and be supported by as many and as varied theories

[1] Peczenik, Alexander, *On Law and Reason*, Kluwer Academic Publisher.

and preferences as possible. Support means that there also as to be positive links between these different support-chains. This creates a system of circles of arguments. In these circles an opinion or preference, a_X, supports a_3 which supports a_2, a_2 supports a_1 which in turns supports a_x. Support in this context means that a_1 also has to be supported by another premise, example a_{22}. a_{22} in turn is valid since it is also supported by another set of valid premises. This in all forms a sizeable net of circles that connect at various points. If one component should fail, the net is still steady since it will still be supported by other components.[2]

For its use in this thesis, I have defined coherence as conformity between what is stated in relevant regulations and whether this corresponds to practice. Since we have a system where society is governed by law and regulations, the desired result should be that these regulations are matched by the actual conditions. If this is the case, then we have what I refer to as coherence between law and practice. If practices are found to not being supported by law, then we have a lack of coherence. That is also the case if we can find different practices in areas that are governed by the same set of regulations, in this example when looking at what the most invasive sanction possible is.

To see if the system is coherent I am using the concept of justice, as it is described in the following section. Justice is a principle that is built similar to coherence. Different aspects of justice have varied strength in different areas. This means that they to form a net of sorts. Justice requires that a balance is struck between the different aspects. This is based on the so-called Formal Principle of Justice. This means that all individuals belonging essentially to the same category is to be treated equally. These categories can be formulated differently but one has been formulated as *"Each individual shall be treated in proportion to his or hers legal status"*. This corresponds to rights, obligations and so forth.[3] It aims at justice as correctly and equally applying the relevant laws. This means that justice is correlated from the specific set of law relevant for the case at hand.[4]

Since individuals can belong to multiple categories at the same time, a compromise must be made between the competing principles using balancing.[5] Otherwise, whatever category one would choose to argue for could be in conflict with the interests of another category. One could then make the case that that category should be priority.[6] Nonetheless, for this thesis, we can assume that the individuals affected primarily belong to one and the same group in that they should be treated the same based on their legal status, as potential refugees trying to exercise their right to seek asylum. And we can agree on that if one category can be chosen as base, then it is also just that people that can be seen as equal within that category should be treated the same. The belonging to the certain group is the

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[2] Peczenik, A, *General Teachings of Jurisprudential* (Juridikens Allmänna Läror), SvJT, s. 261 f.
[3] Ibid s. 263.
[4] Perelman, C, *The idea of justice and the Problem of Argument*, s. 10.
[5] Peczenik, A, *General Teachings of Jurisprudential* (Juridikens Allmänna Läror), s. 264.
[6] Perelman, C, s. 11.

essential quality on how justice is to be administered. This principle can be formulated as *"A principle of action in accordance with which beings of one and the same essential category must be treated in the same way"*.[7]

I am therefore using this principle as a measurement of coherence. Seeing that if we can isolate different groups of people that still qualify as belonging to the same category, and these groups are found in situations that are governed by the same set of principles and rules, if the treatment of the groups varies, than we are no longer upholding the formal principle of justice, and coherence is lost. As the matter at hand for discussion in this thesis is governed by the same set of rules, we do not have to discuss the issue of how what is to be considered just can change depending on the applicable law. This to is why it is possible and desirable to request and aspire for coherence within the treatment of this category.

1.2.2 Method

In the chapters where a description of applicable law and regulations is made, I have used traditional legal dogmatic method. This means that the different sources of law are recited and explained through the use of the preliminary works and other relevant sources. I have not given a description for every regulation or legal work on this area, but rather have made a selection of the ones most relevant for the purpose of this thesis.

For the remaining chapters I used a critical analytical method. Through the use of different sources such as doctrine and articles I have tried to present a clear an image as possible of how the application of the regulations is actually being practiced and what problems this may cause. As Frontex is a relatively new agency, not a lot has been written concerning its practices and the following consequences. The choice of doctrine and articles was therefore made based on how relevant the theories or argumentations presented were for the discussion I intended to have in this thesis, even if the main subject of the book or article may not have been the same as in this thesis.

In my selection of sources I focused on presenting those that was most relevant for the question I wanted to discuss. The aim was not to give a complete account for regulations and instruments concerning asylum and migration issues but rather to present certain specific instruments. As a result of this, the instruments presented derives from a national and EU-level as well as a supranational level concerning instruments originating from the United Nations, such as the 1951 Geneva Convention Relating to the Status of Refugees[8]. Therefore, I have also used statements and assessments from UNHCR[9], which is the UN Refugee Agency and an authority on refugee issues.

[7] Perelman, C, s. 16.
[8] Henceforth referred to as the 1951 Geneva Convention.
[9] United Nations High Commissioner for Refugees.

Another one of the sources I wanted to use was statistics, to get a base for the discussion. I have to emphasize that even with great effort, compiled statistics regarding Frontex's operations are very hard to find. In the end I have opted not to use the little that was available since I found it to be a big problem regarding a lack of definition within the material. If there is no clear definition of what concepts such as "illegal entries" and "refugees" are to be understood as then interpreting the material cannot be done with confidence. This is one example of what I consider to be an overall problem in the documents regarding Frontex that I have had access to. In none of them I could find a proper discussion or clarification of definitions. The lack of definitions raised further questions of how the separation of groups is actually handled in practice. It also shows what I consider to be a problem with transparency.

I have used the different theories discussed in chapter 1.2.1 Theory to discuss the problems that I have noticed while investigating the legal framework. When the theories have shown there to be a problem regarding coherence, I have used different opinions brought fort in doctrine as examples for the reasons behind the lack of coherency. I have also used this as a base for an analysis of the situation.

1.3 Delimitation

I am not giving a complete description of the full acquits in the field of migration, but have rather focused on the specific regulations that apply to the selected issue.

I am basing my discussion on the right to seek protection as it is stated in international conventions, for example Article 14 of the Universal Declaration of Human Rights which states that everyone has the right to seek and enjoy asylum in other countries from persecution. As follows, I will not have any forms of discussion about the right itself, if it even can or should be considered a right or if so, how it should be expressed. Nor am I discussing how the process of the asylum trial should be designed. As a starting point for the discussion is the fact that the relevant actors have agreed to a common standard, that of which people have a right to seek protection. This standard should consequently be upheld and applied in the same way regardless of the actor.

I have excluded any discussion concerning the very existence of Frontex as an agency, and related questions on how the organ should be organized and what its mandate should be. I simply acknowledge that this organ does exist and that it has been empowered to a purpose with certain powers. My interest is not do discuss whether this is correct or not, but rather to discuss if there exists a problem with coherency that should be addressed.

When dealing with the question of interception, I have chosen not to discuss the related issue of safe rescue[10]. I am aware of the close relation between these issues, but since my purpose have not been to discuss the actual obligation that the right to seek asylum poses on states, or how this should be implemented, I have opted only to focus on the question of interception and whether or not there is a problem with upholding the right to seek protection in that situation.

1.4 Outline

Chapter 1 contains an introduction to the subject, and a presentation of the purpose of the thesis. Theory and method are explained as well as the delimitations of the essay.

Chapter 2 gives a brief insight into the national as well as European laws regarding migrations and refugee-issues. I also describe certain regulations that have bearing when you are discussing migration in the EU, and an insight into relevant human rights instruments regarding refugee issues. Here I discuss the question of the most invasive sanction that is used in the national territory and whether or not this is in coherency with the applicable laws.

Chapter 3 presents a short introduction to the Common European Asylum System and how this has led to the creation of Frontex. I present the legal framework of Frontex, its mandate and how this is implemented in the actual work. This is followed by a discussion of what the most invasive sanction is within the EU framework, and whether or not it can be seen as coherent on one hand with the applicable framework and on the other hand Sweden, also largely governed by the same framework.

Chapter 4 contains an analysis of various possible reasons for the lack of coherency found in chapter 3, as well as the possible consequences of this incoherence. It involves a discussion on the EU and its change in posture concerning immigrants, the lack of clarity that comes from so many different actors being involved, and the vague task that Frontex has been appointed with.

In *Chapter 5* the concluding remarks are presented. This entails a summary of the discussion, what conclusion have been drawn and the reasons for this, and some recommendations on what could be done to improve the situation.

[10] Safe rescue as in the obligation to rescue people distressed at sea.

2 Sweden and the European Union. Regulations and sanctions within the asylum system

In this chapter I present the regulatory framework governing asylum and migration law within the EU. It is not a complete description of all instruments related to the subject, but rather a description of the most relevant instruments. When discussing the legal framework within the Union, we can make a separation between instruments aiming at harmonizing and regulating the practices of states within the Union and more strictly human rights instruments. Therefore, I start with a presentation of the regulations that more directly control and regulate how the states should process refugee issues and then give a presentation of the relevant human rights instruments, which binds the member states of the EU to upholding a standard in regards to these rights. One of the most important instruments on this subject is the 1951 Geneva Convention, which makes it important to account for this instrument as well, even if its applicability is not limited to the EU-territory. This is then followed by a discussion regarding the most invasive sanctions found in the systems and if these can be said to be coherent with the spirit of the legislation. Sweden has ratified The 1951 Geneva Convention as well as other human rights instruments. As a member-state of the EU, the relevant instruments concerning migration- and refugee issues also bind Sweden.

