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*“Europe: fortress, or beacon of human rights?”*

**The role of the EU Border Agency in the European  
Union’s Border Policy and its Impact on the  
Fundamental Rights of Migrants**

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Master’s thesis submitted by  
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*'Tant qu'un homme pourra  
mourir de faim à la porte d'un  
palais où tout regorge, il n'y  
aura rien de stable dans les  
institutions humaines.'* - Eugène  
VARLIN anno 1871

## Summary

The objective of this thesis is to assess the existing and planned role of the European Agency for the Management of Operational Cooperation at the External Borders ('EU Border Agency') in the Border Policy of the European Union and the upholding of the human rights of migrants trying to reach their destination country within the European Union. The thesis is divided in three Chapters.

*Chapter I* provides some background to the migration situation at the external borders of the European Union by giving an overview of the current migration flows to and within the European Union in *Section I* and setting out the legal framework relevant to the situation of migrants trying to reach Europe in *Section II*.

*Chapter II* then expands on the creation of the current EU Border Agency, Frontex, and its role within the EU Border Policy by introducing the latter and discussing the developments within the European Union which preceded the creation of Frontex in *Section I*, to then continue to explicate the creation and evolution of the EU Border Agency in *Section II*. Nevertheless, *Section III* acknowledges that, despite the addition of important human rights safeguards in 2011, a number of structural shortcomings remain and new human rights challenges have arisen, particularly in the context of Frontex's role in the 'Hotspots' in Greece and Italy and its agreements with third countries concerning border control, interceptions and returns.

In December 2015, the European Commission suggested the creation of a 'European Border and Coast Guard' as one of its policy responses to the deteriorating migration situation in and at the borders of the EU. *Chapter III* examines whether the Proposal introduces a true European Border Coast Guard, capable of remedying the current shortcomings of the Border Agency and ensuring the respect for human rights and international protection obligations.

It is concluded that the picture of the present and future role of the EU Border agency is not all black and white. Whilst it cannot be denied that, gradually, human rights safeguards were included in Frontex's structure, among which the Fundamental Rights Officer and Consultative Forum have made a visible difference, the primary aim of the EU Border Policy remains and increasingly becomes hostage to the protection of the EU Borders, rather than developing a sustainable, effective and complete model to uphold human rights in the EU Border activities.

## Acknowledgements

I want to express particular thanks to Prof Dr Koen Lemmens, my promotor, and Ms Nele Verbrugghe, my supervisor, for her constant and expert support.

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## List of acronyms

<b>AFSJ</b>	Area of Freedom, Security and Justice
<b>CEPS</b>	Centre for European Policy Studies
<b>DASR</b>	Draft articles on Responsibility of States for internationally wrongful acts
<b>DARIO</b>	Draft articles on the responsibility of international organizations
<b>EASO</b>	European Asylum Support Office
<b>EBCG</b>	European Border and Coast Guard
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECJ</b>	Court of Justice of the European Union
<b>ECRE</b>	European Council on Refugees and Exiles
<b>E(E)C</b>	European (Economic) Community
<b>ED</b>	Frontex's Executive Director
<b>EU</b>	European Union
<b>EU Charter</b>	European Union Charter of Fundamental Rights
<b>EURODAC</b>	European Dactyloscopy (EU Fingerprinting Database)
<b>EUROSUR</b>	European Border Surveillance System
<b>FCO</b>	Frontex Coordination Officer
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>FRO</b>	Fundamental Rights Officer
<b>Frontex</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>JHA</b>	Justice and Home Affairs
<b>J(R)O</b>	Joint (Return) Operation
<b>ICCPR</b>	International Covenant on Civil and Political Rights



<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILC</b>	International Law Commission
<b>IDMC</b>	Internal Displacement Monitoring Centre
<b>IOM</b>	International Organization for Migration
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs
<b>NGO</b>	Non-Governmental Organisation
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>RABIT</b>	Rapid Border Intervention Team
<b>SAR Convention</b>	International Convention on Maritime Search and Rescue
<b>SCIFA</b>	Strategic Committee on Immigration, Frontiers and Asylum
<b>SOLAS</b>	Convention for the Safety of Life at Sea
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## Introduction

External border control of the European Union now appears on a weekly basis in our newspapers and other media. The image of people along the migratory route by land or in boats on the Mediterranean has become everyday fare. Migrants are taking serious risks trying to reach Europe. The current migration situation is the result of policy choices in border management made by both the Member States and the European Union. The control of the external borders of the European Union seems to have turned into a matter of national competition. Prompted by the Member States, the EU Migration and Border Policies have become more restrictive. The European Commission has been urging EU states to pledge funds and equipment to the European Agency for the Management of Operational Cooperation at the External Borders (hereafter 'EU Border Agency' or 'Frontex') and to meet the commitments they made as part of the temporary relocation scheme, without much success.

As a result, more persons are choosing to travel irregularly rather than enter an asylum procedure, for reasons of failing relocation and slow resettlement programmes, fear of being detained or transferred under the Dublin II Regulation and thus remaining entirely subject to the vagaries of smugglers or human traffickers. Furthermore, the reinforcement of border control on land and sea routes has led migrants to take more dangerous routes and means to reach Europe.

The EU-Turkey Statement agreed in March 2016 has all but improved the conditions for migrants in or trying to reach the EU. First of all, returns to Turkey could in some cases constitute a breach of EU human rights obligations, because of Turkey's long-standing *refoulement* record as well as the dire living conditions for asylum-seekers in the country, in particular the non-Syrians and vulnerable groups such as women, children and LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex). Secondly, in Greece, a country still struggling to disengage from the economic crisis, migrants face chaotic registration procedures, serious obstacles to applying for asylum, and inadequate reception conditions with lack of food and healthcare facilities.

In 2004, in virtue of the common interest in an effective control of those borders, the EU Member States agreed to the creation of Frontex in 2004, with its headquarters in Warsaw (Poland). Set up with a limited coordinating role between Member State authorities, the Agency now has an important operational role in practice.

At present, the Agency plans, coordinates and implements air, land and sea operations across the EU external borders. It provides emergency responses through European Border Guard Teams, assists the Member States in the return of migrants and is involved in the management of the ‘Hotspots’ in Greece and Italy. It is thus hardly surprising that Frontex is often in the eye of the storm when it comes to the humanitarian crisis that the EU Border Policy has become. Initially conceived as a border control oriented organisation, standards and tools have been gradually added to its structure to ensure the upholding of human rights during Frontex’s activities. However, the accountability aspect which goes hand in hand with human rights protection, has persistently been the ‘Achilles heel’ of the Agency’s structure.

One of the central challenges of this thesis was that EU migration is a fast-moving area, with abrupt changes in migratory patterns, as well as in policy implementation and its impact. By April 2016, the 2015 Commission Proposal to transform Frontex into a European Border and Coast Guard, became more concrete. Consequently, the objective of this thesis is not only to examine Frontex’s functioning, but the role of the EU Border Agency in the EU Border Policy in general and its impact on the human rights of the migrants trying to reach Europe. The thesis will conclude by formulating some recommendations for the future European Border and Coast Guard to seize this *momentum* for change with both hands and to commit to an EU Border Policy in which the value of upholding of human rights is appreciated and taken seriously.

## Chapter I. The protection of the fundamental rights of refugees and migrants at the EU borders

*Chapter I* starts by giving some background to the migration situation at the external borders of the European Union in order to then expand on the EU Border Policy and the creation of an EU Border Agency in *Chapter II*.

### Section I. An outline of the current situation at the EU borders

*Section I* presents an overview of the current migration flows to and within the European Union. To this effect, *Subsection I* specifies the numbers and profiles of the migrants trying to reach Europe. The data used for this analysis are estimates varying depending on their source and should thus be looked at critically, in particular in view of the broader issue of the lack of reliable, timely and comparable statistical data on migration and asylum, as well as on arrivals at Member State borders.<sup>1</sup> Subsequently, *Subsection II* sketches the routes taken and thus gives an idea about the mainly affected Member States. Finally, *Subsection III* seeks to lay out the reasons behind the increasing migration flows from certain regions towards Europe, in other words, the so-called ‘push’ and ‘pull factors’.

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<sup>1</sup> SINGLETON, A., ‘Migration and asylum data for policy-making in the European Union: the problem with numbers’, *Papers in Liberty and Security in Europe* (89) (Brussels, CEPS March 2016) <<https://www.ceps.eu/system/files/LSE%2089%20AS%20Migration%20and%20Asylum%20Data.pdf>> accessed 9 April 2016.

## Subsection I. Numbers and profiles

In 2015, between 1,011,712 and 1,015,078 migrants, including refugees are reported to have arrived to Europe by sea out of a total of around 1,046,599 by both land and sea routes.<sup>2</sup> Frontex counted 1,822,337 ‘illegal border crossings’ in 2015.<sup>3</sup> However, it warns that these data refer to the number of detections of illegal border crossing at the external borders of the European Union and that the same person may make several attempts to cross the border irregularly on different locations at the external border.<sup>4</sup> Around 3,770 migrants are known to have drowned or remain missing in 2015 trying to reach Europe by sea.<sup>5</sup>

Data of the different actors involved show unanimously that there has been a strong increase in the number of migrants arriving in Europe between 2010 and 2015. This goes without a doubt hand in hand with the fact that in the past five years at least fifteen conflicts have erupted or reignited: eight in Africa<sup>6</sup>, three in the Middle East<sup>7</sup>, one in Europe<sup>8</sup> and three in Asia<sup>9</sup>. Additionally, there is decades-old instability and conflict in Afghanistan, Somalia and elsewhere.<sup>10</sup> Although statistics vary depending on the issuing organisation, due to the inability to exhaustively register migrants as well as the chosen perspective of the statistics<sup>11</sup>, it may be concluded that the majority of migrants arriving to Europe by land and sea in 2015<sup>12</sup>, without significant change in 2016<sup>13</sup>, come from a limited range of the affected countries: the Syrian Arab Republic, Kosovo, Afghanistan, Iraq, Pakistan, Eritrea, Somalia and Nigeria.<sup>14</sup>

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<sup>2</sup> IOM (2015), ‘Mixed migration flows in the Mediterranean and Beyond – Flow Monitoring Compilation 2015 Annual Report’ <<http://doe.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf>> accessed 5 April 2016; UNHCR (2015), ‘Mediterranean Sea Arrivals in 2015’ <<http://tinyurl.com/jeoh84t>> accessed 5 April 2016.

<sup>3</sup> Frontex, ‘Frontex Risk Analysis for 2016’, 5 April 2016, 16.

<sup>4</sup> Frontex, ‘FRAN Quarterly – Number of illegal border-crossings at record high in Q4 (Press release, 10 March 2016)’ <<http://frontex.europa.eu/news/fran-quarterly-number-of-illegal-border-crossings-at-record-high-in-q4-tRfbnB>> accessed 24 March 2016.

<sup>5</sup> IOM (2015), ‘Mixed migration flows in the Mediterranean and Beyond – Flow Monitoring Compilation 2015 Annual Report’; UNHCR (2015), ‘Mediterranean Sea Arrivals in 2015’.

<sup>6</sup> Côte d’Ivoire, Central African Republic, Libya, Mali, Northeastern Nigeria, Democratic Republic of Congo, South Sudan and in 2015 in Burundi.

<sup>7</sup> Syria, Iraq, and Yemen.

<sup>8</sup> Ukraine.

<sup>9</sup> Kyrgyzstan, and in several areas of Myanmar and Pakistan.

<sup>10</sup> UNHCR, ‘News stories - Worldwide displacement hits all-time high as war and persecution increase’ (Press release, 18 June 2015) <<http://www.unhcr.org/558193896.html>> accessed 12 November 2015.

<sup>11</sup> Results will vary as a result of the choice to limit its focus on migrants arriving by sea and thus exclude the migrants who travelled by land only or the choice to focus on all migrants or merely the migrants who eventually requested asylum (see *figure 3*).

<sup>12</sup> See *figure 1*.

<sup>13</sup> UNHCR (2016), ‘Refugees/Migrants Emergency Response – Mediterranean: regional overview’ <<http://data.unhcr.org/mediterranean/regional.php>> accessed 3 July 2016.

<sup>14</sup> UNHCR, ‘The sea route to Europe: the Mediterranean passage in the age of refugees’, 1 July 2015, <<http://unhcr.org/5592bd059.html>> accessed 12 November 2015; OECD, ‘Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015’, N° 7

**Figure 1. Detections of illegal border-crossing, by main nationalities in 2015**

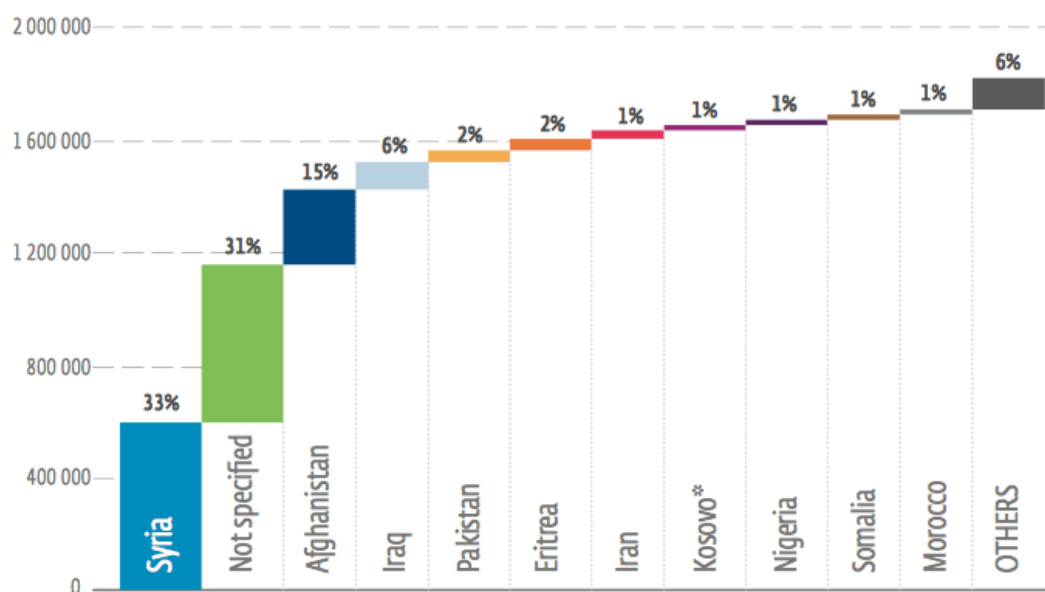


Figure 1/ Source: Frontex, 'Frontex Risk Analysis for 2016', 5 April 2016, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf).

The year 2016 promised to be another 'record year' with 204,311 arrivals by sea and 2,443 deaths in the Mediterranean between 1 January and 29 May 2016 in comparison to 91,860 arrivals and 1,828 in the same period in 2015. However, recently, entries into the European Union were partially halted with the conclusion of the 'one in one out' deal between the European Council and Turkey on 18 March 2016. The deal, which is formally defined as a Statement, aims to stop the flow of irregular migrants travelling across the Aegean from Turkey to the Greek islands by allowing Greece to return to Turkey all 'irregular migrants' arriving after 20 March 2016. In exchange, EU Member States will increase resettlement of Syrian refugees residing in Turkey, accelerate visa liberalisation for Turkish nationals and boost existing financial support for Turkey's refugee population.<sup>15</sup>

September 2015 <<http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf>, 2> accessed 12 November 2015.

<sup>15</sup> European Commission, 'EU-Turkey Agreement: Question and Answers' (Press Release, 19 March 2016) <[http://europa.eu/rapid/press-release\\_MEMO-16-963\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-963_en.htm)> accessed 20 March 2016.

Despite the legal challenges the Statement poses, not the least because of Turkey's long-standing record of *refoulement*<sup>16</sup> and the fact that it is not a full member of the Refugee Convention<sup>17</sup>, the Statement was an important factor<sup>18</sup> in effectively curbing the number of arrivals via the Aegean Sea from around 57,066 in February 2016 and 26,971 in March to 3,650 in April and 1,488 in July<sup>19</sup>. In other words, indirectly deterring large numbers of migrants entitled to international protection to travel in the direction of the EU, leaving them stuck in a country with limited access to basic services for migrants, particularly the non-Syrians.

Arrivals via Italy during the first five months of 2016 did not significantly decrease in comparison to 2015 and even doubled in May according to Frontex<sup>20</sup> - which was not reflected to the same extent in UNCHR or IOM statistics.<sup>21</sup> As briefly addressed at the start of this subsection, Frontex statistics should not be considered an exclusive truth, as they only measure those movements that are visible and detected. Furthermore, Frontex has confirmed there is a certain degree of double counting involved in its statistics.<sup>22</sup> Nevertheless, different sources show that the overall death toll of migrants trying to reach Europe via the Mediterranean in 2016 is topping last year's numbers, with 2,896 to 2,920 dead or missing as of 3 July 2016 in comparison to 1,838 in the first six months of 2015.<sup>23</sup>

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<sup>16</sup> Human Rights Watch, 'Turkey: Syrians Pushed Back at the Border', 23 November 2015 <<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>> accessed 11 March 2016; Amnesty International, 'Europe's Gatekeeper: unlawful detention and deportation of refugees from Turkey', 16 December 2015 <<https://www.amnesty.org/en/documents/eur44/3022/2015/en/>> accessed 11 March 2016; ECRE, 'ECRE strongly opposes legitimizing push-backs by declaring Turkey a 'safe third country'', 29 January 2016 <<http://ecre.org/component/content/article/70-weekly-bulletin-articles/1364-ecre-strongly-opposes-legitimising-push-backs-by-declaring-turkey-a-safe-third-country.html>> accessed 11 March 2016; Statewatch, 'Why Turkey is not a 'safe country'', February 2016, 18 <<http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>> accessed 11 March 2016.

