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Protecting the EU's borders from ... fundamental rights?

Squaring the circle between Frontex's border surveillance and human rights

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Abstract

The phenomenon by which people are dying while attempting to cross the Mediterranean constitutes one of the humanitarian emergencies of our times. Even more strikingly, this continues to happen at a time when the European Union and its member states are policing the Union's external borders more intensively than ever before. This chapter examines the EU's border surveillance and investigates Frontex's actions in order to assess Frontex's compliance with the EU's constitutional commitment to respecting and enforcing fundamental rights. Border surveillance is a crucial part of the EU's strategy for integrated border management. The aim is to combat irregular migration and cross-border crime, which in the EU policy debate are framed as internal security issues.

In this research, I examine and investigate Frontex's most controversial (Hera and Nautilus) and recent (RABIT 2010 and Poseidon in the Evros region) operations on Europe's southern and south-eastern borders. These operations have been criticised on grounds of legality and respect for human rights. Decision 2010/252/EU supplementing the Schengen Borders Code was meant to provide a solution to at least some of the problems that emerged in the first years of Frontex's operations, but it was annulled by the EU Court of Justice. After explaining those aspects of the EU's legal framework for fundamental rights that are relevant to Frontex, I suggest that the *Hirsi* judgment by the European Court of Human Rights, which condemned the Italian push-back policy of 2009, indirectly places boundaries on practices such as those which Frontex used in Hera. Having assessed Frontex's adoption of a fundamental rights policy, I make some recommendations for improving Frontex's commitment to fundamental rights, thus squaring the circle between border surveillance and individuals' human rights.

Introduction

The phenomenon by which large numbers of people are losing their lives trying to cross the Mediterranean constitutes a very significant humanitarian emergency.¹ According to an estimate by the UN High Commissioner for Refugees (UNHCR), in 2011, 1,500 people died while attempting to cross the Mediterranean on their way to European countries.² The dramatic case of a small boat which left Tripoli on 26 March 2011 with 27 people aboard and which drifted back to Libya after two weeks at sea, despite a distress call and direct contact with several other vessels, triggered an in-depth investigation by the Parliamentary Assembly of the Council of Europe (PACE). The Assembly criticised NATO and the various EU member states (MSs) involved for failing to plan a response to the distress call.³ The news reports of disasters at sea did not stop in 2012 either; on the contrary, they recurred on an almost weekly basis.⁴ On 6 September 2012, an accident off the coast of Lampedusa led to the death of 79 persons.⁵ In another accident, occurring on the Turkish coast, 60 migrants died, most of them children (7 September 2012).⁶

By contrast, the efforts of both the MSs and the EU to police the Union's external borders have never been more intense than in recent years. The establishment of Frontex, the EU's dedicated agency for policing external borders, and the conduct of a large number of operations to police both land and sea borders are key elements in this policy of increased border surveillance within the broader context of extraterritorialisation of migration controls. In migration and asylum matters, integrated management of external borders (or rather, how to protect "access to Europe", as framed in the Stockholm Programme) is becoming increasingly disconnected from the "Europe of responsibility, solidarity and partnership". However, "[t]he strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them (...)"⁷ The interpretation of border policing has been stretched to the point of including interception and diversion operations. Although the latter are mainly aimed at combating undocumented migration and preventing the arrival in Europe of migrants and asylum seekers, such operations have been marketed as fulfilling humanitarian purposes, as they can potentially prevent accidents at sea. However, the recent legislative proposal on the European Border Surveillance System (EUROSUR), a network of national surveillance systems meant to be at Frontex's disposal, reveals that the actual purpose of border surveillance has little to do with humanitarian aspirations. While both the initial Council documents and the Commission's initial proposal for EUROSUR

¹ Migrants' routes and the human dimension of the extraterritorialisation of migration control policies have been covered by the media. Among the independent media, see the film documentaries "Mare chiuso" and "Come un uomo sulla terra" and the book "Mamadou va à morir", by G. del Grande, author of the blog 'Fortress Europe', at <http://fortresseurope.blogspot.nl/>.

² See UNHCR Briefing Note "Mediterranean takes record as most deadly stretch of water for refugees and migrants in 2011", 31 January 2012, at <http://www.unhcr.org/4f27e01f9.html>.

³ "Lives Lost in the Mediterranean Sea: Who Is Responsible?", report by Tineke Strik, Committee on Migration, Refugees and Displaced Persons, 5 April 2012, Doc. 12895.

⁴ The blog 'Fortress Europe', by journalist Gabriele Del Grande, lists all fatal accidents recorded by the media. According to this source, since 1988, about 19,000 people have lost their lives at sea. See <http://fortresseurope.blogspot.nl/2006/01/press-review.html>.

⁵ http://palermo.repubblica.it/cronaca/2012/09/13/news/sbarco_con_naufragio_arrestati_due_scafisti-42461437/index.html?ref=search.

⁶ <http://video.repubblica.it/dossier/emergenza-lampedusa-2010/tragedia-nel-mare-in-turchia-60-morti-la-meta-bambini/104591/102971>.

⁷ Stockholm Programme, para. 5.1, p. 26, OJ C 115/2010.

referred to humanitarian reasons – that is, reducing the death toll at sea – this goal was later dropped.⁸ Only after representations by the European Parliament and civil society groups⁹ was the humanitarian objective re-inserted into the most recent version approved by the Council but only as a secondary consequence of increased border surveillance.¹⁰

Europe has an ambiguous attitude to contemporary geo-political challenges: although the Arab Spring has been welcomed for the benefits that democracy is expected to bring to North African countries and their consequent relations with the EU, in recent years, the EU and its MSs have been tightening Europe's southern borders. The image of Europe as a fortress captures this trend very well. However, the tightening of borders has raised humanitarian concerns, as well as several legal questions: the migration of people fleeing African states in precarious conditions does not present a uniform picture. Migrants usually travel in “mixed flows”, which tend to comprise both economic migrants and significant numbers of people seeking international protection, who turn to smugglers as their only chance of escaping persecution and war. In this context, the dangers of crossing the sea in unseaworthy vessels, in conjunction with a legal framework that does not always enforce search and rescue (SAR) obligations, have led to a large number of well-documented, fatal accidents. At the same time, increasing numbers of people are silently “disappearing” in the Mediterranean, far from the media's reach. It is therefore clear that the state's prerogative of defining its migration policies, and thus access to its territory (or not), has implications in this case not only for people's freedom, but also for their lives: it touches upon the notion of a person as a holder of rights, an expression of the very fundamental concept of what it means to be human.

Against this background, on 23 February 2012, the European Court of Human Rights (ECtHR) condemned Italy for intercepting and diverting vessels travelling from African countries towards the Italian coast in the *Hirsi* judgment.¹¹ This judgment, made by the Grand Chamber of the Strasbourg Court, strongly condemned Italy and the Berlusconi government for their approach to migrants and border controls. Even after such an extensively motivated, factually documented judgment, the former Italian Minister of the Interior, Mr Roberto Maroni, defended the policy, stating boldly that he was ready to repeat everything that he had done.¹² Italy stopped engaging in push-back operations after 2009, as a consequence of the fall of the Gaddafi regime in Libya.¹³

⁸ The humanitarian purpose of EUROSUR, “to protect the lives of migrants”, was implemented in earlier Council documents (11437/12 of 20 June 2012), but was deleted in a recent Council discussion (12905/12 of 1 August 2012).

