

MORAIS BISMARQUE GASPAR Ana Gloria

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From: Luisa Marin [REDACTED]
Sent: 05 September 2012 15:01
To: Euro-Ombudsman
Subject: [EOWEB] inquiry into the implementation by Frontex of its fundamental rights obligations - contribution
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Sender

Sender Luisa Marin [REDACTED]
Date Wednesday, September 5, 2012 3:00:34 PM CEST

Your data

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Other language you would accept an answer in (if applicable) fr - français

Part 2 - Data

Subject inquiry into the implementation by Frontex of its fundamental rights obligations - contribution
 Dear Madam/Sir,

with the current email I submit my contribution to the inquiry on the implementation by Frontex of its fundamental rights obligations under EU law.

It is an academic article of mine, recently published on the Journal for Contemporary European Research (n. 4/2011) in which I have assessed the compliance of some Frontex' JO with two constitutional paradigms of EU law, i.e., compliance with rule of law and fundamental rights.

I am an academic with a solid research record in the policies of the Area of Freedom, Security and Justice, as well as a member of the Commissie Meijers, a Standing Committee of international experts in the fields of international migration law and criminal law.

Content

Looking forward to hearing from you.

Kind regards,

Luisa Marin

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Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border

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Abstract

This paper deals with policing the external borders of the European Union (EU), an issue that recently has witnessed significant developments in connection with the externalisation of the fight against undocumented migration. After a presentation of the conceptual elements underpinning the research (1), the paper presents the EU agency Frontex and its origin, tasks and responsibilities (2). The next section will focus on Frontex-led operations carried out at the southern maritime border (3), in order to critically look at issues arising in this context (4), with reference to their legal framework. The results of my analysis will be discussed in connection with the externalisation of migration policies, arguing that the EU and Member States (MSs) have engaged into a multiple exercise of venue shopping, to conclude with a (hopeful) outlook on the future, with the Lisbon Treaty providing new possibilities to fix current problems (5).

Keywords

External borders; Externalisation; Frontex; Rule of law

THIS INTRODUCTION AIMS TO PROVIDE A FRAMEWORK FOR UNDERSTANDING POLICING the external borders in the European Union (EU), by unpacking the topics under exam into their fundamentals, *i.e.* policing, (external) borders and persons.

The first conceptual element underpinning my article is policing. The main tasks of policing consist, first, of tackling crime (crime fighting and crime prevention) as the most salient expression of law enforcement, and, secondly, order maintenance. In order to fulfil

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these core missions, police actors are traditionally entrusted some powers, such as the legitimate use of force and information gathering.¹

The EU treaties indeed have formalised cooperation on policing since Maastricht (1992); later (1995), the EU has established a dedicated agency, Europol.² With the EU growing as a multi-level governance system, we witness a shift of sovereignty beyond the state:³ this broader process has an impact also on policing: European integration added a transnational dimension to policing.⁴ Policing semantically refers to police, the main actor performing policing tasks, a concept which has traditionally - since modern history - evoked the state. The transnational dimension of policing, at EU level, is shifting it toward operational cooperation across police actors' networks⁵, as well as information exchange, enhanced by technologies available nowadays; the latest practices of policing as carried out in transnational networks have been conceptualised as policing at a distance, remote controls, and also externalisation of policing.⁶ In this paper I will investigate specifically these recently emerging phenomena of externalisation of policing, as the activity of controlling and securing law enforcement in a given domain, in my case external borders. I will present actors and operations. The analysis will then move on to the legal problems arising in this framework.

The second fundamental element of this paper is external borders. The physical borders of a state define its territory, which is normally the area over which a state exercises its sovereignty, the limits for its jurisdiction.⁷ Also in this context, the influence of European integration has been enormous. Europe has been displaying deep changes on frontiers, thanks to the internal market project and its freedom of movement *rationale*: borders among MSs have lost most of their meanings with the enforcement of freedoms of movement. Lately, the Schengen process has achieved the removal of internal frontiers and the strengthening of external borders.⁸ The ambitious project of the Area of Freedom, Security and Justice (AFSJ), "without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime"⁹ have consolidated these milestones into something that aims at developing into something more coherent: the *status quo* however is often perceived as problematic, unbalancing (internal) security and freedoms, focusing on cooperation among state authorities and undermining traditional guarantees such as individuals' rights. All these developments

¹ See the paper by Stephen Rozée, "The European Union as a Comprehensive Police Actor", presented at the 2nd UACES conference "Policing the Frontier in Post-Stockholm Europe", held at the University of Abertay Dundee (UK), 25 February 2011.

² Earlier MSs established informal cooperation in specific areas, like terrorism and domestic and non domestic threats to internal security: the TREVI group is the best known example. See Trybus and White (eds.), *European Security Law* (OUP, 2007); see also E. Baker and C. Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar', (2009) 34 *European Law Review* 25.

³ N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), but also N. Walker (ed.), *Relocating Sovereignty* (Ashgate, 2006).

⁴ N. Walker, 'The pattern of transnational policing', in T. Newburn (ed.), *Handbook of Policing* (Devon: Willan Publishing, 2003).

⁵ D. Bigo, *Polices en réseaux: l'expérience européenne* (Presses de Sciences Po, 1996).

⁶ See E. Guild and D. Bigo, 'The Transformation of European Border Controls', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden-Boston, 2010), p. 258-259.

⁷ Being extraterritorial jurisdiction as something relatively exceptional, but definitely a possibility: see states' responsibilities for actions carried out outside their borders under the ECvHR. Cf. E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, cit., p. 206-207; A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, cit., p. 233.

⁸ See E. Guild, *Moving the Borders of Europe*, inaugural lecture, available at www.jur.ru.nl/cmr/docs/oratie.eg.pdf; K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders* (Kluwer, 2003).

⁹ Article 3(2) TEU.

have an impact on the way states exercise their jurisdiction and thus manifest their sovereignty, and, consequently, on the way they frame the relation between state powers and individuals.

In a broader perspective we cannot escape the question of the meaning of borders in a globalised world: what do borders stand for nowadays? Can borders still function as a gate for the movement of persons across the world, and if so, to which extent? How can state authorities legitimise their attempts to control migration phenomena? Europe is no less touched by these questions: in particular borders represent for Europe a test to assess EU's practical adherence to its founding values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, just to mention some from Article 2 TEU. Technology brings in also a number of ethical issues arising from the "promise" of smart border management.

The third core element underlying this paper concerns persons, as stakeholders affected by the activity of policing borders. As a result of developments in infrastructures and transports having occurred in recent times, of the (political implications of the) fall of the Berlin wall and more broadly for demographic changes at global level, mobility has increased significantly in the last decades, determining a metamorphosis of migration phenomena. "Access to Europe", "the fortress", is a sensitive political issue for the EU and MSs' governments nowadays. Persistent poverty, made more acute by the economic crisis that has occurred in the last years, is exasperating this situation.¹⁰ The recent political instabilities in the North African countries can be interpreted as the top of this iceberg. The interests and aspirations of persons willing to come to Europe (for many different purposes) force us to reconsider the way we frame the relation between person and territory and also between *us*, Europeans, and *the others*, persons coming from the rest of the world, technically called 'third country nationals' (TCNs). In this perspective non-European persons seeking access to Europe are stakeholders: in some circumstances as holders of rights (e.g. legal migrants entitled to come to Europe maybe because they are highly skilled), other times as objects of other people's (non-legal) interests and activities. I herewith refer to the phenomena of facilitating undocumented migration, smuggling of migrants and human trafficking.¹¹ Though the focus of this paper will remain on policing external borders, one should nevertheless be aware that the way of framing access to the territory of a country has implications on the freedom of other persons, on the notion of person as holder of rights, and eventually on the very basic idea of human being.¹²

Having sketched the conceptual elements underpinning the research, the paper will continue by presenting the EU agency Frontex and its origin, tasks and responsibilities (2). A next section will focus on Frontex-led operations carried out at the southern maritime border (3), in order to critically look at issues arising in this context (4), with special attention to the rule of law and respect for fundamental rights. The results of my analysis

¹⁰ G. Sapelli, 'Disoccupazione, rivolte e immigrazione', in *Corriere della Sera*, 19.2.2011.

