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Vos informations

Partie 1 - Information sur l'expéditeur

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Partie 2 - Contenu

Sujet Frontex and Fundamental Rights

Contenu

Dear Madam, dear Sir,

I heard about the consultation launched by the Ombudsman on Frontex's compliance with fundamental rights and implementation of safeguards in this respect. I hereby intend to bring a modest contribution by submitting my Master's final dissertation, which second chapter, section 2 especially deals with the issue.

Thank you for your time and attention,

Pierre Georges Van Wolleghem

Section 2: Enhancing Frontex's role and improving the consideration for fundamental rights

The blurred legal basis resulting of member States' will to keep control over the agency led Frontex on unexpected paths. Soon after taking up its tasks, Frontex was questioned by the civil society on the one hand but also a judgement of the ECtHR made clear the non-compliance of diversion with fundamental rights on the other hand. Within the scope of its remits, Frontex showed an impetus towards better consideration of fundamental rights (1.). The amendment of Frontex founding Regulation adopted in 2011 foresees the improvement of the agency's competences that would presumably enhance the consideration of fundamental rights (2.).

1. Frontex as a target of criticism and endeavours to heed of fundamental rights

Between diversion to Libya and RABITs deployment to Greece, the compliance of activities carried out by Frontex with fundamental rights has been put in doubts through detailed reports from the civil society (1.1.). Frontex as a branch of the EU is bound by international and European fundamental rights obligations but, because of its legal basis, cannot bear responsibility for failure to comply with fundamental rights obligations on behalf of member States (1.2.).

1.1. Well-founded criticism from the civil society

1.1.1. Alleged breaches of fundamental rights: from Libya to Greece

Despite the lack of public accountability and transparency, vivid criticisms recently emerged from the civil society through the voice of NGOs known for their activism in the field of fundamental rights and their empirical, founded, findings. These criticisms addressed specifically to Frontex in its role of coordination of operations at sea.

A first report from Human Rights Watch, issued in September 2009 highlighted the questionable practice of diversion to Libya. While operating under the umbrella of Frontex's coordination, an Italian vessel assisted by a German helicopter diverted a boat loaded with

migrants encountered in the central Mediterranean Sea[1]. Operation of the same nature already took place off the coast of Mauritania and Senegal but more than generating the uproar of the civil society, it gave rise to fostered debates on the responsibility under international law in case of rights breached[2]. The diversion that occurred in the central Mediterranean posed a wide range of questions at the top rank of which, the jeopardised prohibition of *non-refoulement* in the event of undifferentiated diversion of asylum seekers and illegal migrants. In the same vein, the state of the asylum system in Libya indeed raised great concerns. But more generally, the treatment of migrants had its share of attention.

The Parliamentary Assembly of the Council of Europe denounced the wide acceptation of "place of safety" by some EU member States. International law provides for the disembarkation of people rescued at sea to a "place of safety" where people saved from danger could find a shelter. For the Parliamentary Assembly:

> "It would seem incongruous to accept a definition of "place of safety" that permits the disembarkation of persons by a rescuing ship (...), at a port of a state where the fundamental human rights of the rescued persons could be at risk. Such disembarkation could be tantamount to *refoulement*"[3].

That is, Libya is particularly known for bad practices when it comes to deal with immigration. The aforementioned report of Human Rights Watch notably reveals the toughness of detention facilities but also the racial violence on sub-Saharan Africans and generalised abuses. In facts, disembarking or diverting in a third country may be tantamount to expose the illegal migrant to lesser standards of fundamental rights. In law, third countries across the Mediterranean are neither bound by the EU Charter nor are they by the ECHR and therefore, ensuring that rights are going to be abided by in a third country would entail the scrutiny beforehand of the actual level of protection and/or of the legal guarantees provided for in the said third country so that migrants are not to be exposed to violation of their rights.

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[1] Human Rights Watch, *Pushed back, pushed around, Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, September 2009, p. 37

[2] The operation was carried out under bilateral agreements with Spain and the diversions conducted were allegedly the responsibility of Senegalese and Mauritanian law enforcement agents on board of Frontex's fleet, in charge of implementing the return to shore

[3] Parliamentary Assembly of the Council of Europe, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, 1 June 2011 (Report), paragraph 42

However, even States bound by both the EU Charter and the ECHR should be submitted to the scrutiny of their actual respect of fundamental rights prior to envisage a Frontex's operation.

At the very same moment the ECtHR found that the conditions of detention of migrants in Greece were degrading and inhuman, an ongoing Frontex mission was taking place under Greek authorities, the first time ever that RABITs (Rapid Border Intervention Teams; within the meaning of Regulation 863/2007/EC) were deployed. According to the rules adopted for this operation, intercepted migrants were to be handed over Greek authorities.

When the ECtHR released its judgement M.S.S v. Belgium and Greece[1], the 21st January 2011, the UNHCR had already issued a report dating back to 2008[2] inviting EU member States to refrain from returning asylum seekers to Greece as provided for by the Dublin II Regulation[3]. In M.S.S v. Belgium and Greece, the Grand Chamber of the ECtHR, judgments of which are final, found a violation of article 3 (prohibition of degrading or inhuman treatment) and 13 (right to an effective remedy) ECHR for Greece and Belgium, following the application of the Dublin II Regulation. In brief, article 3 was violated by Greece because of the asylum seeker conditions of detention and because of his living conditions in Greece; and by Belgium because it exposed the asylum seeker to the risks linked to the deficiencies of the Greek asylum procedure and for exposing him to degrading detention and living conditions. Article 13 was violated by Greece because of the deficiencies of its asylum procedure and by Belgium because of the lack of an effective remedy.