<sup>17</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 ('Refugee Convention').

<sup>18</sup> Another factor was the closure of the Balkan route as agreed by EU leaders on 7 March 2016 after a cascade of unilateral border restrictions in the Balkan region and Austria (see *Chapter I, Section I, Subsection II*).

<sup>19</sup> UNHCR (2016), ' <Refugees/Migrants Emergency Response – Mediterranean: Greece' <<http://data.unhcr.org/mediterranean/country.php?id=83>> accessed 3 July 2016.

<sup>20</sup> Frontex, 'Central Med Remained under migratory pressure in May' (Press release, 16 June 2016) <<http://frontex.europa.eu/pressroom/news/central-med-remained-under-migratory-pressure-in-may-JVHo4n>> accessed 3 July 2016.

<sup>21</sup> UNHCR (2016), ' <Refugees/Migrants Emergency Response – Mediterranean: regional overview'.

<sup>22</sup> Frontex, 'FRAN Quarterly – Number of illegal border-crossings at record high in Q4' (Press Release, 10 March 2016).

<sup>23</sup> IOM, 'Mediterranean Migrant Arrivals in 2016: 227,316; Deaths: 2,920' (Press Release, 7 May 2016) <<https://www.iom.int/news/mediterranean-migrant-arrivals-2016-227316-deaths-2920>> accessed 3 July 2016; UNHCR (2016), ' <Refugees/Migrants Emergency Response – Mediterranean: regional overview'.

## Subsection II. Main migratory routes

Alongside the increasing number of migrants, the summer of 2015 was characterised by a change in routes used by migrants. The ‘Eastern Mediterranean and Western Balkan route’, which is typically used by migrants coming from Syria, Iraq and Afghanistan, has since then been used more frequently, including by Pakistani and selected African migrant groups as well as by Western Balkan nationals themselves. From January to September 2015, 359,171 people crossed the Mediterranean between Turkey and Greece and proceeded to Hungary, where illegal border crossings consequently swell. This route was largely used by families with children.

Yet, on 7 March 2016 EU Heads of State agreed to close the so-called ‘Balkan route’ with a call on the Member States to enforce the rules of the Schengen area<sup>24</sup>, leaving almost 40,000 migrants stranded at the Greek-Macedonian border. The decision was taken after the closure by Hungary of its border with Serbia in September 2015 and later its border with Croatia. This evoked a cascade of unilateral border restrictions in the Balkan Region and Austria, resulting in respectively giving priority to Syrians, Iraqis and Afghanis, and putting a daily cap on the number of asylum-seekers allowed to enter.<sup>25</sup>

As the message about the unavailability of the Western Balkan transit corridor spread and the EU-Turkey Statement was adopted, arrivals via the Eastern Aegean decreased. The decrease could be observed during all three months of the first quarter of 2016 but was most visible in February and March, when coordinated restriction measures were introduced at regional level and eventually the ‘Western Balkan route’ was closed down. After the total shut down in March 2016, the number of detections dropped to the level close to that of the same month in 2015.

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<sup>24</sup> European Council, ‘Statement of the EU Heads of State or Government of 7 March 2016’ (Press release, 8 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>> accessed 8 March 2016.

<sup>25</sup> Human Rights Watch, ‘EU/Balkans/Greece: Border Curbs Threaten Rights: discriminatory actions causing chaos, crisis’, 1 March 2016 <<https://www.hrw.org/news/2016/03/01/eu/balkans/greece-border-curbs-threaten-rights>> accessed 8 March 2016.



The other heavily exploited route to Europe is the ‘Central Mediterranean route’ from Libya to Italy with 128,619 arrivals detected from January to September 2015, compared to 172,000 arrivals in all of 2014.<sup>26</sup> In 2015 there was a shift in nationality of people making use of this route. Where Syrians and Eritreans represented the majority of migrants using the ‘Central Mediterranean route’ in 2013 and 2014, by mid-2015 the main nationalities passing through this route were Eritreans, Nigerians and Somalis.<sup>27</sup> Many of the Syrians had shifted towards the ‘Eastern Mediterranean and Western Balkan route’ given the more limited danger of the latter route and the visa obligations introduced by Egypt and Algeria for Syrians.<sup>28</sup>

Due to the significant drop in arrivals on the Aegean islands in April 2016, the number of migrants reaching Italy exceeded the Greek arrivals for the first time since June 2015. The switch occurred despite the small drop in migrants detected on the ‘Central Mediterranean route’ in comparison to March 2016 and the nearly 50% drop in comparison to April 2015.<sup>29</sup> However, in May and June 2016 arrivals reached similar or higher numbers than in 2015, depending on the source. Yet, no direct signs could be observed of a link to the recently restricted ‘Eastern Mediterranean route’ on the short term.<sup>30</sup> Nationals of Eritrea, Egypt and Nigeria continue to account for the largest share of migrants on this route.<sup>31</sup> On the long term, however, there might be a shift to the more deadly ‘Central Mediterranean route’.

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<sup>26</sup> Frontex (2015), ‘Trends and routes – Migratory routes map’, <<http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>> accessed 12 November 2015.

<sup>27</sup> OECD, ‘Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015’, N° 7 September 2015.

<sup>28</sup> UNHCR, ‘UNHCR expresses concern over new restrictions for Syrian refugees in Egypt’ (Press release, 12 July 2013) <<http://www.unhcr.org/51e03ff79.html>> accessed 17 November 2015; OECD, ‘Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015’, N° 7 September 2015.

<sup>29</sup> UNHCR (2016), ‘<Refugees/Migrants Emergency Response – Mediterranean: Italy’ <<http://data.unhcr.org/mediterranean/country.php?id=105>> accessed 3 July 2016.

<sup>30</sup> Frontex, ‘Central Med Remained under migratory pressure in May’ (Press release, 16 June 2016).

<sup>31</sup> Frontex, ‘Number of Migrants arriving in Greece dropped 90% in April’ (Press release, 13 May 2016) <<http://frontex.europa.eu/news/number-of-migrants-arriving-in-greece-dropped-90-in-april-6e7oBw>> accessed 3 July 2016.

Within this route lays one of the causes of the increasing number of migrants heading to Europe. Until 2010, Libya and its relatively prosperous economy, offered good job opportunities for migrants from sub-Saharan Africa who either used it as a final destination or as a transit country where they could earn money to pay the smugglers for the last leg of their journey to the European Union. This changed in 2011, with the eruption of civil unrest in Tunisia and Libya. Today, many migrants depart from Libya, where the lack of rule of law and basic law enforcement allow smuggling networks to thrive. The increasing number of migrants departing from Northern Africa also led to an increase in the number of people drowning at sea.<sup>32</sup> As mentioned above, some 3,500 migrants lost their lives or remain missing after having departed from the North African shores between January and November 2015.<sup>33</sup>

Importantly, the reason for additional use of this route in 2016 arguably does not lie in changes in the route patterns of migrants stranded in Turkey, but in the increasing number of migrants coming from West Africa and the Horn of Africa, as well as the growing number of departures from Egypt.<sup>34</sup>

The ‘Western Mediterranean route’, which goes through the Spanish Ceuta and Melilla enclaves or through the Strait of Gibraltar, was traditionally used by sub-Saharan migrants, but due to tighter border controls and cooperation with the Moroccan authorities, this route has become less prominent.<sup>35</sup>

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<sup>32</sup> In 2013 the dramatic conditions of the overcrowded boats used by the migrants were particularly visible, when 366 migrants lost their lives near Lampedusa when their boat suddenly capsised.

<sup>33</sup> IOM, ‘Migration Flows Europe – Missing migrants’, <<http://migration.iom.int/europe/>> accessed 17 November 2015.

<sup>34</sup> Frontex, ‘Central Med Remained under migratory pressure in May’ (Press release, 16 June 2016).

<sup>35</sup> Frontex (2015), ‘Trends and routes – Migratory routes map’.

**Figure 2. Main Migratory routes into the EU through land and sea**



Figure 2/ Source: Frontex, 'Migratory routes map', <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

Italy and Greece are thus without a doubt on the 'front line'. Nevertheless, it must be acknowledged that most migrants do not stay in the first EU country of arrival. One way to measure where migrants eventually end up is through asylum applications. Although not all of those arriving claim asylum in a country of the European Union, over 799,195 have done so from January to October 2015.<sup>36</sup> In 2015, Germany received the highest number of new asylum applications with 343,675 by the end of October.<sup>37</sup> Hungary had moved into the second place with 175,960 applications arguably due to the rising popularity of the 'Eastern Mediterranean and Western Balkan route' to Europe in 2015.<sup>38</sup>

<sup>36</sup> Eurostat (2015), 'Asylum and new asylum applicants – monthly data', <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00189&plugin=1>> accessed 17 November 2015.

<sup>37</sup> Eurostat (2015), 'Asylum and new asylum applicants – monthly data'.

<sup>38</sup> Eurostat (2015), 'Asylum and new asylum applicants – monthly data'.

In 2016, Germany continues to receive the highest number of asylum applications followed by Italy and Austria<sup>39</sup>, despite an overall drop in asylum applications in most EU Member States starting from November and December 2015.<sup>40</sup> In contrast, Hungary is no longer part of the top destination countries.<sup>41</sup> The decrease in asylum applications can among others be explained by the above-mentioned border restrictions as well as the tightening of asylum legislation<sup>42</sup> as part of a continuous trend among the EU Member States with a view to discouraging asylum-seekers from deciding to apply in the Member States in question.<sup>43</sup>

With a view to assisting frontline Member States encountering disproportionate migratory pressure, the European Commission put forward a novel ‘Hotspot’ approach in its European Agenda on Migration of 2015<sup>44</sup>, aiming to bring order into the EU migration situation by concentrating on watertight identification and registration of arrivals. The approach has been framed hand in hand with the relocation of 160,000 asylum-seekers from Italy and Greece to other Member States<sup>45</sup> as part of the temporary relocation scheme and the focus on effective returns. The idea behind the ‘Hotspots’ is to dispatch personnel from EU agencies, such as Frontex, European Asylum Support Office (‘EASO’) and Europol, the whole of which is coordinated by a Regional Task Force per frontline Member State in question, supporting national authorities in the screening, identification and fingerprinting of migrants arriving at the EU external borders where they are under pressure.<sup>46</sup>

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<sup>39</sup> Eurostat, ‘Asylum quarterly report’, 15 June 2016 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report#Main\\_destination\\_countries](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Main_destination_countries)> accessed 3 July 2016.

<sup>40</sup> The number of first time asylum applicants increased by more than 50 % in the first three months of 2016 compared with the same quarter of 2015 but decreased by -33 % compared with the fourth quarter of 2015 (See Eurostat (2015), ‘Asylum and new asylum applicants – monthly data’).

<sup>41</sup> Eurostat, ‘Asylum quarterly report’, 15 June 2016.

<sup>42</sup> Asylum Information Database (2016), ‘Registration of the asylum application’ <<http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/registration-asylum-application>> accessed 3 July 2016.

<sup>43</sup> ‘Hungary passes law to tighten asylum rules’ *Reuters* (6 July 2016) <<http://www.reuters.com/article/us-europe-migrants-hungary-idUSKCN0PG10E20150706>> accessed 6 July 2016.

<sup>44</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240, 13 May 2015.

<sup>45</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248/80; European Commission, ‘Relocation and Resettlement: EU Member States urgently need to deliver’ (Press release, 16 March 2016) <[http://europa.eu/rapid/press-release\\_IP-16-829\\_en.htm](http://europa.eu/rapid/press-release_IP-16-829_en.htm)> accessed 1 July 2016.

<sup>46</sup> European Commission (2015), ‘Factsheet on the hotspot approach to managing exceptional migratory flows’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)> accessed 22 June 2015.

While it must be admitted that the ‘Hotspot’ approach *per se* has delivered greater order and substantially increased registration and fingerprinting rates<sup>47</sup>, the current state of play in the ‘Hotspots’ has attracted a great deal of criticism. The concerns centre around the low relocation rates<sup>48</sup>, not using detention as a measure of last resort, the lack of information of the migrants present, and the worsening of conditions, among others due to the withdrawal of NGOs after the EU-Turkey Statement.<sup>49</sup> Furthermore, the focus of the approach has shifted from identification and registration to return, which was publicly acknowledged by the Commission after the adoption of the Statement with regard to the Greek ‘Hotspots’.<sup>50</sup>

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<sup>47</sup> D. NEVILLE, ‘Study: On the frontline: the hotspot approach to managing migration’ (Policy Department C: Citizens’ Rights and Constitutional Affairs, May 2016) 8  
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU\(2016\)556942\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf)> accessed 1 July 2016.

<sup>48</sup> European Commission, ‘Relocation and Resettlement: EU Member States urgently need to deliver’ (Press release, 16 March 2016); S. CARRERA AND L. DEN HERTOOG, ‘A European Border and Coast Guard: What’s in a name?’, *Papers in Liberty and Security in Europe* (88) (Brussels, CEPS March 2016)  
<<https://www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name>> accessed 9 April 2016 9.

<sup>49</sup> United Nations Office of the High Commissioner for Human Rights (‘OHCHR’), ‘Italy’s migrant hotspot centres raise legal questions’ (Press Release, 2 August 2016)  
<<http://www.ohchr.org/EN/NewsEvents/Pages/LegalQuestionsOverHotspots.aspx#sthash.VeWhVCLU.dpuf>> accessed 2 August 2016.

<sup>50</sup> European Commission, ‘Next operational steps in EU-Turkey cooperation in the field of migration’, COM(2016) 166, 16 March 2016.

### Subsection III. Push and pull factors

*“There are two categories of people we’re talking about. There are clearly refugees – the Syrians, Eritreans, Somalis, Afghanis. If we take the Syrians and Eritreans who are mostly based in the Middle East at present – in Turkey, Lebanon, Jordan, and Egypt for the Eritreans – we know they’re stuck, we know there’s no future for them where they are. These countries are not allowing them to settle, get permanent residence, citizenship and then become active citizens. They’re stuck in a place where there’s no future for themselves or their children. (...)”<sup>51</sup>*

As duly illustrated by the quote of UN’s Special Rapporteur on the Human Rights of Migrants, François CRÉPEAU, the current increase, years after the start of some of the conflicts referenced to in *Subsection I*, can, among others, be explained by the fact that few of these crises have been resolved and thus most still generate new displacement. In addition, not all migrants arrive directly from their home country.<sup>52</sup>

For example, many Syrians and Iraqis will have first fled for safety to neighbouring countries such as Turkey and Lebanon but after years of rising pressure and insufficient international support, the economies and infrastructure of many refugee hosting countries are struggling to cope, making it increasingly difficult for refugees to find work, shelter, healthcare, and education.<sup>53</sup> The phenomenon in which refugees and asylum-seekers leave a third country for their final destination, by virtue of various reasons, is called ‘secondary movement’.<sup>54</sup>

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<sup>51</sup> ‘UN’s François Crépeau on the refugee crisis: “Instead of resisting migration, let’s organise it”’ *The Guardian* (London, 22 April 2015) <[http://www.theguardian.com/world/2015/apr/22/uns-francois-crepeau-on-the-refugee-crisis-instead-of-resisting-migration-lets-organise-it?CMP=share\\_btn\\_tw](http://www.theguardian.com/world/2015/apr/22/uns-francois-crepeau-on-the-refugee-crisis-instead-of-resisting-migration-lets-organise-it?CMP=share_btn_tw)> accessed 8 June 2015.

<sup>52</sup> OECD, ‘Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015’, N° 7 September 2015.

<sup>53</sup> UNHCR, ‘The sea route to Europe: the Mediterranean passage in the age of refugees’, 1 July 2015.

<sup>54</sup> Unlike “irregular movement of refugees and asylum-seekers from a country in which they have already found protection”, which has a clear legal meaning, ‘secondary movement’ is a more factual notion, and not a legal status. It reflects the practical reality that refugees move, but it does not speak to why they move nor to whether this movement is regular. See S. H. LEGOMSKY, ‘Secondary Refugee Movements and the Return of Asylum-seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *IJRL* 565.