¹¹ The Trafficking Protocol defines at Article 3 trafficking in persons as: "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used". Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

¹² See E. Guild and D. Bigo, *The Transformation of European Border Controls*, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control*, cit., p. 257-261.

will be discussed in connection with the externalisation of migration policies, arguing that the EU and MSs have engaged into a multiple exercise of venue shopping, to conclude with a (hopeful) outlook on the future, with the Lisbon Treaty and a recent legislative reform providing new possibilities to fix current problems (5). The next paragraph will focus on analysing the set-up of Frontex, in order to look then at its activities in a specific domain, *i.e.* maritime borders.

Frontex: its establishment, its mandate, its powers

Origins and purpose

Frontières extérieures lays at the origin of the name Frontex. The European Borders Agency (Frontex) has been set up in 2004¹³ and reformed in 2007;¹⁴ another reform has been passed while this article went to press.¹⁵ Its birth as a Community agency¹⁶ on the legal basis of the old Treaty of the European Community (TEC), namely Article 62(2)(a) and Article 66 TEC, was possible according to the consolidated case law on implied powers.¹⁷ Those provisions granted the EC powers to adopt measures on the crossing of the external borders, by establishing standards and procedures to be followed by MSs in carrying out checks on persons at such borders and measures to ensure cooperation between the relevant departments of the administrations of the MSs and between Commission and MSs.

In a policy perspective, setting up a regulatory agency is part of a consolidated trend that has witnessed the development of a plethora of agencies not only at (formerly) EC level, but also in the AFSJ: I refer at Europol and Eurojust as the two main agencies in the field. In its White Paper on European Governance,¹⁸ the Commission envisaged better application of EU rules through regulatory agencies: "the advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission the creation of agencies is also a useful way of ensuring it focuses resources on core tasks".¹⁹

Frontex is based on the experience of the fragmented External Borders' Practitioners Common Unit,²⁰ which gathered together the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), a Council Working Party, plus the heads of national border

¹³ 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, OJ L 349/1; hereinafter: Frontex Regulation.

¹⁴ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers; OJ L199/30.

¹⁵ See Regulation (EU) 2011/1168 amending Council Regulation (EC) No 2007/2004 of 26 October 2004, in OJ L 304 22.11.2011, p. 0001. For a survey on the preparation of the new Regulation, see COM (2010) 61 final: Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

¹⁶ D. Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, (OUP, 2009), p. 146-147, describes agencies as the 'satellite executive power'.

¹⁷ The reference is of course to the seminal ECJ's case *AETR*: case 22/70, *Commission v. Council (AETR)* [1971] ECR 263. See also J.J. Rijpma and M. Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law', *EUI Working Papers LAW 2007/01*, quoting readmission agreements adopted on the legal basis of Article 63(3)(b) TEC as an example of act adopted by the EC without an express treaty reference to such instruments (p. 10-11).

¹⁸ COM (2001) 428 final, p. 24.

¹⁹ *Ibidem*. See also S. Leonard, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', 5 *Journal of Contemporary European Research*, 2009, pp. 371-388.

²⁰ See Frontex Regulation, Recital 13.

control services (SCIFA+).²¹ It consolidates in one institution the network of domestic administrative actors: "Europe's new administrative order does not replace former orders; instead it tends to be layered around already existing orders", in the words of Curtin and Egeberg;²² this is valid also for the agency dealing with external borders. Frontex represents a compromise between Commission, Council and MSs: though the Commission was oriented toward a supranational agency,²³ inspired by the proposal of 'European Border Police',²⁴ it had to accept the solution put forward by the Council,²⁵ acknowledging the need to increase cooperation, coordination, convergence and consistency between borders' practitioners in the EU MSs, and pushing for the creation of a number of pilot projects and national contact points, within the framework of the mentioned External Borders' Practitioners Common Unit. This typically European compromise between supranationalism and intergovernmentalism is also visible in the structure of Frontex: created as a Community agency in the (Treaty of) Amsterdam era, with its consolidation of the Schengen *acquis* and the partial communitarisation of the former third pillar, in particular of migration and visa policies, Frontex presents nevertheless intergovernmental features: its management board is composed by two Commission officials and the heads of national border guard services.²⁶

Besides a regulatory dimension, Frontex is coordinating agency, part of a broader network, and thus one of its aims is putting domestic border guard agents in a network. The coordinating and network function fulfilled by the agency should reinforce the exchange of information and the establishment of contacts: two important pre-conditions for the development of mutual trust.²⁷ In Curtin's words,²⁸ with Frontex (and other agencies), we witness a "Europeanization of the functions of the administrations of the MSs rather than the delegation of powers of the Commission authorities as such". Actually in the case of Frontex the Council did not delegate its own powers, or Commission's powers, but tasks so far largely fulfilled by MSs authorities. This is clearly reflected in the composition of the Management Board.

If MSs' political will can, within the European Union's legal framework, legitimately decide the creation of a new agency like Frontex,²⁹ its mandate and its powers are nevertheless bound by the treaties: therefore Frontex's mandate should be placed *within the legal limits* of "measures" establishing "standards and procedures to be followed by Member States in carrying out checks on persons" at the external borders, and of "measures to ensure cooperation between the (...) administrations of the Member States (...), as well as

²¹ See A. Neal, 'Securitization and Risk at the EU Border: The Origin of Frontex', (2009) 47 *Journal of Common Market Studies*, 333, 341.

²² D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's accumulated executive order', (2008) 31 *Western European Politic*, 640.

²³ Commission's Communication – Toward integrated management of the external borders of the Member States of the European Union, COM(2002)233 final, p. 12, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0233:FIN:EN:PDF>.

²⁴ The reference is to the feasibility study on a 'European Border Police', initiated by Belgium, France, Germany, Italy and Spain. See A. Neal, 'Securitization and Risk', cit., 340.

²⁵ Council of the European Union: 'Plan for the management of the external borders of the EU', Council Doc. 10019/02, 14 June 2002; available at http://ec.europa.eu/justice/funding/2004_2007/doc/plan_management_external_borders.pdf

²⁶ A. Neal, 'Securitization and Risk', cit., 343.

²⁷ J. Rijpma, *Building Borders: the Regulatory Framework for the Management of the External Borders of the European Union*, EU PhD thesis 2009, 259.

²⁸ D. Curtin, *Executive Power of the European Union*, cit., 165.

²⁹ "(...) for each of them, the decision to create them is motivated by the need to correspond to the particular circumstances of the moment. In certain cases the occurrence of a crisis that has aroused public sensitivity is the basis of the decision to create the agency", so one reads in the Report by the Working Group "Establishing a framework for Decision making Regulatory Agencies", in preparation of Commission White paper on European Governance. Quoted by D. Curtin, *Executive Power of the European Union*, cit., 148.

between those departments and the Commission":³⁰ this remit should be also visible in the Frontex Regulation, to which we now turn.