⁹ Meijers Committee, Note on the proposal for a Regulation establishing the European Border Surveillance System (COM(2011) 0873), ref. CM1215, of 12 September 2012, at <http://www.commissie-meijers.nl/assets/commissiemeijers/CM1215%20Note%20on%20the%20proposal%20for%20a%20Regulation%20establishing%20EUROSUR.pdf>.

¹⁰ According to the most recent version, currently under discussion (on file with the author).

¹¹ European Court of Human Rights, 23 February 2012, Judgment, *Hirsi Jamaa and others v Italy*, Application no. 27765/09.

¹² See “Immigrati respinti, La Corte UE condanna l'Italia”, at <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2012/02/24/immigrati-respinti-la-corte-ue-condanna.html?ref=search>. Even after the judgment, former Northern League (Lega Nord) head Mr Umberto Bossi declared “l'importante è che abbiamo impedito che il Paese si riempisse di immigrati [the important thing is that we avoided the Country being filled with migrants]”. Former Minister of the Interior Roberto Maroni stated: “È una sentenza politica di una corte politicizzata. Rifarei esattamente quello che ho fatto” (“It is a political judgment by a politicised court. I would do exactly again what I have done”; [translation by the author]).

¹³ See the statement of Mr Maroni's successor, Ms Cancellieri (25 September 2012) “Flussi migratori, serve una linea d'azione che coniughi rigore ed esigenze umanitarie”, on the necessity of combining respect for rules with a humanitarian approach [translation by the author]. Original at

Hirsi was also a landmark judgment for the EU's border surveillance, carried out within the broader process of extraterritorialisation of migration controls. Indirectly, it once again made fundamental rights a priority for border controls. Although the Italian push-backs were conducted within the framework of bilateral agreements with Libya, and the role played by Frontex was not specifically assessed, the judgment had the merit of clarifying the duties and legal obligations of an EU MS under the European Convention on Human Rights (hereinafter: ECvHR) when conducting extraterritorial border surveillance operations. As such, while the judgment was primarily addressed to Italy, indirectly, it placed explicit boundaries on the EU practices developing under the framework of Frontex-coordinated operations. Therefore, *Hirsi* is also relevant to Frontex.

The aim of the present contribution is to analyse Frontex's activities through the lens of compliance with the EU's fundamental rights, as enshrined in its composite constitutional framework.¹⁴ As we are considering Frontex's involvement in policing borders for extraterritorial migration control, the rights that come into play here relate to the protection of (prospective) refugees and asylum rights. The research question underlying this paper could thus be framed as follows: is Frontex carrying out its mission in a manner that is consistent with the overall constitutional framework of the EU? Or has Frontex adopted a fragmented reading of the legal framework that underpins its mission, tasks and duties? This chapter thereby builds on earlier research, in which I analysed the establishment of Frontex and assessed some of its operations in the Mediterranean.¹⁵

In this chapter, I examine Frontex's most recent operations and the ways in which they have evolved. I consider the genesis and fate of Decision 2010/252/EU supplementing the Schengen Borders Code, which was meant to regulate and provide a legal basis for Frontex's initial activities. I then go on to elucidate the EU's legal framework for fundamental rights relevant to Frontex Joint Operations (hereinafter: JOs). The framework draws clear boundaries around the concept of border surveillance, also thanks to the close relationship between different instruments, the EU Charter of Fundamental Rights and the ECvHR. In the next section, I critically assess the fundamental rights policy that Frontex established to improve its compliance with fundamental rights and respond to severe criticisms from academia, civil society and other actors, such as the European Parliament and the Council of Europe, set against the background of the reformed Frontex Regulation. The paper concludes with proposals and recommendations for an improved legal framework aimed at strengthening compliance and ensuring the agency's accountability and transparency and that of the MSs when cooperating on border surveillance initiatives.

http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/2099_500_ministro/2012_09_25_audizione_comitato_Schengen.html?category=immigrazione&x=5&y=8; the approach of the government led by Mario Monti is not immune from criticism. See the Statewatch note "Documents unveil post-Gaddafi cooperation agreement on immigration" of 5 September 2012, at <http://www.statewatch.org/news/2012/sep/01italy-libya-immigration-cooperation.html>.

¹⁴ See L.F.M. Besselink, *A Composite European Constitution / Een Samengestelde Europese Constitutie*. Groningen: Europa Law Publishing, 2007.

¹⁵ L. Marin, "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", *Journal of Contemporary European Research*, vol. 7 No. 4 2011, pp. 468-487.

What happens at Europe's southern borders?

Frontex's far-reaching interpretation of border surveillance

Frontex was established in 2004¹⁶ to improve integrated border management and facilitate and improve the implementation of EU instruments for the management of external borders, in particular the Schengen Borders Code (hereinafter: SBC).¹⁷

Frontex's main tasks are to:

- 1) coordinate operational cooperation between MSs in the management of the EU's external borders (letter a); (...)
- 2) assist MSs in circumstances requiring increased technical and operational assistance at external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea (letter da);
- 3) assist MSs in circumstances requiring increased technical and operational assistance at external borders, especially those MSs facing specific and disproportionate pressures (letter e);
- 4) provide MSs with the necessary support, including, upon request, coordination or organisation of joint return operations (letter f);
- 5) deploy border guards from the European Border Guard Teams to MSs in joint operations, pilot projects or in rapid interventions in accordance with [the RABIT Regulation] (letter g).¹⁸

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

- 1) assisting MSs in training national border guards, including the establishment of common training standards (letter b);
- 2) carrying out risk analyses, including the assessment of the capacity of MSs to face threats and pressures at the external borders (letter c);
- 3) participating in the development of research relevant to the control and surveillance of external borders (letter d).

The RABIT Regulation authorises team members to carry service weapons, ammunition and equipment, and use them in accordance with the law of the MS hosting the RABIT intervention.

Most recently, after Frontex was reformed in 2011, the agency was also given the task of developing and operating “information systems that enable swift and reliable exchanges of information regarding emerging risks at the external borders (...)” and providing “the necessary assistance to the development and operation of a European border surveillance

¹⁶ 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. It was then reformed under 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 [RABIT] and amending Council Regulation (EC) No. 2007/2004 in regard to that mechanism and regulating the tasks and powers of guest officers, OJ L199/30, hereinafter: RABIT Regulation. The last reform arrived with Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 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, OJ L 304/1, hereinafter: Frontex Recast.

¹⁷ Article 1, Frontex Recast.