**Figure 3. Main Migratory routes into the EU through land and sea**

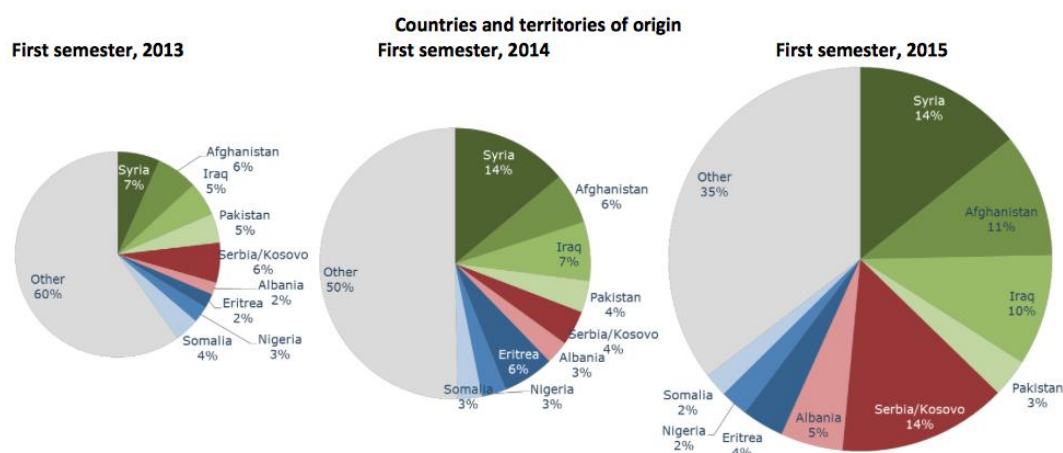


Figure 3/ Source: OECD, 'Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015', N° 7 September 2015, <http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf>.

Figure 3 shows which nationalities eventually applied for asylum in the EU over the course of 2013 to 2015. There is no unambiguous reason for the rapid increase in migration from Kosovo and Albania. It may be explained, partly, by the presence of poor economic conditions and very high youth unemployment, by easier access to Serbia with Kosovar identification documents, by the opening of smuggling routes in the region and by the circulating whispers about accessibility of employment and/or social benefits in some EU destination countries.<sup>55</sup> However, there are also indications of individual persecution or serious harm because of ethnicity<sup>56</sup>, handicap (of a family member), honour killings, gender and sexual orientation etc.<sup>57</sup>

<sup>55</sup> OECD, 'Evolution of the distribution of asylum-seekers in the EU by main countries and territories of origin and by destination countries, 2013 -2015', N° 7 September 2015.

<sup>56</sup> Roma, Serbians and Albanians as ethnic minorities etc.

<sup>57</sup> Vluchtelingenwerk Vlaanderen (2014), 'Kosovo – landenfiche 2014', [http://www.vluchtelingenwerk.be/sites/default/files/landenfiche\\_kosovo.pdf](http://www.vluchtelingenwerk.be/sites/default/files/landenfiche_kosovo.pdf) accessed 17 November 2015.

Application for refugee status in European countries is just one element in the global picture of displacement from wars and conflict. For 2015, the Internal Displacement Monitoring Centre (IDMC) reported that 65.3 million people around the world had been forced to flee their homes by armed conflict, generalised violence and natural disasters, while staying within their countries.<sup>58</sup> Most remain either internally displaced within their own countries or are hosted as refugees in states bordering to war zones – often stranded for years on the edge of society as long-term internally displaced or refugees.<sup>59</sup> It should thus be concluded that even with the increased numbers of migrants, the propensity to move internationally, in particular in the absence of compelling reasons such as wars, is limited to a small proportion of humans.<sup>60</sup>

## Section II. The legal framework for the protection of fundamental rights of migrants at Europe's borders

The human rights of migrants on the route to Europe may be violated in different ways and at various stages. To this effect, *Section II* sets out the legal framework relevant to the situation of migrants trying to reach Europe. As a preliminary necessity, *Subsection I* brings some clarity with regard to the terminology used in this thesis. Subsequently, *Subsection II* sets out the legal instruments that apply to migrants at Europe's external borders to ensure the respect for their fundamental rights. Finally, *Subsection III* applies these standards to the EU migration situation in practice, illustrated by a few examples from the past and present.

### Subsection I. Terminology matters

As there is no universally accepted definition of the term 'migrant', it is vital to indicate that this thesis will use the term 'migrant' in its broadest sense, referring to any person driven from his or her home to seek refuge, referring to migration for reasons of persecution as well as fleeing from grinding poverty.<sup>61</sup>

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<sup>58</sup> UNHCR, 'Global trends: forced displacement in 2015', 20 June 2016, 2.

<sup>59</sup> IOM (2015), 'Migration Flows Europe – Recent trends', <<http://migration.iom.int/europe/>> accessed 12 November 2015.

<sup>60</sup> S. F. MARTIN, 'New issues in refugee research - Global migration trends and asylum', *New Issues in Refugee Research*, Working Paper No. 41, April 2001, <<http://www.unhcr.org/3af66ccc4.pdf>> accessed 14 November 2015.

<sup>61</sup> IOM (2015), 'Key Migration Terms', <<https://www.iom.int/key-migration-terms#Migrant>> accessed 11 November 2015.



Although the notion of ‘refugee’ can be understood in the same broad sense under general international law<sup>62</sup>, states have given this concept a limited scope as flows from among others the Refugee Convention. The distinction is based on the idea that migrants fleeing from poverty have usually decided freely to migrate for reasons of ‘personal convenience’ and without intervention of an external compelling factor.<sup>63</sup> A ‘refugee’ as defined by the Refugee Convention is a person "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".<sup>64</sup> While such a person awaits a decision on the application for refugee status in a country other than his or her own, this person will be considered an ‘asylum-seeker’.<sup>65</sup>

It is often forgotten that the majority of people arriving at the EU borders come from ‘refugee producing’ countries torn up by war or other conditions resulting in the need for international protection of its inhabitants. Only a smaller portion is from elsewhere. Yet, as international human rights law and the ECHR enshrine and enforce rights which are of general application<sup>66</sup>, all persons trying to reach Europe, regardless of their migration status, are entitled to respect for their core human rights.<sup>67</sup> <sup>68</sup> Non-compliance with the conditions for entry, stay or residence in the EU cannot deprive migrants of certain basic rights shared by all human beings.<sup>69</sup>

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<sup>62</sup> G.S. GOODWIN-GILL and J. MCADAM, *The refugee in international law* (3rd edn, Oxford University Press 2007) 15.

<sup>63</sup> IOM (2015), ‘Key Migration Terms’.

<sup>64</sup> Article 1(A)(2) Refugee Convention.

<sup>65</sup> IOM (2015), ‘Key Migration Terms’.

<sup>66</sup> Art 2 Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (‘UDHR’); Fundamental Rights Agency of the European Union (‘FRA’), ‘The fundamental rights of migrants in an irregular situation in the European Union’, November 2011 <[http://fra.europa.eu/sites/default/files/fra\\_uploads/1827\\_FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1827_FRA_2011_Migrants_in_an_irregular_situation_EN.pdf)> accessed 1 July 2016.

<sup>67</sup> As repeated by the UN Special Rapporteur on the Rights of Migrants in its annual report of 2015 (Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François CRÉPEAU, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’, 8 May 2015, A/HRC/20/24).

<sup>68</sup> The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (‘ICCPR’) defines such basic rights of all persons as: the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; the right to marry and to found a family.

<sup>69</sup> Although the Member States are not required to accord the same benefits to irregular migrants as to nationals, they must follow a core set of human rights standards. In that respect, articles 1, 14, 31, 35 and 47 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 (‘EU Charter’), guarantee the right to human dignity, education, fair and just working conditions, healthcare and the right to an effective remedy and to a fair trial.

The choice of terminology is not only decisive with regard to academic accuracy, in particular because the different terms bring about a different legal framework<sup>70</sup>, but even more with regard to the categorisation of migrants in the public debate which can lead to stigmatisation, as the above-mentioned terms have gained different connotations.<sup>71</sup> This concern is reflected in the launching of the ‘Words Matter!’ campaign<sup>72</sup>, advocating for accurate terminology in all official communication regarding migrants, which has been picked up by a lot of civil society organisations.<sup>73</sup>

## **Subsection II. Relevant legal sources for the protection of migrants at Europe’s borders**

The human rights of migrants trying to reach Europe may be threatened or violated at various stages of their journey to Europe. For the purpose of this thesis, the ensuing analysis focuses on the legal framework relevant for the assessment of Frontex and its activities.

### **§1. International refugee law**

Every EU Member State has ratified the Refugee Convention of 1951 which codifies the customary law principle of *non-refoulement* in art 33. The Protocol of 1967 to the Refugee Convention eliminates all geographical and temporal limitations of the Refugee Convention.<sup>74</sup>

On the whole, the principle prohibits the expulsion or return (‘refouler’) of a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However, case law has applied *refoulement* in instances where there is no persecution, but the conditions in the receiving country do not comply with international standards either. This case law is elaborated in §3.

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<sup>70</sup> See *Subsection II*.

<sup>71</sup> M. KJAERUM (Former Director FRA), ‘Crisis? What crisis? How Europe has coped with refugee surge in the past and what it can do today’ (High Level Lecture Series on Human Rights, Permanent Mission of Belgium to the EU in Brussels, 29<sup>th</sup> October 2015).

<sup>72</sup> See < <http://picum.org/en/news/picum-news/44372/>> to read more about this campaign run by PICUM.

<sup>73</sup> UNHCR, ‘UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?’ (Press release, 11 July 2016) < <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>> accessed 20 July 2016.

<sup>74</sup> Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

The generally accepted extraterritorial application of the prohibition of *non-refoulement*<sup>75</sup> in line with human rights law as elaborated below, does not necessarily require the admittance of all migrants into the territory of the controlling state, when subjected to extraterritorial border control. In the context of interceptions at sea, it should be established that by refusing admittance the person in question is put at risk in violation of the prohibition of *non-refoulement*. While it is undoubtedly not permitted to return migrants to a country of origin, if there is a risk of persecution, or to a third country which is not willing to accept them, legal return to the high seas might also result in indirect *refoulement*<sup>76</sup>, as it leaves the migrant no choice than to return to a country where his life or freedom is at risk. In addition, forcing migrants in unseaworthy vessels may result to inhumane treatment or worse. States are thus under a positive obligation to allow entry to a migrant vessel or at least render them assistance, which is a duty likewise stemming from international law of the sea.<sup>77</sup>

Further below in this thesis it will become clear that identifying the precise scope of States' obligations will become even more difficult when border control operations are conducted jointly with other States or organisations, or when border control tasks are outsourced altogether.

## §2. International law of the sea

The United Nations Convention on the Law of the Sea (hereafter 'UNCLOS')<sup>78</sup> determines that a vessel falls within the jurisdiction of its flag state on the High Seas<sup>79</sup> and compels ship masters to render assistance and rescue persons in distress<sup>80</sup>. The duty to render assistance at sea is likewise included in the International Convention on Maritime Search and Rescue (hereafter 'SAR Convention')<sup>81</sup>, the Convention for the Safety of Life at Sea (hereafter 'SOLAS')<sup>82</sup> and the International Convention on Salvage.<sup>83</sup>

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<sup>75</sup> M. DEN HEIJER, 'Europe beyond its borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in RYAN, B., and MITSILEGAS, V. (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (169) 188.

<sup>76</sup> For example, Italy's Joint border control Operations with Libya have been criticised for resulting in returns into the hands of authorities of a country with a poor human rights record. In the same way, the ECtHR held in *Hirsi Jamaa* that the Libya's and Italy's border control cooperation risked resulting in collective expulsion (see below).

<sup>77</sup> M. DEN HEIJER, 'Europe beyond its borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in RYAN, B., and MITSILEGAS, V. (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (169) 189.

<sup>78</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

<sup>79</sup> Art 92 (1) UNCLOS.

<sup>80</sup> Art 98 UNCLOS.

<sup>81</sup> Annex, para 2.1.10 to the International Convention on Maritime Search and Rescue, 27 April 1979, 1405 UNTS 97.

<sup>82</sup> Annex, Chapter V, Regulation 10 to the Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 278.

<sup>83</sup> Art 10 International Convention on Salvage, 28 April 1989, 1953 UNTS 165.

### §3. International, regional human rights law and European Union law

The international Bill of Rights comprises the Universal Declaration of Human Rights (hereafter ‘UDHR’), the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’) and the International Covenant on Social, Economic and Cultural Rights (hereafter ‘ICESCR’)<sup>84</sup>. Art 2 UDHR establishes unequivocally that migrants enjoy the protection of international human rights law like anyone else, even if they are in an irregular situation. In addition to the International Bill of Human Rights, so-called ‘thematic treaties’ have been developed in order to protect specific groups, such as the Convention on the Elimination of All Forms of Racial Discrimination<sup>85</sup>, the Convention on the Elimination of All Forms of Discrimination Against Women<sup>86</sup>, the Convention on the Rights of the Child<sup>87</sup>.

Similarly, the provisions in the European Convention on Human Rights (hereafter ‘ECHR’)<sup>88</sup> are principally of general application. Hence, its rights and freedoms generally apply to everyone within the jurisdiction of the Parties.

The applicability of human rights instruments is triggered whenever a situation falls within the jurisdiction of the States (or organisations) which are party to the instrument. Jurisdiction is primarily territorial, meaning that it is presumed to be exercised normally throughout the State’s territory. However, the relevant treaty monitoring bodies as well as the International Court of Justice have recognised that human rights treaties bind States with regard to persons in foreign territories who can be considered to fall within the jurisdiction of that State.<sup>89</sup> According to the ECtHR’s case law, such jurisdiction can also be established when a State exercises control over an area or territory, or when its state agents exercise effective control over an individual.<sup>90</sup>

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<sup>84</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (‘ICESCR’).

<sup>85</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195.

<sup>86</sup> Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

<sup>87</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

<sup>88</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5 (‘ECHR’).

<sup>89</sup> ECtHR, *Loizidou v. Turkey Application* Application no. 15318/, 23 February 1995, para 62; HRC, *Lilian Celiberti de Casariego v. Uruguay* CCPR/C/13/D/56/1979, 29 July 1981, para. 10(3).

<sup>90</sup> ECtHR, *Al-Skeini and Others v. United Kingdom* Application no. 55721/07, 7 July 2011 paras 130-133.

In 2009, the EU's own 'Bill of Rights', the Charter on Fundamental Rights became legally binding and has since then become the key instrument for the protection of fundamental rights for irregular migrants within the EU legal order. The rights enshrined in the EU Charter of Fundamental Rights apply to everyone, regardless of their migration status, unless otherwise specified. The Charter contains the right to asylum, and prohibits collective expulsion and the removal of individuals if there is a risk to their life or of other serious harm.

After the entry into force of the Lisbon Treaty, foundational EU principles and rights, among others the human rights principles flowing from the EU Charter of Fundamental Rights, should now be fully respected by EU agencies as well as Member States when implementing EU law.<sup>91</sup> Even though most of these principles are also included in the ECHR, the EU Charter is an essential tool for the protection of human rights as the EU is not a party to the ECHR, so far.

#### ***§4. Relevant case law for the protection of migrants at Europe's borders***

Firstly, as briefly touched upon in §1, case law does not limit the application of *refoulement* to cases of persecution. For instance, the Human Rights Committee in *Jasin v Denmark*<sup>92</sup> considered the return of a single mother with three minor children to Italy from Denmark a form of *refoulement*, a violation of art 7 ICCPR. More specifically, it decided that Denmark did not obtain any guarantee that the mother would not be deported from Italy or that she would be received in Italy in conditions adapted to their age and vulnerable status, which would enable her to remain in Italy.

The assessment of the living conditions is often done in the light of the individual situation of the applicant, as demonstrated by the *Jasin v Denmark* case or the *M.S.S. Belgium and Greece* case<sup>93</sup> which concerned a "particularly vulnerable (given the particular state of insecurity and vulnerability in which asylum-seekers were/are known to live in Greece) and traumatised" Afghan national.

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<sup>91</sup> Art 51 Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 ('EU Charter').

<sup>92</sup> HRC, *Osman Jasin v Denmark* CCPR/C/114/D/2360/2014, 22 July 2015.

<sup>93</sup> ECtHR, *M.S.S. v Belgium and Greece* Application No. 30696/09, 21 January 2011.

Secondly, in line with the above-referenced extraterritorial application of human rights law, a new dimension was added to the prohibition of collective expulsion of aliens in the *Hirsi Jamaa* case<sup>94</sup>. The case concerned the handing over of migrants by Italy to Libya on the basis of the bilateral ‘Treaty of Friendship, Partnership and Cooperation’, concluded in August 2008.<sup>95</sup> The ECtHR held that even acts carried out outside of the national territory, such as the interception and disembarkation of boat migrants in a third country without any examination of each individual situation, can amount to collective expulsion.

In the recent *Khlaifia* case, which is now pending before the Grand Chamber, the ECtHR<sup>96</sup> stated that “the current circumstances of the refugee crisis do not clear a State from respecting its obligations under art 3 ECHR”.<sup>97</sup> The case talks about arbitrary detention of asylum-seekers but it could cautiously be cited as a more general principle.