Article 1 states that Frontex is established with the mission of "improving the integrated management of the external borders of the Member States (...)", a concept defined by a Council document of 2006³¹ and endorsed by the European Council of 4-5 December 2006.³² Integrated border management comprises:

- 1) Border control (checks and surveillance);
- 2) Detection and investigation of cross border crime;
- 3) The four-tier access control model, comprising measures in third countries (TC), cooperation with neighboring countries, border control, control measures within the area of movements, including return;
- 4) Inter-agency cooperation;
- 5) Coordination and coherence on actions at EU level.

It appears that integrated border management goes beyond border checks and surveillance, and embraces also investigation of cross border crime and cooperation with TC.³³ The former, in particular, was not a Community task, but definitively falling under the cooperation structure put in place with the former third pillar.

The legal text regulating the internal and external border management, the Schengen Border Code (SBC),³⁴ was also adopted only in 2006, more than one year after Frontex became operational.³⁵

Frontex's main tasks and responsibilities

According to the Frontex Regulation, the Agency's main tasks are:

- coordinate operational cooperation between Member States in the management of external borders of the EU;³⁶
- assist them in circumstances requiring increased technical and operational assistance at external borders;³⁷
- provide them the necessary support in organizing joint return operations.³⁸

Besides this core operational dimension, the other main tasks include:

- assist Member States on training of national border guards, including the establishment of common training standards,
- carry out risk analyses;

³⁰ See Treaty provisions quoted above, note 16.

³¹ Council document No 14202/06, draft Council conclusions on integrated border management. The concept has been previously referred at in Commission's Communication -Toward integrated management of the external borders of the Member States of the European Union, COM(2002)233 final, cit.

³² Council Conclusions on Justice and Home Affairs Council, Brussels, 4-5 December 2006.

³³ See A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 233.

³⁴ Regulation (EC) No 562/2006 of the European Parliament and of the Council, OJ L 105/01.

³⁵ E. Guild and D. Bigo, 'The Transformation of European Border Controls', cit., 268.

³⁶ Article 2(1) letter a).

³⁷ *Ibidem*, letter e).

³⁸ *Ibidem*, letter f).

- follow up on the development of relevant research for the control and surveillance of external borders.³⁹

Providing a rapid crisis-response capability available to all Member States, through so-called Rapid Border Intervention Teams (RABITs), is the additional mission of Frontex, the tool to be used when risk analysis and intelligence activities (also by Frontex) fail to predict risks or events MSs want to react to.⁴⁰

The core provisions of the Regulation disciplines more in detail the organisation and realisation of the main tasks presented above. Other provisions of the Frontex Regulation, such as Articles 13 and 14, reveal the broad scope of the action they allow to the Agency, the first one enabling Frontex to conclude working arrangements with other EU agencies and the second one with TC and their authorities. Though this second type of working arrangements have not been considered as binding international agreements, they nevertheless reveal operational autonomy.⁴¹

Another interesting legal question surrounding Frontex concerns the responsibility for its operations; one could ironically say that the 'border of responsibilities' between Frontex and EU's MSs looks fuzzy.

On one side, recital 4 and Article 1(2) of the Frontex Regulation limit clearly the Agency's responsibilities: "while considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future" Community measures on the management of external borders.⁴² On the other side, Baldaccini⁴³ has underlined that "Frontex effectively initiates the coordination it engages in", by carrying out risk analyses that eventually will be the basis for Frontex joint operations.⁴⁴ Article 3 of the Frontex Regulation also provides that Frontex itself may launch initiatives for joint operations, in agreement with MSs, operations that it will eventually assess in order to enhance quality, coherence and efficacy. Bearing this in mind, and considering as well the relevant action carried out by Frontex regarding intelligence and information gathering, one has to be aware that Frontex' coordinating function should not be underestimated. It definitively cannot be interpreted as a body with mere coadjutor functions. One can thus conclude that there is a gap between Frontex's role and function, considering the remit and scope of its interventions, which is way more complex than neutral cooperation, and the actor(s) bearing the final responsibility for those activities.

Analysing Frontex competences, the first assessment to be made is that the core focus of the Agency is put on operational aspects: coordinating MSs' operational cooperation and providing assistance to MSs' authorities are the main tasks of the agency, as established in the Frontex Regulation.⁴⁵ The operational nature of the tasks performed by Frontex has

³⁹ Article 2(1) letters b), c), d) respectively.

⁴⁰ Regulation No 863/2007/EC.

⁴² See Article 1(2) Frontex Regulation. See also E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.

⁴³ COWI Evaluation report, 15.1.2009, see Frontex website. See also A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 233.

⁴⁴ Ex Article 2(1), letter c), Frontex Regulation.

⁴⁵ So one can read in Frontex Press release: 'Frontex - facts and myths' (available at www.frontex.europa.eu), by Ilkka Laitinen: "Summing up I would like to remind that Frontex activities are supplementary to those undertaken by the Member States. Frontex doesn't have any monopole on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision takers, as Frontex only executes its duties described in the Regulation 2007/2004." In J. Rijpma, *Building Borders*, cit. See also the Commission Communication on European Agencies – The Way Forward COM (2008)135, p. 7, where Frontex is classified as an agency "in charge of operational activities", like Eurojust, Europol and CEPOL: "Agencies can be classified in different ways. One useful way is to try to look at the key functions they perform. Although

been strong since its establishment and the reform of 2007 has confirmed this trend, strengthening the tasks and powers of officers participating in Frontex operations:⁴⁶ there seems to be a stable evolution stressing Agency's operational dimension,⁴⁷ corresponding also to the way the Agency profiles itself. Its reports are written in a very technocratic jargon, stressing cooperation aspects, co-ordination function and management logics applied to external borders. All this is purposely meant to evocate knowledge- and expertise-based legitimacy, and output legitimacy, with the view to strengthen the credibility of its activities.

However, in spite of this apparently limited, and thus clearly defined, set of competences, scholars as Curtin have considered Frontex as an example of the third wave of agencies, *i.e.* "agencies with more overtly regulatory and far-reaching tasks in many instances",⁴⁸ confirming the analysis proposed by scholars like Baldaccini, who devoted considerable attention to Frontex' operations.

After having analyzed Frontex's main regulatory framework, the next paragraph will focus indeed on its activities and operations, and the legal issues they create within the AFSJ. The scope of the analysis has been limited to operations conducted at sea.

Frontex operations at sea

Some facts and figures about what happens at sea

Since the beginning of its functioning, the number of sea border joint operations Frontex is carrying out is increasing every year, as well as the number of participating states.⁴⁹ The trend is also reflected in the annual budgets, increased in a significant manner: in 2008, 31,1 MEUR out of 50,635, representing 62% of the total budget is devoted to sea borders control and operations, whereas the second voice (13% of the budget) is represented by training (of border guards).⁵⁰

This is due to the pressure coming from southern maritime borders countries (Spain, Italy, Malta, Greece), faced with the problem of migrants approaching their costs from the sea. The lack of controls at internal frontiers coupled with the establishment of a common external border - the main axes of the Schengen *acquis* - pushed those countries to require the EU and (thus) other MSs to join their efforts in policing the external borders. 'Sharing a burden' otherwise not proportionate is the argument often referred at by those MSs to ask for the financial solidarity from other MSs. In spite of this constant political pressure, a counterargument often referred by academics is that figures show that irregular migration at maritime borders does not represent a significant *ratio* of the whole phenomenon, and that the successful effects of operations at sea is not clear.⁵¹ This element requires attention because it can undermine the political desirability of these operations and questions the proportionality of the resources involved with the results achieved. Recent political instabilities in the North African States have made the problem more acute in 2011.⁵²

agencies often perform a number of different roles, an analysis of the centre of gravity of agencies' activities suggests the following categories: (*omissis*)".