¹⁸ See Frontex Regulation, Article 2, as amended by Frontex Recast.

system and, as appropriate, to the development of a common information sharing environment, including interoperability of systems” (letters h and i). This refers to the EUROSUR system that is currently being established at the legislative level.¹⁹

Since it became operational in 2005, Frontex has been deployed in a number of JOs: the first was JO Hera on the Western African route; later, JO Nautilus followed in the central Mediterranean; and most recently, JO Poseidon covered the south-eastern border. The latter was both a land (between Greece and Turkey, Greece and Albania, and Bulgaria and Turkey) and sea operation. The first RABIT operation ever undertaken (between November 2010 and February 2011 in the Evros region, the land border between Greece and Turkey) was later continued as JO Poseidon Land.²⁰ Most recently, JO Hermes focused on patrolling the Italian coast. The operational area has thus shifted from the western part of the southern border toward the east, in response to the mobile geography of migratory flows.

In its first years of activity, Frontex was occupied with coordinating JOs which also entailed the interception and diversion of migrants at sea. This was the case for Hera II and III, which were directed at migrants and asylum seekers who had left the shores of Senegal, Mauritania and Cape Verde.

JO Nautilus did not go smoothly due to persistent disagreement between Italy and Malta over the concept of distress and over the disembarkation port, which had implications for the assignment of responsibility for migrants rescued at sea. In 2006 and 2007, Frontex declared that about 3,000 migrants had been intercepted, one third of whom within the operational area and two thirds outside it. This means that, consistent with its intelligence capacity, Frontex knew and was able to find out what was happening outside its operational area. In 2009, with Nautilus IV, it appears that Frontex did not engage directly in diversion operations. However, such operations were carried out by Italy, the MS hosting the Frontex JO, on the basis of bilateral agreements with Libya.²¹ Official Frontex reports claim that the “effectiveness of Frontex activities at the sea borders” and national bilateral agreements in this area have displaced migration flows from sea to land borders. Frontex’s rare, thoroughly vetted reports are synthetic documents, written in management jargon, which only offer information about output, classified in categories (facilitators arrested, persons intercepted, etc.) and complemented with figures. However, even if one chooses to believe Frontex’s version of events, it is hard not to conclude that the Italian push-backs that took place alongside Frontex’s JO, but allegedly outside the Nautilus operational area, benefited from Frontex’s coordination and support.²²

It appears that Frontex ceased to engage in push-back operations after 2009. JO Hermes was launched in the central Mediterranean area in 2011. This JO involved assisting the Italian

¹⁹ See L. Marin, “Is Europe Turning into a ‘Technological Fortress’? Innovation and Technology for the Management of EU’s External Borders. Reflections on FRONTEX and EUROSUR”, in M.A. Heldeweg & E. Kica (eds.), *Regulating Technological Innovation: Legal and Economic Regulation of Technological Innovation*, Palgrave MacMillan, 2011, pp. 131-151.

²⁰ See the Frontex review of migratory routes: <http://www.frontex.europa.eu/intelligence/migratory-routes>.

²¹ Signed in Benghazi 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.

²² See L. Marin, “Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice?”, *op. cit.*, pp. 477-479. See also 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), pp. 174-220.

authorities in patrolling “a predefined area with a view to detecting and preventing illegitimate border crossings (...)”. Aerial assets were to provide enhanced border surveillance and SAR capacity. Second-line border control would involve the identification of migrants’ nationalities and the gathering of intelligence on the smuggling phenomenon and networks.²³

To summarise, until 2009, Frontex border surveillance involved interception and diversion operations. This was the result of a very broad interpretation of border surveillance, beyond the reading and purpose of the SBC, made possible by a legal framework that gave Frontex significant autonomy and weak accountability.

More recently, Frontex has been policing the area around the Evros river in Eastern Macedonia and Thrace, which constitutes the land border with Turkey. Between November 2010 and March 2011, 12,000 migrants crossed the Greek border illegally. The activities started in 2010 as a four-month RABIT intervention and continued later as JO Poseidon. Frontex has presented JO Poseidon as an operation aimed “to increase the level of border surveillance, to increase the level of border checks and assistance with screening and debriefing activities”.²⁴

The RABIT intervention in the Evros region has been criticised in a well-documented report by the NGO Human Rights Watch (HRW).²⁵ During the operations, which were encouraged by the European Commission, Frontex deployed 175 border guards with material support in the form of a helicopter, minibuses, minivans and portable buildings to be used as office units. According to HRW, migrants were transported to Greek detention centres. They were interviewed by Frontex to determine their nationality (screening) and questioned about smuggling and organised crime (debriefing).

Frontex offered its cooperation in the apprehension of migrants and their transfer to detention facilities. During these patrols, it appears that a Greek “shift leader” was in charge of the operations and, in principle, responsible for what happened. The screenings constituted the most intensive type of interview experienced by migrants. Very few migrants arriving in Evros applied for humanitarian protection, since they were not informed that they were entitled to it and were even misled into thinking that lodging such a request would cause them months of detention.²⁶

The overall picture one gains from the HRW report is that Frontex has been actively cooperating with the Greek authorities in patrolling the borders, apprehending migrants and placing them in detention facilities. This has given rise to a number of concerns, also on the part of other organisations. In this regard, special mention should be made of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak,²⁷ together with the European Committee for the Prevention of Torture, who

²³ Frontex Press Release, 21 February 2011, “Hermes 2011 running”, at <http://www.frontex.europa.eu/>.

²⁴ See <http://www.frontex.europa.eu/news/greek-turkish-land-border-jo-poseidon-land-situational-update-january-2012-DWvKc6>.

²⁵ See the Human Rights Watch (HRW) Report “The EU’s Dirty Hands. Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece”, 2011, available at <http://www.hrw.org>, pp. 23-24.

²⁶ HRW Report, p. 43.

²⁷ See Human Rights Council, Mission to Greece Report, submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 4 March 4 2011, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4e6082e72&skip=0&advsearch=y&process=y&allwords=&exactphrase=&atleastone=&without=&title=special+rapporateur>

visited some detention facilities at the time of the RABIT deployment.²⁸ Both described extremely poor detention conditions with insufficient and poor sanitary facilities. They argued that detention in such conditions amounted to inhuman and degrading treatment.²⁹ The UNHCR also defined asylum in Greece as a humanitarian crisis due to the lack of a functioning asylum system, a judgment that also has important implications for the EU level.