### Subsection III. Possible human rights violations of migrants at the EU borders

In what follows, this thesis will lay out a few principles, codified in various international and regional human rights instruments, which are relevant to the protection of migrants in the context of Frontex’s activities. Firstly, every person is entitled to apply for asylum. However, only refugees fulfilling the conditions of the Refugee Convention will obtain asylum.<sup>98</sup> Secondly, the right to life<sup>99</sup> has been interpreted as entailing a prohibition on the use of unreasonable force to prevent migrants from entering.<sup>100</sup> This could be relevant in cases of excessive use of force by law enforcement officials charged with border control. Furthermore, it entails an obligation to endeavour to rescue those whose life may be in danger in seeking to enter, which has among others been translated in the law of the sea principle of a duty to render assistance to persons in distress at sea.<sup>101</sup>

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<sup>94</sup> ECtHR, *Hirsi Jamaa and others v Italy* Application no. 27765/09, 23 February 2012, paras 159-186.

<sup>95</sup> *Ibidem* para 20.

<sup>96</sup> ECtHR, *Khlaifia and Others v. Italy* Application no. 16483/12, 1 September 2015.

<sup>97</sup> *Ibid* paras 127-128.

<sup>98</sup> Art 18 EU Charter; Refugee Convention; Protocol to the Refugee Convention.

<sup>99</sup> Art 2(1) EU Charter and art 2 ECHR.

<sup>100</sup> Council of Europe Commissioner for Human Rights, ‘The Human Rights of Irregular Migrants’, Issue Paper, CommDH/IssuePaper (2007)1, Strasbourg, 17 December 2007, 13; C. HEYNS and T. PROBERT, ‘Securing the Right to Life: A cornerstone of the human rights system’ (*EJIL*, 11 May 2016) <<http://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/>> accessed 1 July 2016.

<sup>101</sup> See *Subsection II*, §2.

Thirdly, given the possible extraterritorial application of human rights as discussed in *Subsection II*, §3, the prohibition of torture, inhuman and degrading treatment<sup>102</sup> is among others relevant when the EU or its Member States cooperate with third countries to perform border controls or return of irregular migrants. This prohibition entails an obligation to respect human dignity when applying coercive measures in the context of removals and to protect individuals from being sent back to a country of origin or transit where they risk persecution. Certain vulnerable groups of migrants arguably are subjected to inhuman or degrading treatment on the migratory route. Various organisations and experts report sexual violence against women and slavery of both men and women.<sup>103</sup> Fourthly, on the basis of art 4 Protocol 4 ECHR<sup>104</sup> and 19(1) EU Charter, Parties to these instruments are prohibited from collectively expelling aliens.

Finally, the above-mentioned principle of *non-refoulement* is expressly included in art 19(2) EU Charter and was also read into the ECHR in the famous *Soering* case in combination with art 3.<sup>105</sup> Violations of the right to *non-refoulement* may actually be caused by coast guards trying to avoid that migrant boats reach certain territorial waters by returning them to their point of departure in so-called ‘push-back operations’. In 2014-2015 there were various reports of ‘push-backs’ by individual States, such as Greece, Spain or Italy, as well as in the context of operations under the auspices of Frontex.<sup>106</sup> In the run-up to the EU-Turkey deal, which arguably violates a few human rights principles in itself, Turkish border guards reportedly engaged in push-back practices against a migrant boat on its way to Greece.<sup>107</sup>

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<sup>102</sup> Art 3 ECHR and 4 EU Charter.

<sup>103</sup> M. VENTRELLA (Senior Lecturer at University of Wolverhampton (UK)), ‘Frontex: smuggling of migrants and human trafficking’ (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015); Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’, 8 May 2015, A/HRC/20/24, para 31; R. SHREEVES, ‘Gender aspects of migration and asylum in the EU: An overview’, *Briefing European Parliament* (European Parliamentary Research Service Blog, March 2016) 3.

<sup>104</sup> Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46 (‘Protocol 4 ECHR’).

<sup>105</sup> ECtHR, *Soering v. The United Kingdom* Application no. 14038/88, 7 July 1989.

<sup>106</sup> COGOLATI, S., VERLINDEN, N. and SCHMITT, P., ‘Migrants in the Mediterranean: Protecting human rights’ (Leuven Global Centre for Governance Studies October 2015) 31-32.

<sup>107</sup> “Migrant crisis: Turkish guards hit migrant boat with sticks” *BBC News Online* (12 March 2016) <<http://www.bbc.com/news/world-europe-35794563>> accessed 20 March 2016.

## Chapter II. The management of the external borders of the European Union

*Chapter II* expands on the EU Border Policy and the creation of the current EU Border Agency, Frontex. *Section I* starts by providing an introduction to the EU Border Policy and discussing the developments within the European Union which preceded the creation of Frontex to then continue by laying out the creation of Frontex in *Section II*, ending with assessing Frontex's past and current impact on the human rights of migrants in *Section III*.

### Section I. The Border Policy of the European Union

The external borders of the European Union are defined by the Schengen Borders Code<sup>108</sup> as “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”<sup>109</sup>. Traditionally, the responsibility for the EU Border Policy resides with the EU Member States.<sup>110</sup> As a consequence, the cooperation on external border control among EU Member States initially developed outside the EU framework<sup>111</sup>, in particular within Schengen, which was established following the signing of the Schengen agreement of 14 June 1985 by five of the then ten Member States of the European Economic Community (hereafter ‘EEC’).<sup>112</sup>

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<sup>108</sup> Regulation (EC) 562/2006 of the European parliament and Council of the European Union, establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L 105/1 (‘Schengen Borders Code’).

<sup>109</sup> Art 2.2 Schengen Borders Code.

<sup>110</sup> H. EKELUND, ‘The establishment of FRONTEX: a new institutionalist approach’ (2014) 36(2) *European integration* 99, 101.

<sup>111</sup> S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 371, 376.

<sup>112</sup> J. MONAR, ‘The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders’ in J. DE ZWAAN and F. GOUDAPPEL (eds), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (The Hague, T. M. C. Asser Press 2006) 74-75.



Attention for external border control increased with the widening and deepening of European integration.<sup>113</sup> The gradual transformation of the EU into an Area of Freedom, Security and Justice (hereafter ‘AFSJ’) has at its core the relaxation of the internal border controls, and, accordingly, the necessity of strengthening the EU external borders. Strengthening the EU external borders has required the approximation of the national rules concerning surveillance and control of persons crossing external borders. One of the first steps towards the AFSJ as we know it today, was taken by way of the incorporation of intergovernmental cooperation in the field of Justice and Home Affairs (hereafter ‘JHA’) into the institutional framework of the EU, under the former so-called Third Pillar<sup>114</sup>, by virtue of the Maastricht Treaty of 1992.<sup>115</sup>

The scope of this cooperation changed fundamentally with the birth of the Treaty of Amsterdam, which entered into force in 1999. The Treaty laid down the legal basis for the strengthening of common external border control<sup>116</sup>, namely the incorporation of Schengen into the EC framework<sup>117</sup>, labelled the ‘Schengen *acquis*’.<sup>118</sup> The same Treaty signified an important step in the development of the AFSJ of today by bringing visa, asylum and migration issues under the Community method through the transfer of former Third Pillar policies to Title IV of the former EC Treaty. The AFSJ was further developed in the programmes of the European Council Summits in Tampere (1999-2004), The Hague (2004-2009) and Stockholm (2010-2014).

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<sup>113</sup> For an analysis of EU integration as a dynamic process, see A. STONE SWEET and W. SANDHOLTZ, ‘European Integration and Supranational Governance’ (1997) *Journal of European Public Policy* 297.

<sup>114</sup> The expression “the 3 pillars of the European Union” is used to illustrate how the various forms of cooperation are built up within the EU depending on which policy area, which part of the treaty provisions is involved and thus which decision-making procedure applies. Each of the three pillars represents a different policy area, all three pillars being held together with a common roof and common foundations. The Treaty signed on 7 February 1992 in Maastricht laid the foundations for this new European structure.

<sup>115</sup> H. EKELUND, ‘The establishment of FRONTEX: a new institutionalist approach’ (2014) 36(2) *European integration* 99, 104; On the history of JHA cooperation, see e.g. S. PEERS, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 9-41.

<sup>116</sup> See article 62 (2) EC Treaty which requires the Council to adopt measures “on the crossing of the external borders of the Member States which shall establish (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders.

<sup>117</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

<sup>118</sup> A lot can be said on what is actually included within the Schengen *acquis*. However, it can be argued that it includes at least the Schengen Agreement of 1985, the Schengen Convention of 1990, as well as various decisions and agreements adopted in Schengen’s implementation such as the Common Manual [2002] OJ C 313/97. See G. HUYBREGHTS, ‘The Schengen Convention and the Schengen *acquis*: 25 years of evolution’ (2015) 16 ERA Forum 379 for a comprehensive analysis of the content of the Schengen *acquis*.

The pending Eastern enlargement of the EU, the arrival of new migration flows on the southern EU borders<sup>119</sup> and arguably the events of 9/11<sup>120</sup>, provided the political impetus for the EU to address certain formerly expressed necessities<sup>121</sup>, such as the need for a closer cooperation and mutual technical assistance between the border control services of the Member States with a view to overcome the weaknesses of the remainders of the national management of the external borders, which had already been put forward in the programme of Tampere in 1999.<sup>122 123</sup>

Early 2001, Germany, Italy, France, Belgium and Spain embarked upon a feasibility study on the idea of a 'European Border Police'.<sup>124</sup> However, the United Kingdom encouraged other Member States to express reservations about the idea<sup>125</sup>, which was clearly reflected in the careful wording and the lack of reference to possible legislative initiatives with regard to such a 'European Border Police' of the Conclusions of the Laeken Summit of 14-15 December 2001.<sup>126</sup>

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<sup>119</sup> "Malta, which joined the EU in 2004, had seen the arrival of significant numbers of irregular immigrants for some time. According to a Maltese official, the country began to see even larger numbers of so-called 'boat people' in the early 2000s, and, as this inevitably put strains on the country's resources, a quick solution was needed [...] However, 'old' Member States, such as Italy and Spain, also experienced irregular immigration, and authorities even there perceived this to be problematic [...] Around the same time, the wider public became increasingly aware of irregular immigration and the suffering of the refugees involved due to incidents such as The Monica where nearly 1000 refugees had to be rescued at sea and taken to Sicily (BBC News Online 2002)." (H. EKELUND, 'The establishment of FRONTEX: a new institutionalist approach' (2014) 36(2) *European integration* 99, 105).

<sup>120</sup> Whether Frontex can be branded a product of securitisation after 9/11, has been thoroughly addressed in A. W. NEAL, 'Securitization and Risk at the EU Border: The Origins of FRONTEX\*' (2009) 47 (2) *Journal of Common Market Studies* 333, 340.

<sup>121</sup> J. POLAK and P. SLOMINSKI, 'Experimentalist but not accountable governance? The Role of Frontex in Managing the EU's External Borders' (2009) 32 (5) *West European Politics* 904, 904.

<sup>122</sup> S. LEONARD, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 375-376; C. KAUNERT, S. LÉONARD, J.D. OCCHIPITI, 'Agency Governance in the European Union's Area of Freedom Security and Justice' *Perspectives on European Politics and Society* (2013) 14 (3) 273, 276; S. WOLFF and A. SCHOUT 'Frontex as Agency: More of the Same?' *Perspectives on European Politics and Society* (2013) 14 (3) 305, 311.

<sup>123</sup> These factors were considered as another category of interest shapers for the development of the AFSJ in C. KAUNERT, S. LÉONARD, J.D. OCCHIPITI, 'Agency Governance in the European Union's Area of Freedom Security and Justice' *Perspectives on European Politics and Society* (2013) 14 (3) 273, 276.

<sup>124</sup> A. W. NEAL, 'Securitization and Risk at the EU Border: The Origins of FRONTEX\*' (2009) 47 (2) *Journal of Common Market Studies* 333, 340; J. MONAR, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. CAPARINI and O. MARENIN (eds), *Borders and Security Governance: Managing Borders in a Globalised World* (Geneva, Centre for the Democratic Control of Armed Forces (DCAF) 2006) 193-208.

<sup>125</sup> A. W. NEAL, 'Securitization and Risk at the EU Border: The Origins of FRONTEX\*' (2009) 47 (2) *Journal of Common Market Studies* 333, 340.

<sup>126</sup> European Council, 'Presidency conclusions European Council Meeting Laeken 14 and 15 December 2001' 00300/1/01, conclusion 42.

Following its Laeken mandate<sup>127</sup>, the European Commission issued a Communication in May 2002 entitled “Towards Integrated Management of the External Borders of the Member States of the European Union”. Based on an analysis of the challenges and the current situation with regard to the management of external borders, the Commission made several proposals including a common corpus of legislation, a common coordination and operational cooperation mechanism, a common integrated risk analysis, staff trained in EU-wide operations and interoperational equipment, and burden-sharing between Member States – all of which would eventually lead to a ‘European Corps of Border Guards’.<sup>128</sup>

Acknowledging that such a European Corps could not be established in the short term - not the least due to the fact that it would entail the conferring of traditional prerogatives of national public authorities, which was considered an encroachment on their state sovereignty<sup>129</sup> - the Commission suggested that the “common coordination and operational cooperation mechanism” could involve at first the establishment of an External Borders Practitioners Common Unit, as well as the gradual development of a “permanent process of exchange and processing of data and information” between the authorities of the Member States.<sup>130</sup> The Commission’s proposals became part of the “Action Plan for the Management of the External Borders of the Member States of the European Union” put forward by the Council in June 2002.<sup>131</sup>

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<sup>127</sup> Conclusion 42 of the European Council Meeting of Laeken reads: “Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...).”

<sup>128</sup> These were presented by the European Commission in its Communication of 7 May 2002 to the Council and the European Parliament, *Towards integrated management of the external borders of the Member States of the European Union*, 7 May 2002, COM (2002) 233 final, and endorsed by the Council of the European Union in its *Plan for the management of the external borders of the Member States of the European Union* of 14 June 2002.

<sup>129</sup> A. BALDACCINI, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’ in B. RYAN and V. MITSILEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) 229, 231.

<sup>130</sup> S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 380.

<sup>131</sup> A. BALDACCINI, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’ in B. RYAN and V. MITSILEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) 229, 232.

A few days later, this Action Plan was endorsed at the Seville European Council in 2002, which was marked by an intense politicisation of asylum and migration matters.<sup>132</sup> A Common Unit or SCIFA+ was subsequently created in 2002 within the framework of the Strategic Committee on Immigration, Frontiers and Asylum<sup>133</sup>, gathering the heads of national border guards and SCIFA, taking the lead in coordinating various operations and pilot projects relating to border controls from 2002 onwards<sup>134</sup>, aiming to improve operational standards and coordination. These operations and projects consisted of Joint Operations (hereafter ‘JOs’) at the maritime borders such as ‘Operation Ulysses’ under Spanish leadership, as well as *ad hoc* centres, such as the Centre for Land Borders in Berlin, Germany<sup>135</sup>, in charge of supervising EU-wide pilot projects and common operations related to border management.

Given the intended short-term nature of this Common Unit and the structural shortcomings stemming from it<sup>136</sup>, in particular “the absence of a monitoring mechanism and of a method for independent and thorough evaluation as well as for the processing and utilisation of results” with regard to the pilot projects and JOs<sup>137</sup>, the Thessaloniki European Council in 2003 mandated the Commission to examine alternative institutional mechanisms with a view to establishing a more centralised model of governance through the creation of a Community structure.<sup>138</sup>

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<sup>132</sup> S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 371, 378.

<sup>133</sup> In the meantime, an intergovernmental Council working group, the ‘Strategic Committee on Immigration’, Frontiers and Asylum (hereafter ‘SCIFA’) had been set up by the Treaty of Amsterdam in 1997.

<sup>134</sup> V. MITSILEGAS, ‘Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance’, in A. BALDACCINI, E. GUILD, and H. TONER (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford, Hart 2007) 359, 365; S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 380; S. WOLFF and A. SCHOUT ‘Frontex as Agency: More of the Same?’ *Perspectives on European Politics and Society* (2013) 14 (3), 305, 312; H. EKELUND, ‘The establishment of FRONTEX: a new institutionalist approach’ (2014) 36(2) *European integration* 99, 105.

<sup>135</sup> S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 378.

<sup>136</sup> “ (...) there appears to have been dissatisfaction with the functioning of the Common Unit, a major shortcoming of which arguably was ‘the lack of effective operational co-ordination’. The arrangements were also criticised for their lack of ‘an adequate legal framework’, guidelines for implementation, evaluation and monitoring mechanisms and clearly defined objective targets. Another problem was that the SCIFA+ arrangements relied on project funding. Having to acquire funding separately for each initiative made it difficult to plan; cooperation took place *ad hoc* rather than as part of a planned strategy. Projects that may have reinforced each other instead competed for the same funding.” (H. EKELUND, ‘The establishment of FRONTEX: a new institutionalist approach’ (2014) 36(2) *European integration* 99, 105).

<sup>137</sup> European Commission, ‘Establishing a European Agency for the management of the operational co-operation at the external borders’ (Press release, 11 November 2003) <[http://europa.eu/rapid/pressrelease\\_IP-03-1519\\_en.htm?locale=en](http://europa.eu/rapid/pressrelease_IP-03-1519_en.htm?locale=en)> accessed 9 June 2015.