⁴⁶ See Article 6 and 7, Regulation (EC) No 863/2007, cited above.

⁴⁷ See JHA Council of 5-6 June 2008; Commission COM (2009) 262 p.18; earlier: COM (2008) 67 p. 5.

⁴⁸ D. Curtin, *Executive Power of the European Union*, cit., 148.

⁴⁹ See Frontex Press Pack, available at www.frontex.europa.eu

⁵⁰ COWI report, cit., p. 25.

⁵¹ COWI report, cit., and A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 239.

⁵² "Maroni: 'Rischi umanitari e terrorismo'. L'Italia chiede missione davanti alla 'Tunisia", at http://www.repubblica.it/cronaca/2011/02/11/news/maroni_problema_tunisia-12329395/ ; "Emergenza

Frontex has carried out several activities at sea in the near past: we will present Joint Operations (JO) Hera and Nautilus that were carried out in the southern maritime border of Europe, respectively at its western and central part. JO Poseidon concerned southern eastern both land (between Greece and Turkey, Greece and Bulgaria and Albania) and maritime borders. Considering the focus of this article on sea operations and the better availability of information on the first two JO, the latter will not be examined in this analysis, though recently the land part of Poseidon 2011 has received media's attention and criticism, especially in connection with the situation in the Greek region of Evros, close to the Turkish border.⁵³ While JO Hera and Nautilus are not so recent, the problems they beg are still not resolved: also in 2011, an estimate of about 2,000 people are reported as dead or disappeared at sea in the Mediterranean. In the words of the Dutch MP Tineke Strik, Rapporteur for the Parliamentary Assembly of the Council of Europe (PACE) currently investigating on these accidents, "this means that precisely in the year the Mediterranean region was subject to the most surveillance, the largest amount of deaths or disappearances were recorded".⁵⁴

Looking at JO Hera, one must observe that the trend has been the following: in the first phase (Hera I) experts have been deployed to Canary Island to assist with 'identification' (of nationality) of undocumented migrants. In a second phase (Hera II) the operation shifted toward joint sea surveillance operations, by dissuading small boats (*pateras* and *cayucos*) to sail off from African states: if boats were found at sea but within 24 nautical miles off the coast, the objective was to intercept them and divert them back to the country of embarkation, *i.e.* Senegal, Mauritania or Cape Verde; if they were intercepted in the high seas, they were escorted to Canary Islands. The third phase (Hera III) consisted also in joint aerial and naval patrols, to intercept and divert boats, in cooperation with Senegalese and Mauritanian authorities. In a Frontex News Release on JO Hera, one can read that the Agency detected vessels setting off toward Canary Islands, and diverted them back to Senegal and Mauritania,⁵⁵ on the basis of secret bilateral agreements between Spain and Senegal and between Spain and Mauritania.

The questions here are: under which legal basis is it possible for Frontex to cooperate to these operations? Frontex self was not part to those agreements. Secondly, within Frontex joint patrols, MSS' officials other than the Spanish ones are also involved; the fact that Frontex cooperates in missions without a clear legal framework represent a serious problem also for those officials, besides the Agency self.⁵⁶

sbarchi, scontro Ue-Maroni. La Tunisia: no alla polizia italiana", at http://www.repubblica.it/cronaca/2011/02/13/news/maroni_emergenza-12402756/

⁵³ See the Human Right Watch Report "The EU's Dirty Hands. Frontex Involvement of Ill-Treatment of Migrant Detainees in Greece", 2011, available at <http://www.hrw.org>, accessed 12.12.2011.

⁵⁴ ECRE (European Council for Refugees and Exiles) Interview with Tineke Strik (9.12.2011), member of the PACE: its Migration Committee is currently investigating on 2011 accidents in the Mediterranean. The interview is available at <http://migrantsatsea.wordpress.com/2011/12/12/ecre-interview-with-tineke-strik-regarding-pace-investigation-into-migrants-deaths-in-mediterranean/>, accessed 12.12.2011.

⁵⁵ "Based on their bilateral agreements with Spain, Senegal and Mauritania were also involved with their assets and staff. The main aim of this joint effort was to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea. During the course of the operation more than 3,500 migrants were stopped from this dangerous endeavour close to African coast". News Release "Longest Frontex coordinated operation – Hera, the Canary Islands" of 19-12-2006, available at http://www.frontex.europa.eu/newsroom/news_releases/art8.html . For figures, see the statistic published on Frontex's webpage.

⁵⁶ S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', in A. von Bogdandy and R. Wolfrum (eds.), (2008) 12 *Max Planck Yearbook of United Nations Law*, (Brill, 2008), 205, 245; S. Trevisanut, 'Maritime Border Control and the Protection of Asylum Seekers in the European Union', (2009) 12 *Touro International Law Review*, 157, 159.

This triggers further questions of whether acts of Frontex are sufficiently underpinned by a sound legal framework, and whether the interpretation of those acts is within the boundaries of correct interpretation techniques, and does not threaten rule of law.

The second series of operations considered is JO Nautilus, stopped because of the disagreement of Malta as to the sharing of responsibility for migrants saved at sea, and later reorganised as JO Chronos.⁵⁷ In the several stages of JO Nautilus (2006, 2007, 2008, 2009), there is uncertainty of information as to what has happened. There is little or no official information on Frontex's website on Nautilus IV (2009), nor on JO Chronos, for example. In the 2006 and 2007 operations, Frontex statements declare that about 3000 migrants were intercepted, one third within the operational area, two thirds outside it.⁵⁸ In 2008 operations, Frontex declared that no migrant was diverted back or deterred; instead some 15 facilitators were arrested. Frontex statistics for Nautilus 2008 tell that 16098 migrants arrived to Italy, whereas 2321 to Malta.

NGO's and academic sources tell another story. About Nautilus II one can read that Maltese state secretaries from Ministry of Interior reported that 700 irregular migrants were brought back to Libya, whereas several maritime squadrons denied this ever happened.⁵⁹ Furthermore, one can learn that the Schengen Border Code was not applied because Malta was not yet a member of the Schengen Agreement. The legal basis of those operations was unclear, and how to intercept migrants and where and how to take them were discussed on an *ad hoc* basis by military and security officials, thus "reinforcing (...) [their] discretion".⁶⁰

According to the NGO Human Rights Watch⁶¹, Nautilus operation IV (April-October 2009) "resulted in the interdiction and push back of migrants in the central Mediterranean Sea to Libya", with the cooperation of a German helicopter and under the coordination of the Italian coast guard. The boat was carrying 75 migrants and has been "handed over" to a Libyan patrol boat, which "took them" to Tripoli, where they were assigned to a military unit. The Human Rights Watch report quotes also a declaration of Frontex Vice-Director, Mr Gil Arias-Fernandez, who commented favourably this operation: "Based on our statistics, we are able to say that the agreements [between Libya and Italy] have had a positive impact. On the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency does not have the ability to confirm if the right to request asylum as well as other human rights are being respected in Libya."

According to other sources,⁶² Frontex Director denied the involvement of the Agency in such operation, and clarified that the Italian push-back operations took place outside Frontex's operational area.⁶³ Now, a question remains: where is the truth? Even accepting that diversion operations have been carried out by Italy on the basis of the Treaty of Friendship, Partnership and Cooperation with Libya,⁶⁴ how can someone accept that there was no overlap among operational areas if Frontex operational plans remain secret? As

⁵⁷ M. Tondini, 'Fishers of Men? The Interception of Migrants in the Mediterranean Sea and Their Forced Return to Libya', *INEX Paper*, October 2010, at www.inexproject.eu, 16.