The ECtHR's judgment on the application of *M.S.S. v Belgium and Greece*³⁰ reiterated this political alarm with reference to Greece, indicating that Belgium, an EU MS, could not enforce EU law without considering other obligations arising under international law regarding the protection of fundamental rights. The case originated from the Belgian authorities' removal of an asylum seeker to Greece, in compliance with the Dublin II Regulation. According to this Regulation, the Greek authorities were required to process the asylum claim. The Grand Chamber of the ECtHR described Greek detention centres as characterised by "overcrowding, dirt, lack of ventilation, little or no possibility of taking a walk, (...), insufficient mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care." The attitude toward migrants and potential asylum seekers was also characterised by racial insults and physical violence.³¹ Frontex was aware of the situation, and decided to go ahead with the RABIT operation, allegedly because "it was still necessary to stop this, as the situation was not under control".³²

The Fundamental Rights Agency has acknowledged that:

[W]hile the Greek authorities are responsible for the readmission process, the fact that no system exists to determine if a person proposed for readmission is indeed in need of international protection, also puts the European Union at a grave risk: EU assistance is provided to determine nationality and hence to facilitate readmission without having a parallel assistance provided to identify whether persons to be readmitted are in need of international protection.³³

To summarise, Frontex's interpretation of border surveillance and its role in the Mediterranean has ranged from interception and diversion operations (Hera), to assistance with interception and diversion (Nautilus 2009), and cooperation with national authorities to apprehend migrants and transfer them for detention with the purpose of returning them, as well as interviewing migrants to determine their nationality without informing them of their rights (RABIT 2010 and Poseidon). All these cases show that Frontex has adopted a broad approach to border surveillance, together with a one-sided interpretation of its mission and a fragmented reading of EU law that includes neither international and European human rights rules, nor asylum law.

torture&monthfrom=&yearfrom=&monthto=&yearto=&coa=&language=&ci
tation=

²⁸ Extensively quoted at paras. 160-173 of the judgment of the ECtHR in *M.S.S. v Belgium and Greece*, request no. 30696/09, of 21 January 2011.

²⁹ See Human Rights Watch report "Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union", November 2008, at <http://www.hrw.org/en/node/76211/section/8>, p. 22.

³⁰ ECtHR, *M.S.S. v Belgium and Greece*, request no. 30696/09, of 21 January 2011.

³¹ Judgment *M.S.S.*, cit., para. 160.

³² See HRW interview with K. Wahlstorm, head of Frontex operational office in Greece. Source: HRW Report "The EU's Dirty Hands", op. cit., p. 23.

³³ Fundamental Rights Agency (FRA) Report "Coping with a Fundamental Rights Emergency. The Situation of Persons Crossing the Greek Land Border in an Irregular Manner", 2011, p. 24. The report is available at http://fra.europa.eu/sites/default/files/fra_uploads/1500-Greek-border-situation-report2011_EN.pdf.

The following section will explore the legal framework in which Frontex operates, paying particular attention to fundamental rights, in order to establish whether Frontex's interpretation of border surveillance is governed by any boundaries and, if this is the case, what these boundaries are. I focus first on Decision 2010/252/EU and its fate, and then move on to the framework for protection of fundamental rights, paying specific attention to the Charter of Fundamental Rights and the ECvHR, which has recently been interpreted in relation to push-back operations.

The legal framework governing Frontex border surveillance: the genesis and fate of Decision 2010/252/EU supplementing the Schengen Borders Code

As explained above, Frontex's core mission is to improve integrated border management.³⁴ The main legal instruments governing Frontex's powers and tasks are the Frontex Regulation itself and the SBC. According to the SBC, border control comprises border surveillance and border checks.³⁵ Border surveillance, regulated by Article 12 SBC, is primarily intended "to prevent unauthorised border crossing, to counter cross-border criminality and to take measures against persons who have crossed the border illegally". Furthermore, "surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points" by border guards using mobile or stationary units. The provision further explains that border guards shall act "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."

Although the Code does not seem to put strict territorial limits on Frontex's territorial activities, it does not refer to the interception and diversion of vessels as part of border surveillance. Furthermore, it grants priority to the rights of refugees and persons seeking international protection, namely against *refoulement*.³⁶

As explained above, in practice, Frontex has coordinated JOs that involved the interception and diversion of vessels towards third states, in a framework of externalisation of migration controls.³⁷ Many observers have criticised these initiatives. While civil society has focused on the humanitarian dimension, academics (namely lawyers) have drawn attention to the lack of

³⁴ For a review of Frontex's mission, tasks and responsibilities, see L. Marin, "Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice?", *op. cit.*

³⁵ See Art. 2(9) SBC: Article 2: "Definitions. For the purposes of this Regulation the following definitions shall apply: (...)

2. "external borders" means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders; (...)

9. "border control" means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance; (...)."

³⁶ See Art. 3 SBC: Article 3: Scope. "This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

(a) the rights of persons enjoying the Community right of free movement;

(b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement."

³⁷ See B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden-Boston, 2010).

a proper legal background to authorise and regulate such actions. First of all, the legal bases of the JOs were “precarious”. For example, JO Hera was based on bilateral agreements between Spain and the third countries involved: indeed, the interception of boats of migrants and their diversion to third countries were foreseen in this particular case. However, while these agreements legitimised participation by officials from these third countries and Spain, they did not authorise Frontex and other MS agents to participate in the same operations.³⁸

In order to counter the mounting criticisms relating to Frontex and its actions, the Council of the EU adopted a Decision supplementing the SBC for border surveillance at sea,³⁹ recognising the “need for strengthened border control operations coordinated by [Frontex] and for clear rules of engagement for joint patrolling”, together with the “need for rules on disembarkation of rescued persons.” The Decision’s first objective was to provide a clearer legal framework for Frontex JOs, taking Frontex’s recent activities into account.⁴⁰ The aim of the Decision was to foster better coordination among MSs and Frontex in the conduct of border surveillance operations, leaving MSs’ SAR responsibilities intact (responsibilities that include delivering rescued persons to a place of safety).⁴¹

The measure was adopted on the basis of Article 12(5) of the SBC, providing that “additional measures governing surveillance (...) designed to amend non-essential elements of [the SBC] by supplementing it” may be adopted in accordance with the procedure indicated in the so-called second “comitology” decision, that is, the regulatory procedure with scrutiny.⁴²

The Decision consists of two Articles, which mainly refer to the Annex, structured in two Parts. Part I contains binding rules and Part II non-binding guidelines. Surveillance of external sea borders during Frontex-coordinated JOs is governed by the rules laid down in Part I, and the rules together with the guidelines (Part II) form part of the operational plan for Frontex JOs. This division between rules and guidelines is a result of EU competences in the domain: on the one hand, we have sea border operations and interception (Part I), and, on the other, there are SAR situations and disembarkation (Part II).

While the Decision was “justified” as providing “additional rules” on border surveillance, and therefore “not modifying the essential provisions” of the SBC, the European Parliament did not agree with this qualification. The Parliament brought the Decision before the EU Court of Justice (CJEU) for annulment, on the basis that it had been adopted on an incorrect legal basis

³⁸ One could argue that Frontex’s participation was enabled by the Frontex Regulation itself, although this remains problematic for interception and diversion operations. For other MSs’ officials, see E. Papastavridis, “‘Fortress Europe’ and Frontex: Within or Without International Law?”, *Nordic Journal of International Law* (79) 2010, 75-111, 89.

³⁹ 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.

⁴⁰ See Preamble 4 to the Decision: “(...) the European Council underlined the need for strengthened border control operations coordinated by the Agency and for clear rules of engagement for joint patrolling. The European Council in June also stressed the need for rules on disembarkation of rescued persons”.

⁴¹ See Recital 9 of the Decision, referred to at para. 23 of the judgment.

⁴² Under this procedure, the Commission presented a proposal and the Regulatory Procedure with Scrutiny Committee did not deliver an opinion. Therefore, the Commission submitted the proposal to the Parliament, which did not oppose it. The Council adopted the contested decision. 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, 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”.

and in violation of its legislative prerogatives.⁴³ In particular, the Parliament argued that (the rules on) “interception”, “rescue at sea” and “disembarkation” were concepts separate from border surveillance, as defined by the SBC.⁴⁴ These rules constitute a modification of the SBC and should therefore have been adopted via a legislative procedure.