In substance, an Afghanistan national fled his country and entered the EU through the Turkish-Greek border where his finger-prints were taken. After having been given an order to leave the territory, he undertook a travel to Belgium where he finally applied for asylum. In accordance with the Dublin Regulation, the member State responsible for the asylum claim is the one that has had the border crossed; so in the case at issue, Greece. The UNHCR recommended to Belgian authorities not to apply the Dublin Regulation, considering the deficiencies of the asylum system in Greece and the bad condition of detention there. Despite the recommendation, the Afghan national was sent back to Greece where he faced ill-treatments in a detention centre and almost deportation.

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[1] EHCR, Grand Chamber, Judgment M.S.S. v. Belgium and Greece, 21 January 2011, Application no. 30696/09

[2] United Nations High Commissioner for Refugees, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008

[3] United Nations High Commissioner for Refugees, *Ibid.*, the report highlighted the impossibility in practice for an asylum seeker to lodge his claim

The judgment of the Court in M.S.S has far-reaching features inasmuch as it does not only concern asylum seekers but also illegal migrants that would be detained in the same conditions. The present judgment as much as the previous warnings issued by the UNHCR put in question the ability of Greece to respect fundamental rights while managing its borders.

The judgment was pronounced in January the 21st, 2011. In the meantime, the first ever RABITs operation was in progress. It started in November the 2nd, 2010 and lasted until March the 2nd, 2011. The Frontex deployment took place at the land border with Turkey[1] further to a request from the Greek government. At the time, Greece experienced an exceptionally high number of migrants intending to cross the border, raising the rate of detected crossing to Greece to 90% of the detected crossing inward the EU as a whole[2]. It thus called upon Rapid Border Intervention Teams as provided by article 8a of Regulation 2007/2004 as amended by Regulation 863/2007. But, as the migrants intercepted by the RABITs were to be handed over to Greek authorities, it sparked vivid criticisms from Human Rights Watch. Regulation 863/2007 does not explicitly provide for intercepted migrants to be handed over to host member State's authorities. However, operations on the land leave much less ambiguities than operations at sea with regard to the definition of the authority responsible insofar as operations take place within the borders and not beyond. The operational plan, which is made compulsory and binding in the case of RABITs deployment (article 8e(2)), provides for the geographical area of responsibility in the requesting member State where the teams will be deployed (article 8e(1)(c)). Otherwise, article 10(10) reads:

> "Decisions to refuse entry in accordance with Article 13 of Regulation (EC) No 562/2006 shall be taken only by border guards of the host Member State."

In echo, article 13(2) of Regulation 562/2006 or otherwise called Schengen Borders Code reads:

> "Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately (...)".

[1] So in this regard, it falls somewhat out of the scope of our study as this border is not generally reckoned as a southern border but rather as an eastern border. However, the member State at issue is plainly part of our study and the conditions of detention applying there as well.

[2] Frontex press release, *Frontex deploys rapid border teams to Greece*, 25 October 2010, available at: http://frontex.europa.eu/media-centre/press-releases

In a nutshell, the operation aiming at preventing migrants from crossing the Greek border illegally and the operations taking place on the Greek territory, refusal of entry is to be delivered by Greek authorities. Therefore, Frontex's task is limited to coordinating interception of migrants but it is by no means to decide whether entry is legitimate or not.

Given that, in a report of September 2011, Human Rights Watch held in plain language:

> "Human Rights Watch believes that Frontex has fallen short of its obligations to respect the absolute prohibition on exposing individuals to inhuman and degrading treatment as a result of its cooperation with Greek authorities in detaining migrants in Greek detention facilities where the conditions violate European and international human rights standards"[1].

In the report, the NGO drew the analogy between Frontex activities at the Greek-Turkish border with the M.S.S case cited above were Belgium handed an asylum seeker to Greece and therefore submitted him to degrading treatments; Frontex being "handing over" irregular migrants to Greece as Belgium did with an asylum seeker. In the organisation's view, Frontex, despite claiming its non-responsibility, cannot be absolved "from responsibility and liability where it co-operates in activities that contribute to exposing detainees to the abuses that occur in them"[2]. Thereby, the NGO rightly held that Frontex is submitted to the same fundamental rights standards than any member States or EU institutions. However, as Frontex founding Regulation stands, its responsibility remains very limited.