⁵⁸ This means that Frontex knows what happens also outside the operational areas of its JO.

⁵⁹ S. Klepp, 'A Contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea', (2010)12 *European Journal of Migration and Law*, 1, 16.

⁶⁰ S. Klepp, 'A Contested Asylum System', cit., 17.

⁶¹ See Human Rights Watch Report "Pushed Back, Pushed Around", available at <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0>, p. 37.

⁶² M. Tondini, 'Fishers of Men?', cit., 16.

⁶³ M. Tondini, 'Fishers of Men?', cit., 17.

⁶⁴ Signed in Bengasi on 30 August 2008. For a comment see "Il trattato Italia-Libia di amicizia, partenariato e cooperazione", dossier n. 108/2009, under the direction of N. Ronzitti, available at http://www.iai.it/pdf/Oss_Transatlantico/108.pdf. Additional Technical-Operational Protocol of 4 February 2009, not publicly available.

observed by Moreno Lax,⁶⁵ one has to recognise at least some extent of complementarity among Frontex operations and Italian 'push-back' operations: if Frontex claims that a massive displacement of migration flows from sea to land is the consequence of the "effectiveness of Frontex activities at the sea borders" as well as "national bilateral agreements in these areas", Frontex should rightly be considered among the victims of its own success.

A (tentative) assessment of Frontex operations

Considering that all these maritime operations take place at sea, one has to observe that it is relatively difficult for independent media to have access to information on what happens in remote areas: "On what happens on the high seas there is no direct information, and there will never be"⁶⁶, so stated a *Guardia di Finanza* Colonel, in the audio-documentary *Krieg Im Mittelmeer* by Roman Herzog.⁶⁷ This complicates also the work of scholars: here more than in other areas, part of the task is also to try to find out a plausible version of reality, which is journalistic ability. Only in a second moment, one can try and conduct a legal analysis on the overall picture as resulting from this process of elaboration on facts, taken from a variety of conflicting, and somehow also biased, sources.

This objective scarcity of sources need to be confronted with another obstacle: the information available on Frontex's operations at sea is presenting different, sometimes conflicting, pictures: if Frontex (scarce and well-controlled) reports depict operational missions delivering nothing but outputs technically measurable (number of persons intercepted, facilitators arrested, persons saved, etc.), the same reports do not tell or explain what has happened in reality to migrants and how; in contrast academic research and NGOs' reports focus on the migration dimension of these operations.⁶⁸ While some sources seem to argue that migrants even benefit from these operations, as they perceive the level of security of their desperate journeys is increased,⁶⁹ most of the independent information and analysis attribute to those operations disruptive effective on migration routes, and regularly report severe accidents where massive numbers of human lives are lost. Without engaging here into sociological investigations, this paragraph will nevertheless try to qualify these operations in legal terms and, consequently, to analyze their legality, both with reference to the respect of the rule of law and with EU's commitment to respect fundamental human rights.

As to the conceptualisation in legal terms of operations coordinated by Frontex, one needs to go beyond the rhetoric of Frontex reports, stressing the management dimension of its operations at borders: some of those operations (such as Hera II, III) are actual interdiction programs against migrants, a practice that has developed alongside the right to visit as stated in the law of the seas.⁷⁰ If the actual role of Frontex is unclear in operations

⁶⁵ V. Moreno Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, *International Journal of Refugee Law* 23 (2011), 174-220.

⁶⁶ "Su quello che veramente accade in mare non ci sono informazioni dirette e mai ci saranno", statement from Colonel Manozzi of the *Guardia di Finanza*; my translation from Italian.

⁶⁷ Audio-documentary available at <http://fortresseurope.blogspot.com/2006/01/frontex-krieg-im-mittelmeer.html>. See also M. Tondini, '*Fishers of Men?*', cit., 3, footnote 1. See also A. Baldaccini, '*Extraterritorial Border Controls in the EU*', cit., p. 242.

⁶⁸ See for example the reports of Statewatch, the weblog *Migrants At Sea*, <http://migrantsatsea.wordpress.com>, Human Rights Watch, the RefWorld tool of UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>

⁶⁹ COWI report, cit.

⁷⁰ The reference is to Art. 110 of the United Nations Convention on the Law of the Seas (UNCLOS), establishing a right to visit. The general principles are set in Article 87, freedom of the high seas, and Article 90, right of navigation. The UN Convention is available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 12.7.2011). See also S. Trevisanut, '*Maritime Border Control*', cit., 158. On interdiction programs and arms control policies, see M. Knights, '*Maritime Interdiction in the Gulf: Developing a Culture of Focused Interdiction Using Existing*

such as Nautilus IV of 2009 and parallel Italian-led interceptions,⁷¹ it remains nevertheless undisputed that *in occasion of* or *alongside* a Frontex-coordinated operation a single member state, Italy, has been sending back migrants to Libya. This also amounts to maritime interdiction or interception practices, carried out in both cases by semi-military agencies.⁷² In the Hera II and III operations we count respectively 1243 people and more than 1,167 (Hera III in 2007) and 5,969 migrants (Hera 2008) diverted to the country of departure in the West African coast⁷³ and in the case of the Italian push-back it is about 'at least 900 people', as reported by UNHCR.⁷⁴

While there is no definition of maritime interception in international law, the phenomenon comprises a variety of practices carried out by several states, from the US to Australia.⁷⁵ The UNHCR has described this as "measures applied by States outside their national boundaries which prevent, interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by sea...".⁷⁶ Interception takes place in a variety of forms and is pushed by different reasons. If Spain has practiced interception, among others, for purposes of drug trafficking, Italy has tried to react to incoming waves of migrants leaving Albania toward the coasts of Apulia since the '90.⁷⁷

The purpose of the next section is to analyse those operations with reference to their legal framework, with the aim to assess their compliance with the rule of law principle and with fundamental rights.

Legal issues arising from Frontex operations at sea, with special attention to the rule of law and fundamental rights

This paragraph tries to explore some of the numerous legal problems arising from Frontex's operations at sea: the legal framework governing interception operations is intertwined between international law, be it the law of the seas (UNCLOS), treaty law on search and rescue at sea (SAR Convention and SOLAS Convention) or refugee and human rights law, in which we count the law stemming from the European Convention of Human Rights (ECvHR), as interpreted by the Strasbourg Court, which has since decades 'inspired'

International Conventions', 3, available at http://www.npec-web.org/article_file/050620IranKnightsMaritimeInterdictionintheGulf_010211_0658.pdf (accessed 12.7.2011).

⁷¹ See also the request for explanation on the relation between operations carried out on the basis of the bilateral agreements between Italy and Libya and the activity of Frontex from the ECtHR to the Italian State, defendant in the case *Hirsi and Others v. Italy*, request no. 27765/09: "Il est enfin invité à expliquer à la Cour le rapport existant entre les opérations prévues par les accords bilatéraux avec la Libye et l'activité de l'«Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures des États membres de l'Union européenne (Frontex)»."

⁷² *I.e. Guardia Civil*, for Spain (JO Hera) and *Guardia di Finanza*, Italy (JO Nautilus).

⁷³ Frontex Press Release 'Hera III Operation', 13 April 2007, and Frontex Reports on Hera and Nautilus 2008, at http://www.frontex.europa.eu/newsroom/news_releases/art40.html

⁷⁴ UNHCR Press Release: 'UNHCR deeply concerned over returns from Italy to Libya', 7 May 2009.