2.1 The Swedish Aliens Act on how a refugee is defined, grounds for asylum and sanctions

The process of seeking asylum in Sweden is regulated by the Swedish Aliens Act (2005:716). The definition of a refugee is stated in chapter 4 §§ 1-2a. In § 1 it is stated that a refugee is defined as an alien who is outside his or hers country of nationality because he or she feels a well-grounded fear of persecution on ground of race, nationality, religious or political belief, or on the grounds of gender, sexual orientation or membership to another specific social group. The alien also has to be unable or unwilling, because of the fear, to seek the protection of his or hers country's authorities. It does not make a difference if the subject responsible for the persecution is the actual authorities themselves or if the authorities cannot be assumed to offer adequate protection from persecution by private individuals.[11] This definition corresponds in principle to that found in Article 1.A.2 in the 1951

[11] Swedish Aliens Act chapter 4 § 1.

Geneva Convention as the 1967 Protocol Relating to the Status of Refugees, henceforth referred to as the 1967 Protocol, revised it.[12]

An individual can also be entitled to shelter on the ground of subsidiary protection (alternativt skyddsbehövande). This is covered in chapter 4 § 2. For this to be applicable there has to be substantial grounds for assuming that the alien would run a risk of suffering the death penalty or being subject to corporal punishment, torture or other inhuman or degrading treatment or punishment upon return to his or hers country of origin. If there is a risk of the alien running a serious and personal risk as a civilian of being harmed by reason of indiscriminate violence as a result of an external or internal armed conflict this can also be ground for protection. The alien has to, as in § 1, be unable or unwilling to avail himself or herself to the protection of the country of origin. The regulation of chapter 4 § 2 is in direct correlation to Articles 2 e and 15 in the Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, henceforth referred to as the Qualification Directive, which in turn correlates to the grounds expressed in the 1951 Geneva Convention.

Lastly, as stated in chapter 4 § 2a, a person may meet the requirements to be considered as otherwise in need of protection (övrigt skyddsbehövande). In these cases an alien can be in need of protection because of a severe external or internal armed conflict or other severe conflicts in the country of origin that is the cause of a well-founded fear of being subjected to serious abuses. This is also applicable in the case of an alien being unable to return to their country of origin because of a natural disaster.

These grounds can also be found in international instruments[13] regulating asylum issues. If an alien meets these requirements, he or she is entitled to international protection. Therefore, every person has the right to apply for asylum and have that case tried by the appropriate authority. What we have seen in this chapter is that national regulations, in this case exemplified by the Swedish Aliens Act, are derived from international instruments in such a way that they largely adhere to the internationally recognized grounds for protection. From this we can conclude that there is an internationally recognized right to asylum and an accompanying obligation to uphold this right. In some cases however, the process of trying an application for asylum can invoke sanctions regarding how, or in some cases if, an individual's asylum claim should be tried accordingly to the standard procedure or if it qualifies as an exemption. In cases were the regulations allow for exemptions to be made, this cannot mean that the state also allow for an avoidance of obligations related to the right to seek international protection. These cases will therefore be examined more in-depth in the following chapters followed by a discussion on whether or not we can find

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[12] Wikrén & Sandesjö, *The Swedish Aliens Act with comments* (*Utlänningslagen med kommentarer)*, Nordstedts Juridik AB, s. 156; Prop. 1979/80:96 med förslag till ny utlänningslag m.m. s. 40 f.

[13] For example the 1951 Geneva Convention.

coherency between the regulations, or more specific the exemptions of the regulations, and the states obligation to ensure everyone, if needed, the right to seek asylum.

2.2 Invasive sanction in the form of direct rejection of an alien

In the process of applying for asylum, the most invasive sanction towards an individual must be considered to be any form of direct rejection, when the alien is rejected entry into the country upon arrival, or is granted entry only in awaiting return to the national country or another country. In both cases the alien is not subjected to an investigating process concerning their possible grounds for protection. Regarding so-called Dublin-cases[14], this investigation is referred to take place in another state. The risks in these cases are therefore not so much connected to the question of access to justice, but rather to what responsibilities states have for ensuring that the judicial process is performed in a legally secure way.

In two cases the Swedish Migration Board may order that their decision of rejection according to the Swedish Aliens Act chapter 8 § 4 section 1 may be enforced even if it has not yet become final. In these cases The Swedish Migration Board may order that their decision to refuse an alien entry under chapter 8 § 1 may be enforced even if it has not yet become final and non-appealable. For this to be applicable it has to be *obvious* that there are no grounds for asylum and that a permit of residence should not be granted on any other grounds.[15]

The case of direct rejection is an exception to the rule that an applicant has the right to stay in the country until the matter is finally settled. Since it is a matter of rejection (as opposed to expulsion) the rule cannot be applied to in cases older than three months.[16] According to the arguments brought forth in the preparatory works, it was considered as unreasonable that persons with an apparent lack of grounds for protection should remain in Sweden for the duration of a decision becoming final, as this could take a long time. This could cause problems not only for the state in form of financial and social burdens but also for the individual in question.[17] These were some of the arguments that were stated as reasons for the regulations.[18]

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[14] See chapter 2.2.2 The second case of direct rejection: The Dublin II Regulation and Dublin-cases.
[15] Swedish Aliens Act chapter 8 § 6.
[16] Rättschefens rättsliga ställningstagande angående avvisning med omedelbar verkställighet enligt 8 kap. 6 § utlänningslagen. RCI 03/2012 s. 2.
[17] Prop. 2004/05:170 Ny instans- och processordning i utlännings- och medborgarskapsärenden s. 215.
[18] These arguments are certainly not free from objections. It seams that there was a fear that granting aliens the right to reside within the country while their applications were under consideration would lead to an increase of costs and expenses, as well as an increased burden on the social services. However, it is not clear why this was not reason to discuss possible ways of creating a more effective process, rather than simply drawing the conclusion that the aliens should be prevented from entering the country.

The constituted elements for the rule to apply are, as seen above, that it has to be obvious that there are no grounds for asylum, a so called apparently ill founded application, and that residence permit should not be granted due to any other reason.[19] This can also be applied in the so-called Dublin-cases, where the Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, henceforth referred to as the Dublin II Regulation, regulates that the alien's claim for asylum should be tried in another country. These two grounds shall now be examined more closely in the following chapters.

2.2.1 The first case of direct rejection: Applications for asylum that are found to be manifestly ill founded or abusive

An important criterion is that the asylum application has to be manifestly ill founded. There can be no uncertainty concerning this, or the criterion has not been fulfilled. If the case in any way needs further investigation or consideration, then a rejection cannot take place based on this rule.

An application can be apparently unfounded in cases where, for example, the Migration Board has a good understanding of the conditions of the country in question to where the rejection should take place, and that the individual reasons stated in the application cannot be said to entail a right to asylum. The rule can also be applied if it is evident that the aliens information is untrue in all the essential aspects. The criterion requires that at the time the alien apply for asylum, it has to be absolutely clear that the alien by removal from Sweden will not be at risk of being subjected to persecution, harassment or other things of that nature. The base for determining this must be in the individual case. It follows that an application therefore never can be deemed ill founded simply based on the applying aliens nationality or religion, for example in cases where asylum normally would not be granted. It must still be determined that there are no other circumstances which, alone or together with earlier mentioned facts, would be sufficient to grant asylum. Only if this is not the case can a decision of direct rejection be issued.[20]

Significant is that the interests of the alien must be considered. The criteria that it has to be apparently ill founded cannot be considered fulfilled if there is any doubt as to whether the alien's information can be grounds for asylum or whether the grounds are credible.[21]

[19] Swedish Aliens Act chapter 8 § 6.
[20] Prop. 1988/89:86 med förslag till utlänningslag m.m. s. 198.
[21] Prop. 1988/89:86 s. 198

UNHCR has in a recommendation[22] defined clearly abusive or manifestly unfounded applications as such that are obviously deceitful or lacks connection to the definition of a refugee and grounds for protection as it is defined in the 1951 Geneva Convention, or other criterions for asylum.[23]

It is important to note that The Swedish Aliens Act chapter 8 § 6 also states that it has to *be apparent that a residence permit should not be granted based on any other grounds* [emphasis added]. This could for example be the ground of relations to a family member with a residence permit in Sweden or particular distressing circumstances.[24]

