

Frontex: Successful Blame Shifting of the Member States? (ARI)

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Theme: Frontex has been often criticised for failing to take action against the deaths of asylum seekers and migrants trying to reach Europe by crossing the sea.

Summary: The EU's border agency Frontex is an easy target for criticism regarding the way in which the EU's southern maritime borders are controlled. However, a closer look at the Agency's tasks reveals that its powers are limited and that the responsibility for operational activity at sea continues to lie largely with the Member States. The EU should speak out against Member States' practices that are in breach of international refugee law and use Frontex as a tool to increase the awareness of protection issues amongst national border-guard authorities.

Analysis: 'Summing up I would like to remind that Frontex activities are supplementary to those undertaken by the Member States. Frontex doesn't have any monopoly on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision-takers, as Frontex only executes its duties described in the Regulation 2007/2004'.

Over the past decade thousands of irregular migrants and asylum seekers have lost their lives in attempts to reach Europe by crossing the Atlantic or Mediterranean.¹ The above quotation is taken from a press release issued by the Executive Director of Frontex, Europe's 'border agency', in response to criticism that it had failed to take action against this. Although the statement does not show much empathy with the plight of these people, it does contain an undeniable truth, namely that Frontex's powers are limited by its founding regulation.²

This short discussion paper aims to contribute to a more realistic image of the Agency in relation to its role in the management of the EU's southern maritime borders. It is argued that criticism on the way in which the EU aims to tackle irregular migration across the Mediterranean and the Atlantic is justified, but that it is misdirected against a relatively weak actor. Although Frontex's activities and future development need to be monitored, it is far more important to watch closely the practices of the Member States and the EU's institutions. The possibilities for Frontex making a positive contribution to the plight of irregular migrants and asylum seekers should not be discarded too readily.

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¹ Exact figures are difficult to establish. Estimates are often based on reports in the media; see, for instance, <http://fortresseurope.blogspot.com>, or, for Spain, www.apdha.org.

² 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, 2004, L349/1 (hereinafter 'Frontex Regulation').

For this to happen, however, the EU needs to become more aware of the practical implications of its policies. Increased controls and cooperation with third countries have already led to the diversion of migratory routes, the so-called 'waterbed effect', often resulting in longer and more perilous journeys. Moreover, by turning a blind eye to the practices of its Member States which prevent people from leaving certain third countries, the EU allows the right to seek asylum to be emasculated, either because asylum seekers cannot leave their country or because they are forced to stay in a third country that cannot adequately process their request or may *refoule* them.

Frontex in Short

Frontex can be seen as the outcome of a 're-balancing' of powers between the Member States, the Council and the Commission following the communitarisation of the policy on external borders after the Treaty of Amsterdam, constituting an important shift from the intergovernmental coordination of operational activity under the Council to a more Community-based approach.³

At the same time, it can be considered the Community's answer to the arrival of 'boat people' at its southern external borders. The framing of this phenomenon as a (humanitarian) crisis and the authorities' apparent incapacity to deal with this situation has eroded the authority of Member States' governments and the Commission. Frontex was not only intended to restore the public's trust, it also allowed the Commission and the Member States to shift the blame for human suffering and the loss of life that coincide with ever more desperate attempts to evade stricter border controls. In addition, a failure to curb irregular migration would reflect badly on the Agency rather than the Community institutions or the Member States themselves.

It is important to realise that Frontex's role is limited to providing support and expertise to the Member States.⁴ Its involvement in on-the-ground operational activity is limited to the coordination of specific joint operations of Member States' border-guard authorities. Frontex neither replaces national border-guard services, nor does it have independent executive powers. For its operations it remains largely dependent on Member States' technical and human resources. Recital 4 of its founding regulation emphasises that '[t]he responsibility for the control and surveillance of external borders lies with the Member States'.

Joint Operations at Sea

Some of the most costly joint operations that have been coordinated and co-financed by Frontex are maritime operations aiming to curb migration by sea, such as the Hera operations off the Canary Islands and the Nautilus operations in the central Mediterranean. Joint patrols on the High Seas and in the territorial waters of third countries from which irregular migrant boats depart mean that the physical surveillance of the external borders has moved upstream. By making it increasingly difficult for people to actually reach EU territory, the Member States try to avoid the responsibility for asylum claims or the –in practice often impossible– removal of irregularly-present third-country nationals. Extra-territorial patrols raise a range of legal questions, not least because of the simultaneous application of the law of the sea, the international rules on search and rescue as well as refugee law and a lack of a common interpretation of these rules. A full discussion of these questions would go beyond the scope of this short paper.