⁷⁵ The reference is to the US interdiction and return program toward Haitian migrants, who reached the US Supreme Court. See also B. Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interdiction*, 30 *Fordham International Law Journal*, 2006, p. 75; S.H. Legomsky, "The USA and the Caribbean Interdiction Program", 18 *International Journal of Refugee Law*, 2006, 677. On the Australian interdiction program, known as Operation Relax, and its most known and academically debated case, the Tampa accident, see J. Howard, "To deter and deny: Australia and the interdiction of asylum seekers", 21 *Refugee*, 2003.

⁷⁶ See Executive Committee of the High Commissioner's Programme, Standing Committee, 18th meeting: "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach" (EC/50/SC/CRP.17) of 9 June 2000, available at <http://www.unhcr.org/refworld/docid/49997afa1a.html> accessed 12.12.2011. The same definition is also referred at in the Report of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", Doc. 12628, 1 June 2011, p. 9.

⁷⁷ See the judgement of the ECtHR, *Xhavara et al. v. Italy and Albania*, No. 39473/98, 11.1.2001.

also the European Court of Justice; and last but not least, we should mention the ever growing bulk of European migration rules, which comprises also European asylum law.

Trying to elaborate a complete picture of this articulated legal framework would be beyond the remit of this article. A survey of legal literature shows that most of the areas mentioned above have been covered.⁷⁸ My aim is to elaborate on the legality of those operations with reference to the rule of law and to the duty of protection of fundamental rights. Both are core principles of the European constitutional order as it did emerge and develop in the last decades of European integration. More recently, the Treaty of Lisbon has certainly enhanced their 'visibility' and, most importantly, their legal enforceability thanks to the EU Charter of Fundamental Rights (EUCFR), the accession of the EU to the ECvHR and the strengthening of control functions by the European Parliament and the Court of Justice.

The first issue to be examined is whether Frontex' operations respects the rule of law; this means looking at the legality of Frontex operations, *i.e.* the legal bases covering them.

Frontex Regulation states that the mission of Frontex is improving the integrated border management, and it shall facilitate and render more effective the application of Community measures on the management of external borders. The first instrument regulating Frontex operations is the Schengen Borders Code (SBC), which has been adopted in 2006, with the aim of replacing the *acquis* represented by the Convention Implementing the Schengen Agreement (CISA) –relevant provisions- and the so-called 'Common Manual'.⁷⁹

Though the territorial scope of the SBC has been disputed, the author believes that extra-territorial activities by Frontex fall within the scope of the SBC. In particular the Code foresees "border surveillance" as "surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks". Furthermore, its Article 12 provides that the main purpose of border surveillance is to "prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally" and "to prevent and discourage persons from circumventing the checks at border crossing points". Lastly, it says that "[s]urveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally".

From this, it appears that there is no strict territorial limitation to Frontex' action. Other provisions in the annexes indicate that Frontex' activities might take place also outside the EU territory.⁸⁰

⁷⁸ The legal literature has covered many substantive areas: on the law of the seas and the non refoulement principle, see E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?, *Nordic Journal of International Law* (79) 2010, 75-111, 89; on the principle of non refoulement, see S. Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', in A. von Bogdandy and R. Wolfrum (eds.), (2008) 12 *Max Planck Yearbook of United Nations Law*, (Brill, 2008), p. 205 ff.; on S.A.R. obligations: S. Trevisanut, Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?, *The International Journal of Marine and Coastal Law* 25 (2010) 523-542; on international human rights and refugee law, see Fischer-Lescano, Löhr & Tohidipur (2009). Border controls at sea: Requirements under international human rights and refugee law, *International Journal of Refugee Law*, 21 (2) 2009, 256-296, 295; *ex multis*, see the overall reconstruction by V. Moreno Lax, Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, *International Journal of Refugee Law* 23 (2011), 174-220.

⁷⁹ See recital 3 of the Preamble of the SBC.

⁸⁰ The reference is to the Schengen Borders Code, Annex VI laying down "Specific Rules for the various types of border and the various means of transport used for crossing the Member States' external borders". In

This triggers important consequences on the applicability of the SBC, which grants – at Article 3- priority for the rights of refugees and persons requesting international protection, in particular against *non-refoulement*. Secondly, this implies that Frontex activities, though carried out extraterritorially, will remain subject to the general principles of EU law, *i.e.* the fundamental rights provisions and other principles, as recognised in the case law, such as legal certainty and transparency.

While looking more precisely at Frontex JO constituting in the substance diversion operations, one should observe that they are not explicitly mentioned in the SBC: this seems to suggest that no clear (European law) legal basis can be found for the first Hera operations, in particular for Frontex and for MS other than the one hosting the JO, in that case Spain. As to Nautilus IV, if we consider them as been carried out outside the Frontex JO operational area, the question remains as to the clarification of the role of Frontex. Currently the European Court of Human Rights (ECtHR) is indeed adjudicating a complaint against Italy, where the role of Frontex is subject to clarification.⁸¹

Considering the uncertain legal basis for Frontex' operations in European law, one should consider whether the legality of Frontex operations can be justified on other legal instruments, for example on the basis of bilateral agreements among the Member State hosting the Frontex mission and third states. This alternative has been put forward by Frontex self for JO Hera. This would also trigger the question of whether these agreements can cover also other (non hosting) MSs' participation to the same JOs.

If those agreements can cover the host State's (Spain) participation and Article 8 of the Frontex Regulation authorises the Spanish request of assistance to Frontex, the remaining issue that can be reproached to Frontex is the scarce transparency it has displayed while justifying its participation into the operation.

As to the participating MSs, I like to refer to the thesis put forward by Papastavridis, consider those bilateral agreements as *res inter alios acta* that cannot justify other MSs' involvement, lacking any specific provision on the right to be exercised by those States.⁸²

Persistent criticism had led the Council to adopt recently a Decision 2010/252/EU covering the surveillance of sea borders for operations coordinated by Frontex, on a proposal of the Commission.⁸³

While the decision has been 'justified' as providing for 'additional rules' on borders surveillance,⁸⁴ and therefore 'not modifying the essential provisions' of the SBC, the

particular, Section 3.1.1. "Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country." This leads to the interpretation that checks are possible also outside the territory of the EU. See also M. den Heijer, *Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control*, in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden-Boston, 2010), p. 169, at 176 ff.

⁸¹ Case Hirsi and Others v. Italy, request no. 27765/09, pending before the ECtHR.

⁸² E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?, *Nordic Journal of International Law* (79) 2010, 75-111, 89.

⁸³ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111, p. 20.

⁸⁴ See Article 12, paragraph 5, "Additional rules governing surveillance may be adopted in accordance with the procedure referred to in Article 33(2)", which refers to the so-called 'Comitology Decision', Decision 1999/468/EC, namely its Articles 5 and 7, "having regard to the provisions of Article 8 thereof and provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Regulation".

European Parliament did not agree on such qualification, bringing this Decision before the EUCJ for annulment, as adopted on a wrong legal basis and in violation of its legislative prerogatives.⁸⁵ In particular, the EP argues that the rules on "interception", "rescue at sea" and "disembarkation" are different concepts from borders surveillance, as defined by the SBC.⁸⁶ These rules modify the SBC and therefore should have been adopted with legislative procedure.