The Migration Board is under obligation to see to that the processing of cases that can come into question for direct rejection are handled in the same way as other case and live up to the demands made under the rule of law.[25] Decisions of direct rejection can be appealed to the Migration Court according to The Swedish Aliens Act chapter 14 § 3, and they can also be re-examined by the Migration Board.[26]

2.2.2 The second case of direct rejection: The Dublin II Regulation and Dublin-cases

The rule of direct rejection is most often used in the case where the alien stands to be sent back to a so-called first-asylum country. This is in accordance with the member states' obligations under Art 3 of the Dublin II Regulation.[27] The so-called Dublin Convention was adopted in 1997 and contained rules regarding which member state is responsible for handling an application for asylum. The point of this is to avoid that an application is tried in more than one country at once, a phenomenon referred to as "asylum-shopping". It will also prevent that an alien will not get their application tried in any country. The Dublin II Regulation has later replaced the convention.[28]

According to Article 3 of the regulation, member states shall try every application for asylum that is submitted by an alien to any member state, either at the border or within the member state's territory. The application shall be tried by only one member state, the state that is responsible according to the criterions of the regulation. According to this, if an alien is found to have applied for asylum in one country before entering another country, in this case Sweden, it is the first country that has the obligation to process the asylum claim. The Dublin II Regulation states in its preamble that all member states, which are expected to respect the rule of non-refoulement, are considered to be safe states for citizen of a third country. From this follows that states can decide on direct rejections without trying

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[22] "The Problem of Manifestly Unfounded or Abusive Applications for Refugeestatus or Asylum", No 30 (1083).
[23] Rättsligt ställningstagande RCI 03/2012 s. 5.
[24] Wikrén & Sandesjö, s. 400.
[25] Rättsligt ställningstagande RCI 03/2012 s. 9.
[26] Wikrén & Sandesjö, s. 402.
[27] Regulation 2003/343/CE.
[28] Wikrén & Sandesjö, s. 37 f.

an alien's asylum case and still not be in violation with the rule of non-refoulement. Member states are allowed to try an application for asylum even if they are not obligated to do so according to Art. 3.2 of the Dublin II Regulation. If it is decided to do so, that state becomes responsible for trying the case and will have all the obligations that thereof follow according to the regulation.[29]

As stated in Art. 4, the proceeding of determining the state responsible for trying an application starts at the moment an asylum application is first submitted in a member state. If it is found that an application has been handed in in another state than that where the applicant currently is staying, it is the responsibility of the state where the applicant is staying to determine the state responsible for processing the application. If an alien, without proper permission, has crossed the border of a member state by way of sea, land or air from a third country, it is the member state on whose territory entry has first occurred that has the responsibility of trying the application. However, Art. 10 states that this responsibility ceases 12 months after the unauthorized border crossing took place.[30]

The Swedish Aliens Act chapter 5 § 1 c states that if a decision is made regarding transfer according to the Dublin II Regulation, the asylum-application connected to this decision shall be refused. During 2011, a total of 30 404 asylum-applications received decisions in the first instance by the Migration Board. Of these, 2 852 where rejected as Dublin-cases. The corresponding numbers for unaccompanied children are 2 744 decisions, of which 113 where Dublin-cases.[31]

2.2.2.1 Tracking of aliens with the help of The Eurodac Regulation

The Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, henceforth referred to as the Eurodac Regulation, was initiated as a part of the pursuit to create a uniform asylum system within the EU. The Eurodac-system was created to facilitate the application of the Dublin II Regulation.[32] Member states are obligated by the Eurodac Regulation to promptly take fingerprints of any asylum seekers and of any aliens that are seized in connection with an irregular crossing of the external border of a member state, and who is at least 14 years old.[33] This information is collected in a database known as Eurodac. The member states can use the information found in the Eurodac to allocate which country is the first-asylum country and therefore responsible for processing an asylum application. If it is found that an alien entering Sweden has already entered the territory of another member state and applied for asylum there, Sweden is under no obligation to process the application made here.

[29] Regulation 2003/343/CE.
[30] Ibid.
[31] http://www.migrationsverket.se/info/5357.html "Avgjorda asylärenden 2011 – Asylum decisions 2011.pdf".
[32] Regulation 2003/343/CE, preamble.
[33] Regulation No 2725/2000 Article 8.

Therefore it is possible under The Swedish Aliens Act chapter 8 § 4 to carry out a direct rejection of an alien even though they may have an asylum claim that is in need of further investigation, and hence not apparently unfounded, simply because the obligation of that asylum claim falls otherwise.

2.3 Human rights instruments

As mentioned earlier, in this section I present the relevant human rights instrument concerning refugee issues. The 1951 Geneva Convention is the instrument that presents the most extensive regulation regarding refugees and the rights and obligations of refugees and states. It therefore becomes important to present this instrument even though it is an international instrument with a wider range than just the EU-territory. The other instruments are chosen because they are what you refer to as the pillar of the regulations on human rights that member states of the EU are bound to respect and uphold.

2.3.1 The 1951 Geneva Convention Relating to the Status of Refugees

The 1951 Geneva Convention provides the most comprehensive international codification of the rights of refugees. It also contains a single definition of the word "refugee". This definition states that a refugee is a person that is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[34] Sweden has ratified the convention, as have the rest of the EU member-states.[35]

The 1951 Geneva Convention entered into force on 22 April 1954 and has since then only been amended once, through the Text of the 1967 Protocol Relating to the Status of Refugees. With this amendment the original limitations in geographical and temporary applicability was removed and today the 1951 Geneva Convention is universally applicable.[36] The convention does not contain any explicit rule regarding an obligation to grant asylum. However, regulations such as the ban against non-refoulement can mean that an asylum-seeker must be granted to stay in the country, at least temporary. On numerous occasions it has also been stated that states have an obligation to provide temporary refuges at the least for refugees that reach their borders and needs protection.[37]

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[34] The 1951 Geneva Convention Relating to the Rights of Refugees Article 1.
[35] Wikrén & Sandesjö, s. 47; http://www.ecre.org/refugees/refugees-in-the-eu.html.
[36] Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) Geneva Dec 2010.
[37] Wikrén & Sandesjö, s. 69.

The 1951 Geneva Convention is based upon a number of founding principles, such as the principle of non-discrimination (Article 3) and non-penalization (Article 31). The provisions of the convention are to be applied without discrimination to race, religion or other prohibited grounds of discrimination. The principles also recognize the possibility that refugees, in their stride to seek asylum, can be forced to breach immigration rules. The convention therefore stipulates that refugees are not to be penalized for this, for instance by being charged with immigration or criminal offences relating to the seeking of asylum.[38]

2.3.1.1 The principle of non-refoulement

One of the most important principle stated in the Convention is found in Article 33, which prohibits the expulsion or return ("refouler") of a refugee, against their will in any matter whatsoever, to an area where he or she fears threats to their life or freedom. This principle is formally known as *non-refoulement.* The principle is considered so fundamental that no reservations may be made to it.[39] The principle of non-refoulement is not subject to any geographical limitations according to UNHCR, which means that refugees should be able to apply for asylum from the moment they are rescued or intercepted on the high seas.[40]

The 1951 Geneva Convention also stipulates a number of minimum standards regarding the treatment of refugees. These are without prejudice to the possibility of States granting more favorable treatment, which is also stated in Article 5. The rights include access to courts (Article 16), to education and work and to provision for documentation.[41] The convention also stipulates that expulsions of refugees shall only be made as a result of a decision made under legal review and in accordance with law.[42]

2.3.2 The European Convention on Human Rights

The convention, know as ECHR, does not include any specific mentioning of the right to seek protection. However, ECHR includes protection of rights that become relevant in the aspect of what refugees are seeking protection from. The Convention protects rights such as the right to life found in Article 2, the prohibition of torture and the right to life and security stated in Article 3 and 5, and so forth.[43] From this, we can draw the conclusion that states are under a responsibility to protect these rights, and that sending anyone back to a country where they would be at risk of having their rights violated would not only be in conflict with the rule of non-refoulement but also in conflict with the obligations under ECHR.

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[38] Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) Geneva Dec 2010.
[39] The 1951 Geneva Convention Relating to the Rights of Refuges Article 33.
[40] Carr, M, *Fortress Europe. Dispatches from a Gated Continent.* The New Press, s. 75.
[41] Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) Geneva Dec 2010.
[42] The 1951 Geneva Convention Relating to the Rights of Refugees Article 32.
[43] European Convention of Human Rights

The Protocol No. 4 to the Convention[44] Article 4 further states a direct prohibition of collective expulsions of aliens. Protocol No. 7 to the Convention[45] also states in Article 1 that an alien residing lawfully in a state shall not be victim of expulsion except as a result of a decision that has been made in accordance with law where the alien has had the opportunity to have his or hers case reviewed and tried by the proper authorities. Lastly, Protocol No. 12 to the Convention[46] states a general prohibition against discrimination in Article 1.