<sup>138</sup> S. LEONARD, ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’ 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 380-381; A. W. NEAL, ‘Securitization and Risk at the EU Border: The Origins of FRONTEX\*’ (2009) 47 (2) *Journal of Common Market Studies* 333, 342.

The option of creating an agency for the management of the external borders was endorsed six months later.<sup>139</sup> The above initiatives were thus taken over by Frontex, the EU Border Agency falling under the former Community Pillar, in 2005. It was set up to improve the integrated management of the external borders of the Member States and to facilitate and render more effective the application of existing and future Community measures in this area. In addition, this time, there was clear mention of the fact that “the responsibility for the control and surveillance of external borders lies with the Member States” and that the role of the Agency is strictly limited to the coordination of Member States’ actions.<sup>140</sup>

## **Section II. The European Agency for the Management of Operational Cooperation at the External Borders (‘Frontex’)**

As referenced above, *Section II* discusses the creation and evolution of the EU Border Agency. In that respect, *Subsection I* briefly outlines the context surrounding the creation of the European Border Agency to then continue by discussing its envisaged mission and the tasks it was allocated in *Subsection II*. By thereafter laying out Frontex’s institutional framework in *Subsection III*, it becomes apparent that, already from the start, the implementation of its mission in practice will go beyond what was envisaged by the Member States, without providing commensurate human rights safeguards. This asymmetry was tentatively addressed a first time in 2011 as discussed in *Subsection IV*.

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<sup>139</sup> Council Regulation (EC) 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 [2004] OJ L 349/1 (‘Frontex regulation’); S. WOLFF and A. SCHOUT ‘Frontex as Agency: More of the Same?’ *Perspectives on European Politics and Society* (2013) 14 (3), 305, 315; H. EKELUND, ‘The establishment of FRONTEX: a new institutionalist approach’ (2014) 36(2) *European integration* 99, 106.

<sup>140</sup> Art 1 Frontex regulation.

## Subsection I. Creation of Frontex

After some trial and error<sup>141</sup> and two years before the EU adopted its own set of rules on the crossing of external borders, in the above-referenced Schengen Borders Code, Member States chose to establish a European Borders Agency (Frontex)<sup>142</sup>, among various models for developing such cooperation on external border management<sup>143</sup>. The creation of Frontex was part of the previously discussed European Integrated Border Management strategy presented by the European Commission in 2002<sup>144</sup> which essentially entails one holistic approach to border management, migration and internal security<sup>145</sup>.

Its creation as well as its status as First Pillar Agency<sup>146</sup> were based on the former articles 62(2)(a) on common standards and procedures for carrying out checks on persons at the external borders and 66 EC Treaty dealing with measures to ensure cooperation amongst Member States and the Commission in the Title IV policy areas.<sup>147</sup> As Frontex's stated purpose goes much wider than the wording of its legal basis in the Treaty, its creation must likewise be seen to be made possible in view of the case law on implied powers.<sup>148</sup> Today articles 74 and 77 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') form the basis for Frontex's Founding Regulation which was adopted in 2004 and modified in 2007<sup>149</sup> and 2011<sup>150</sup>.

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<sup>141</sup> See *Section I*.

<sup>142</sup> S. LEONARD, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 373.

<sup>143</sup> *Ibid* 380.

<sup>144</sup> European Commission 'Towards integrated management of the external borders of the Member States of the European Union', 7 May 2002, COM (2002) 233 final.

<sup>145</sup> M. DEN HEIJER, 'Europe beyond its borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Ryan, B., and Mitsilegas, V. (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (169) 173.

<sup>146</sup> The First Pillar represents supranational cooperation. This form of cooperation is derived from the EC Treaty and allows the EU to issue legislation, which directly binds EU Member States and citizens. In other terms, in the First Pillar, unlike the other two, Member States have given up some of their sovereignty due to which EU institutions may act independently of the national governments.

<sup>147</sup> S. LEONARD, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 373.

<sup>148</sup> C-22/70 *Commission v Council (AETR)* [1971] ECR 263; 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' 2011 7(4) *Journal of Contemporary European Research* 468, 471.

<sup>149</sup> Regulation (EC) 863/2007 of the European Parliament and of the Council, establishing a mechanism for the creation of rapid border intervention teams (RABIT) and amending Council (EC) No. 2007/2004 in regard to that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/30 ('RABIT Regulation').

<sup>150</sup> Regulation (EU) 1168/2011 of the European Parliament and of the Council, amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304/1 ('Frontex Recast').

Admittedly, Frontex does not embody the same degree of cooperation as regards external border control activities as was envisaged for the European Corps of Border Guards.<sup>151</sup> The watering down of this initial ambition can be attributed to the fact that Frontex's creation represents a compromise between the Commission and Council, and thus the Member States. The guarantee that the Member States would be able to control the Agency through its Management Board and other mechanisms, and that *de jure* its function would be limited to mere coordination, facilitated the particularly swift agreement in 2004 as opposed to previous attempts.<sup>152</sup>

While the Commission was oriented towards a supranational agency<sup>153</sup> analogous to the proposal of a 'European Border Police', it was obliged to support the solution put forward by the Council<sup>154</sup>, which did acknowledge the need for increased cooperation, provided it remained within the framework of the mentioned External Borders' Practitioners Common Unit. This compromise between supranationalism<sup>155</sup> and intergovernmentalism<sup>156</sup> is also reflected in, on the one hand, Frontex's status as Community agency and, on the other hand, Frontex's intergovernmental features, in particular its Management Board which is composed of two Commission officials and the heads of national border guard services.<sup>157</sup> *Subsection III and Section III* will elaborate on both the supranationalist and intergovernmentalist character of Frontex and their implications for the accountability of human rights violations occurring in the context of Frontex's operations.

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<sup>151</sup> Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union', 14 June 2002, 10019/02, 27; S. LEONARD, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 381.

<sup>152</sup> For an overview of these control mechanisms, see S. LEONARD, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy' 2009 5 (3) *Journal of Contemporary European Research* 2009 371, 381-385.

<sup>153</sup> European Commission, 'Proposal for a Council Regulation Establishing a European Agency for the Management of Operational Cooperation at the External Borders', 11 November 2003, COM (2003) 687.

<sup>154</sup> Council of the European Union, 'Conclusions on the Main Elements of the Commission Proposal for a Council Regulation Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', 28 November 2003, 15446/03.

<sup>155</sup> Supranationalisation is a mode of governance characterised by the competence of the EU to legislate in a specific policy area. It means that centralised EU governmental structures, the EU institutions, exercise power on policy areas within the territory of the Member States as a consequence of the conferral of power from the Member States to the EU within those policy areas.

<sup>156</sup> Intergovernmental cooperation is a mode of governance whereby national executives of the EU Member States negotiate with each other to achieve common objectives.

<sup>157</sup> 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' 2011 7(4) *Journal of Contemporary European Research* 468, 472.

## Subsection II. Mission and functioning

Frontex was established with the aim of coordinating and assisting Member States' actions in the surveillance and control of the external borders of the Schengen Area with a view to a more efficient and comprehensive management of the EU borders.

It should be emphasised, however, that as not all EU Member States have adopted the above-mentioned Schengen *acquis* and are thus not all part of the Schengen Area, today's Schengen borders do not coincide with the EU borders.<sup>158</sup> In that respect, the United Kingdom and Ireland are not subject to the Frontex regulation and cannot even fully participate in Frontex's functioning without joining the Schengen Area<sup>159</sup>, as it is the Schengen external borders<sup>160</sup> which form the object of the Community competence on the strengthening of the EU external borders of which Frontex is in charge.<sup>161</sup> Yet, there is loose operation between Frontex, the UK and Ireland, particularly for joint expulsions.<sup>162</sup>

In the light of its aim, Frontex was assigned, already in its Founding Regulation, fairly diverse cooperative tasks and corresponding *de jure* competences<sup>163</sup>, in contrast to the rather limited coordinating role the recitals and art 1(2) of the Frontex Founding Regulation seemed to suggest<sup>164</sup>. These tasks included the coordination of the operational cooperation between the different Member States at the external borders, the assistance of Member States in the training of national border guards, along with the establishment of common training standards, the conduct of risk analyses, the follow-up on developments in research relevant for the control and surveillance of external borders, the assistance of Member States when increased technical and operational assistance at external borders is required and the assistance of Member States in organising Joint Return Operations (hereafter 'JROs').<sup>165</sup>

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<sup>158</sup> Due to the opt-out of the United Kingdom and Ireland, the special regime for Denmark, and the association with the Schengen *acquis* of Norway, Iceland, Switzerland and Liechtenstein, as well as the exclusion of the non-European territories of the Schengen Member States, today's Schengen borders do not coincide with the borders of the European Union. See J. RIJPMAN, 'EU border management after the Lisbon Treaty' (2009) 5 *Croatian yearbook of European Law and Policy* 121, 123.

<sup>159</sup> Case C- 77/05 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2007] ECR I – 11501.

<sup>160</sup> The Schengen Area is composed of 22 EU Member States and 4 Schengen-Associated Countries, non-EU Member States which are part of the Schengen Area. The United Kingdom and Ireland decided to retain their border controls and did thus not join the Schengen Area. Other EU Member States Croatia, Cyprus, Bulgaria and Romania are still waiting to join the Schengen Area.

<sup>161</sup> Art 1(4) Frontex regulation.

<sup>162</sup> S. PEERS, 'The Reform of Frontex: Saving Schengen at Refugees' Expense?' (*Eu Law Analysis*, 16 December 2015) <<http://eulawanalysis.blogspot.be/2015/12/the-reform-of-frontex-saving-schengen.html>>.

<sup>163</sup> Art 14 Frontex Regulation.

<sup>164</sup> See the recitals and art 1(2) Frontex regulation.

<sup>165</sup> Art 2(1) Frontex Regulation.



### Subsection III. Evolution of Frontex's institutional framework and activities

The Member States' reservations about a dedicated Community structure in charge of the external borders of the EU contributed to the emphasis in the Frontex Founding Regulation on the fact that "the responsibility for the control and surveillance of external borders lies with the Member States" and that the role of the Agency is strictly limited to the coordination of Member States' actions.<sup>166</sup>

As referenced in *Subsection I*, these reservations are in line with the Member States' hesitation about most conferrals of competences in the context of Justice and Home Affairs, as they are considered an encroachment on their sovereign powers. Ambiguously, while formally mandated to play a 'supportive' or 'facilitative' role towards Member States<sup>167</sup>, Frontex's Founding Regulation includes *de jure* competences resulting in *de facto* activities which both moved far beyond a mere facilitating role. The question of the extent to which Frontex has autonomous powers and a more executive role in operational activities is not merely academic and will prove to be fundamental in establishing responsibility of Frontex for its participation in JOs alongside the responsibility of Member States.

For instance, Frontex's operational activities are planned on the basis of the risk analyses carried out by Frontex itself, and not on the basis of the Member States' own strategic considerations.<sup>168</sup> Hence, Frontex is the initiator of the operational activities it engages in and derives a degree of responsibility from its initiating and coordinating role. Furthermore, the Founding Regulation requires the Member States to supplement or complement Frontex's activities without jeopardising them.<sup>169</sup> As referenced above, Frontex Founding Regulation *per se* already demonstrates the enhanced operational role of Frontex by making provisions for executive powers of Frontex's staff on the territory of a Member State<sup>170</sup>, as well as the cooperation of Frontex with third countries and organisations through Working Arrangements<sup>171</sup> and a reference to Frontex's own operational resources and assets.<sup>172</sup>

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<sup>166</sup> Art 1(2) Frontex Regulation.

<sup>167</sup> S. CARRERA, L. DEN HERTOEG and J. PARKINA, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) 15(4) *European Journal of Migration and Law* 337, 341.

<sup>168</sup> A. BALDACCINI, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B. RYAN and V. MITSILEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (229) 234.

<sup>169</sup> Art 2(2) Frontex Regulation.

<sup>170</sup> Art 10 Frontex Regulation.

<sup>171</sup> Arts 13 and 14 Frontex Regulation.

<sup>172</sup> Art 8(3) Frontex Regulation.

In addition, only four years after its creation, in 2007<sup>173</sup> Frontex's Founding Regulation was revised to mandate Frontex for the deployment of Rapid Border Intervention Teams (hereafter 'RABITs') to assist Member States to deal with an urgent and excessive flow of migrants at the external borders, granting the Agency a considerable degree of coercive power which originally pertained to the Member States. This mechanism was used for the first time on Greece's external land border with Turkey between November 2010 and February 2011 and continued as JO Poseidon Land.<sup>174</sup>

The Agency's operational competences and supranationalist aspects were further reinforced in 2011 with the adoption of the Frontex Recast Regulation, which included an increase of powers in the coordination of JOs, the possibility of deploying European Border Guard Teams, consisting of Member State border guards, under the supervision of a Frontex Coordination Officer (hereafter 'FCO'), as well as the foundations for the current EUROSUR system, which provides for the possibility of exchanging relevant information between Member States and border guards, thereby supporting Frontex's activities.<sup>175</sup>

Considering that Frontex has been deployed in JOs since its founding, their structure and Frontex's relevant *de jure* competences also provide a good example of Frontex's evolution towards an increasingly enhanced operational role in the cooperation between Member States. Despite Member States' participation in all phases of the planning of such JOs, it has been Frontex's risk analysis from its creation onwards which has given the incentive to initiate an operation, and not the Member States' political considerations.<sup>176</sup> A risk analysis identifies certain trends in the EU migration situation, such as new routes used by migrants, as well as the corresponding 'risks', a theoretical term referring to all that threatens the EU's reinforced borders, such as 'illegal stay', 'facilitators' of 'illegal' migration, to name a few.

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<sup>173</sup> Regulation (EC) 863/2007 of the European Parliament and of the Council, 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 [2007] OJ L199/30 ('RABIT Regulation').

<sup>174</sup> See S. CARRERA and E. GUILD, 'Joint Operation RABIT 2010' – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System', *Papers in Liberty and Security in Europe* (34) (Brussels, CEPS 2010) <[http://aei.pitt.edu/15186/1/No\\_34\\_Carrera\\_&\\_Guild\\_on\\_RABIT\\_2010.pdf](http://aei.pitt.edu/15186/1/No_34_Carrera_&_Guild_on_RABIT_2010.pdf)> accessed 9 June 2015; L. MARIN, 'Protecting the EU's borders from ... Fundamental Rights? Squaring the Circle between Frontex's Border Surveillance and Human Rights' in R. L. HOLZHACKER and P. LUIF (eds.), *Freedom, Security and Justice in the European Union* (New York, Springer Science+Business Media 2014) 75, 81.

<sup>175</sup> 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* (New York, Palgrave MacMillan 2011) 131–151.

<sup>176</sup> A. BALDACCINI, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B. RYAN and V. MITSILEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) 229, 234.

Furthermore, with the amendment in 2011, Frontex became in charge of drafting and amending the operational plan for JOs together with the Member States.<sup>177</sup> Via the person of the FCO, it can also express its views on the instructions given by the host Member State during border control operations.<sup>178</sup> Finally, Frontex's Executive Director (hereafter 'ED') has the right to suspend or terminate such operations.<sup>179</sup>

This stretching of powers has not only been reflected in Frontex's broader *de jure* competences, as discussed above, but also in its broad interpretation of border surveillance, and *de facto* expansions or 'learning by doing' activities in the Mediterranean which have ranged from interception and diversion operations (JO Hera 2006), to assistance of Member States' interception and diversion (JO Nautilus 2009), and cooperation with the Member States as part of RABIT 2010 and JO Poseidon in apprehending, transferring, and interviewing migrants arriving via the 'Eastern Mediterranean route' and most recently also in the context of the 'Hotspots' in Greece and Italy.<sup>180</sup>

Similarly, JO Triton was launched in October 2014 on the 'Central Mediterranean route' after the closing down of the Italian naval 'Mare Nostrum' Operation. Although initially limited to border surveillance and control activities, the JO's assets were reinforced to 'contribute' to Search and Rescue at sea (hereafter 'SAR').<sup>181</sup> This development goes entirely against Frontex's long-standing proclamation of not being tasked with SAR Operations, contrary to the clearly stipulated rules on Frontex SAR activities in the Frontex Regulation on Sea Borders Surveillance from 2014.<sup>182</sup>

The dynamism and degree of 'experimentation' characterising Frontex, that is to say the going beyond the mere coordination of Member States' actions which was envisaged in art 1(2) of the Frontex Founding Regulation, as well as the slightly broader *de jure* competences of Frontex included in that same regulation, likewise demonstrate the enhanced operational role of Frontex, rather than a merely 'facilitating' one.

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<sup>177</sup> Art 3a Frontex Recast.

<sup>178</sup> Art 3c (2) Frontex Recast.

<sup>179</sup> Art 3 (1a) Frontex Recast.

<sup>180</sup> See *Section III, Subsection I*.