1.1.2. Frontex's fundamental rights obligation and the very recent Hirsi case

Indeed, even if Frontex founding Regulation is rather little eloquent on the respect of fundamental rights, it was created in accordance with the competence conferred to the EU by member States. It is an extension of the EU and it is therefore bound by the same principles. The respect for fundamental rights is made a founding value of the EU by article 2 TEU and, prior to the entry into force of the Lisbon treaty, article 6 TEU fulfilled this role. A more precise reference is given in article 67(1) where it is provided that the Area of Freedom, Security and Justice, to which Frontex pertains, is to be constituted in compliance with the respect for fundamental rights. Further on, article 3(5) TEU states that the EU, in its relation

[1] Human Rights Watch, *The EU's dirty hands: Frontex involvement in ill-treatment of migrant detainees in Greece*, September 2011, available at: http://www.hrw.org/fr/node/101692 , p. 46
[2] Human Rights Watch, 2011, *Ibid,* p. 47

to the wider world, upholds its values and contribute to the protection of human rights; i.e. even while operating beyond its borders, it shall respect fundamental rights. Finally, article 6(1) TFEU affords the same binding force as the treaties to the EU Charter and the third paragraph of the same article makes fundamental rights, as guaranteed by the ECHR and by the common constitutional traditions of the member States, general principles of the Union's law. It comes into view that Frontex cannot be absolved of compliance to fundamental rights, save when the compliance does not rely on its responsibility.

Beside EU primary law, the ECHR also shows to be applicable to activities carried out by Frontex even if the EU has not yet acceded to the ECHR. Even though Frontex cannot be held responsible. As a matter of law and facts, the "responsibility for the control and surveillance of external borders lies with the member States" (Frontex founding Regulation, recital (4)), so EU member States' assets operating in a Frontex coordinated mission either in the Mediterranean or beyond EU external borders are bound by the ECHR. Notably, as we mentioned it before, article 1 ECHR reads: "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (emphasis added). In this regard, the ECHR does not admit geographical limitation of scope but legal limitations. The international law of the sea provides that the law to which a vessel is submitted in international waters is the law of its home land (article 92 UNCLOS). Thereby, EU member States vessels are without any doubt bound by the ECHR. And so the ECtHR found in T.I. v. UK when it rendered its decision:

> "Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution"[1].

In spite of this, the German Institute for Human Rights released a rapport in 2007 in which it questioned the extra-territorial applicability of the ECHR that even if affirmed by the consistent case law of the Court, had never been expressly uttered by the Court in the case of

[1] ECHR, Third Section, T.I. v. UK, Decision as to the admissibility of the application n°43844/98, 7 March 2000

refoulement or collective expulsion[1]. Since then, the case Hirsi has swept all possible doubts and allows us to definitively opt for the liability of member States before the ECHR in case of right violation beyond ECHR State parties borders.

Substantially, the very recent Hirsi case[2] shows the stance adopted by the ECtHR on the extra-territorial applicability of the ECHR with regard to *refoulement* and collective expulsion. So far, the Court had only once found a violation of the prohibition of collective expulsion in Čonka v. Belgium[3] but with the Hirsi case, it was called "for the first time, [to] examine whether [the prohibition of collective expulsion of aliens] applies to a case involving the removal of aliens to a third State carried out outside national territory" (paragraph 169). Italy argued that as far as the plaintiff had not entered the territory, he had not been expelled but rather refused entry into the national territory (paragraph 160). The Court held on its part that the succinct article 4 of protocol 4, worded as "Collective expulsion of aliens is prohibited", "does not in itself pose an obstacle to its extra-territorial application" (paragraph 173). As for the assessment of the collective expulsion, the Court held:

> "[T]he purpose of Article 4 of 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. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land" (paragraph 177).

The Court went then further by stating that if the notion of jurisdiction is principally territorial, it is also the case for the notion of expulsion and as a consequence, a State exercising its jurisdiction outside its territory is logically liable for a breach of the prohibition of collective expulsion that shall thus be applicable as well (paragraph 178). Accordingly,

[1] Ruth Weinzierl and Urszula Lisson, *Border management and human rights: a study of EU law and the Law of the Sea*, German Institute of Human Rights, December 2007, p. 61
[2] ECHR, Grand Chamber, Judgment Hirsi Jamaa and others v. Italy, 23 February 2012, application no. 27765/09
[3] ECHR, Third Section, Judgment *Čonka v. Belgium,* 5 February 2002, application no. 51564/99

diversion further to interception at sea "constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4" (paragraph 180).

In the Hirsi case, the ECtHR was finally called to judge on the extra-territoriality of the ECHR in the case of *refoulement* and collective expulsion, clearing of all doubts the non-compliance of diversion activities with fundamental rights. Frontex, which coordinated operations often take the shape of diversion when occurring beyond EU external borders, is likely to draw the conclusions of such practices.

1.2. The Introduction of fundamental rights considerations

1.2.1. A certain openness of Frontex

Facing criticisms from the civil society and in order to take up the challenge of the guarantee of fundamental rights in such rights-sensitive activities, Frontex took different steps, from a formal account taken of fundamental rights towards legal guarantees. If a first stone in the building of Frontex fundamental rights commitment was to be identified, one might consider it to be the appointment, in 2007, of a liaison officer from the UNHCR to help ensuring that border management abides by international obligations of member States[1].

In 2008, Frontex asked for the introduction of inputs from the Council of Europe in the common training of border guards coordinated by the agency[2]. In May 2010, Frontex signed a cooperation arrangement with the European Union agency for fundamental rights[3] which contains among other things measures related to expertise and development of good practices in the ambit of joint operations.