³ See A. Neal (2009), 'Securitization and Risk at the EU Border: The Origins of FRONTEX'S 47', *Journal of Common Market Studies*, nr 2, p. 343.

⁴ For a precise enumeration of its tasks see Article 2(1), Frontex Regulation.

What is important to emphasise here is the continuing importance of the Member States as participants in coordinated operations and as independent actors. Member States are in no way prevented from patrolling their waters independently or in cooperation with other Member States or third countries, where this is complementary to the activities of the Agency.

Article 3 of the Frontex Regulation determines that the Agency shall 'evaluate, approve and coordinate' Member States' proposals for joint operations and 'may itself, and in agreement with the Member State(s) launch initiatives for joint operations'. Although both the Commission and Frontex have argued that an independent risk-assessment should be at the basis of the Agency' activities, for political reasons it has not hesitated to respond swiftly and positively to requests for assistance made by Member States or Community institutions. As an example one could point to the Hermes operation carried out in September-October 2007 off the coasts of Sardinia and the Balearic Islands, which seems to have been motivated mainly by the need for the EU and the Italian government to take decisive action in response to a steep increase in irregular landings in Sardinia in August of that year. Indeed, an external evaluation of the Agency carried out in 2008 concluded that '[i]t seems that Member States' political considerations in certain cases may overrule decisions based entirely on risk analysis'.⁵ The Frontex Internal Rules of Procedure seem to recognise this by stating that, in addition to an assessment or any other Risk Analysis product, 'Council Conclusions or any other proposal that supports a Community Policy' could be at the basis of a proposal for a Frontex action.

Once a decision to implement a joint operation has been taken an operational plan is drafted in close consultation with the participating Member States. This plan forms the blueprint for the operation and contains important information such as timing, *modus operandi*, operational area, communication channels, available technical means and human resources as well as a detailed budget. In the case of sea operations, an International Coordination Centre (ICC) is established in the host-Member State which provides the coordinator in charge of the centre. The ICC coordinator is also the Head of the Joint Coordinating Board (JCB), consisting of representatives of the participating Member States (National Officers) and Frontex experts, including a risk analyst. The command and control of the participating assets remains in national hands, through the National Officers, who have the possibility of consulting with their superiors before giving orders. The ICC coordinator implements the decisions related to operational activities taken by the JCB. The tactical command remains under the authority of each specific asset, or as directed by national authorities.

The presence of Member States' ships participating in joint operations in the territorial waters of third countries normally have their legal basis in bilateral agreements between a Member State, usually the host-Member State, and the third country in question. The involvement of Frontex arguably has its legal basis in a broad interpretation of Article 12 of the Schengen External Borders Code which states that the purpose of border surveillance is to prevent unauthorised border crossings, in combination with Article 14 of the Frontex Regulation that says that the Agency has the task of facilitating the cooperation between Member States and third countries.

⁵ 'Final Report of the External Evaluation of Frontex Carried Out on the Basis of Article 33, Frontex Regulation', COWI, Kongens Lyngby, January 2009, 41.

Often, the bilateral agreements allowing for extra-territorial patrols are not agreements under public international law. Rather they are non-binding Memoranda of Understanding between Ministries of the Interior. This means that they escape parliamentary scrutiny in the Member States. Only with Cape Verde does Spain have a fully-fledged bilateral agreement in place that allows joint patrols in the territorial waters of this island state.⁶ Article 6(2) of this Agreement specifically refers to the possibility of patrols being integrated in the context of Frontex joint operations. It is important to note that the patrols are carried out in cooperation with Cape Verde. Article 3(1)(b) clearly states that where patrols are carried out with Spanish assets the effective presence of a Cape Verdean official is compulsory. Officers from Senegal and Mauritania have also been present on the Member States' vessels during the Hera operations.

Currently, the most controversial practice is that of the diversion by national border guards of ships back to their point of departure. This practice entails not only a real risk to the life and safety of the passengers on board these often unseaworthy ships, but as regards possible asylum seekers on board, it also risks violating the right to claim asylum and the prohibition of *refoulement*. The Greek coast guard has the questionable reputation of regularly diverting boats back to the Turkish shores. Italy has openly admitted to the interception and return of irregular migrants and asylum seekers from Libya under its 2008 Treaty on Friendship, Partnership and Cooperation with the latter country. Both within and outside the Hera operations, Spain has been returning people to Senegal and Mauritania, but here at least the interceptions are formally cast in terms of rescue operations and transfer to the nearest place of safety.

Frontex: the Lesser Evil?