<sup>181</sup> Frontex, Operation Division – Joint Operations Unit, 'Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN triton to better control irregular and contribute to SAR in the Mediterranean Sea', 28 August 2014, Reg. No 2014/JOU Limited <[https://www.proasyl.de/wp-content/uploads/2014/12/JOU\\_Concept\\_on\\_EPN-TRITON\\_\\_2\\_.pdf](https://www.proasyl.de/wp-content/uploads/2014/12/JOU_Concept_on_EPN-TRITON__2_.pdf)> accessed 9 July 2016.

<sup>182</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea 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 [2014] OJ L 189/93 ('Frontex Regulation on Sea Borders Surveillance').

Furthermore, the continuing emphasis on Frontex's role as mere 'coordinator' or 'technical facilitator' of Member State actions, leads to uncertainty in the demarcation of responsibilities between Member States and the Agency, as well as the idea that it cannot be held responsible for human rights breaches followed by directing questions of accountability towards Member States.<sup>183</sup> As discussed above, this particular framing stems from sovereignty sensitivities. In other words, Member States are reluctant to concede national competences in the field of Justice and Home Affairs, including border control, to 'Community or formerly called First Pillar institutions', resulting in predominantly intergovernmentalist solutions, of which Frontex governance<sup>184</sup> is an adequate example.

It is these 'intergovernmental and national barriers' that have prompted Frontex to gain more autonomy 'through the back door', resulting in the above-mentioned experimentalist character of Frontex's *de facto* activities.<sup>185</sup> These theoretical terms used to demarcate the responsibility for alleged human rights violations do not detract from the fact that Frontex is increasingly involved in operational activities. In addition, often, the guest officers made available by the Member States, wear armlets inscribed 'Frontex', leading possible victims to think these guards are acting under the responsibility of Frontex and thereby considering it the first resort for obtaining redress.<sup>186</sup>

Consequently, even though it has been continuously emphasised that borders remain the responsibility of the Member States, Frontex's current functioning is not based on mere intergovernmental coordination. On the contrary, it undoubtedly contains more than a few supranationalist elements, in particular with regard to its operational competences, which is among others reflected in the fact that Frontex does not only support but is also involved in directing the operations of the Member States.<sup>187</sup>

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<sup>183</sup> S. CARRERA, L. DEN HERTOOG and J. PARKINA, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) 15(4) *European Journal of Migration and Law* 337, 342.

<sup>184</sup> As discussed above, the Agency is a Community Pillar body, under budgetary control of the European Parliament but is managed by a board which comprises the Member States' heads of national border guard services and two commission officials.

<sup>185</sup> J. POLAK and P. SLOMINSKI, 'Experimentalist but not accountable governance? The Role of Frontex in Managing the EU's External Borders' (2009) 32 (5) *West European Politics* 904, 905.

<sup>186</sup> European Ombudsman, Case OI/5/2012/BEH-MHZ, Letter from the European Ombudsman to the Frontex concerning his draft recommendation, 9 April 2013.

<sup>187</sup> R. MUNGLIANU (Assistant Professor at University of Copenhagen and Visiting Researcher at Max Plancke Institute), 'Frontex's Operational Cooperation: between intergovernmental governance and supranationalisation' (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

While the national authorities are formally in charge of the decision-making with regard to operational actions, both Frontex's *de jure* competences and *de facto* activities thus provide some grounds for arguing that the 'assistance' and 'input' of Frontex in this decision-making process is vital and could possibly lead to 'joint responsibility' or 'derivative responsibility' for any unlawful effects.<sup>188</sup> And even where Frontex would not have enough 'effective control' over the operations, it arguably could be in breach of its positive obligation to avoid fundamental rights breaches.<sup>189</sup> In this respect, the Court of Justice of the European Union ('CJEU') has held that if an EU body fails to properly oversee Member States actions, EU liability can be triggered.<sup>190</sup>

#### Subsection IV. Human rights guarantees within the framework of Frontex

*Chapter II, Section II* discusses which fundamental rights could be placed at stake by Frontex's action. *Subsection IV* in its turn discusses the guarantees for the respect of fundamental rights already part of Frontex's institutional framework.

While recitals (22) and (29) of respectively the Frontex Founding Regulation and the Frontex Recast confirm respect for the fundamental rights and principles recognised by the Treaties and the EU Charter, the Frontex Regulation initially contained inadequate safeguards for human rights and obligations.<sup>191</sup> More specifically, it contained no reference to a human rights monitoring mechanism nor to the principle of *non-refoulement*. Democratic oversight was limited to the submission of an Annual Report adopted by the Management Board, mainly composed of Member State officials, to the Council, the Commission and the European Parliament.<sup>192</sup> The European Parliament does control the budget, but did not have a formal basis in the Frontex Regulation to ensure Frontex is being held accountable.

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<sup>188</sup> R. MUNGIANU, *Frontex and Non-Refoulement: International Responsibility of the EU* (Cambridge, Cambridge University Press 2016) 74-75.

<sup>189</sup> M. FINK (PhD researcher Leiden University at University of Vienna), 'Legal accountability for human rights violations that may occur during Frontex-coordinated operations' (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

<sup>190</sup> See e.g. Case C-132/77 *Société pour l'Exportation des Sucres* [1978] ECR 1061, paras 26-27.

<sup>191</sup> Parliament of the Council of Europe ('PACE'), 'The Interception and rescue at sea of asylum-seekers, refugees and irregular migrants' (21 June 2011) Resolution 1821, para 5.4.

<sup>192</sup> Art 20(2)(b) Frontex Regulation.

The European Parliament tried to supervise Frontex's activities informally by requesting the ED to report and by inviting some senior Frontex officials to a hearing organised by the EP Committee on Civil Liberties, Justice and Home Affairs (hereafter 'LIBE'), which the latter declined. These shortfalls are exacerbated by the continuous lack of publicly available detailed information concerning Frontex's activities.<sup>193</sup>

In 2011, the Frontex Recast added some important human rights safeguards. Following these additions Frontex is now required (i) to train all border guards in fundamental rights and access to international protection<sup>194</sup>, (ii) to draw up and further develop and implement its Fundamental Rights Strategy<sup>195</sup>, (iii) to put in place an effective mechanism to monitor the respect for fundamental rights in all its activities<sup>196</sup>, (iv) to establish a Consultative Forum<sup>197</sup>, which consists of representatives from the EU Fundamental Rights Agency (hereafter 'FRA'), the Council of Europe, the Organisation for Security and Cooperation in Europe (hereafter 'OSCE'), the United Nation's High Commissioner for Human Rights (hereafter 'UNHCR'), EASO, the International Organisation for Migration (hereafter 'IOM'), and nine civil society organisations, to assist the ED and the Management Board in fundamental rights, and lastly, to designate a Fundamental Rights Officer (hereafter 'FRO') to report to the Management Board and contribute to a fundamental rights monitoring mechanism.<sup>198</sup>

Furthermore, Member States are now obliged to take "appropriate disciplinary or other measures [...] in case of violations of fundamental rights or international protection obligations in the course of a JO or pilot project".<sup>199</sup> Frontex's ED is since 2011 also required to "suspend or terminate, in whole or in part, JOs and pilot projects if he/she considers that such violations are of a serious nature or are likely to persist".<sup>200</sup> Finally, with regard to operations in third countries, Frontex and the Member States involved "shall [now] comply with norms and standards at least equivalent to those set up by Union legislation".<sup>201</sup>

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<sup>193</sup> A. BALDACCINI, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B. RYAN and V. MITSLEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (229) 237; M. FINK, 'Legal accountability for human rights violations that may occur during Frontex-coordinated operations' (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

<sup>194</sup> Art 5(1) Frontex Recast.

<sup>195</sup> Art 26a (1) Frontex Recast.

<sup>196</sup> Art 26a (1) Frontex Recast.

<sup>197</sup> Art 26a (2) Frontex Recast.

<sup>198</sup> Art 26a (3) Frontex Recast.

<sup>199</sup> Art 3 Frontex Recast.

<sup>200</sup> Art 3 Frontex Recast.

<sup>201</sup> Art 14 Frontex Recast.

### Section III. Frontex's impact on the fundamental rights of migrants at the EU's borders

*Section II* shows that when Frontex was established, its role was seen predominantly in terms of border and migration management. However, as soon as it began to operate, the Agency's activities went beyond what the Member States had envisaged, carrying unanticipated human rights implications. Its inability to put a halt to these human rights concerns, eventually led to the establishment of the FRO and the Consultative Forum in 2011. Nevertheless, *Section III* acknowledges that a number of structural shortcomings remain and that new human rights challenges have arisen.

*Subsection I* discusses the lasting uncertainty over Frontex's responsibility for human rights violations and other breaches of international law owing to Agency's role in coordinating and implementing Joint (Return) Operations with Member States, resulting from among others a lack of transparency with regard to most Frontex activities. *Subsection II and III* demonstrate that the same unclarity exists concerning respectively Frontex's role in the Greek and Italian 'Hotspots' and its agreements with third countries concerning border control, interceptions and returns. In addition, it shows that, apart from a general lack of transparency, Frontex's Working Arrangements with third countries escape democratic scrutiny, as they are not considered 'agreements'.

## Subsection I. Lack of clarity on responsibility and accountability for human rights violations

### §1. Strengthening external borders, overlooking the allocation of accountability

As discussed at length in *Chapter I*, the EU's response to the current migration influx is more tailored towards deterrence strategies, among which a primary role is reserved for interception operations, carried out by the Member States individually or in the context of a Frontex coordinated operation as its mandate has been stretched to include interception and diversion operations. Although often baptised as 'rescue operations', these JOs have predominantly been aimed at stemming the migratory flows going in the direction of the European Union.<sup>202</sup> Some of these operations have given rise to allegations of human rights violations, particularly given the evident risk of returning these migrants to face persecution, torture or inhuman and degrading treatment.<sup>203</sup>

In 2006, Operation Hera was carried out under the auspices of Frontex in the Atlantic Ocean with the official aim of enhancing "the control of the area between the West African coast and the Canary Islands, thus diverting the vessels using this migration route and contributing to the reduction of human lives lost at sea during the dangerous long journey"<sup>204</sup>. However, the primary goal was to prevent migrants from reaching the shores of the Canary Islands.<sup>205</sup> Diversion operations during JO Nautilus 2009 attracted similar criticism and resulted in accusations vis-à-vis Frontex for having played a role in the Italian 'push-backs' which were the object of the *Hirsi Jamaa* case.<sup>206</sup> Furthermore, with the gradual broadening of Frontex's tasks Frontex's involvement in the Greek detention facilities through its RABIT 2010 Operation came under criticism in view of the ill treatment of migrants in these facilities.<sup>207</sup>

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<sup>202</sup>L. MARIN, 'Protecting the EU's borders from ... Fundamental Rights? Squaring the Circle between Frontex's Border Surveillance and Human Rights' in R. L. HOLZHACKER and P. LUIF (eds.), *Freedom, Security and Justice in the European Union* (New York, Springer Science+Business Media 2014) 75, 77.

<sup>203</sup>E. PAPANASTAVRIDIS, 'The EU and the obligation of *non-refoulement* at sea', in IPPOLITO, F. AND TREVISANUT, S. (eds) *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press, 2016) (236) 237.

<sup>204</sup>Frontex (2006), 'Frontex Annual Report 2006: Coordination of intelligence driven operational cooperation at EU level to strengthen security at external borders' 12.

<sup>205</sup>L. MARIN, 'Protecting the EU's borders from ... Fundamental Rights? Squaring the Circle between Frontex's Border Surveillance and Human Rights' in R. L. HOLZHACKER and P. LUIF (eds.), *Freedom, Security and Justice in the European Union* (New York, Springer Science+Business Media 2014) 75, 77; S. BORELLI and B. STANFORD, 'Troubled waters in the Mare Nostrum: Interception and push-backs of migrants in the Mediterranean and the European Convention on Human Rights' (2014) 10 *Uluslararası Hukuk ve Politika – Review of International Law and Politics* 29, 34.

<sup>206</sup>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' 2011 7(4) *Journal of Contemporary European Research* 468, 482.

<sup>207</sup>Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (September 2011) <<https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece>> accessed 20 July 2016.



Consequently, despite the addition of important human rights safeguards in 2011, EU border management continues to raise human rights concerns, which increasingly involve the role of Frontex and therewith the uncertainty in the allocation of responsibilities for human rights violations occurring during Frontex coordinated JOs. In what follows it will become apparent, that the Frontex Recast arguably even intensified the gap in legal accountability by strengthening the role of the Agency.

Admittedly, the in 2011 designated FRO and Consultative Forum did make considerable progress in the mainstreaming of human rights in Frontex's activities.<sup>208</sup> The FRO was among others involved in the drafting of the Code of Conduct for Joint Operations. In addition, human rights training was made obligatory for all Frontex staff and more specifically the FRO was assisted by the United Nations Office of the High Commissioner for Human Rights in the development of training materials for border guards.<sup>209</sup> However, it must be underlined that the FRO is not independent *sensu stricto* as she is appointed by the Management Board and was granted limited resources. Furthermore, she did not succeed in setting up an appropriate human rights monitoring mechanism as was envisaged in art 26a (1) Frontex Recast.<sup>210</sup>

Even after 2011, NGOs still reported allegations of push-back operations carried out by partners of Frontex.<sup>211</sup> For instance, 'widespread and persistent human rights' were reported to occur within the context of JO Poseidon operating on the Greek-Turkish border, following which Amnesty International called on Frontex's ED to suspend part of the JO, without response.<sup>212</sup> The recently concluded EU-Turkey agreement in which Frontex assists Greece in returning migrants to Turkey<sup>213</sup> is yet another illustration of an EU Border Policy directed towards stemming migratory flows.

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<sup>208</sup> Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, A/HRC/20/24, para 22.

<sup>209</sup> Ibid para 26.

<sup>210</sup> Ibid para 129.

<sup>211</sup> Platform for international cooperation on undocumented migrants ('PICUM'), 'PICUM Bulletin – 27 January 2014' <<http://picum.org/en/news/bulletins/42771/>> accessed 9 June 2015.

<sup>212</sup> Amnesty International, 'Human Cost of Fortress Europe – Human Rights Violations against Migrants and Refugees at Europe's Borders', July 2014 <[http://www.amnesty.eu/content/assets/Reports/EUR\\_050012014\\_\\_Fortress\\_Europe\\_complete\\_web\\_EN.pdf](http://www.amnesty.eu/content/assets/Reports/EUR_050012014__Fortress_Europe_complete_web_EN.pdf)> accessed 6 June 2015.

<sup>213</sup> Frontex, 'Frontex seeks 1500 police officers, 50 readmission officers to Greece' (Press release, 21 March 2016) <<http://frontex.europa.eu/news/frontex-seeks-1-500-police-officers-50-readmission-officers-for-greece-ayU667>> accessed 24 March 2016.

## §2. A complaints mechanism: the magic solution?

As explained in *Subsection IV* Frontex's mandate does not encompass the investigation of allegations of human rights violations, which remains a national competence resulting in a disparity in the fundamental rights monitoring system Frontex is required to set up.<sup>214</sup> The lack of an internal complaints mechanism has been criticised already in April 2013 by the Parliamentary Assembly of the Council of Europe (hereafter 'PACE').<sup>215</sup> In 2012, the European Ombudsman looked into the implementation by Frontex of its fundamental rights obligations and recommended 'Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled Joint Operations'.<sup>216</sup>

The recommendation was rejected by Frontex arguing that individual incidents are the responsibility of the respective Member States following which the Ombudsman submitted a Special Report to the European Parliament asking for its support.<sup>217</sup> Eventually, in December 2015, the European Parliament voted a non-binding resolution calling for the setting up of a complaints mechanism.<sup>218</sup> The Commission introduced such mechanism in its December 2015 European Border and Coast Guard Proposal which will be analysed in *Chapter III*. However, the Commission has not taken any action to create a similar system within Frontex as it stands now.

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<sup>214</sup> Art 26a (1) Frontex Recast; I. FERNANDEZ (Frontex' Fundamental Rights Officer), 'Frontex and human rights an insider's view' (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

<sup>215</sup> PACE, 'Frontex: Human Rights responsibilities', Resolution 1932 (25 April 2013), para 9.5.

<sup>216</sup> European Ombudsman, Case OI/5/2012/BEH-MHZ, Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013; European Ombudsman, Case OI/9/2014/MHZ, Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 4 May 2015.

<sup>217</sup> European Ombudsman, Case OI/5/2012/BEH-MHZ, Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 7 November 2013.

<sup>218</sup> European Parliament, 'European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI))', 2 December 2015, P8\_TA(2015)0422.

Whilst establishing a complaints procedure for individual victims is a step in the right direction, ending the broader legal and practical difficulties in human rights accountability requires more decisive measures. A recurrent phenomenon with regard to JOs is the so-called ‘blameshifting’, in other words the different actors involved blaming each other for alleged human rights violations.<sup>219</sup> To avoid losing legal remedies for individuals whenever operations are conducted jointly, it is thus of utmost importance to establish some clarity in the allocation of human rights accountability for violations committed during such operations.