The same year, the Council adopted the Decision 2010/252/EU[4] containing rules and non biding guidelines for the surveillance of the sea external borders in the context of Frontex

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[1] See the interview with the UNHCR liaison officer with Frontex of 18 May 2010, available at: http://www.unhcr.org/4bf29c8b6.html

[2] Parliamentary Assembly of the Council of Europe, *Europe's "boat people": mixed migration flows by sea into southern Europe*, 11 July 2008 (Report), paragraph 55

[3] For more details, see the full text of the cooperation arrangement available at: http://fra.europa.eu/fraWebsite/attachments/Cooperation-Agreement-FRA-Frontex_en.pdf

[4] Council Decision 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 (2010/252/EU)

activities. Its purpose was to supplement the Schengen Borders Code with regard to the surveillance of external maritime borders in the context of operational cooperation coordinated by Frontex. This, in order to avoid disputes between member States over the country responsible for search and rescue or the delay in joint operation due to disagreement on issues such as the place of disembarkation, as it occurred by the past. The set of rules provided therein recalls international obligations to which member States are bound by such as the prohibition of *refoulement*, be it direct or indirect, and clarifies the rules on interception in member States territorial waters and at high seas among other things. In addition the non-binding guidelines laid down in the Decision features clarifications over the applicable international law.

1.2.2. The fundamental rights Strategy

Frontex went further when its management board adopted in March the 31st, 2011 a strategy for fundamental rights[1]. In this publication, the Management Board explained the commitment of Frontex to the respect of fundamental rights and its will to develop "the highest operational standards also in terms of safeguards of fundamental rights and professional ethics"[2]. After recalling that Frontex, as a EU agency, is bound by the respect of fundamental rights, the strategy repeated a now very common statement according to which:

> "Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations (...) and therefore also for the respect of fundamental rights during these activities"[3].

However, the same paragraph of the strategy introduces a novelty by specifying:

> "This does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all its activities".

[1] Frontex Fundameental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011, available at: http://frontex.europa.eu/publications?c=general
[2] Frontex Fundamental Rghts Strategy, *ibid.*, preamble, p. 1
[3] Frontex Fundamental Rghts Strategy, *ibid.*, paragraph 13

Hence, the strategy asserts: "As last resort, Frontex might terminate a JO if the conditions guaranteeing the respect for fundamental rights are no longer met". In the light of what has been said before, it appears that this element of the Strategy would prove difficult to apply to the extent that Frontex has very little oversight once the operation in course; and otherwise the agency does not necessarily know what is actually undertaken on the ground[1]. Nevertheless, the mere expression of such a principle reveals at least the force of the commitment.

Even if of a declaratory nature, the Frontex fundamental rights strategy finds its verification in facts. For the launching of joint operation Hermes 2011 further to the formal request for assistance from the Italian government on February, the 11th, 2011[2], the EU Commissioner Cecilia Malmstrom clearly stated that the mission would be governed by EU legislation and that push-back practices would not be permitted[3]. She also said that "push-back practice was prohibited by European norms"[4] and so they were not to occur. One could here assume that conclusions of the Hirsi case were drawn by the agency.

2. Enshrining fundamental rights with the Regulation 1168/2011/EU of 25 October 2011 amending Frontex founding Regulation

In order to address the weaknesses of Frontex legal framework that were hampering the attainment of the agency's purpose, Regulation 1168/2011/EU[5] amended Frontex founding Regulation. Thereby, improvements were brought about as regards Frontex's competences and the mechanisms to share the burden (2.1.) but also, greater consideration was afforded to fundamental rights. As a consequence of extended powers and greater rights guarantees, mechanisms of accountability were introduced (2.2.).

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[1] Once again, the example reported by Human Rights Watch, 2009, is relevant: for instance, when an Italian vessel was taking intercepted people back to Libya with the assistance of a German helicopter, Frontex declared not being aware of the fate reserved to boat people

[2] Frontex press release, *Hermes 2011 starts tomorrow in Lampedusa*, 19 February 2011, available at: http://frontex.europa.eu/media-centre/press-releases

[3] Parliamentary Assembly of the Council of Europe, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, 1 June 2011 (Report), paragraph 66

[4] Il Velino AGV, 19/02/2011, "Immigrati, Malmstom: rimanderemo chi è sbarcato nei paesi d'origine", available at: http://www.ilvelino.it/articolo.php?Id=1300482 , declaration as reported: "I respingimenti sono espressamente proibiti dalle norme europee."

[5] Regulation 1168/2011/EU 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

2.1. The Regulation bringing-ins: addressing Frontex's deficiencies

2.1.1. Enhanced competences

The growing importance granted to fundamental rights by the agency did not limit itself to soft law or declarations of principle but it has been also upheld by the European institutions when it came to amend the founding Regulation. Regulation 1168/2011[1] amending the Frontex founding Regulation bears witness of these changes. Whereas the former regulation referred to fundamental rights only once in recital (22), the recent regulation multiplies references as regards the same very rights thus placing them, at least symbolically[2], at a top rank priority[3]. Recital (1), opening the reading of the Regulation, soon mentions "The development of a forward-looking and comprehensive European migration policy, based on human rights, solidarity and responsibility". Right therein, the aim of the Regulation, deemed to be addressing the weaknesses of the former, is displayed: fundamental rights, solidarity and responsibility, the three ingredients that have been pointed out as missing in Frontex's former legal basis. Further on, recital (16) foresees the creation of an "incident reporting scheme" to take account of alleged breaches of EU law (Frontex Regulation and the Schengen Borders Code are explicitly referred to), including fundamental rights, during Frontex coordinated operations. Recital (18) then states that the agency should provide training on fundamental rights (see article 5 for further details). Recital (20) reads that in the ambit of joint return operations, "No Union financial means should be made available for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the European Union".