2.3.3 Charter of Fundamental Rights of the European Union

The rights set forth in the 1951 Geneva Convention and ECHR have also been reaffirmed in the Charter of Fundamental Rights of the European Union. Under Chapter II Article 18, the Charter states that the right to asylum shall be guaranteed in respect to the 1951 Geneva Convention and the 1967 Protocol. It further states in Article 19 that collective expulsions are prohibited and reaffirms the importance of the principle of non-refoulement, and that the principle is to be respected. The Charter is addressed to the institutions and bodies of the Union who accordingly to Article 51 are to respect the rights and principles of the Charter and promote the application and implementation of this in their respective areas.[47]

2.4 Base for comparison between regulations and actual application

As discussed in the theory chapter, I seek to examine whether coherency exists between established rules and how they are applied.
As the criteria for measuring coherence is based on the Formal Principle on Justice, with the selected category being that each shall be treated accordingly to his or hers legal status, it is relevant to examine whether the law is in itself coherent with the norms and values behind it.

The category in itself requires, in my opinion that two classifications are created:

1. How do we establish the legal status of the individuals concerned?
2. What does that legal status entail for them as far as rights and obligations goes?

The test of coherency is performed when these classifications have been created. If we have categorized individuals as having the same legal status and the legal framework gives ground that this comprises overall the same

[44] Protocol No. 4 to the Convention for the protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto.
[45] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[46] Protocol No. 12 to the Convention for the Protection of Human rights and Fundamental Freedoms. Sweden is not a party to this convention but it is nevertheless interesting to mention in this context.
[47] Charter of Fundamental Rights of the European Union (2000/C 364/01).

rights and obligations, then justice is only achieved if the individuals receive the same treatment regardless of their geographical location.

In the following chapter there is a discussion of how well these criteria are met within the framework of the Swedish laws. The focus will be to see if we can find coherence within the treatment of a group belonging to the same legal status, in this case what I refer to as "potential refugees". Since the individuals in these cases have not had their asylum-claims processed, they cannot be referred to as refugees in the meaning of the law. However, I still define the groups as refugees since the right to have their asylum-claim tried is what is at stake.

As a member state of the EU, the relevant laws to take into consideration for the case of Sweden are national regulations such as The Swedish Aliens Act as well as the overall legal framework within the EU. In this case, what becomes most relevant is the Dublin II Regulation.

2.4.1 Compliance of norms in order to achieve coherency

In Swedish law, the main rule is that every alien that applies for asylum is entitled to have his or her case tried. The only deviations that exist from this are when an application is manifestly unfounded or abusive[48] and shen it is a case of transfers according to the Dublin II Regulation[49] (Dublin-cases).

In the case of manifestly unfounded applications, as mentioned in chapter 2.2.1 The first case of direct rejection: Applications for asylum that are found to be manifestly ill founded or abusive, deviation from the main rule is motivated based on that the exception in itself aims at cases where it is *apparent* that the requested reasons for asylum are lacking.[50] In these cases, it has been found to be unnecessary to proceed with a process of trying a case that is so apparently unfounded.

However, it must be noted that these cases are not excluded from access to a process. An asylum-claim can still be presented, and a general assessment of the claim is made. At this stage of the process, the alien behind the claim is still to be categorized as a potential refugee. When the claim is found unfounded, we can see that the alien is re-categorized as a non-refugee. This means that he or she is no longer belonging to a group with the same legal status as before. A different treatment of the alien can therefore not be considered as unjust, since it is in coherence with the law.

Regarding Dublin-cases it is a similar proceeding. In these cases, the issue is not whether the alien is to be re-categorized or not. The alien is to be categorized as a potential refugee all throughout the process. The issue here is rather a question of access to justice, since the alien does not get his or hers asylum-claim tried in Sweden. Nonetheless, the decision to transfer an

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[48] Swedish Aliens Act chapter 8 § 6.
[49] Swedish Aliens Act chapter 5 § 1 c.
[50] Prop. 1988/89:86 s. 198.

alien in accordance with the Dublin II Regulation is not in any way an evaluation of their potential grounds to qualify for protection. It is simply a decision regarding which state that is responsible for trying these grounds. The requirement that an asylum-seeker is entitled to a trial of his or hers case is therefore still upheld. There is still a problem that needs to be addressed concerning the inherent assumption that all member states are considered to be safe countries. As many member states have a problem with judicial security and in providing a minimum standard of reception and treatment of asylum seekers, there is a valid point to be made in questioning whether or not a state can be sure to uphold their responsibilities according to international standards simply by abiding the Dublin II Regulation. However, based on the national regulation, we cannot see any clear deviations from the principle of justice in the exemptions allowed for within the legal framework. As we have now looked at the legislation and practice in a single member state (Sweden), in the following chapter I will move to discuss the ongoing process for a more harmonized and uniform European asylum system and the creation of The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and its role as a part of this system.

3 The Common European Asylum System and Frontex

In this chapter I present the steps that have been taken with the aim of creating a more harmonized asylum system within the EU, which relevant instruments that have been created and their significance. These steps in turn led to the creation of The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). This is followed by a presentation of the regulations that make up the legal mandate of Frontex as well as the purpose and tasks of the agency. The chapter is concluded with a discussion of the problems that are due to a lack of coherency between the actual practices of the agency and its obligations to uphold the spirit of the legislation, which also means upholding the respect for the basic human rights.

3.1 The creation of the Common European Asylum System

At the meeting of the European Council in Tammerfors in 1999 and then again in Hague 2004 the member states of the EU agreed to that a common European system for asylum would be established by 2010. The Common European Asylum System (CEAS) is meant to create a mutual level in the member states regarding reception of asylum seekers, processing of the applications and the distribution of responsibility between the states. This would promote legal security and effectiveness within the systems and increase cooperation within the Union. During the meeting of 2009 this was reaffirmed and the states decided that a new program was to be created along the same lines, the so-called Stockholm program.[51]

During 2006 the first phase of the CEAS was completed under the so-called Hague program. The system contains three directives and one regulation, which are currently under review.[52] These are the Directive on reception conditions for asylum-seekers[53], the Directive laying down minimum standards for the qualification and status of non-EU nationals and stateless persons as refugees or as persons who otherwise need international protection (also known as the Qualification Directive)[54], the Asylum Procedures Directive[55] and lastly the Dublin II Regulation[56].

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[51] http://www.temaasyl.se/Templates/Page.aspx?id=736.
[52] http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html.
[53] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
[54] Council Directive 2004/83/EC of 29 April 2004 in minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[55] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

The Stockholm program is the new phase of the CEAS and it is planned to be fully implemented by 2014. This phase aims to broaden the scope of the CEAS and may include access to the EU, integrations issues, responsibility sharing mechanisms between the member states, and so on.[57]

3.2 The Qualification Directive and the obligations it poses on member states

Council Directive 2004/83/EC, also known as the Qualification Directive, was adopted by the European Council as a step in the work towards a common politic in the asylum-area within the EU. The Directive contains minimum standards for when third-country nationals or stateless persons are to be considered refugees or persons otherwise in need of protection. It also contains information regarding the person's status and what the protection granted entails. The Directive is based directly upon the Geneva Convention and corresponds with it in all relevant aspects.[58] The main objective stated in the preamble is said to be that member states apply a common criteria for determining persons in need of international protection, as well as ensuring a minimum standard of what that protection is meant to include which is consistent throughout the member states. Article 3 of the Directive also leaves it possible for states to instate more favorable standards as a part of their own national legislation.[59]

Article 4 of the Directive states that the assessment of whether or not a person is in need of international protection is to be made based on the individual circumstances, taking into account a number of facts such as the aliens country of origin, relevant documentation, the aliens background, gender and age, and so forth. The Directive also stresses the importance of the rule of non-refoulement in Article 21 and it confirms that member states are bound to respect this rule in accordance with their international obligations.[60]

3.3 Harmonization through The Schengen Borders Code

The Schengen Borders Code[61] was adopted in February 2006. It defines what requirements a third country national that seeks to enter the EU-area must meet. It also offers a more transparent and harmonized set of rules regarding crossing the external border of the EU than what was available before. The Code lacks to offers a legal base for maritime border control

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[56] Regulation 2003/343/CE.
[57] http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html.
[58] Wikrén & Sandesjö, s. 52 f.
[59] Council Directive 2004/83/EC.
[60] Council Directive 2004/83/EC.
[61] Regulation (EC) No. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 13.4.2006.

operations in connection to human rights obligations and what the responsibilities are in those situations.