The CJEU based its judgment⁴⁵ solely on the first objection raised by the Parliament, that is, that the Decision implied the introduction of new essential elements into the SBC and should therefore have been adopted by the EU legislature. Other points, such as whether the Decision modified essential elements of the SBC or the Frontex Regulation, were not dealt with by the Court. This means that the relation between interception and diversion measures and the SBC was not assessed, potentially leaving a political window open for negotiations, on the condition that the Parliament would be involved. In its judgment, the Court chose to focus on and clarify what can be considered an essential element of the SBC. Adopting a teleological interpretation of the SBC, the Court explained that the purpose of Article 12 is to prevent unauthorised border crossing, combat cross-border criminality and take measures against persons who have crossed the border illegally. Although Article 12 para. 4 states that the aim of surveillance is to apprehend individuals crossing the border illegally, the Court stated that “it does not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended”, nor on enforcement measures, such as the use of force against persons of vessels.⁴⁶

According to the Court, measures such as stopping vessels, boarding, search and seizure cannot be considered as practical rules detailing the apprehension of individuals who have crossed borders illegally, as foreseen in the SBC.⁴⁷ Diversion operations usually take place before borders are reached, and as such imply an extraterritorialisation of border controls, which also requires cooperation with third countries’ officials. The Court therefore concluded that “the adoption of rules on the conferral of enforcement powers on border guards (...) entails political choices falling within the responsibility of the European Union legislature.”⁴⁸

With this judgment, the Court has drawn a clear boundary between border surveillance and interception and diversion operations, without examining the question of whether such rules constitute a reform of essential elements of the SBC or of the Frontex Regulation. At the same time, the Court has decided to maintain the effects of the contested Decision,⁴⁹ as requested by the European Parliament. The final outcome is thus rather paradoxical: the Court has declared, on the one hand, that an act covering rules and guidelines on interception, diversion and disembarkation should have been adopted by the EU legislature; and, on the other hand, that its effects will nevertheless be maintained until the adoption of a new instrument. This means that Frontex is still able to coordinate JOs involving such measures: their legality is therefore only formally assured.

⁴³ OJ C 246 (11 September 2010), p. 34. The Commission was granted intervention in this case.

⁴⁴ 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.

⁴⁵ CJEU, Case C-355/10, *European Parliament v Council of the European Union*, Judgment of the Court (Grand Chamber) of 5 September 2012, OJ 2010 L 111, p.20.

not yet reported.

⁴⁶ Para. 73 of the judgment.

⁴⁷ Para. 74 of the judgment.

⁴⁸ Para. 76 of the judgment.

⁴⁹ Paras. 86-90 of the judgment.

In conclusion, the CJEU annulled Council Decision 2010/252/EU on the grounds that it added new essential elements to the SBC and was therefore in breach of the European Parliament's constitutional prerogatives. Indirectly, the judgment placed some boundaries on Frontex's far-reaching interpretation of its mandate and of border policing, as witnessed by its operations on the high sea, which now require the involvement of the EP and have thus opened a new political debate.⁵⁰

Which boundaries for border surveillance?

The EU's fundamental rights framework for border surveillance

The entry into force of the Lisbon Treaty implied a constitutional change in the protection of fundamental rights: the EU Charter of Fundamental Rights has become a legally binding text. The main implication of this is that the EU's activities can now be scrutinised by the CJEU for their compliance (or lack of it) with the European Charter of Fundamental Rights. Secondly, the provisions of the Charter now also apply to the agencies of the EU and to the MSs when they are implementing Union law.⁵¹

The Lisbon Treaty clarifies that annulment actions can now also target agencies' activities, in particular acts intended to produce effects *vis-à-vis* third parties, thus filling a legal lacuna that had been criticised by scholars. When looking at the means available to individuals to address these questions, one is still confronted with the strict conditions for *locus standi* of individuals before the CJEU. However, nothing prevents EU institutions – for example, the Parliament – from asking the Court to review the legality of Frontex's acts intended to produce legal effects *vis-à-vis* third parties.⁵²

Several provisions in the Charter of Fundamental Rights are relevant in the context of Frontex operations. The first is protection in the event of removal, expulsion or extradition (Article 19), which prohibits collective expulsions, similar to Article 4 of Protocol No. 4 ECvHR; and (para. 2) “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”, which captures (part of) the elaboration of the ECtHR on Article 3 of the European Convention.

The most important implication of this principle at sea is non-rejection at the frontier (1967 Declaration on Territorial Asylum, 1967 OAU Convention on Refugees). The peculiarity of the context is such as to have led scholars to interpret that “*non-refoulement* is about being admitted to the State community, although in a minimalist form of non-removal. It could be described as a right to transgress an administrative border”.⁵³ Similarly, the Executive

⁵⁰ J. Pollak and P. Slominski, (2009) ‘Experimentalist But Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders’, *West European Politics*, 32:5, 904-924.

⁵¹ Article 51 Charter of Fundamental Rights.

⁵² 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.

⁵³ G. Noll, “Seeking Asylum at Embassies: A Right to Entry under International Law?”, *International Journal of Refugee Law*, 17 (2005), 542, 548, quoted in 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).

Committee of the UNHCR⁵⁴ has required that it is “imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment”.⁵⁵

Secondly, the Charter enshrines the right to asylum (Article 18), guaranteed in accordance with the Geneva Convention of 1951 and relative Protocol of 1967. The right to an effective remedy and to a fair trial also comes into play in the context of Frontex activities (Article 47). I have mentioned these provisions as they indicate the EU’s engagement with respect to fundamental rights on issues such as *non-refoulement*, the legal framework for asylum and ensuring access to an asylum system.

Thirdly, the Charter of Fundamental Rights encompasses a prohibition against torture and inhuman or degrading treatment or punishment (Article 4), which corresponds to Article 3 ECvHR. It is relevant to note here that the Strasbourg Court has qualified the right enshrined in this provision as an absolute right, regarding which there can be no derogation or limitation.⁵⁶

Other provisions are relevant to the field of Frontex operations. Frontex’s border surveillance operations might impact private and family life (Article 7) and, last but not least, the protection of personal data (Article 8).

The Charter itself refers to other instruments that are binding on MSs, such as the ECvHR, stating that the Charter cannot restrict or adversely affect human rights and fundamental freedoms as recognised in those instruments to which the EU or all MSs are party.⁵⁷

Among those instruments, the ECvHR as interpreted by the ECtHR⁵⁸ plays a special role, in particular through its provisions at Articles 3, 4 of Protocol 4, and 13. This instrument is especially topical as the Strasbourg Court recently had the chance to examine Italian interception and diversion operations as being in possible breach of the ECvHR. Among other instruments binding on the EU and MSs, one could mention the Geneva Convention, referred to in both the EU Charter and the ECvHR; and the SOLAS and SAR Conventions,⁵⁹ which establish SAR obligations for MSs.