The Regulation lately adopted and amending the Frontex founding Regulation brings important changes about. It clearly aims at addressing the shortcomings identified by either the Commission in its impact analysis or the civil society. It substantially leads to wider but

[1] 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

[2] The Parliamentary Assembly of the Council of Europe insists on the fact that the proposition for Frontex activities to be conducted in accordance with fundamental rights is a "general statement (...),the strength of which will only be evidenced in its application", Parliamentary Assembly of the Council of Europe, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, 1 June 2011 (Report), paragraph 63

[3] See Table 3: Regulation 2007/2004/EC and Regulation 1168/2011/EU amending Regulation 2007/2004/EC; a comparative table of selected provisions, in Appendix, p. 149

also stronger competences. In this fashion, it consists in better outlined competences, the establishment of improved mechanisms on solidarity between member States, a somewhat enhanced accountability and a better heed of fundamental rights issues.

As Frontex's competences grow better outlined, the legal certainty in its activities becomes less problematic. First of all, the long-lasting problem of the link between borders management and the Schengen Borders Code finds an answer in article 1(2) explicitly referring to the latter.

Certainly of greater importance is the operational plan finally referred to, therefore providing a legal basis for it in the ambit of joint operations and pilot projects[1] (article 3a). As it reads:

> "The operational plan shall cover all aspects considered necessary for carrying out the joint operation or the pilot project (...)".

The term "necessary" is here to be understood in its wide meaning as article 3a provides a list of eleven items that shall figure in the operational plan (situation, modus operandi, objectives; duration; geographical area; tasks and special instructions for guest officers; technical equipment to be deployed; modalities of cooperation with third countries; etc.). One item addresses clearly to the steep criticisms and fostered debates on the legal uncertainty of intervention at high seas. Article 3a(1)(j) reads:

> "regarding sea operations, specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation or pilot project takes place, including references to international and Union law regarding interception, rescue at sea and disembarkation".

Besides, the operational plan gains a binding value ensuring its implementation. In plain words, article 3a(2) and (3) respectively establish that any "amendment" or "adaptation" of the operational plan requires the "agreement" of both Frontex's Executive Director and the host member State; and that the agency shall ensure the operational implementation "of all the organisational aspects". Article 25(3)(g), defining the functions and powers of the Executive Director, stipulates that he is

[1] The operational plan for RABITs was provided for in article 8e of the RABITs Regulation but concerned exclusively the deployment of RABITs.

> "to ensure the implementation of the operational plans referred to in article 3a [regarding joint operations and pilot projects] and 8e [regarding operational plan for the former RABITs, the nomination having changed with the adoption of the last Regulation that did not keep the name and favoured the more general designation of European Border Guard Teams, deployed in either Rapid intervention and joint operations]".

In the same vein, it ought to be underlined here that Frontex's competence has substantially widened as the operational plan is now drawn by the Executive Direction of Frontex and later agreed upon by the host member State. Added up to the provisions made for amendments or adaptations of it, it confers to the agency what has been called a "co-leading role" for the implementation of operations[1]; so to speak, increased power of decision.

Finally, a striking indicator of Frontex's growing competence is its possibility to "terminate" joint operations or pilot projects "if the conditions to conduct those joint operations or pilot projects are no longer fulfilled" (article 3(1a)). This provision now takes its full effect with the improvements brought to the operational plan[2] in comparison with the announcement made in the Frontex's Fundamental Rights Strategy.

2.1.2. Greater mechanisms of solidarity

In addition, the Regulation introduces changes for joint operations and pilot projects inspired by the functioning of former RABITs; so to speak, the principle of compulsory solidarity. This principle aims at ensuring the effectiveness of Frontex coordinated operation through equipment and staff adequacy to the operation foreseeable needs. As it was the case in the ambit of RABITs deployment, the deployment of European Border Guard Teams for the purpose of joint operations and pilot projects is based on agreements between the agency and member States according to which "member States shall make the border guards available" (article 3b(2)) at the request of the agency; indeed, "unless [member States] are faced with an exceptional situation substantially affecting the discharge of national tasks".

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[1] Amnesty International and the European Council on Refugees and Exiles, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 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)*, September 2010, p. 4

[2] See below, our paragraph 2.2.

Moreover, article 7 changes the deal of Frontex's strict dependency on member States' good will. The aforementioned CRATE (Centralised Register of Available Technical Equipment), as it stood within the meaning of the former article 7, gave potent influence to member States that decided in full discretion whether or not to participate in joint operations. Introducing the capacity for the agency to buy equipment of its own, to enter in co-ownership with member States or to lease equipment considerably increases the agency's autonomy in administrating assets. As the new article 7 stands, it covers all Frontex's operational activities[1]. It remains that, if possible, the acquisition of assets by the agency entails considerable spending and so, funds would have to be made available. However, what should be considered is the implication of such a possibility in the context of an ever-growing-power agency.