The Schengen Borders Code states in Article 6 that border guards must fully respect human dignity, the principle of proportionality and non-discrimination. It also states that persons that are refused entry at an external border have the right to know the exact reasons behind the refusal of entry, which shall be based on a decision taken by an authority under law. Persons also have the right to appeal the decision. The Code also stipulates that the provisions of the Code shall apply without any prejudice to the rights of refugees and persons requesting international protection, nor shall entry conditions for third country nationals apply to persons seeking asylum or international protection, according to Article 3(b) and 13(1).[62]

3.4 The creation of Frontex

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was founded by Council Regulation (EC) 2007/2004[63] and started its operational work on October 3 of 2005. The name Frontex comes from *Frontières extérieures*, which is French for "external borders". The agency's main responsibility is external border security and it is responsible for coordinating activities of national border agencies and border guards to ensure the security of the EU's external borders. The responsibility for monitoring the borders of Europe is shared between the national governments, different police forces, immigration officers and border guards in different countries. Frontex, Rapid Border Intervention Teams[64], different police and criminal investigation agencies and more all form part of a new security structure within the EU.[65]

Even though the states have the ultimate responsibility, as an organ of the EU, Frontex is still obliged to uphold the rights stated in the different conventions and charters that binds EU-organs. That means that they have a duty to ensure that their work is carried out while ensuring that basic human rights are still upheld.

3.4.1 Council regulation (EC) No 2007/2004

The founding regulation of Frontex states that the responsibility of controlling the national borders falls on each member state individually.[66] Frontex is obliged with the task of ensuring that all member states implement EU rules on external border control and that they do so with the

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[62] Regulation (EC) No. 562/2006.
[63] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.
[64] Will be explained in more detail in chapter 3.7.1 Rapid Border Intervention Teams.
[65] Carr, M, s. 23.
[66] Council Regulation (EC) 2007/2004 Article 1.2.

same standards of efficiency.[67] In its preamble the regulation stresses the importance of effective border control throughout the EU area and the following need of solidarity between member states in this arena. Frontex is therefore obliged with the task of gathering information and risk analysis to provide the member states with adequate information to manage their actions on this area. Frontex is also responsible for providing coordinated training at a European level for national instructors of border guards, as well as other forms of education regarding border surveillance.[68]

Frontex is an independent agent with legal, administrative and financial autonomy, and it is regarded as a Community body with its own legal personality. The agency only enjoy as much legal capacity as the current member state's national laws allows for according to Article 15. The regulation also states in Article 12-14 that Frontex shall cooperate with member states and international organizations as well as third countries in the fulfillment of its tasks.[69] The legal framework of Frontex can be said to reflect the attempt to compromise between a national approach and a fully international operational body. Although Article 1 states clearly that the control over external borders lies with the member states, this does not exclude the possibility of operational powers. This vagueness of competencies and responsibilities, especially in the area of human rights is one of the biggest controversies surrounding Frontex.[70]

Member states are not bound to the coordination within Frontex, they have the right to cooperate with other member states as well as third countries, when this cooperation matches the actions of Frontex. Member states have to refrain from any activities that could risk the agency's function or objectives, and the states have an obligation to report to Frontex on operational matters outside the scope of the agency.[71]

3.4.2 Frontex Fundamental Rights Strategy as a means to ensure respect for human rights

On 31 March 2011 Frontex adopted the Frontex Fundamental Rights Strategy. This was partly done as a response to the criticism that the agency has received on severe flaws in managing how to upheld the fundamental human right during operations. It states in the preamble that "Frontex considers that respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management" and "Frontex aspires to the horizontal integration of fundamental rights throughout all its activities and at all stages".

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[67] http://www.frontex.europa.eu/about/origin.
[68] Council Regulation (EC) 2007/2004.
[69] Council Regulation (EC) 2007/2004.
[70] Ahumada-Jaidi, Audelina (2010) *Border control and internal security in the European Union – information, technology and human rights implications for third-country nationals*, Detecter, Seventh Framework Programme, s. 6.
[71] Council Regulation (EC) 2007/2004 Article 2.2.

The Strategy further goes on to state in Article 4 that respect for the fundamental human rights are a core value of the EU, as confirmed in the Lisbon Treaty[72], and that the EU Fundamental Rights Policy is fully applicable to Frontex in its role as an EU Agency. It also states in Article 5 that Frontex through its activities come in contact with human rights that need to be upheld, in particular rights such as the right to life, the prohibition of torture, the right to seek international protection and asylum, the rule of non-refoulement, and so on. Following, Article 6-11 in the Strategy asserts the importance of ECHR, 1951 Geneva Convention, as well as other human rights instruments adopted by the United Nations and the Council of European Convention. These are, as ratified by the member states, applicable to Frontex as an agency of the EU.[73]

Important to note is that the Strategy stresses that member states are primarily responsible for the actions undertaken in context of Frontex joint operations. Therefore they also have the primarily responsibility to see to it that the respect for fundamental human rights are being upheld during these operations. Frontex is mainly a coordinating agency, and that the States still have the executive power. Hence, during joint operations it is still mainly personnel and agencies belonging to the States that carry out the executive part of the operations, even though Frontex serves as a coordinator. This does not relieve Frontex of its obligations as coordinator, the agency is still responsible for all decisions and actions taken under its mandate and it must focus on ensuring conformity with fundamental human rights throughout all its activities.[74]

3.4.3 Mandate and joint operations

Frontex's mandate is divided into six categories: Risk Analysis, Coordination of operational cooperation between Member States, Training, Facilitating the attainment of research and development goals, Providing a rapid crisis-response capability to all Member States, and lastly Assisting Member States in joint return operation.[75]

Frontex defines itself as an intelligence-driven agency. This makes Risk Analysis the starting point for its operations. The agency gathers information within and beyond the EU borders from various sources to create a base of information that is then analyzed using a system developed within Frontex, called the Common Integrated Risk Analysis Model (CIRAM).[76] Within this analysis special consideration should be taken of the situation of persons seeking international protection and especially vulnerable groups. When planning and proposing operations, Frontex shall access the possible effect on fundamental rights with the special focus on ensuring that the right to international protection is not endangered by the actions taken within the operation. Frontex also have the authority to, as a last resort, terminate an operation it is considered that the guarantee for the

[72] Treaty of the European Union, Article 2.
[73] Frontex Fundamental Rights Strategy.
[74] Frontex Fundamental Rights Strategy Article 13.
[75]Council Regulation (EC) 2007/2004 and http://www.frontex.europa.eu/about/origin
[76] http://www.frontex.europa.eu/about/mission-and-tasks.

respect of human rights is no longer met. This is according to Article 14-15 of the Strategy.[77]

Frontex coordinates joint operations between member states and other partners as well as manage pooled resources as a part of EU's rapid response mechanism for when a crisis situation occurs on the external borders. Joint operations takes place in three different settings; sea, land and air, of which the most relevant for this thesis are the operations at sea. All operations are based on risk analysis and fitted to the specific circumstances identified.[78] Border activities at sea are divided in border checks and border surveillance. The latter is conducted at sea. These Frontex-coordinated operations make out the biggest Search and Rescue operations in Europe, so called SAR operations. The interception of migrants, smugglers and trafficking networks are a focus of Frontex. Therefore they have established the European Patrols Network (EPN) as a part of a long-term solution to border control issues at sea.[79]

3.4.3.1 Rapid Border Intervention Teams

To be able to meet the needs in a possible crisis situation, Rapid Border Intervention Teams (RABITs) were established by Regulation (EC) No. 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers. RABITs are units that are kept in a constant state of readiness and are to be used in circumstances that are urgent and exceptional.[80] These teams can be deployed for a temporary period upon the request of a member state, and will assist the national border guards. During deployment, the teams take their instructions from the host member state. The teams are given a wider range of tasks and powers, for example concerning surveillance and the possibility to make controls of different sorts. Members of the teams shall in their performance of their tasks and duties fully respect human dignity and act accordingly to the principle of non-discrimination, as stated in Article 5 and 6.[81]

3.4.4 Interception and the separation between refugees and non-refugees

Interception at sea can consist of a great variety of measures. For example, these can include activities to prevent the departure of ships on dry land or in the proximity of the coast or the visiting and/or boarding of vessels. Whether the activities are lawful or not depends on the stretch of sea[82] that they are conducted in and what law is applicable to it.[83]

[77] Frontex Fundamental Rights Strategy.
[78] http://wwww.frontex.europa.eu/operations/types-of-operations.
[79] http://wwww.frontex.europa.eu/operations/types-of-operations.
[80] http://www.frontex.europa.eu/about/mission-and-tasks.
[81] Regulation (EC) No. 863/2007.
[82] It could for example be the high sea, territorial waters, and so on.
[83] European Council of Refugees and Exiles (ECRE) (2007), Defending Refugee's Access to Protection in Europe, p. 5.