This, broadly speaking, is the framework binding Frontex and MSs during joint border surveillance operations. The thesis advanced here is that Frontex operations are also covered by this legal framework. The fact that Frontex does not bear the legal responsibility for its

⁵⁴ Conclusion No. 22 (XXXII) 1981.

⁵⁵ 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), 205.

⁵⁶ See European Court of Human Rights, 23 February 2012, Judgment in *Hirsi Jamaa and others v Italy*, Application no. 27765/09, paras. 120 and 122.

⁵⁷ Another provision (Article 53) states that “nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective field of application, by Union law and international law and international agreements to which the Union or all the Member States are party, including the European Convention of [HR], and by the Member States’ constitutions.”

⁵⁸ See the Charter’s Preamble, para. 5. See also Art. 6 TEU, enabling EU access to the ECvHR.

⁵⁹ Safety of Life at Sea (SOLAS) Convention, most recent version of 1974, and SAR Convention, of 1979. Information on the SOLAS Convention can be found at

[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx), and on SAR at:

[http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx).

operations, which instead belongs to the MSs, cannot grant immunity to Frontex and, at a higher level, the EU and its MSs, for their actions.

The outer boundaries of EU border surveillance: the position of the Council of Europe and of the Strasbourg Court on push-back operations

Another important judicial development concerns the legal environment surrounding Frontex. I refer in particular to the recent case *Hirsi Jamaa et al. v Italy* of the ECtHR⁶⁰ interpreting the obligations under the ECvHR of a contracting MS, Italy; indirectly, the judgment clarifies the *boundaries* of border surveillance.

The events behind the judgment occurred in May 2009. Three vessels with 200 individuals on board left Libya with the aim of reaching the Italian coast. Among the passengers were Somali and Eritrean nationals, who were to lodge the application in the present case. On 6 May 2009, the vessels were intercepted to the south of Lampedusa, in the Maltese SAR region, by the *Guardia di Finanza* and the Italian coastguard. After the passengers had been transferred onto Italian military ships, they were taken to Tripoli without being informed of the destination and without prior identification. The Italian government conducted nine operations in total, on the basis of bilateral agreements with Libya. The Minister of the Interior at that time, Roberto Maroni, publicly presented those operations to the Senate of the Republic (one of the two parliamentary chambers of the Italian Parliament) as being very effective in combating illegal immigration, discouraging smuggling and trafficking, helping to save lives at sea and substantially reducing landings.

In its very extensive judgment *Hirsi v Italy*, the Strasbourg Court described the legal framework applicable and assessed whether the Italian practices had or had not violated the ECvHR. The Grand Chamber of the Court strongly condemned interdiction practices as being in sharp contrast to several provisions of the system of the European Convention of Human Rights.

In particular, the Strasbourg Court recognised that the interceptions and push-backs carried out by Italian warships on the high seas did constitute an exercise of jurisdiction for the purpose of Article 1 of the ECvHR; such cases amounted to a *de jure* “extra-territorial exercise of jurisdiction by Italy”,⁶¹ because “a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying”.⁶²

Secondly, the Court held that expulsions such as those that occurred in the case amounted to a breach of Article 3 ECvHR, prohibiting torture and other inhuman and degrading treatment, because, although in principle entitled to expel aliens, Italy exposed the applicants to the real risk of being subject to inhuman and degrading treatment in the receiving country, Libya. Article 3 implies an obligation not to expel the individual to a country if there are reasonable grounds to believe that the persons in question would be subject to such treatment. The violation of Article 3 was twofold, as the Court considered as an autonomous violation the fact that migrants had been pushed back and therefore exposed to the risk of arbitrary

⁶⁰ European Court of Human Rights, 23 February 2012, Judgment, *Hirsi Jamaa and others v Italy*, Application no. 27765/09.

⁶¹ *Hirsi*, para. 78.

⁶² *Ibid.*, para. 77.

repatriation to Somalia and Eritrea, and lack of access to an asylum system in Libya, a country that had not even ratified the Geneva Convention on the Status of Refugees.⁶³

Thirdly, the Court stated that diversion operations amounted to collective expulsions of aliens, which are prohibited by Article 4 of Protocol No. 4 of the ECvHR. While recognising that states can legitimately have immigration control policies, the meaning of Article 4 Protocol No. 4 is “to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority”.⁶⁴ In the reasoning of the Court, the fact that expulsions took place on the high seas does not constitute an obstacle to framing push-back operations as collective expulsions of aliens, because there was exercise of jurisdiction by Italy in the circumstances of the case. The problem of migratory flows cannot justify having recourse to the practice of intercepting migrants on the high seas, “the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State”.⁶⁵ The lack of access to an administrative and judicial system to challenge their expulsion – which has suspensive effects – amounts to a lack of access to a judicial remedy to enforce their rights, deriving from the Convention. This lack caused Italy to violate the right to a judicial remedy (Article 13 ECvHR), read *juncto* Article 4 of Protocol No. 4.

The first merit of the judgment is to clarify ECvHR obligations binding an EU MS in the framework of operations allegedly aimed at combating illegal immigration and conducted alongside EU-coordinated border surveillance operations, as was the case in Frontex’s JO Nautilus. At another level, the judgment has exposed the flaws in EU law in this respect. The Strasbourg Court underlined that interceptions at sea must be accompanied by clear procedural safeguards regarding access to an asylum system and judicial review. At the EU level, Council Decision 2010/252/EU was an attempt to provide a legal basis for such practices, but its fate has been narrated above.

At another level, the judgment is interesting because it clarifies the legal framework surrounding the EU’s policy of border surveillance. Although addressed to Italy, as a contracting party to the ECvHR, the legal proceedings before the ECtHR have tried to clarify the role of Frontex and the relation between Italian push-backs and Frontex-coordinated operations (namely, JO Nautilus IV, 2009). Indeed, during the hearing, the Court requested an explanation of the relation between Frontex operations and Italian push-backs carried out on the basis of bilateral agreements.⁶⁶ In the end, the judgment did not assess the role of Frontex; however, the mere request for clarification of the operational area is a sign of the lack of transparency regarding agencies’ activities and their unclear relation to the facts under dispute. Absent any official disclosure from Frontex of the operational area of JO Nautilus in the days of the Italian push-backs, one must rely on the sources available: in this specific case, Frontex’s press releases and NGO reports, which suggest that it is impossible to deny some complementarity between the Italian and Frontex activities. In so doing, the judgment clearly delimits Frontex’s future operational autonomy, placing clear boundaries on border surveillance.

⁶³ *Ibid.*, paras. 139-158.

⁶⁴ *Ibid.*, para. 177.

⁶⁵ *Ibid.*, para. 180.

⁶⁶ See also the request for an explanation of 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)’.”