Taking heed of the argument, the legal basis for the CRATE was kept in the amending Regulation in article 7(2) in the same fashion as it was prior the amendment, although enhanced a great deal. While the first version envisaged the participation of member States as lying in their willingness, the new legal basis insists on the establishment of a list of minimum assets per type of technical equipment required for the performance of joint operations, pilot projects and return operations (articles 3, 8 and 9). The assets featured in that list are the fruit of bilateral agreements between Frontex and member States. Once agreed, member States are to provide what they commit they would on the agency's request; indeed, "unless they are faced with an exceptional situation substantially affecting the discharge of national tasks". Solidarity between member States is made stronger and less unforeseeable (as it was the case prior the amendment in question). Frontex can now count on the equipment it has "on paper" to paraphrase Frontex Executive Director, M. Laitinen[2].

Another important point enhancing the solidarity among member States dwells in paragraph (5) of article 7 where it is stated that the financing of deployed assets by the agency can be up to 100% in the event of the necessity of more assets than the minimum list established by article 7. Solidarity is reinforced in two regards: first because Frontex's funding flows from member States; secondly because it constitutes, if not an incentive, something that does not deter member States from participating.

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[1] Joint operations, pilot projects, rapid interventions, joint return operations and technical assistance. The possibility to have assets of its own was already foreseen in the amended article 8(3) (see article 12(4) of Regulation 863/2007) but only concerned RABITs deployment.

[2] In Ilkka Laitinen, "Frontex – Facts and Myths", press release, 11 June 2007 available at: http://www.frontex.europa.eu/newsroom/news_releases/art26.html , Frontex Executive Director declared that equipement listed in the CRATE belonged to member States and therefore remained in their hands. Frontex's assets were thus only available "on paper"

Given the foregoing, one could only witness the grown competences of the agency where its weak control over member States involved under its coordination had been pointed out before. As it has been held above, the limited competences of the agency could somehow limit its responsibility in the event of fundamental rights breaches. As a matter of law, the ever-revolving-around motto of the Frontex founding Regulation according to which the responsibility of border management lies with member States, even if maintained in article 1(2), is counterbalanced by other provisions of the new Regulation. In this regard, Frontex responsibility in the event of fundamental rights breaches should also be more significant. We saw that not much was foreseen in this regard in the first place. The Regulation 1168/2011 brings some improvements as to the account for fundamental rights as well as for its responsibility.

2.2. A predictable reinforcement of Frontex's accountability?

2.2.1. From the provisions on fundamental rights...

A set of provisions aims at ensuring the respect of fundamental rights during Frontex coordinated operations. From mere declaration of principle as article 1(2) declaring the "full compliance" of the agency with the EU Charter, the new Regulation provides more elaborated mechanisms ensuring the respect of fundamental rights in its activities. Article 3(1a) providing for Frontex to "terminate" an operation where "the conditions" are "no longer fulfilled" has been criticised, notably by Amnesty International and the European Council on Refugees and Exiles when the Regulation was still at a proposal stage[1]: in the view of the two NGOs, "conditions" had an unclear meaning. However, the third and fourth paragraphs of the said article tend to include fundamental rights within the meaning of "conditions" as the third paragraph provides that:

> "*home Member State* shall provide for appropriate disciplinary or other measures in accordance with its national law in case of *violations of*

[1] Amnesty International and the European Council on Refugees and Exiles, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 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)*, September 2010

> *fundamental rights* or international protection obligations in the course of a joint operation or pilot project" (emphasis added)

And the fourth paragraph that:

> "the Executive Director shall suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that such violations are of a serious nature or are likely to persist".

Given that, the termination of Frontex-led activities is provided for individual misbehaviour (third paragraph) as much as for generalised misbehaviour (the fourth). The weak point is therefore not the meaning of "conditions" but rather the manner to assert the existence of such misbehaviours as they would occur in a context remote from the public eye. To anticipate the issue, article 3a(1)(h) provides that the operational plan shall contain "detailed provisions on immediate incident reporting by the agency to the Management Board and to relevant member States".

More generally, references to the respect of fundamental rights punctuate the Regulation and, although to a less extent, mechanisms for their implementation are provided for. Those mechanisms tend to constitute upstream and downstream tools which, along with the improvement of respect of fundamental rights, increase in an important manner the accountability of the agency, be it public, political or legal. Indeed, our purpose is not to conclude too fast on the idea of a proper mechanism of accountability, but rather to underline the improvements here done in this direction.

2.2.2. ... *towards redress means in the event of a violation*

That is, the Fundamental Rights Strategy adopted in March 2011 gained through the Regulation a legal, binding, value. Article 26a(1) states that the agency "shall draw up", "develop" and "implement" the fundamental rights strategy as well as it shall "put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the agency". Accordingly, Regulation 1168/2011 establishes counselling and reporting devices through which Frontex is to take account of fundamental rights and would eventually have to answer for its field activities.

The creation of a Consultative Forum to assist the Executive Director and the Management Board on fundamental rights matters is provided for in paragraph 2 of article 26a. The European Asylum Support Office, the FRA, the UNHCR and other relevant organisations are to participate to that forum. This Consultative Forum shall be consulted on the development and implementation of the Fundamental Rights Strategy notably.
Another novelty for the implementation of fundamental rights is the institution of an independent Fundamental Right Officer by paragraph 3 of article 26a to be designated by the Management Board and reporting to the Management Board but also to the Consultative Forum. Paragraph 4 of article 26a specifies that:

> "The Fundamental Rights Officer and the Consultative Forum shall have access to all information concerning respect for fundamental rights, in relation to all the activities of the Agency".