With the implementation of the Schengen-system, states gained more control over the managing of the external borders, as a compensation for the abolition of the internal borders within these states.[84] This combined with the growing calls for a more effective regulation against "illegal" immigration has resulted in that the context of border control has become somewhat militarized. It has also resulted in a tendency to move the surveillance and border control away from the actual physical border, outwards into the high seas or sometimes even into third country territories.[85] This have caused many to question whether this externalization of border controls and connected activities may cause problems regarding the upholding of human rights, especially considering the principle of non-refoulement.[86] When these forms of pre-border controls take place on the high seas and are lacking a proper mechanism for distinguishing between possible refugees and non-refugees, the problem becomes ever more clear.[87]

Frontex have on occasions been connected to these sorts of activities, either by its coordinating role or through the use of RABIT teams. One example was in 2007 when Spain along with some other member-states began a series of joint naval operations in the South Atlantic, under the direction of Frontex. These operations where conducted in cooperation with various West African governments. The aim of the operations where to intercept migrant boats before they left the territorial waters of West Africa, and in the following year almost six thousand migrants where, as it is expressed, "convinced to return to safety" or "escorted back to the closest shore". However, humanitarian rescue was rather a byproduct of the operations that in fact where intended to stop migrants trying to travel to Europe. The operations actually meant that the European borders were in reality extended into the territorial waters of West Africa.[88] There are no records of if or how evaluations of the aliens' possible protection needs were conducted.

Another example was in the summer of 2009 when a number of people were returned to Libya by the Italian authorities without having received a proper evaluation of their possible protection needs. The aliens had been intercepted on the high seas with the assist and involvement of Frontex.[89] Lastly, recently information has emerged from 25 Syrian refugees that have stated that this summer they were intercepted while trying to reach the Greek border by the river Evros. They were allegedly forced back into boats by Greek border forces and possible Frontex personnel and returned to Turkish territory, without any evaluation of their possible grounds for protection.[90]

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[84] Ahumada-Jaidi, Audelina s. 4.
[85] Ahumada-Jaidi, Audelina s. 5; European Council of Refugees and Exiles (ECRE) (2007), Defending Refugee's Access to Protection in Europe, p. 9.
[86] Ahumada-Jaidi, Audelina s. 6.
[87] Brouwer, A & Kumin, J (2003), *Interception and Asylum: When Migration Control and Human Rights Collide.* Refuge 2003, Vol 21, No. 4, s. 6-24, s. 13.
[88] Carr, M, s. 49.
[89] "UNHCR deeply concerned over returns from Italy to Libya", Press release 7 May 2009, http://www.unhcr.org/4a02d4546.html.
[90] http://www.guardian.co.uk/world/2012/dec/07/syrian-refugees-turned-back-greek.

Neither the Council Regulation (EC) No 2007/2004 nor the Fundamental Rights Strategy contains any reference to how the separation between refugees and non-refugees is to be made in situations such as the one described above.[91]

So we can conclude, that even though Frontex is bound by a number of international binding documents to uphold the principle of non-refoulement and ensure that persons can utilize their right to seek protection, there is still no actual information on how the border teams are to make the separation between refugees and non-refugees. This means that there is a possibility that persons in need of protection could be perceived as illegal immigrants, and in that process be hindered from exercising their right to seek protection by applying for asylum. Interception in itself is not necessarily a problem in regards to human rights, but it must be accompanied by a set of rules or procedures on how to avoid this risk that apparently exists.

I ask that the reader to note that I am aware of the nation state's responsibility in these cases, and that Frontex cannot be hold directly responsible for incidents such as those mentioned in the chapter. But as an organ of the EU, Frontex is obliged to uphold human rights which are stated in different international instruments. That means that although they cannot be subject to accountability in the sense of state-responsibility, they still have a duty to ensure that their work is carried out while ensuring that basic human rights are still upheld.

3.5 Base for comparison between regulations and actual application

In the next chapters I will mostly refer to how coherency and justice are to be understood in this context. Therefore, I ask the reader to return to these chapters[92] should there be any questions regarding the discussion.

As previously stated, the purpose of this thesis is to examine whether or not Frontex poses a problem for asylum seekers possibility to utilize their rights. This is done by investigating if coherency can be found between the given legal frameworks and actual procedure. The common legal framework for both Sweden as a national state and the area in which Frontex operates are the international conventions and the EU-regulations. Relevant to notice are therefore the Dublin II Regulation, The 1951 Geneva Convention, and so on. The Dublin II Regulation is the most relevant regarding cases where aliens are transferred between EU-states without first having their asylum-

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[91] The reader may note that I have not been able to find a reference to this in any documents available to me regarding the coordinating role of Frontex, RABIT teams, and so on. I find this quite noteworthy considering that Frontex in all aspects should be conscious of the possibility that refugees can be found within the group ”illegal immigrants”. Especially considering that refugees most often do not have the possibility to travel using legal means, and therefore reaches the EU-area through the same channels as those referred to as ”illegal immigrant”.

[92] See chapters 1.2.1 Theory, chapters 2.4 Base for comparison between actual regulations and actual application, and 2.4.1 Compliance of norms in order to achieve coherency.

claim tried. But based on what has been outline above, the problem that I intend to focus my discussion on arises outside the borders of the EU rather than when an alien have actually crossed the border, applied for asylum and the process of trying the claim has begun. This problem therefore tends to lie outside the current legal framework.

Consequently, it is more relevant to highlight the norms that stand behind the regulations. We have already discussed the principle of non-refoulement. This is one of the most important principles in the area of international refugee-issues. It stands for the absolute obligation to protect people from being send back to the possible risk of torture and death. At the core of the principle is the obligation to examine if such a risk exists before making a decision regarding about whether or not a person is eligible for international protection and/or allowed to cross a country's borders.
This principle, along with others, will serve as an example of the standards we look for when we examine the coherence between them and actual situations. These are also norms that are applicable for the entire EU-area.

3.5.1 Compliance of norms in order to achieve coherency

In comparison to the situation in Sweden, it seams to me that the most invasive procedure an alien could be subjected to while trying to enter the EU-area would be similar sanctions to the ones described in chapters' 2.2.1 and 2.2.2[93]. But more importantly, there is also a risk of a sanction that is not explicitly covered in law. That is for an individual to be prevented from utilizing his or her right to seek protection. There is a risk of this occurring in situations where interception is involved. In these situations, there seem to be a lack of a proper system for how the categorization of people intercepted is to be conducted.

Connecting to the earlier discussion on the Principle of Formal Justice and categorization of groups, we can see that a problem arises in the case of interceptions. The aliens trying to reach the borders of the EU should be categorized as potential refugees until proven otherwise, to make sure that the basic human rights are upheld, especially the right to seek protection. Yet, the categorization that seems to be made is that the aliens are actually belonging to the group "illegal immigrants". If they are in fact belonging to this group, they should be treated accordingly to their legal status to uphold the principle of justice. But to ensure that the right to seek protection is upheld, we cannot make this categorization so hastily. It must be determined that every single person actually belongs to this group to ensure that they receive just treatment. If even one person in the group should be categorized as a potential refugee instead of an illegal immigrant, and they instead receive treatment accordingly to the legal status of the group illegal immigrants, the categorization is invalid and the treatment is unjust.

[93] Chapters 2.2.1 The first case of direct rejection: Applications for asylum that are found to be manifestly ill founded or abusive, and chapter 2.2.2 The second case of direct rejection: The Dublin II Regulation and Dublin-cases.

The norms and values guiding the legal framework obligate the actors to make a distinction between these groups. This can be traced, for example, through the reaffirming of the importance of the principle of non-refoulement that reoccurs in almost every regulation concerning refugee issues. Refugees are recognized as a group entitled to certain rights, and states are obligated to make the necessary efforts to ensure that these rights are upheld. This includes a proper categorization of possible refugees. Since there is no framework in place to ensure that the categorization is correct, we have a lack of coherence between the regulations and the actual situation. As we have also seen that this problem mainly arises in some areas, the inconsistency between Sweden and the areas of the EU where this problem arises means that we also have a lack of coherence within the whole area.

As have been stated several times throughout this thesis, coherency is something to be aspired to and expected in an area that is largely governed by the same legal framework. Since there has been shown to be a problem with coherency within the EU-area, it is important to further analyze why the established regulatory disappoints in its implementation. This will be done in the following chapter.

4 Possible reasons for lack of coherence – an analysis

The discussion has shown that there does exist a lack of coherence between the most severe sanctions that can be exerted in Sweden as a nation state respectively the rest of the EU-area. This lack of coherency poses a risk towards the judicial security of the concerned asylum systems. This risk only grows larger as more progress is made towards a joint European asylum system. The more harmonized the system becomes, the more essential it becomes that coherency is uniform through the system. This is vital to ensure that the aim of the system, to create and implement a uniform and common system for handling asylum seekers is actually met. But more importantly, it is also vital to ensure that the basic human rights are upheld and protected. Since the concerned areas in large are governed and bound by the same legal framework, coherency is something that is both needed and wanted. In order to achieve this, it is important to examine the possible reason behind this incoherence. This will be done in the following section.