The role of Frontex has captured the attention, albeit indirectly, of other bodies within the Council of Europe system. In Resolution 1821(2011), the PACE states that “although [Frontex] plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it co-ordinates.” In the same document, the Assembly reminds EU MSs of their obligations under international law, and calls upon states to “refrain from any practices that might be tantamount to direct or indirect *refoulement*, including on the high seas, in keeping with the UNHCR’s interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights”.⁶⁷ For example, the Assembly expresses concerns about “the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency” and requests that the European Parliament be entrusted with supervisory powers over the agency’s activities.⁶⁸

Since clear boundaries on border surveillance at European level are lacking, other fora will scrutinise MSs’ operations and, indirectly, Frontex’s actions. The Strasbourg Court and the PACE have already made their contributions. Another ongoing investigation is that by the UN Special Rapporteur on the Human Rights of Migrants, who recently delivered a report on respect for human rights in the conduct of border surveillance operations with a specific focus on Italy. The report also addressed the role of Frontex, and the UN Special Rapporteur stressed that “security objectives still appear to overshadow human rights considerations” and re-established the necessity of integrating human rights standards “into all departments and agencies related to border management”.⁶⁹ Considering that the EU’s action on external borders has already attracted much attention from the media, international agencies and NGOs, the EU cannot afford to be slow in ensuring that Frontex operates in an accountable manner and within clear and effective legal boundaries, in full respect of the Stockholm Programme and of the EU’s constitutional framework. In view of this, the next section will look at the initiatives being taken to bridge the gap between Frontex’s approach and human rights.

Frontex’s move toward fundamental rights: dismantling Fortress Europe?

⁶⁷ Resolution, 1821(2011), PACE, para. 9.4.

⁶⁸ Ibid., para. 10.

⁶⁹ See the “UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy” available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E>; on Frontex, the report states: “During my mission, I have also learned how the management of Italy’s external borders has been harmonised and strengthened through the Schengen process and is further supported by the EU border agency FRONTEX. FRONTEX’s work in strengthening Italy’s search and rescue capacity is important. I am encouraged by recent positive steps such as the appointment of a Fundamental Rights Officer within FRONTEX. Nevertheless I am aware that the key focus of FRONTEX remains information and intelligence gathering. In Italy FRONTEX thus works predominantly with the Guardia di Finanza and the Border Police to combat irregular migration, migrant smuggling and other migration related crimes. I remain concerned that these security objectives still appear to overshadow human rights considerations. For example, I have learned that FRONTEX officers conduct interviews with migrants in Italian detention facilities in order to gather information on their journeys. However these interviews are conducted without any external supervision. It is thus essential that effective human rights standards be integrated into all departments and agencies related to border management.”

In the wake of the Decision supplementing the SBC of 2010, the EU legislature amended the legal framework within which Frontex operates in 2011.⁷⁰ This led to an increase in the agency's powers, again revealing the political importance EU institutions attach to protecting the Union's borders from irregular migration as well as to improving the agency's compliance with fundamental rights. However, it appears that the relation between Frontex and fundamental rights was already perceived as a problem: indeed, even before the amendments to the legislation, Frontex itself adopted a Fundamental Rights Strategy.⁷¹

This document represents a move forward in ensuring that fundamental rights are respected in all of the activities coordinated by Frontex. The effort to "operationalise" fundamental rights is certainly one of the more meritorious points. The Strategy does indeed stress that joint operations and risk analyses 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". Furthermore, Frontex's operational plans shall be elaborated in "strict conformity with the relevant international standards and applicable European and national laws". Another significant implication is that Frontex "might terminate a JO" if respect for fundamental rights is no longer assured. This engagement should be enforced by a reporting system, which forms the basis for monitoring all of its operations, including forced return operations. The document also requires that MSs guarantee that they can provide such a monitoring system.

Secondly, I would mention Frontex's Code of Conduct, a compilation of generally accepted standards of soft law that promotes professional values based on the principles of the rule of law and respect for fundamental rights; and the Action Plan, which will become the main implementation tool for Frontex's Fundamental Rights Strategy and which should also be properly reflected in the Frontex Programme of Work. In addition, Frontex has made an effort to improve transparency and participation by periodically convening a Consultative Forum, gathering together external third parties, such as other international organisations (the Council of Europe, the UNHCR, the International Organisation for Migration and the OSCE) and other EU agencies (the European Asylum Support Office (EASO) and the Fundamental Rights Agency (FRA)) and civil society representatives. Last but not least, Frontex has concluded working agreements with UNHCR and with EASO, which might represent a positive move toward greater operationalisation of fundamental rights in practice. The Fundamental Rights Strategy and the Code of Conduct certainly represent a step forward. What remain problematic are the overall accountability mechanisms relating to Frontex, which are quite weak.⁷²

The Frontex Recast Regulation has transformed into law all initiatives previously taken by Frontex. Besides this, the new legal framework contains several provisions intended to ensure that border surveillance is compliant with fundamental rights duties and obligations. As to the legal framework, the new Article 1(2) requires that:

The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights (...); the relevant international law,

⁷⁰ See Regulation (EU) No. 1168/2011 quoted above, OJ L304/01.

⁷¹ Endorsed by the Frontex Management Board on 31 March 2011, the document is available at www.frontex.europa.eu.

⁷² For a detailed analysis and proposals for improving accountability of EU agencies, see the study "Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies", authored by E. Guild, S. Carrera, L. den Hertog and J. Parkin, available at <http://www.ceps.be/book/implementation-eu-charter-fundamental-rights-and-its-impact-eu-home-affairs-agencies>.

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 its new paragraph 1a, prohibits disembarkation in a third country,

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 international protection 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 full respect for the EU Charter of Fundamental Rights, shall ensure respect of such obligations in the Code of Conduct and shall be effectively monitored.⁷³

Another concrete step in the direction of fundamental rights is represented by the creation of a Fundamental Rights Officer, recently appointed in the person of Ms Arnaez Fernandez.⁷⁴ The Fundamental Rights Officer should be the interface between the Consultative Forum, the Management Board and the Executive Director. Designated by the Management Board, she/he shall be independent in the performance of her/his duties, report directly to the Management Board and the Consultative Forum, and contribute to the mechanism of monitoring fundamental rights.⁷⁵

The Frontex Recast Regulation has brought into the legislative framework the initiatives taken by Frontex, such the Fundamental Rights Strategy, which also provides for the Code of Conduct, to be developed in cooperation with the Consultative Forum.

All of the initiatives discussed above certainly represent steps in the right direction, which should lead to a clearer legal framework for Frontex's border surveillance role on external borders. While this trend is to be welcomed, we should not forget that the revised framework is the counterpart to Frontex's increased operational powers. Viewed this way, it was imperative to make some positive steps towards operationalising fundamental rights, in an attempt to redress an unbalanced state of affairs.⁷⁶ Only by monitoring the practical effects of these initiatives and new actors will we discover the extent to which they can make Frontex a more accountable and human rights-friendly agency and therefore contribute to dismantling "Fortress Europe". From a broader perspective, it seems that "Fortress Europe" is in fact embracing a high-tech future, thanks to the establishment of EUROSUR, the surveillance system that will set up a network of national surveillance systems. EUROSUR has been criticised for the costs it will entail, allegedly underestimated by European institutions,⁷⁷ and for its unproven humanitarian benefits, among other things.⁷⁸ In a draft version of the

⁷³ New Article 9 Frontex Recast.