Thereby, the ex-post accountability of the agency is further developed. One question remains with regard to the actual role of the Fundamental Rights Officer. Provision is made in article 3(3) for the Fundamental Rights Officer to render its observations together with the agency's evaluation on an achieved operation to the Management Board. However, it is not clear whether the Fundamental Rights Officer is actually deployed on the field with law enforcement agents and what means are put at his disposal to effectively oversee the respect of fundamental rights.

In another manner, the Regulation establishes that third countries with which the agency is to cooperate must abide by fundamental rights. In this fashion, article 14 foresees that while facilitating operational cooperation between member States and third countries, the agency must take heed of "human rights". The following paragraph establishes that member States and the agency must comply with standards "at least equivalent to those set by Union legislation [i.e. including fundamental rights standards] also when cooperation with third countries takes place on the territory of those countries". Further on, the next paragraph specifies that "the establishment of cooperation with third countries shall serve to promote European border management standards, also covering respect for fundamental rights and human dignity".

Besides, certain openness ought to be noted as Frontex, to enhance the taking account of fundamental rights, is to collaborate with other bodies (in some cases, the Regulation at issue

just gives a clear legal basis to the cooperation where it did not exist before. For instance, Frontex had already engaged relationship with the European Union Agency for Fundamental Rights, the FRA, however outside the scope defined by its founding Regulation). Article 13 reads "The Agency may cooperate" with the Fundamental Rights Agency, the European Asylum Support Office and other relevant international organisations.

Finally, a relative accountability of the agency is observable through a set of provisions according to which the agency must report on its activities. Article 3(3) states that the agency must, within 60 days after the termination of an operation, report in a detailed manner on its activity to the Management Board. This device has been highly criticised, notably in a report of Migreurop, because the agency alone is running the evaluation leading to "a self-assessment mechanism that makes FRONTEX accountable for its actions to itself alone"[1]. True, the self-assessment provided does contain the observations of the Fundamental Rights Officer but above all concerns the general assessment of objective-reaching and effectiveness. Other mechanisms show to be more centred on fundamental rights compliance. Article 25 tends, in a somewhat very limited manner, to increase the political liability of the agency inasmuch as the European Parliament may invite the Executive Director to report on the carrying out of the agency's activities (as it was the case in the former Regulation) but also on the implementation of the Fundamental Rights Strategy, the work programme for the following year and the multiannual plan. Finally, article 33 establishing an independent external evaluation of Frontex activities shall now include a "specific analysis on the way the Charter of Fundamental Rights was complied with in the application of [the] Regulation".

Last but not least, the constant growing powers of the agency are likely to make its activities fall under the scope of article 263 TFEU according to which the Court of Justice of the European Union shall review the acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties. In effect of the growing powers of the agency, notably the inscription in its legal basis of the operational plan or its co-leading role in the implementation of operations described above, are likely to render the agency more responsible before the European Court of Justice. To take the words of S. Carrera and E. Guild, "if the Agencies' powers of oversight and operational control increase, their 'exposure'

[1] Migreurop, *Frontex agency: which guarantees for human rights?,* March 2011, available at: http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf , p. 36

to judicial review will increase"[1]. As a more and more autonomous body, it cannot be considered anymore that the responsibility of border surveillance lies exclusively with member States as the agency is endowed of the power to ensure the implementation of operational plans drawn up by the Executive Director of the agency and agreed upon afterwards by the host member State (article 3a).

The improvements brought about by the lastly adopted Regulation are yet to be assessed in the light of facts. Does the constant reference to fundamental rights ensure necessarily their better respect? Does the enhanced competence of Frontex actually increase its accountability? What can be told is that the adoption of Regulation 1168/2011 does not mark the absolute change of stance or a passage from member States' hands to the EU of border management competences but anyways, it has to be said that the "common" management of borders is still at an early stage of its development and, as a matter of facts, the evolution of Frontex's remits is at the image of the development of the EU as a whole. From the outset, the EU has been conceived as an economic community and step by step grew wider in scope until covering political aspects and the respect of fundamental rights. In the same manner, one could assume that from a rather limited scope in the management of borders (with a former Regulation that did not include any obligation), the EU competence in this domain would follow the general pattern that has driven so far the reach of EU competences.

[1] Elspeth Guild and Sergio Carrera, 2011, *Ibid,* p. 86

Conclusion

From the outset, the very purpose of the present study has been to shed light on a complicated interaction between three poles: the European Union integration, the management of external borders and the respect of illegal migrants' fundamental rights.
The EU integration is a gradual process rooted in the recognition that more and more matters are better ruled in common at a higher level, in accordance with the henceforth well-known principle of subsidiarity. The European Communities were brought into being following the idea of establishing long-term peace through economic means in a Europe torn apart by the Second World War. But from a strictly economic agreement, the time passing on showed the ambitions of the founding-father Jean Monnet come true: the European construction took a political turn encompassing political and legal domains far beyond mere economic matters.