The Decision is actually comprising of two different parts, one binding, adopting Rules (Annex, part 1) and one non-binding, providing for Guidelines (Annex, part 2), which shall form part of the operational plan for Frontex operations.⁸⁷ Pending proceedings before the EUCJ, the Decision is still in force: however, the legal action of the European Parliament to the EUCJ constitutes *per se* evidence of the controversial nature of the conformity of operations carried out by Frontex with reference to their respect of the rule of law, in a twofold way: first, enacting European *ad hoc* rules for interception operations sounds like an implicit statement and recognition that current Frontex operations are not underpinned by an adequate legal basis, and thus, not fully legitimate with reference to the rule of law. Second, the fact that the Decision has been litigated by the democratic institution is symptomatic of the latter's disagreement as to its compliance with the current legal framework. The EP asks indeed that a legislative piece is passed according to the ordinary legislative procedure.

Therefore, clarifying the legal framework will be beneficial for the legality of Frontex coordinated operations, and, more generally, for the sake of the rule of law in the European Union level.⁸⁸

To sum up, the arguments presented above show that, so far, Frontex operations at sea were not carried out with a clear European legal framework. This triggers consequences, especially for participating MSs, whose international liability can be called upon, for example, before the ECtHR.⁸⁹ The second point I wish to make concerns the possible breach of fundamental rights: the current situation falls short of many legal obligations, of different nature but at the same time clearly intertwined. Literature has ascertained that diversion operations, as carried out by MSs and Frontex during JO Hera and in occasion or alongside JO Nautilus violate several legal frameworks: interceptions and push-back constitute *refoulement* and therefore are in breach of the international refugee law, as they have the effect of sending persons back to the place of departure. In particular, potential refugees have been sent back to countries (Senegal, Libya) which are known for not having arranged a legal and institutional system that can protect refugees: Libya in particular did not sign the Geneva Convention of 1951. This is done without an assessment of a person's individual case. In the SBC, for example, provisions of international and asylum law are supposed to prime on rules concerning entry and stay of TCN.⁹⁰ Secondly, diversion operations are not legitimised either by the law of the sea, because the right to visit against flagless ships does not imply the right to seizure *tout court*. Thirdly, we should mention the issue of compliance of these operations with search and rescue duties of boats in distress in the high sea. If we consider that the number of people disappeared at sea is increasing together with the surveillance of the Mediterranean, there is a

⁸⁵ OJ C 246 (11.9.2010), p. 34. The Commission has been granted intervention in the case.

⁸⁶ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, p. 1.

⁸⁷ See Article 1 of the mentioned Decision.

⁸⁸ See also A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 255.

⁸⁹ This might also be the reason why JO Nautilus and Italian diversion operations took place probably into different operational areas.

⁹⁰ See A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 245, who argues for the extraterritorial applicability of the Schengen Border Code (SBC).

macroscopic problem of breach of search and rescue duties bearing on MSs. Fourthly, the ECvHR is violated as well: the case law of the ECtHR, has interpreting the European Convention obligations as 'following' contracting states in all the situations where they exercise their jurisdiction, which happens also if they operate outside their territory, like in TC (e.g. Libyan) territorial waters.⁹¹

If this is in broad lines the *status quo* concerning the substantive legal frameworks applicable as sketched by the literature, the next step is to look at the actions taken by Frontex to tackle the problem.

In the attempt to clarify some of these questions, in June 2008 Frontex has established with the United Nations High Commissioner for Refugees (UNHCR) a working agreement providing the framework for cooperation on training of border guards, on international refugee laws. The aim is to try to avoid conflicts between integrated border management and international human rights standards through training, (best) practices and exchange of expertise.

Another step taken by Frontex is the adoption of a Fundamental Rights (FR) Strategy.⁹² This document represents certainly a step forward on the way to ensure the respect of fundamental rights in all the activities coordinated by Frontex. Among the points to be presented, I wish to draw the attention on the operationalisation part of this strategy, stressing that joint operations, and the risk analyses underpinning them, shall take into account the "particular situation of persons seeking international protection, and the particular circumstances of vulnerable individuals or groups in need of protection or special care"; Frontex' operational plans shall be elaborated in "strict conformity with the relevant international standards and applicable European and national laws". Frontex "might terminate a JO" if the respect for fundamental rights is no longer assured. This engagement is enforced by a reporting system which should be the basis of a monitoring of all its operations, including forced return operations, which requires also that MSs can guarantee that they can provide for such a monitoring system.

Among other aspects, I will mention Frontex' Code of Conduct, which collects generally accepted standards of soft law and promotes professional values based on the principles of the rule of law and respect of fundamental rights, together with the Action Plan, that will become the main implementation tool for Frontex' FR Strategy, and which should also be properly reflected in the Frontex Programme of Work.

Working on transparency and credibility, Frontex will convey periodically a consultative forum, gathering together external third parties, namely civil society representatives.

While, on the one hand, one should recognise that this effort represents a step ahead if compared to the previous situations marked by a lack of transparency, on the other hand, one should notice that we nevertheless talk about soft law and commitments which need as well the active cooperation of MSs' officials in order to be effective.

⁹¹ ECtHR, *Xhavara et al. v. Italy and Albania*, No. 39473/98, 11.1.2001. For more references, see, *mutatis mutandis*, the case law of the ECtHR quoted in E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.

⁹² Endorsed by the Frontex Management Board on 31 March 2011, the document is available at www.frontex.europa.eu, last accessed 12.12.2011.

2011 represented a significant year because the recast of the Frontex Regulation has recently been approved. This witnesses the awareness of the need of find a *legislative* remedy to a *political* problem which became acute.⁹³

Also this reform represents in my understanding an implicit recognition of the problems discussed in this contribution.⁹⁴ At the same time, this recast increases the powers of Frontex and therefore requires for a more solid underpinning of its actions on a clear legal framework.

I wish to draw the attention to two main points: the first one could be labeled as specific fundamental rights actions, whereas the second one is about general provisions meant to ensure the respect of fundamental rights duties, including international law obligations, such as refugee law. As to the first point, we indicate the further development of Frontex FR Strategy, the Consultative Forum already envisaged in this former document, and the FR Officer. This last one, designated by the Management Board, shall be independent in the performance of his/her duties, and shall report directly to the Management Board and the Consultative Forum and contribute to the mechanism for monitoring fundamental rights.⁹⁵ Under the second point, several provisions should be mentioned. Lacking time and space for a complete overview, I would nevertheless present, among others,⁹⁶ the 9th and the 29th recitals of the Preamble; the former indicates that the mandate of the Agency should be revised in order to strengthen its operational capabilities "while ensuring that all measures taken (...) fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*." The latter puts forward that the Regulation respects the fundamental rights and observes the principles recognised by the TFEU and the EUCFR (...).

Among the legal provisions, we draw the attention on the text of new Article 1(2), which reads as follows:

"While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency (...) shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code (...)"

"The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights (...); the relevant international law, including the [Geneva Convention]; obligations related to access to international protection, in particular the principle of *non refoulement*; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation."

Article 2, with the new paragraph 1a, prohibits disembarkation in a TC "in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance persons in need of medical protections

⁹³ See Regulation (EU) 2011/1168 amending Council Regulation (EC) No 2007/2004 of 26 October 2004, in OJ L 304 22.11.2011, p. 1.

⁹⁴ See European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COM(2010)61 final, p. 7 and UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COM(2010)61 final.

⁹⁵ New Article 26a, "Fundamental Rights Strategy".

⁹⁶ I refer at recitals 1, 9, 16, 18, 20, 21, 22.

and other vulnerable persons shall be addressed in accordance with Union and international law."