⁷⁴ See Frontex's press release: <http://www.frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-zqofRR>.

⁷⁵ New Article 26a Frontex Recast, 'Fundamental Rights Strategy'.

⁷⁶ J. Pollak and P. Slominski, (2009) 'Experimentalist But Not Accountable Governance?', cit.

⁷⁷ See the report: "Borderline" of the Heinrich Boell Stiftung, at http://www.boell.de/downloads/DRV_120523_BORDERLINE_-_Border_Surveillance.pdf.

⁷⁸ See Meijers Committee, Note on EUROSUR, CM1215 of September 2012, quoted above.

EUROSUR Regulation,⁷⁹ the Council agreed on a text in which the surveillance of external borders is meant to provide information (in the National Situational Picture and the European Situational Picture) relevant to “detecting, preventing and combating illegal migration and cross-border crime at the external borders”. Thus, if migration is still perceived as a crime and a security threat, it is not clear how Frontex will manage to fulfil its human rights agenda.

How to square the circle between border surveillance and human rights at the borders? A proposal

So far, Frontex has conducted surveillance of borders to apprehend any persons trying to cross them, without consideration for each personal situation. This is the consequence of the externalisation of border surveillance. In so doing, it has erected borders that not only affect people, but also their rights. It has been proven in several instances⁸⁰ that those borders were erected against fundamental rights and that Frontex played a role in this, coordinating operational cooperation among MSs. While it can be maintained that Frontex can still police borders as it is mandated to, this chapter suggests that some changes might be needed in order to square the circle between border policing and human rights (at the borders), by enacting and enforcing a legal framework that simultaneously protects borders, persons and rights. The following paragraphs propose how this might be achieved.

In the first instance, the legal framework governing Frontex’s operations and mandate should be clarified and Frontex should strictly abide by it. This would serve a dual purpose. On the one hand, it would ensure that Frontex’s activities are duly covered from a legal perspective. On the other hand, it would require that Frontex refrain from participating in, assisting or cooperating with activities not explicitly permitted by its legal framework, the SBC, or any other (also future) legislative instrument governing its activities, such as readmission agreements. This should ultimately improve the transparency and accountability of this still-contested agency. More respect for the principle of legality should also reduce the discretion with which Frontex operates and, eventually, result in greater transparency and accountability. In practical terms, interception and diversion operations should no longer feature among Frontex-coordinated operations.

Secondly, a clarified legal framework should avoid the fragmented approach taken by Frontex in the fulfilment of its mission to date, an approach that is based on the division of responsibilities between Frontex and MSs.⁸¹ This should determine that rules ensuring the primacy or the special nature of the principle of *non-refoulement* and of the right to lodge an asylum application should be *operationalised* into a clear legal framework respecting fundamental rights in practice, including in Frontex’s operational plans. It is still a necessity for Frontex to ensure that some rules prevail over others, in operational practice more than on paper, thereby putting the culture of rights into practice, as requested by the FRA and other actors, such as the Council of Europe. This could and should entail, where necessary, the adoption of a conditionality rule by Frontex, in the first instance regarding the MS hosting a

⁷⁹ Council doc. No. 16508/12, on file with the author.

⁸⁰ Among the NGO reports, I would refer to that by Human Rights Watch; among those by international organisations, I have referred above to the Council of Europe documents and resolutions, together with UNHCR documents.

⁸¹ Article 1, para. 2, of the Frontex Regulation. See also para. 13 of the Fundamental Rights Strategy, quoted above.

JO, and also inserted in the operational plan, requiring respect for fundamental rights during the JO. If necessary, this should lead to the interruption of a JO if the hosting MS fails to fulfil its duties, as is provided in the Frontex Fundamental Rights Strategy.⁸² The rule already exists, but should now be enforced and scrutinised. Only this would guarantee the practical enforcement of fundamental rights, as advocated by several civil society organisations as well as other agencies.⁸³ This would also lead to the emergence of a political problem, which should be tackled by the appropriate (political) forum. Using conditionality would require Frontex to be less “responsive” to MSs and their requests for support. At another level, this would enable an alignment of the external borders agency with the legal obligations of MSs in respect of the case law of the ECtHR and other international bodies, such as the UNHCR.

Why should Frontex do so? Because under the current legal framework, Frontex might be held legally accountable for its operations. The secrecy of its operational plans certainly represents an obstacle to lodging an annulment procedure before the CJEU. However, one should read the recent *Hirsi* and *M.S.S.* judgments of the Strasbourg Court against the background of the *Bosphorus* doctrine: the Court will not assess respect for human rights at EU level so long as the EU offers equivalent protection. *A contrario*, if the protection is no longer equivalent, the Court of Human Rights will tighten its control and scrutiny of the EU’s legal order. This means that the CJEU has to take ECtHR case law into account: this is the price for being and remaining the ultimate (fundamental rights) court at EU level. Indeed, this already happens, and recent examples illustrate this point: the CJEU is taking into account ECtHR case law on asylum issues, avoiding conflicts with the ECtHR and trying to align with its case law.⁸⁴

By way of conclusion, however, we should take a critical look at some of the root causes of the current *status quo*, where border policing has got to the point of rejecting or detaining persons and undermining their rights. The Dublin II Regulation together with a lack of burden-sharing and relocation programmes for people seeking international protection have exacerbated the pressure on some asylum systems more than on others. The Greek example illustrates this point. Taking a feeble approach to the problem of asylum is not the right choice for a European Union that has won the Nobel Peace Prize. The securitisation of migration has criminalised a natural demographic phenomenon and transformed it into a humanitarian emergency. The CJEU has made its contribution by accommodating the *M.S.S.* judgment into its case law. However, the current Dublin II system lays an excessive burden on Southern European countries and should be revised. This would enable states to fulfil their SAR tasks without being left alone to deal with the consequences of taking the necessary actions to save human lives; that is, giving access to an effective asylum system. Relocation programmes and financial support for effective and decentralised national asylum systems should be prioritised over any other measures, and should be considered as necessary steps to avoid pushing back human beings having fundamental rights during EU border policing operations.

⁸² See paragraph 15 of the Fundamental Rights Strategy, in particular: “As last resort, Frontex might terminate a JO if the conditions guaranteeing the respect for fundamental rights are no longer met.”

⁸³ See also Meijers Committee, Contribution to the public consultation on Frontex and fundamental rights of the European Ombudsman, ref. CM1217, 26 September 2012, at <http://www.commissie-meijers.nl/assets/commissiemeijers/CM1217%20Response%20Meijers%20Committee%20to%20the%20public%20consultation%20by%20the%20European%20Ombudsman%20on%20Frontex%20and%20fundamental%20rights.pdf>.

⁸⁴ Cf. CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v SSHD and M.E. et al. v Refugee Applications Commissioner*, Judgment of the Court (Grand Chamber) of 21 December 2011 [2011] OJ C 274/21 and OJ C 13/18. See also: S. Carrera, M. De Somer and B. Petkova, “The Court of Justice as a Fundamental Rights Tribunal”, CEPS Paper No. 49/2012.