As the EU has moved into the role of a "security state"[94], the focus regarding migrations issues has centered on aliens being labeled as 'outsiders' or 'potential threats'. Control of the borders is therefore not only focused on simply administrating and managing border controls and policing, but more and more on different ways of identifying and categorizing individuals as possible external threats.[95] The identity of migration law-issues have in its evolution created a concept of a migrant as someone being illegal simply by its being. This label means that the person by definition is a criminal, and that takes priority over other labels such as refugee.[96]

One example of the control-oriented nature of the EU's migration policy is the so-called readmission agreements[97]. This is an example of the Commissions interest in integrating migrations issues in the EU's overall relations with third countries, by coordinating and facilitating the cooperation between the EU and third countries in the return of illegal immigrants to their country of origin or transit.[98]

The priorities to detect and prevent immigrants travelling along the main asylum routes have also made the Mediterranean to one of the most militarized oceans in the world. The area is surveillance by cost guards,

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[94] As stated by Cetti, F, in "Asylum and the European 'security state'. The construction of the 'global outsider', in *Globalisation, Migration and the Future of Europe. Insiders and Outsider* (Edited by Simona Talani, Leila) Routledge, London and New York.
[95] Cetti, F, s. 16.
[96] Cetti, F, s. 19.
[97] I mention this as an example but I will not immerse myself further in the discussion concerning these agreements, since they are not the focus of the analysis.
[98] Simona Talani, L, "The internal and external dimension of the 'Fortress Europe' in *Globalisation, Migration and the Future of Europe. Insiders and Outsider* (Edited by Simona Talani, Leila) Routledge, London and New York, s. 71.

naval surveillance, Frontex, aerial and satellite surveillance, and so on. The focus of these efforts is mainly to detect and prevent unauthorized border crossings.[99] This intense focus on illegal border crossings have made many critics raise the point that it is EU's own restrictive and security-oriented system that forces refugees to use illegal ways for getting into the EU, thus in advance transforming them into illegal immigrants.[100]

The development with border controls further and further out from EU's actual physical borders also creates a worrying situation. It makes it difficult to supervise what happens in the moment when a potential refugee comes in contact with the authorities of a potential asylum-country for the first time. Without a possibility to supervise this, and without clear guidelines for how this is to be handled, there is a risk of potential "push-backs" of people without them ever coming into contact with the asylum system of the EU.[101] It has been pointed out that migrants travelling by sea often travel in so-called mixed groups, which means that people leaving their country seeking international protection can be travelling together with people leaving their country for other reasons. Statistic show that a major number of those crossing the external sea border of the EU member states in the Mediterranean area without the adequate documentation has later been recognized as refugees.[102]

All member-states and organs of the EU have a common commitment to uphold human rights. You would hardly see any state or organ deny this obligation, but many actors seem to be determined to ensure that this obligation does not hinder them in their work to enforce their immigration policies and restrictions. This pursuit of enforcement has regularly created situations where such rights risk being weakened or directly absent. This can be due to an intentional policy or as a result of vague areas of jurisdiction and responsibilities.[103] And as William Spindler, UNHCR's spokesman in Calais has specified: "We don't believe that immigration is a right. We don't believe that people have a right to go and live wherever they want. But asylum is a right, a basic universal human right."[104]

As we have established a lack of coherency, we must also ask if this could possibly affect the asylum process in the national states? Since the problem that has been pointed out mainly takes place during interceptions, the aliens have in those cases not arrived, alternatively have just arrived at the state's

[99] Carr, M, s. 67.
[100] Hansen, P, *The EU migration policy for 50 years. An integrated perspective on contradictory development* (*EU:s migrationspolitik under 50 år. Ett integrerat perspektiv på en motsägelsefull utveckling)*, Studentlitteratur. s. 150.
[101] European Council of Refugees and Exiles (ECRE) (2007), Defending Refugee's Access to Protection in Europe, p. 4.
[102] Ahumada-Jaidi, Audelina (2011), *Preventing irregular immigration through interception: Recommendations for a human rights compatible maritime border policy in the European Union*, Detecter, Seventh Framework Programme, s. 16; UNHCR Press release of 10 December 2010 http://www.unhcr.se/en/who-we-help/asylum-seekers/artikel/b68dc2b0b1a6abca670f4fccf0732666/unhcr-urges-eu-and-frontex-to-ensure.html.
[103] Carr, M, s. 193.
[104] Carr, M, s. 194.

border. The way they come in contact with the asylum process would therefore be through the intercepting authorities, which in the discussed cases could consist of both national border guards and Frontex personnel. Hence, the first step in the process is for these border guards to make a proper assessment of the aliens' status as a potential refugee or immigrant. Otherwise, it is an imminent danger that the problem that arises is that the aliens does not attain access to judicial process. This would not only constitute a lack of coherency but a direct violation of the right to asylum.

Frontex has a responsibility as a EU-organ to ensure that their actions and the actions of their personnel are in accordance with relevant human rights instruments. Since Frontex has the responsibility of both educating and coordinating national states, I find it reasonable to think that one could hold them to high expectations regarding their personnel's own practices, even if the routines of the national border guards should differ from these. The lack of procedures for how separation between refugees and illegal immigrants should be executed is therefore both problematic and disappointing.

The above mentioned are all reasons that could serve as possible explanations or part of explanations for the lack of coherency within this area. My reflection is that you can quite clearly observe a change in discourse regarding how the refugee and migration issue is discussed within the EU today. Officially, refugees are still recognized as a group that is entitled to special rights, including protection. However, the discussion today does not concern refugees but rather "illegal immigrants" and how to best protect the external borders. Aliens trying to cross our borders illegally are first and foremost perceived as just illegal, which in turn entails a possible threat. The task of determining their possible need for protection have taken a backseat to the task of creating controlled borders and stop illegal crossings. It is my opinion that as long as this task is not joined with the outspoken demand of creating clear procedures for identifying potential refugees within the groups of people trying to cross the borders, the problem with coherency will not be resolved and Frontex will continue to be a hindrance for refugees trying to use their right to seek international protection.

I also think that Frontex would benefit from having clear procedures in this regard, since it would create predictability in the actual work and increase the importance of rule of law. As the situation is today, Frontex is faced with the role of trying to coordinate and organize several different actors, but without having the proper means to do so. The main task of the agency has from the start been to monitor and assist member states in the surveillance and control over their external borders. The focus in carrying out that task is not to make a proper separation between possible refugees and illegal immigrants, but rather to make sure that nobody that does not have the proper authorization can cross the borders. However, refugees often travel along the same routes and by the same means as other groups that may not have the same internationally recognized need for protection. As Frontex have been faced with criticism regarding that their practices does not include a human rights perspective, they have included this into their legal base through the Frontex Fundamental Rights Strategy. Actual

instructions and procedures regarding how this Strategy is to be implemented in the daily work of the agency is still lacking. The creation of clear regulations and procedures would in my opinion not only lead to the agency's ability to be more efficient in its daily work, but would also act as a safe-guard for the agency to ensure that their requirements regarding upholding of the basic human rights are met. In the current situation, there is a clear gap between the harmonization of the legal level of the common European asylum system, and the practical level. As a consequence of the harmonization come greater demands of a uniform application of law in the affected areas. As long as clear procedures for how refugees are to be identified and treated are not in place, there will be a risk of potential refugees not being able to utilize their right to seek protection and have their case review by proper authorities under law. Instead, which treatment you receive will in large be up to which border you arrive at and the border guards you come in contact with. In short, the human factor will be decisive. This cannot be acceptable in a system that strives for harmonization and a coherent and uniform application of law. I do not considered that Frontex alone should be blamed for this situation as the agency lends its capacity from the EU and the member states, of which the latter is still primarily responsible for the control of its external borders. Frontex has the responsibility to ensure that operations coordinated and/or controlled by them are regulated by such provisions that give clear instructions on how affected personnel are to act and handle the relevant situations. However, member states also have the responsibility to make this a priority within their control of the external borders and to make it a prioritized part of their cooperation with Frontex and other actors.

In the following chapter, I will summarize the discussion and give my view on why it is vital that this problem is corrected, as well as what could be done to improve the situation.

5 Concluding remarks

The purpose of this thesis was to examine whether or not Frontex in any way could pose a hindrance for refugees in their attempts to utilize their right to seek international protection. I have examined if there exists coherency between the norms and regulations and the actual situations that refugees faced upon crossing the border of on one hand a national state, on the other hand the EU-area. In this chapter I will recapitulate some important points from the discussion as well as give my suggestions on how the situation could be improved.