There are many reasons why Frontex can be subject to criticism. It could be argued that it is an instrument of an essentially flawed EU migration and asylum policy. It could be pointed out that by reinforcing the management of external borders, through its coordinating efforts and involvement in the development of the surveillance system EUROSUR it contributes to making it increasingly difficult and hence dangerous for people to reach Europe.⁷ Finally, it could be said that the Agency reinforces a securitised perception of what is essentially a humanitarian problem through its one-sided mandate, the background of most of its staff in national law-enforcement agencies and its military-style operations. Frontex does indeed deserve close monitoring, especially where future legislation might wish to expand its competences. It cannot be ruled out that in the (distant) future the Agency might acquire independent executive powers, such as the power of command over assets in joint operations.

However, it is important to realise that for the moment the Agency's scope for independent action remains very limited, both in practical and in legal terms. Serious human-rights violations are more likely to occur in operations from national border guards removed from the public eye, than in relatively well-scrutinised joint operations. Frontex, being a Community body, is subject to numerous reporting and evaluation duties, as well rules on transparency. It is true that the Agency has excelled in creating an aura of secretiveness around its activities and often denied access to documents by invoking the public-security exception. Recently, however, improvements have been made, even though Frontex's website still lacks a comprehensive and updated register of documents.

⁶ 'Acuerdo entre España y Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde', *BOE*, nr 136, 5/VI/2009, 47545.

⁷ Commission Communication examining the creation of a European Border Surveillance System (EUROSUR).

The presence of operations coordinated by Frontex may well have increased the number of migrants rescued at sea. Even though search and rescue operations as such are outside the mandate of the Agency –and arguably outside the EU’s– assets participating in joint operations coordinated by Frontex remain bound by the general duty under international law to come to the rescue of those in danger at sea. The Schengen Borders Code explicitly states that it leaves the right of international protection unaffected (Article 3(b)) and it is affirmed in recital 20 that it fully respects fundamental rights. The latter point is also explicitly made in recital 22 of Frontex’s founding regulation, as well as in recital 17 and Article 2 of the Regulation amending Frontex’s founding regulation.⁸ The Agency has never publicly endorsed a practice of diverting ships at sea, even if this might be due to the legal uncertainty regarding this practice rather than to a more principled position on the matter. Although in strictly legal terms national border guards are just as much bound by the Schengen Borders Code and fundamental rights as Frontex, a Community body can be expected to have a greater awareness of the applicable Community rules and be more sensitive to questions of protection.

The Agency could and indeed should play a role in improving national border-guard sensitivity towards protection issues and improve awareness of these services’ obligations under Community and international law. It could do so through its training activities, which encompass courses and exercises, as well as within the development of a Common Core Curriculum for border-guard academies, already part of the Agency’s tasks. An active human-rights policy within Frontex would raise awareness not merely amongst the Agency’s staff, often recruited from national enforcement authorities, but also filter through to the national components of the network of border-guard authorities in which Frontex operates.

Frontex has recently concluded working arrangements with the UNHCR and the IOM. There is a UNHCR liaison officer in Warsaw. Although the Agency is very hesitant to give a larger role to the UNHCR in its operational activities, UNHCR is now being involved in the Agency’s training routines. Cooperation with the yet to be established Asylum Support Office and the European Fundamental Rights Agency would allow further progress to be made.

Conclusion: Efforts should focus on ensuring full respect of international rules regarding international protection and search and rescue and an authoritative interpretation of these rules in a broad sense. These are essentially political decisions. It is the Member States and the Community institutions, not Frontex, that are to be reproached for the failure to do so.

Individual Member States that divert ships or ignore calls for rescue should be held responsible for doing so. Since respect for international law obligations is also mandated by the Schengen Borders Code, the Commission and Council should clearly speak out against such practices, even if this is politically sensitive. If they do not, the EU risks acting in contravention of its own fundamental values, becoming an accomplice in the violation of international legal norms. Frontex has already had to admit that it may indirectly endorse the Italian policy of returning migrants and asylum seekers to Libya through the participation of Italian assets in joint operations coordinated and co-financed

⁸ Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007, L199/30 (the so-called ‘RABIT Regulation’).

by the Agency.⁹ The lack of transparency and the ‘executive’ character of cooperation with third countries means that it is increasingly difficult to assess what is actually happening at the external borders of the EU.

If the EU is really committed to respecting fundamental human rights and its international obligations, it should reconsider its endorsement of cooperation with third countries with a questionable human-rights record. It should moreover give thought to how it can ensure respect for the safeguards contained in the Schengen Borders Code in the context of extra-territorial controls, ensuring that the rule of law is also respected in the external dimension of EU border management.

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⁹ ‘Frontex “May be Helping” Italian migration policy’, *European Voice*, 24/IX/2009.