### **§3. Untying the accountability knot**

As a preliminary remark, the Frontex Regulation<sup>220</sup> sets out that the Agency ‘shall have legal personality’, enabling it to fulfil its tasks independently from the EU institutions. Still, some discussion exists on whether this entails international legal personality to subject the EU Border Agency to international law. Some argue that Frontex continues to act under the umbrella of the Union’s international legal personality. Regardless of the discourse, the EU will have to assume responsibility, directly or indirectly via its Border Agency.<sup>221</sup>

There are two aspects to the human rights accountability concerns of Frontex. Firstly, discord persists as to the extent of Frontex’s accountability for its own actions. As briefly touched upon above, in any case, Frontex may be held accountable, in addition to Member States, especially on the basis of its positive obligations under human rights law. Nevertheless, Frontex persists that in general only the participating Member States are accountable for possible human rights violations during JOs.

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<sup>219</sup> M. FINK, ‘Sharing Responsibility in Times of Crisis - Challenges at Europe’s External Border’ *Global View* (2015) 3 *Global View* 11.

<sup>220</sup> Art 15 Frontex Regulation.

<sup>221</sup> M. FINK, ‘Legal accountability for human rights violations that may occur during Frontex-coordinated operations’ (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

Secondly, uncertainty remains as to the division of accountability among the different participating actors in JOs coordinated by Frontex.<sup>222</sup> If a Member State ‘pushes back’ a migrant boat contrary to human rights law, the State in question will logically bear the legal responsibility for it. However, difficulties arise when other Member States contribute to the operation in the context of which human rights violations are committed. During Frontex operations Member States, other than the host Member State, contribute aerial, naval or ground assets under the coordination of Frontex which finances these operations, but can itself also contribute personnel and under some circumstances technical equipment.

In order to establish responsibility for a violation, it is necessary to ascertain whether such acts are attributable to the EU or its Border Agency. Since no specific attribution rules exist yet under EU law<sup>223</sup>, the general principles of attribution flowing from the International Law Commission (hereafter ‘ILC’) Draft Articles on State Responsibility (hereafter ‘DASR’)<sup>224</sup> and the Responsibility of International Organisations (hereafter ‘DARIO’)<sup>225</sup> prove helpful to allocate responsibility between respectively the different participating Member States and the host Member State, and the Member States and the EU Border Agency.

In the light of these principles, one possibility is that the contributing Member States are considered co-authors because the infringing conduct is also attributable to them. As a rule organs of a state are the responsibility of the entity they are institutionally tied to. Nonetheless, the conduct of such an organ may become attributable to another state where it is placed at the disposal of the latter.<sup>226</sup> Such attribution will require a far-reaching degree of control over actions violating human rights during operations. More specifically, the organ will have to act “in the exercise of elements of the governmental authority of the State at whose disposal it is placed”.<sup>227</sup>

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<sup>222</sup> M. FINK, ‘Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex’ genetic defect.’ (*EJIL*, 10 March 2016) <<http://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>> accessed 9 April 2016.

<sup>223</sup> R. MUNGIANU, *Frontex and Non-Refoulement: International Responsibility of the EU* (Cambridge, Cambridge University Press 2016) 51-54.

<sup>224</sup> International Law Commission (‘ILC’), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/10.

<sup>225</sup> ILC, ‘Draft articles on the responsibility of international organizations, with commentaries’ (2011) UN Doc A/66/10.

<sup>226</sup> Art 6 DASR.

<sup>227</sup> Art 6 DASR.

When guest officers or assets are deployed during Frontex operations an International Coordination Centre<sup>228</sup> is established in the host Member State in which a coordination board is hosted which takes the operational decisions. These decisions are passed on to the team leader of the guest officers who is under control of the host Member State. Hence, the host Member State has the required degree of control over the guest officers to be held accountable for their possible human rights violations.<sup>229</sup>

A different analysis should be made with regard to maritime and aerial operations as every participating Member State will have a national official in the joint coordination board who will be consulted when an action concerns one of their maritime or aerial assets. Also the national official passes on the operational decisions involving the asset in question. In this case, one can argue both ways. Nevertheless, considering the strict interpretation of art 6 DADR arguably more elements point into the direction of the accountability of the home State.<sup>230</sup>

On the other hand, where a state organ is placed at the disposal of an international organisation which exercises ‘effective control’, its conduct will be attributable to the international organisation in question.<sup>231</sup> In the above-referenced example Frontex arguably does not exercise enough control to be attributed human rights violating practices on the basis of art 7 DARIO. However, even if Frontex or the participating Member States did not exercise enough control, they were under a positive obligation to prevent human rights violations. Hence, in the case of an intercepted migrant in the context of a Frontex operation at sea there may be two international wrongful acts resulting in the separate responsibility of the Member States involved; one would be the *refoulement per se* and the omission to prevent the *refoulement* committed by Frontex.<sup>232</sup>

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<sup>228</sup> See e.g. art 9(2)(b) Frontex Regulation on Sea Borders Surveillance.

<sup>229</sup> M. FINK, ‘Legal accountability for human rights violations that may occur during Frontex-coordinated operations’ (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

<sup>230</sup> Ibid.

<sup>231</sup> Art 7 DARIO.

<sup>232</sup> M. FINK, ‘Legal accountability for human rights violations that may occur during Frontex-coordinated operations’ (Frontex: legal questions and current controversies, Weicker Building Université de Luxembourg, Luxembourg, 27th November 2015).

Finally, under public international law, both Frontex<sup>233</sup> and the Member States could be held responsible for having aided or assisted another Member State or international organisation in the commission of human rights violations. As referenced above, Frontex is in charge of the drafting of the operational plans and is involved in the establishment of the International Coordination Centre through which it does acquire ‘knowledge of the circumstances of the internationally wrongful act’ as required under art 14 DARIO. Consequently, as soon as Frontex becomes aware of the wrongful conduct, notwithstanding the responsibility of the participating Member States and the host Member State, it *de facto* facilitates the conduct and should thus be considered an ‘accomplice’ in this regard.<sup>234</sup>

To conclude, there are enough elements to establish the respectively shared or separate responsibility of all the actors involved in Frontex operations under international law. However, difficulties remain with regard to the implementation of accountability. As will be discussed in *Chapter III*, the European Border and Coast Guard (hereafter ‘EBCG’) Proposal analogously recognises the shared responsibility<sup>235</sup> of Frontex and the Member States in the context of the European Border Management, without resolving, however, the issue of implementation of accountability, considering the lack of express recognition of Frontex’s command and control powers as well as the limited number of courts available which have the competence to treat such liability claims.

#### ***§4. Transparency and finding a competent forum as additional obstacles***

Most of the above-mentioned concerns are of a rather general nature and are not strictly Frontex-related. The close intertwinement of activities of international actors often blurs the delineation of responsibility resulting in an extremely difficult allocation of accountability. To strike an adequate balance between autonomy and accountability, power should be counterbalanced with adequate control as it is the touchstone for determining to which extent an actor involved may be accountable. Given the importance of locating control and command as demonstrated above, transparent accountability frameworks are necessary for such multi-actor operations in order to prevent involved actors from shifting responsibility and escaping accountability.

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<sup>233</sup> Art 14 DARIO.

<sup>234</sup> E. PASTAVRIDIS, ‘The EU and the obligation of *non-refoulement* at sea’, in IPPOLITO, F. AND TREVISANUT, S. (eds) *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press, 2016) (236) 259.

<sup>235</sup> Art 5 European Parliament Legislative Resolution.

One of the instances of a lack of such transparency are the JOs between the Member States, coordinated by Frontex resulting in blameshifting with Frontex arguing it has a mere coordinative function. The Member States on the other hand, argue Frontex's role goes beyond solely coordinating as it has considerable control over the operations. While the overall division of roles between the involved actors is described in the Frontex Founding Regulation and Frontex Recast, their specific tasks and command structure are addressed on a case-by-case basis in their respective operational plans resulting in a non-transparent picture of the distribution of responsibility and therewith accountability. In the absence of express recognition of the powers of command and control, the notion of shared responsibility thus remains legal fiction.<sup>236</sup>

Furthermore, it is difficult to access Frontex documents, particularly Working Arrangements with third countries. The main publicly available documents are its annual report and risk analysis report, two very generally worded documents, which are published on its website. The other means of transparency is that Frontex, similar to other institutions, is subject to the EU Regulation on Access to Documents<sup>237</sup> on the basis of which an individual can lodge a complaint to the European Ombudsman when Frontex does not publish certain documents upon request within 15 days.

The issue of attribution of conduct for human rights violations committed in the framework of JOs is exacerbated by the limited fora available for obtaining redress. The Frontex Regulation does not establish specific jurisdiction nor a special legal process before European Courts to obtain redress against unlawful conduct in the context of Frontex operations.<sup>238</sup>

On the one hand, the applicability of the ECHR may prove to be difficult with regard to Frontex's part as the EU is not a Party to the ECHR. On the other hand, under European Union law two different liability regimes would apply to Frontex operations: the non-contractual liability of the EU for its Agency, Frontex, and the State liability regime.

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<sup>236</sup> J. RIJPMAN, 'Study for the LIBE Committee: The proposal for a European Border and Coast Guard: evolution or revolution in external border management?' (Policy Department C: Citizens' Rights and Constitutional Affairs, March 2016)

<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL\\_STU\(2016\)556934\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf)> accessed 1 April 2016.

<sup>237</sup> Council Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

<sup>238</sup> A. FISCHER-LESCANO, T. LÖHR and T. TOHIDIPUR, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21(2) *IJRL* (256) 294.

The ECJ is exclusively competent to hear any claim against EU agencies<sup>239</sup>, whereas the Member State courts are exclusively competent to hear liability claims against the Member States. Considering that one Member State may be responsible on the basis of attribution and the other because of violating a positive obligation, the determination of the accountability of the one will depend on the other, with no court having jurisdiction to decide on both.

In addition, as is well known the judicial protection pathways flowing from articles 263, 265, 267 and 340 TFEU do not unconditionally guarantee an effective remedy to individuals, as envisaged in art 47 EU Charter, due to their strict standing requirements and the *de facto* impossibility for an individual to bring an action for damages due to the strict conditions attached.<sup>240</sup> Consequently, legal recourse for individuals with regard to claims arising from Frontex operations will be limited to cases before the national courts with regard to the share of the Member States.<sup>241</sup>

### Subsection II. The ‘Hotspots’ in Italy and Greece

As touched upon in *Section II, Subsection III*, Frontex plays an important role in the EU’s ‘Hotspot’ approach which was brought into life to deal with the immediate challenge of large-scale arrivals of migrants in the context of the May 2015 Agenda on Migration. Frontex assists Europol with the debriefing of migrants to gather intelligence on smugglers. It also assists the Member State authorities with the registration and screening of migrants, such as fingerprinting and registration on EURODAC, the EU fingerprinting database, the essence of which is considered to remain the task of the Member State in question. After having identified the migrants eligible for international protection with the support of EASO, Frontex organises the logistics of the returns.<sup>242</sup>

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<sup>239</sup> Art 263 TFEU.

<sup>240</sup> S. WOLFF, S., AND A. SCHOUT, ‘Frontex as Agency: More of the Same?’ in KAUNERT, C., LÉONARD, S., OCCHIPINTI J.D., *Justice and Home Affairs Agencies in the European Union* (London, 1st edn, Routledge 2015) (33) 45.

<sup>241</sup> E. PAPANASTAVRIDIS, ‘The EU and the obligation of *non-refoulement* at sea’, in IPPOLITO, F. AND TREVISANUT, S. (eds) *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge, Cambridge University Press 2016) (236) 262.

<sup>242</sup> Frontex (2016), ‘Situation at external border’ (Press Room, FAQ) <<http://frontex.europa.eu/pressroom/faq/situation-at-external-border/>> accessed 1 July 2016; D. NEVILLE, ‘Study: On the frontline: the hotspot approach to managing migration’ (Policy Department C: Citizens' Rights and Constitutional Affairs, May 2016) 28.



It should be noted that certainly with regard to Greece the ‘who does what’ and to which extent (mere assistance or actual management) may change from day to day, due to the persistent systemic deficiencies in Greece’s asylum system and uncertainty among the actors involved, due to the chaotic situation in some Greek ‘Hotspots’. For example, on the Greek Island Chios, Frontex is debriefing the migrants upon arrival, due to the absence of Europol staff.<sup>243</sup>

The lack of specific legal framework governing the ‘Hotspots’ and the work of the agencies, without a doubt, fuelled the uncertainty. Frontex’s involvement in the ‘Hotspots’ finds its basis in its own Regulation.<sup>244</sup> However, the relevant clauses do not go as far as actually regulating Frontex’s operational support leaving various important questions unanswered.<sup>245</sup> More specifically, a clear legal framework is quintessential to determine to which extent the involved EU agencies might be liable for possible human rights violations occurring in the ‘Hotspots’.<sup>246</sup> In line with the complex question on whether Frontex may be held accountable for breaches in the context of JOs it coordinates<sup>247</sup>, Frontex’s enhanced operational support in the often chaotic environment of the ‘Hotspots’ necessitates clear and separately stipulated responsibility and accountability provisions.

In addition, while the policy documents laying out the ‘Hotspot’ model very clearly envisage a multi-agency approach, the staff numbers on the ground show an overly present Frontex and substantially less represented EASO, Europol and FRA, revealing a focus on Frontex-related tasks. The focus on border control, more specifically effective returns, of the ‘Hotspots’ became even more explicit after the EU-Turkey Statement, when the Commission announced the Greek ‘Hotspots’ “will need to be adapted” to their “objective of implementing returns to Turkey”.<sup>248</sup>

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<sup>243</sup> C. ZIEBRITZKI, ‘Chaos in Chios: Legal questions regarding the administrative procedure in the Greek Hotspots’ (EU Migration Law Blog, 26 June 2016) <<http://eumigrationlawblog.eu/chaos-in-chios-legal-questions-regarding-the-administrative-procedure-in-the-greek-hotspots/>> accessed 1 July 2016.

<sup>244</sup> On the basis of arts 8 to 8(h) Frontex Regulation, Frontex may “deploy its experts to support the competent national authorities” in Member States “facing specific and disproportionate pressures” as well as European Border Guard Teams “at the request of a Member State faced with a situation of urgent and exceptional pressure”.

<sup>245</sup> D. NEVILLE, ‘Study: On the frontline: the hotspot approach to managing migration’ (Policy Department C: Citizens’ Rights and Constitutional Affairs, May 2016) 29.

<sup>246</sup> *Ibid* 31.

<sup>247</sup> The accountability question was addressed at length in *Chapter II, Section III, §3*.

<sup>248</sup> European Commission, Next operational steps in EU-Turkey cooperation in the field of migration, COM(2016) 166, 16 March 2016.

Furthermore, the weakness of the *in se* well-designed ‘Hotspot’ model is that it fully relies on the capacities and good will of the Member States. By providing operational support to the national authorities at the ‘frontline’, the EU helps to ensure the effective management of migration at the EU external borders. However, the deep-rooted deficiencies in the Greek asylum system contribute to chaos and worsening life conditions in its ‘Hotspots’. Reports of overcrowding, inadequate sanitation and hygiene, poor food, mainly in Greece,<sup>249</sup> and lack of protection of vulnerable groups in both Italy and Greece are coming to the surface.<sup>250</sup> In addition, as far as relocation is concerned, very limited numbers of asylum-seekers, mostly from Syrian and Eritrean origin, have thus far been relocated. Three Member States, France, Finland and Portugal, have taken in the highest numbers. As of 15 June 2016, Austria, Croatia, Hungary, Poland and Slovakia have not made any relocation places available.<sup>251</sup>

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<sup>249</sup> D. NEVILLE, ‘Study: On the frontline: the hotspot approach to managing migration’ (Policy Department C: Citizens' Rights and Constitutional Affairs May 2016) 37.

<sup>250</sup> OHCHR, ‘Italy’s migrant hotspot centres raise legal questions’ (Press Release, 2 August 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/LegalQuestionsOverHotspots.aspx#sthash.VeWhVCLU.dpuf>> accessed 2 August 2016.

<sup>251</sup> European Commission, ‘Relocation and resettlement – state of play’ (Press Release, 15 June 2016) <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160615/factsheet\\_relocation\\_and\\_resettlement\\_-\\_state\\_of\\_play\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160615/factsheet_relocation_and_resettlement_-_state_of_play_en.pdf)> accessed 1 July 2016.

### Subsection III. Partnerships with third countries

Frontex has been involved in operations taking place on the territory of third countries. For instance, JO Hera took place in the territorial waters of Senegal and Mauritania. Uncertainty remains with regard to the legal framework for Frontex's assistance to these operations. Sea operations beyond the EU external borders are usually based on a bilateral agreement between EU States and the third country which governs the conduct of the surveillance and interception operations and sets out their legal basis. These agreements are often not publicly available and hence escape scrutiny.<sup>252</sup> They may also take the form of readmission agreements to which Frontex likewise delivers support. For instance, Frontex provides escort officers and transportation<sup>253</sup> for the returns to Turkey taking place following the EU-Turkey Statement of 18 March 2016, on the basis of the existing bilateral readmission agreement between Turkey and Greece<sup>254</sup>, until the conclusion of an EU-Turkey readmission agreement which was scheduled for 1 June 2016, but has been delayed for an unknown time.<sup>255</sup>

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<sup>252</sup> A. BALDACCINI, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B. RYAN and V. MITSILEGAS (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff 2010) (229) 252.