What I have found is that regarding the national state, in this thesis exemplified by Sweden, the most invasive sanction found was clearly regulated within the framework of the law. The process is initiated when an alien comes in contact with the national authorities. In this situation, the individual have the possibility to apply for asylum. If they do so, what could possibly hinder them from having their application tried in Sweden would be if the application is found to be manifestly unfounded, or if the alien qualifies as a so-called Dublin-case. In both these alternatives, the alien will not have their application processed in Sweden. However, the spirit of the legislation is still respected as the aliens are tried as potential refugees until proven otherwise. They have access to a process, governed under law, until it has been decided that this is not necessary in the individual errand. In the first case, the individual is found to lack the need for international protection. In the second case, no decision is made regarding the possible need for asylum. It is only a decision regarding the proper instance for trying the claim. Therefore, the decision does not come in conflict with principles such as the rule of non-refoulement. I have not been able to find any incoherence between the regulations and the actual situation in the above examples. Without making any sort of value judgment regarding the rules in themselves, I consequently found that coherency exists in the above situation.

Regarding the EU-territory, in which Frontex operates, the international regulations are built on the same spirit and values that stand behind the national legislation in Sweden. This is one reason why we want to find coherency in this area. The increased efforts in creating a uniform asylum system within the EU also makes it important to make sure that coherency is present at all levels of the system. I have found that there does exist situations, mainly in the case of interceptions, where the necessary procedures to ensure that coherency is upheld are lacking. If the focus of the operations is to prevent illegal immigrants from crossing the external border of the EU, then there is a risk that the border guards performing this task will not make a difference between potential refugees and the "illegal immigrant". This risk is increased by the fact there are no procedures in place regulating how the categorization at the scene of refugees respectively immigrants is to be made. Since Frontex have a key responsibility regarding both risk analysis, education, coordination and organization of the managing of the external borders, a large responsibility falls on the organ to uphold

human rights in all aspects of their mission. A lack of doing so results not only in direct implications for the individuals affected, who do not attain access to a judicial process that they are entitled to. It does also affect the national asylum system indirectly, since the personnel of Frontex becomes at least partly responsible for making decisions on a level of authority, which rightfully is the obligation of the national states. Frontex may for example have the authority to act on behalf of the member states in matters of border control, but matters of asylum are still a matter for national states exclusively to make decisions in and these cases are to be processed and decided on by due national authorities. Frontex have been enjoined by the EU with the task of organizing the control of the external borders. At the same time, the responsibility of controlling the borders still falls mainly on the member states. The agency is therefore faced with the difficult situation of trying to coordinate a number of different actors without having the final decision-making or executive authority. Instead, it lends its authority, to that extend that it is given, from the member states. From this follows that for actions to secure the status of human rights to be successful, they must be implemented on all levels of the system and with all actors. As of today, Frontex does not have such procedures in place regarding their own work, not do they have the authority do demand such that such implementations are made by the member states.

As the EU seems to move more and more towards external border control, where the controls in some cases are actually moved outward from the physical borders, the responsibility of upholding human rights have to move with them. The right to seek asylum is universal, without territorial restrictions. This means that all representatives of a national authority, such as border guards, have to have the capacity, preparation and knowledge to identify and handle potential refugees and make sure they gain access to a judicial process. As stated before, it is essential that Frontex takes responsibility for the actions of their personnel and ensures that these actions are in line with upholding respect for human rights, specifically the right to seek protection. As can be seen today in the statistics of the agency itself, Frontex does not have a discussion regarding the definitions of refugees' versus illegal immigrants or how to separate the two. This lack of definitions is a symptom of the greater problem of how the separation of groups is actually being handled in practice. But any efforts from Frontex must also be followed by initiative from the member states, as the agency in large parts of their work cooperate and coordinate with national institutes such as border guards. This is also a vital aspect in guaranteeing that the common European asylum system becomes uniform and coherent. As long as actual practice can be allowed to vary as much as the current situation allows for, a serious problem with upholding the security of judicial system exist. It is therefore both desirable and imperative that procedures are instated to ensure that the management of refugees at the external borders of the EU and the safeguarding of their rights will become a priority at the highest level.

Implementing a set of regulations regarding how persons intercepted should be dealt with, with a clear set of steps to follow should be a starting point. This should also include further education of personnel that could come into

contact with potential refugees. As aliens seeking protection do not always have knowledge of their rights, it is up to the authorities they come in contact with to inform them of the right to seek protection and to ensure that they have the possibility to utilize that right if needed. Every individual intercepted while trying to cross a border or in a connected situation should be evaluated to investigate if they have any possible grounds for protection that should be examined further by the appointed authority. Only after that has been done should a decision be made if that individual is an illegal immigrant who should be refused entry to the territory, or a potential refugee who should be granted access while their application is assessed.

Bibliography

International instruments
The Universal Declaration of Human Rights

The 1951 Geneva Convention Relating to the Status of Refugees

The 1967 Protocol Relating to the Status of Refugees,

European Convention of Human Rights

Protocol No. 4 to the Convention for the protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

EU documents
Charter of Fundamental Rights of the European Union (2000/C 364/01)

Council Directive 2004/83/EC of 29 April 2004 in minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention

Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Council Regulation No. 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers

Frontex Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011

Cases
Council Decision of 26 April 2010 (2010/252/EU) OJ L111/20, 4.5.2010.

EU Court of Justice, judgment in Case C-355/10, of 5 September 2012

Swedish legislation
Swedish Aliens Act, Utlänningslag (2005:716)

Preparatory work
Proposition 1979/80:96 med förslag till ny utlänningslag m.m.

Proposition 1988/89:86 med förslag till utlänningslag m.m.

Proposition 2004/05:170 Ny instans- och processordning i utlännings- och medborgarskapsärenden

Literature
Carr, Matthew (2012) *Fortress Europe. Dispatches from a Gated Continent.* The New Press, New York

Cetti, F (2012) ”Asylum and the European ’security state’. The construction of the ’global outsider’”, in *Globalisation, Migration and the Future of Europe. Insiders and Outsider* (Edited by Simona Talani, Leila) Routledge, London and New York

Hansen, Peo (2008) *The EU migration policy for 50 years. An integrated perspective on contradictory development* (*EU:s migrationspolitik under 50 år. Ett integrerat perspektiv på en motsägelsefull utveckling).* Studentlitteratur.

Peczenik, Aleksander (1989) *On Law and Reason*, Vol. 8, Kluwer Academic Publishers, Dordrecht, Boston, London

Perelman, Ch. (1963) *The idea of justice and the Problem of Argument*, Routledge & Kegan Paul, London

Simona Talani, L (2012) ”The internal and external dimension of the ’Fortress Europe’ in *Globalisation, Migration and the Future of Europe. Insiders and Outsider* (Edited by Simona Talani, Leila) Routledge, London and New York

Wikrén, Gerhard och Sandesjö, Håkan (2010) *The Swedish Aliens Act with comments* (*Utlänningslagen med kommentarer)*, 9 uppl, Nordstedts Juridik AB, Stockholm

Articles
Ahumada-Jaidi, Audelina (2010) *Border control and internal security in the European Union – information, technology and human rights implications for third-country nationals*, Detecter, Seventh Framework Programme

Ahumada-Jaidi, Audelina (2011) *Preventing irregular immigration through interception: Recommendations for a human rights compatible maritime border policy in the European Union*, Detecter, Seventh Framework Programme

Brouwer, A & Kumin, J (2003), *Interception and Asylum: When Migration Control and Human Rights Collide.* Refuge 2003, Vol 21, No. 4, s. 6-24

Peczenik, Aleksander (2005), *Jurisprudential General Teachings* (*Juridikens allmänna läror).* SvJT, häfte 3, s. 249-272

Reports and other sources
Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) Geneva Dec 2010

European Council of Refugees and Exiles (ECRE) (2007), Defending Refugee's Access to Protection in Europe

Legal standpoints of the Head of the Migration Board concerning rejection with immediate enforcement in accordance with the Swedish Aliens Act chapter 8 § 6 (Rättschefens rättsliga ställningstagande angående avvisning med omedelbar verkställighet enligt 8 kap. 6 § utlänningslagen).
RCI 03/2012. Migrationsverket. Beslutsdatum 2012-02-10

Internet sources – All links last visited 2013-01-07
http://www.ecre.org/refugees/refugees-in-the-eu.html

http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html

http://www.frontex.europa.eu/about/origin

http://www.frontex.europa.eu/about/mission-and-tasks

http://wwww.frontex.europa.eu/operations/types-of-operations

http://www.guardian.co.uk/world/2012/dec/07/syrian-refugees-turned-back-greek

http://www.migrationsverket.se/info/5357.html
"Avgjorda asylärenden 2011 – Asylum decisions 2011.pdf"

http://www.temaasyl.se/Templates/Page.aspx?id=736

http://www.unhcr.org/4a02d4546.html (Press release 7 May 2009)

http://www.unhcr.se/en/who-we-help/asylum-seekers/artikel/b68dc2b0b1a6abca670f4fccf0732666/unhcr-urges-eu-and-frontex-to-ensure.html (Press release 10 December 2010)