The reformed provision on return cooperation requires that agreements with MSs granting financial support are made conditional upon the full respect for the EUCFR, shall ensure respect of such obligations in the Code of Conduct, and be effectively monitored.⁹⁷

Other provisions refer to the Code of Conduct, to be developed in cooperation with the Consultative Forum,⁹⁸ to the training of European Border Guards Teams,⁹⁹ and to the cooperation with other Union bodies, such as the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA), and international organisations.¹⁰⁰

The recast of the Frontex Regulation is certainly more than a step in the right direction, which should lead to more transparency on Frontex coordinating role of external borders policing operations.

Beside the rhetoric of the merely operational function performed by Frontex, being coordination of MSs' operations its main task, the *status quo* so far presented many critical problems, which undermined the overall legality of the activity of the Agency.

Secondly, MSs cooperating to a JO are in a difficult situation as well: in international law concerted actions among several states does not relieve participating states from responsibility.¹⁰¹ If the MS hosting a JO breaches international obligations, the supporting MS cannot enjoy exemption.

The relevance of these questions became more serious after the entry into force of the Lisbon Treaty: the legally binding status of the Charter of Fundamental Rights, with its many references to international law instruments, would have made the problem more acute. The higher degree of political and legal accountability makes more likely that current shortcomings will be scrutinised, for example by the EUCJ.

Frontex and the externalisation of migration controls: a multiple exercise of venue shopping?

This paragraph aims at putting Frontex in a broader perspective. It is here suggested that Frontex is not only an agency dealing with external borders management, but rather a piece of the broader puzzle of EU's response to the migratory phenomenon. More precisely, in the past years, the control of migration has been developing in the direction of EU's external relations. Since 2001 indeed the Commission established the need to integrate migration issues in EU's relations with third countries:¹⁰² this contributed to the

⁹⁷ New Article 9.

⁹⁸ New Article 2a.

⁹⁹ New Article 3b.

¹⁰⁰ New Article 13.

¹⁰¹ See the codification work of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, at Article 6:

"Conduct of organs placed at the disposal of a State by another State"

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

See also, *mutatis mutandis*, the case law of the ECtHR quoted in E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.

¹⁰² Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM (2001) 672 final, of 15.11.2001, namely points 3.3 and 4.3.2. See also the Commission's Communication on integrating migration issues in the European Union's relations with third countries, COM (2002)703 final, of 3.12.2002. Both documents are available on the European Commission's website.

development of an external dimension of the AFSJ. Secondly, the EU and MSs established practices and policies involving also private actors (*e.g.* aerial companies), aimed at screening migrants before they are inside European borders, thus "moving" those borders, as argued by Elspeth Guild.¹⁰³ Political scientists explain this as a form of 'outsourcing' or 'externalizing' migration policies. Thirdly, migration policy and migration controls have been brought increasingly under the framework of policing activities: Bigo defined it as 'normalisation of policing migration', which means that the extension of police and policing into the migration controls has been accompanied by a criminalisation of migration, beforehand considered an administrative discipline. This linkage of border controls to police and policing means that there is a presumption that movement of people is an illicit activity.¹⁰⁴

The trend of developing an external dimension of the policies falling within the context of the AFSJ has been encouraged since the Tampere multi-annual programme, in order to support the achievement of the AFSJ's goals by tackling threats perceived coming from outside, but also in order to favor coherence of EU's external relations. In practice, the external development of the AFSJ seems to confirm the naturally inward-looking perspective of the AFSJ. Is this the simple logical consequence of the development of an external action on the basis of some (internal) policies, or is it something more?

In my understanding the externalisation of migration is determined by the research for more convenient legal venues in order to achieve desired policy target(s). In particular, I argue that Frontex-led JO at EU's external maritime borders (Atlantic and Mediterranean) which resulted in or supported interdiction practices, should be explained as a *multiple exercise* of 'venue shopping' by MSs' governments for the benefit of their police and quasi-military law enforcement actors. According to this theory "actors seek new venues when they need to adapt to institutional constraints in a changing environment".¹⁰⁵ It is here argued that the policing of external borders through Frontex is the result of the research of a more convenient venue for several reasons: first, there is an accent on the operational dimension, enabled by linking police actors into cooperation networks. The role of Frontex as coordinator of operations carried out by cooperating MSs corresponds to the limited responsibility it bears, responsibility lying eventually on MSs. Second, the main actors involved in these operations are police actors, often also having a semi-military status. Thirdly, there is an exercise of venue shopping also in policing pre-borders areas (high seas and TC territorial waters), instead of policing migration within the borders (MSs' territorial waters/contiguous zone). Though the territorial scope of international refugee law, namely the territorial scope of the prohibition of *refoulement*, might be disputed,¹⁰⁶ it is clear that 'off-shore venues' bear, even only *de facto*, an advantage for some actors and a disadvantage for others. To be a vulnerable individual in a precarious boat in the middle of the sea, even if protected by international law obligations, means that one is precluded access to a legal and administrative system apt to assess her/his entitlement to the status of refugee or not, and to have a decision scrutinised by a judicial instance.¹⁰⁷ This last aspect touches upon human dignity and the very nature of human beings as part of mankind.

By way of conclusion, the article has demonstrated that recent practices of policing external borders put in place by MSs under the coordination of Frontex present several

¹⁰³ E. Guild, 'Moving the Borders of Europe', cit.

¹⁰⁴ D. Bigo, "Frontier Controls in the European Union: Who is in Control?", in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free Movement into and within Europe*, Farnham: Ashgate Publishing, 2005, pp. 49-99.

¹⁰⁵ V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', (2000) 38 *Journal of Common Market Studies*, p. 251, at 258.

¹⁰⁶ See M. den Heijer, *Europe beyond its Borders*, cit., p. 169, at 180 ff.

¹⁰⁷ S. Kneebone, *Refugees, Asylum Seekers and the Rule of Law*, Cambridge University Press, Cambridge, UK, (2009).

problems: this contribution has focused on the respect of the rule of law and on the protection of fundamental rights. With such operations the EU and its MSs threaten the very idea of rule of law and display little consideration for human dignity. The Lisbon Treaty together with the recent reform of the Frontex Regulation offer nevertheless the possibility to fix these problems; the former provided the EU of an improved constitutional environment, with a more effective framework for fundamental rights' protection,¹⁰⁸ and better instances for legal and political accountability.¹⁰⁹ The latter represents a step in the direction of making the activities of Frontex more transparent and more clearly bound by the respect of fundamental rights obligations.

On the other side, the new legal architecture presents (positive) threats and opportunities: the de-pillarisation deriving from the unification of the legal and procedural framework now characterizing the AFSJ within the new Title V of the TFEU, and the reform of the decision-making procedures might favor an increase of legislative production in this field. However the dimension of control and guarantees is also strengthened by the Treaty of Lisbon, thanks to the further expansion of the remit of the EUCJ and to the incorporation of the Charter of Fundamental Rights, not to mention the accession to the ECvHR.

¹⁰⁸ Art. 6 TEU; Charter of FR and possibility to accede the ECHR; Article 18 and 19 Charter of FR: non refoulement and protection in the event of removal, expulsion or extradition. Status of ECHR into EU law as per consolidated case law and treaties.

¹⁰⁹ See the full scrutiny of the EUCJ on agencies, which includes examining the legality of their acts intended to produce legal effects toward third parties: Article 263 TFEU. See also Fischer-Lescano, Löhr & Tohidipur (2009), Border controls at sea: Requirements under international human rights and refugee law, *International Journal of Refugee Law*, 21 (2) 2009, 256-296, 295.