Immigration, as a by-product of borders and their control, did not escape the rule. A first reference in the treaty of Maastricht followed by a bold affirmation in the treaty of Amsterdam started to beat the track towards a "common" immigration policy. However, the management of external borders is a traditional prerogative of the State, inseparable from its sovereignty. Borders create an inside as much as they create an outside, they include as much as they exclude, they allow the State to define who is entitled to rights and submitted to duties. In sum, they are essentially related to the Nation-State in its relationship with its community of nationals.

The creation of a common inner area within which controls at national borders would be abolished is the fruit of the interaction between the two cited poles. Pursuing economical but also political goals, member States of the Union conferred in part their powers to the higher level. Indeed, this conferral was limited, notably by national order clauses, of which we saw the outcomes in 2011 and 2012, that gave somewhat discretionary powers to the States in re-establishing (momentarily) their border-checks. The fact remains that the creation of a wider inner area pushed further the external borders of the EU to the borders of the States forming the belt separating the inside from the outside. And here the third pole enters into play. The differentiated level of development at an international scale and hopes in developing countries flowing thereof trigger immigration waves of people that by no means fulfil entry requirements: many of them do not fulfil the conditions for asylum or for family reunification

or for work permits or for a Schengen visa. Diversely qualified of irregular, undocumented, economic or illegal migrants, migrants' motives to undertake the journey are alike, and so is the treatment reserved to them: detention prior return in their country of origin or of transit or, in case of impossibility, dwelling on the territory without legal status. From our understanding, the lack of EU integration of the immigration policy jeopardizes the respect of illegal migrants' fundamental rights whilst managing southern external borders.

A first instance lies in the incapacity of generating a *de facto* solidarity between member States, given the limits of *de jure* mechanisms. That is, a set of Decisions flowing from the General programme 'Solidarity and Management of Migration Flows' instituted a EU funding aiming at implementing solidarity among member States with regard to immigration influxes but also the Decision on temporary protection showed to be insufficient. However, this funding does not prevent southern European countries from bearing the expenses, notably of longer-term implications of the migratory phenomenon, of their incumbent responsibility: managing EU's borders. In practice, it gives rise to risks weighing on illegal migrants' fundamental rights, risks that have been grounded into facts notably in the cases of Malta, Italy and Greece, however from different respects. From that point, there is one step to take to underline the absence of a European status of the illegal migrant and its implications. In a nutshell, the definition of a European status would lay down minimum standards, a set of rights that would have to be guaranteed to illegal migrants. In the absence of such standards, rights granted to illegal migrants result from the discretion of the State, engendering thus disparities from one country to another[1].

Given the international context, torn between economic crisis and unemployment, growing security preoccupations, and the weight of the burden to be borne by few member States, the trend is toward restrictive rights to be granted and means to deter further immigration waves.

Nonetheless, the EU has been built on a stop-and-go basis and it is likely to follow the same logic for the construction of a sound immigration policy. The first elements of a

[1] Taking into account healthcare policies in the 27 member States of the EU, two main trends are distinguishable. The first one grants a rather wide access to sanitary services to irregular migrants, somewhat in line with the universal approach of human rights. The second trend shows much stricter access to the same rights, generally limited to emergency care and not necessarily free of charge. See Elisa Rebessi, "L'accesso ai servizi sanitari per gli immigrati irregolari in Europa fra diritti umani, diritti di cittadinanza e politiche di integrazione", in Nicola Pasini (dir.) Confini irregolari: Cittadinanza sanitaria in prospettiva comparata e multilevello, FrancoAngeli, Milano, 2011, pp. 97-128. Given, that, one has to bear in mind that health is directly related to the right to life and is therefore considered as fundamental. Otherwise, the question of the right to work for illegal migrants is not likely to be recognized insofar as it would play on pull-factors and attract further immigration influxes. France, for instance does not provide for their right to work, even if proving the status of residence is not required for employment purposes. And yet, working is a preliminary condition for one to meet his needs.

European status were settled under the ECHR and were to be upheld in the case El Dridi of the European Court of Justice.

In another manner, the limited integration of the immigration policy as a whole and more particularly of the illegal immigration policy oriented the developments at the EU level towards the creation of an agency for the management of external borders, Frontex.
Frontex's competences were fairly limited by its founding Regulation to operational cooperation, depriving it of autonomous law enforcement powers. If it was conceived to help alleviate the burden of member States ensuring the management of external borders, it revealed to be a tool subjected to member States willingness to participate in Frontex's operations on the one hand; and a body which action outcomes were unpredictable on the other hand. From the launching to the ending of Frontex coordinated operations, member States kept their hand over its activities posing serious questions on the agency's accountability in the event on a violation of fundamental rights. Lately, a Regulation amending Frontex's founding Regulation brought about novelties of great importance. It considerably enhanced its possibility to constrain member States in the carrying out of its activities. In the same vein, it introduced references to Frontex's commitment to fundamental rights. Both characteristics hold promises of an increased accountability of the agency as well as a better heed taken with regard to the respect of fundamental rights of people intending to cross the borders, many of whom being illegal migrants.
Indeed, it is yet too soon to draw absolute conclusions in this direction. However, the improvements of Frontex's competences and the taking account of rights tend to show that a deeper EU integration coupled with a political will increase the likelihood of seeing fundamental rights respected. If this mere statement yet concerns only Frontex's activities, it might be interesting to understand it as an instance to be spread out to other sections of the immigration policy such as the burden sharing and the European status of the illegal migrant.