<sup>253</sup> Frontex (2016), 'Frontex's role in the EU-Turkey Agreement (FAQ)' <<http://frontex.europa.eu/pressroom/faq/frontex-s-role-in-eu-turkey-agreement/>> accessed 1 July 2016.

<sup>254</sup> European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council: First Report on the progress made in the implementation of the EU-Turkey Statement', 20 April 2016, COM(2016) 231 final, 4-5.

<sup>255</sup> "EU-Turkey readmission deal in doubt" *EU Observer* (6 June 2016) <<https://euobserver.com/migration/133712>> accessed 11 July 2016.

Frontex may also enter into Working Arrangements concluded between third countries and Member States, thereby establishing its own bilateral cooperation with the third country in question on the basis of art 14 Frontex Regulation. The EU continuously emphasises that Working Arrangements are merely ‘technical’ documents, not treaties and thus not legally binding. However, they are of considerable importance as they are often the basis for sharing intelligence and the actual participation of the third country in Frontex JOs. Furthermore, as can be deduced from the EU latest policy documents, such as the EU Global Strategy<sup>256</sup> and Migration Partnership Framework of June 2016<sup>257</sup>, cooperation with third countries, particularly transit and departure countries, is considered quintessential for the effectiveness of the JOs and the EU whole migration policy directed at ‘stemming the flow of irregular migrants’. It must be noted that a few of these countries have dubious records in human rights and the treatment of migrants.

The external cooperation of Frontex under this form raises a number of concerns. First of all, similarly to other operational activities of Frontex, it might be difficult to determine the extent to which actions in the context of this cooperation are undertaken by the third country in a sovereign manner, or are instead under the command or control of Frontex. As discussed in *Subsection I*, the Member States and Frontex will be liable for their own violations, the violations committed by organs over which they have respectively far-reaching or effective control<sup>258</sup> or which other States have committed through their aiding and abetting.<sup>259</sup>

Secondly, the Working Arrangements entered in by Frontex are not subject to European Parliament scrutiny, as these Arrangements are not considered international treaties. Still, they could have an important detrimental impact on the rights of migrants in third countries. The European Parliament is merely informed about their existence after the signing of the agreements and is not competent to control their implementation. It should be emphasised that the Member States and Frontex cannot circumvent their responsibilities by outsourcing their tasks.<sup>260</sup>

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<sup>256</sup> European External Action Service (‘EEAS’), ‘Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union’s Foreign And Security Policy’, 28 June 2016 <[http://eeas.europa.eu/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/top_stories/pdf/eugs_review_web.pdf)> accessed 1 July 2016.

<sup>257</sup> European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration’, 7 June 2016, COM(2016) 385 final.

<sup>258</sup> Arts 6 DASR and 7 DARIO.

<sup>259</sup> Arts 16 DASR and 14 DARIO.

<sup>260</sup> ECtHR, *Xhavara & Ors v. Italy & Albania* Application no. 39473/98, 11 January 2001.

## **Chapter III. Recommendations for the Future role of the EU’s Border Agency and its Protection of the Fundamental Rights of Migrants**

In December 2015, the European Commission suggested the creation of a ‘European Border and Coast Guard’<sup>261</sup> as one of its policy responses to the deteriorating migration situation in and at the borders of the European Union. *Chapter III* addresses the question whether the EBCG Proposal introduces a true European Border Coast Guard functioning as a suitable successor for Frontex, capable of remedying the current shortcomings of the Border Agency and ensuring the respect for human rights and international protection obligations. *Section I* briefly introduces the Proposal and discusses its main innovations. *Section II* examines the principal elements of the Proposal and formulates recommendations to alter the proposed structure to enable it to adequately address the main challenges encountered by the Agency and by asylum-seekers seeking shelter and asylum in the European Union.

### **Section I. The New European Border and Coast Guard**

On 15 December 2015 the Commission proposed to create a European Border and Coast Guard (‘EBCG’) as one of the key responses to the current ‘migration crisis’. The aim of the Proposal is to ensure the European Integrated Border Management as regards migration and internal security by reinforcing Frontex, in line with what the Commission views as the main deficiencies taunting the functioning of the current EU Border Agency, Frontex.

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<sup>261</sup> European Commission, ‘Proposal for a Regulation of the Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 15 December 2016, COM(2015) 671 final (‘EBCG proposal’).

Contrary to the findings in *Chapter II, Section III*, shared by human rights organisations and the Greens<sup>262</sup>, the Commission essentially points to the Member States' unwillingness to contribute to Frontex operations or to allow Frontex interventions on their territory, as the main shortcomings of the current Border Agency.<sup>263</sup> The structure includes a beefed up Frontex ('European Border and Coast Guard Agency') and a cooperation mechanism with the Member States' national border and coast guard authorities, which will continue to exercise the day-to-day management of the external borders ('European Border and Coast Guard').<sup>264</sup> The Proposal will replace the existing Frontex Regulation which was amended in 2007 and 2011.

The Proposal has been the subject of a speedy legislative procedure in the Council and European Parliament, prompted by the need to find a coherent response to the increase in arrivals of refugees and migrants in Europe. On 6 April 2014 the Council of the European Union agreed on its Negotiating Position.<sup>265</sup> The LIBE committee adopted a draft legislative resolution on 6 June 2016<sup>266</sup> after the Council had put some additional pressure at the Justice and Home Affairs Council press conference on 21 April 2016 emphasising that all Member States are aligned. It added that as far as the Council is concerned the EBCG could start operating from June and that the ball is now in the European Parliament's court.<sup>267</sup>

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<sup>262</sup> Amnesty International, International Commission of Jurists and ECRE, 'Joint briefing on the European Border and Coast Guard regulation', 4 April 2016, 9; S. KELLER, 'More Power for Frontex – No Boost to Human Rights: The New European Border and Coast Guard System' (*Ska Keller*, 7 May 2016) <<http://www.skakeller.de/en/topics/refugees-migration/more-power-for-frontex-no-boost-to-human-rights-the-new-european-border-and-coast-guard-system.html>> accessed 21 May 2016.

<sup>263</sup> European Commission (2015), Factsheet on the European Border and Coast Guard <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/factsheets/docs/a\\_european\\_border\\_and\\_coast\\_guard\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/factsheets/docs/a_european_border_and_coast_guard_en.pdf)> accessed 22 June 2015.

<sup>264</sup> European Commission, 'A European Border and Coast Guard to protect Europe's External Borders' (Press release, 15 December 2015) <[http://europa.eu/rapid/press-release\\_IP-15-6327\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6327_en.htm)> accessed 16 June 2015.

<sup>265</sup> Council of the European Union, 'Mandate for negotiations with the European Parliament on the European Border Guard regulation', 8 April 2016, 7649/16 ('the Council's Negotiating Position').

<sup>266</sup> European Parliament, 'Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015)0671 – C8-0408/2015 – 2015/0310(COD))', 6 June 2016, A8-0200/2016 ('Draft European Parliament Legislative Resolution').

<sup>267</sup> Council of the European Union, 'Outcome of the Justice and Home Affairs Council Meeting', 21 April 2016, 8065/16.

On 22 June 2016, the Netherlands presidency announced that it came to a political agreement with the European Parliament, which suggested the Proposal would probably be adopted at first reading in both the Parliament and the Council.<sup>268</sup> On 6 July 2016 the draft legislative resolution was adopted by the plenary in Strasbourg<sup>269</sup>, following which the text was sent to the Council for approval. The legislation is expected to enter into force autumn 2016.<sup>270</sup>

The Proposal introduces the possibility of deploying ‘European Border and Coast Guard Teams’ to external borders identified by the Union assessment system as vulnerable as regards to the operational capacity of the concerned Member State in order to prevent potential crises. In other words, as soon as a Member State is unable to uphold the EU’s restrictive Border Policy, the Agency will be able to step in. In that respect, one of the main innovations brought by the EBCG Proposal is that the reinforced Frontex will be able to carry out ‘vulnerability assessments’ of the Member States’ “technical equipment, systems, capabilities, resources and contingency plans”.<sup>271</sup> Again, this comes down to assessing the Member States’ ability to uphold the restrictive measures imposed as part of the EU Border Policy.

To the same effect, the current Frontex Regulation already makes provision for a risk analysis of Member States’ “capacity to face upcoming challenges”<sup>272</sup>. The new competence will likewise complement the Schengen evaluation mechanism<sup>273</sup>, as part of which Frontex may deliver a ‘risk analysis’ in support of the evaluation.<sup>274</sup>

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<sup>268</sup> Council of the European Union, ‘European Border and Coast Guard: Council confirms agreement with Parliament’ (Press release, 22 June 2016).

<sup>269</sup> European Parliament, ‘European Parliament legislative resolution of 6 July 2016 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015)0671 – C8-0408/2015 – 2015/0310(COD))’, 6 July 2016, P8\_TA(2016)0305 (‘European Parliament Legislative Resolution’).

<sup>270</sup> European Parliament, ‘MEPs back plans to pool policing of EU external borders’ (Press release, 6 July 2016) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0305+0+DOC+PDF+V0//EN>> accessed 6 July 2016.

<sup>271</sup> Art 12 EBCG Proposal.

<sup>272</sup> Art 4 Frontex Recast; S. CARRERA AND L. DEN HERTOOG, ‘A European Border and Coast Guard: What’s in a name?’, Papers in Liberty and Security in Europe (88) (Brussels, CEPS March 2016) <<https://www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name>> accessed 9 April 2016 13.

<sup>273</sup> Council of the European Union, ‘Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen’, 6 November 2013, OJ L 295/27 (‘Schengen evaluation mechanism Regulation’).

<sup>274</sup> Art 7 Schengen evaluation mechanism Regulation.

The crux of the novel ‘vulnerability assessment’ mechanism lays in the ability of the Agency’s ED to follow up on the assessment by proposing corrective measures in situations “requiring urgent action”.<sup>275</sup> The Agency will thus have a so-called ‘right to intervene’, in other words the sending of border and coast guards from other Member States to a common EU external border without the need to obtain the formal consent of the Member State concerned. In addition, if the corrective measures are not complied with by the Member State, the European Commission may identify the implementing measures to be taken by Frontex, requiring the Member State to cooperate.<sup>276</sup> Such measures could entail the deployment of European Border and Coast Guard Teams.<sup>277</sup>

As a response to the repeatedly expressed accountability concerns, the accountability and information duty of the Agency vis-à-vis the Parliament and the Council have been reinforced.<sup>278</sup> In terms of transparency, the Proposal was even amended to include a duty to communicate on its activities. However, it shall do so on its own initiative.<sup>279</sup> In addition, the final version’s recitals now envisage the Agency should report in its annual report on its cooperation with third countries.<sup>280</sup> As laid out in *Chapter II, Section II, Subsection I*, transparency with regard to third country cooperation is currently greatly lacking. It is however unclear which commitment and level of detail exactly stem from this recital.

Furthermore, following the above-referenced calls<sup>281</sup> by PACE, the European Ombudsman and other human rights organisations<sup>282</sup>, a ‘complaints mechanism’ will be created, supervised by Frontex’s FRO to “monitor and ensure the respect for fundamental rights in all its activities”.<sup>283</sup> Individuals (or someone acting on their behalf) can file a complaint for human rights abuses. Following the Proposal, filed complaints could be rejected if ‘manifestly unfounded, anonymous, malicious, frivolous, vexatious or hypothetical’. This limitation was however not retained in the final Legislative Resolution of the Parliament.<sup>284</sup>

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<sup>275</sup> Art 12 EBCG Proposal.

<sup>276</sup> Art 18(1) EBCG Proposal.

<sup>277</sup> Art 18(2) EBCG Proposal.

<sup>278</sup> Recital 38, 36a and art 6a European Parliament Legislative Resolution.

<sup>279</sup> Art 7(3)(b) and 74(2) European Parliament Legislative Resolution.

<sup>280</sup> Recital 28 and art 53(9) European Parliament Legislative Resolution.

<sup>281</sup> See *Chapter II, Section III, Subsection I*.

<sup>282</sup> PACE, ‘Frontex: Human Rights responsibilities’, Resolution 1932 (25 April 2013), para 9.5; European Ombudsman, Case OI/5/2012/BEH-MHZ, Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013.

<sup>283</sup> Art 72 EBCG Proposal.

<sup>284</sup> Art 72 (3) EBCG Proposal.



Each complaint will go through the FRO, who will decide on admissibility and then forward the complaint to the Frontex ED and the home Member State in case of a complaint concerning a national border guard. Meaning that it will be the management of the operation at issue, the Agency or the Member State, who is examining possible wrongdoing of the operational personnel, with a clear risk of a biased analysis. If the complaint is well-founded it will be followed up, possibly by disciplinary action.<sup>285</sup>

With a view to reversing the recurring logic of increasing the Agency's budget as a response to critical periods in the EU migration situation, the Proposal attempts to structurally remedy and prevent shortages in the human and technical support of the Border Agency due to unfulfilled Member State commitments. To this effect, the EBCG will have a 'rapid reserve pool' of EBCG Teams, consisting of a 'standing corps' of minimum 1,500 national border guards to which Member States "shall make available" 2-3% of their officers<sup>286</sup>, deployable within three working days.<sup>287</sup> The pool will also be used in the context of forced returns.<sup>288</sup> Furthermore, the Agency will be competent to place liaison officers in all Member States who will "take instructions from the Agency".<sup>289</sup> Moreover, the future Agency will have the competence for border operations on the territory of third countries.<sup>290</sup>

To the same effect, the Proposal broadly defines the Agency's involvement as "operational and technical reinforcement to Member States at hotspot areas" through personnel "deployed from Member States" by the EBCG<sup>291</sup>, which is arguably closer to the situation on the ground than the more limited notion of "support to the competent authorities" in the current Regulation.<sup>292</sup>

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<sup>285</sup> Art 72(5) and (6) EBCG Proposal.

<sup>286</sup> S. CARRERA AND L. DEN HERTOOG, 'A European Border and Coast Guard: What's in a name?', *Papers in Liberty and Security in Europe* (88) (Brussels, CEPS March 2016) 2.

<sup>287</sup> Art 19 EBCG Proposal.

<sup>288</sup> Arts 28-30 EBCG Proposal.

<sup>289</sup> Art 11 EBCG Proposal.

<sup>290</sup> Art 53 EBCG Proposal.

<sup>291</sup> Art 2 (9) European Parliament Legislative Resolution.

<sup>292</sup> Art 8 (2)(b) Frontex Recast.

In the same way, the Proposal makes provision for the Agency's assistance of the Commission in the coordination among the EU agencies involved in the 'Hotspots'. Art 17 of the Proposal then proceeds by listing the tasks which Frontex was *de facto* already carrying out on the ground in the Greek and Italian 'Hotspots', contrary to what the current Regulation seems to suggest.<sup>293</sup> Nevertheless, it is worth pointing out that in the final version of the future Regulation a duty to provide initial information and referral of persons in need of protection in cooperation with EASO was added to this list of tasks.<sup>294</sup>

Another main innovation is related to the external mandate of the Agency. Frontex's current legal framework already entails an external aspect on the basis of which Frontex has the competence to station liaison officers in third countries or carry out operations on third-country territory in the context of the above-referenced 'Working Arrangements'. The real novelty brought by the Proposal concerns the establishment of a new Returns Office to coordinate, technically and operationally, returns of irregular migrants by the Member States. In addition, the Agency will be able to propose return operations at its own initiative and will be able to coordinate 'mixed return operations' with returnees from one third country to another – provided the former is a Party to the ECHR.<sup>295</sup> In other words, the Agency would be entitled to carry out Joint Return Operations from countries such as Turkey, Russia and several Western Balkan countries.<sup>296</sup>

In the following stages a few important changes were made to the Commission's Proposal. First, the Council was put in charge of authorising the deployment of the European Border and Coast Guard Teams without the consent of the Member State in question, instead of the Commission<sup>297</sup>, "because of the potential politically-sensitive nature".<sup>298</sup> Second, following the Council's input<sup>299</sup>, the Proposal includes an amendment to the Schengen Borders Code by making provision for the temporary reintroduction of internal border control within the Schengen Area if a Member State opposes a Council decision to provide assistance.<sup>300</sup>

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<sup>293</sup> Art 8 Frontex Recast.

<sup>294</sup> Art 7(g)(2) European Parliament Legislative Resolution.

<sup>295</sup> Arts 26-32 EBCG Proposal.

<sup>296</sup> S. CARRERA AND L. DEN HERTOOG, 'A European Border and Coast Guard: What's in a name?', Papers in Liberty and Security in Europe (88) (Brussels, CEPS March 2016) 16.

<sup>297</sup> Art 18(1) European Parliament Legislative Resolution.

<sup>298</sup> Recital 17 European Parliament Legislative Resolution.

<sup>299</sup> Flowing from the above-referenced Council's Negotiating Position.

<sup>300</sup> Art 78a European Parliament Legislative Resolution.

Third, the possibility of return operations from one third country to another was not retained in the final text resulting from the first reading at the European Parliament.<sup>301</sup> The Agency will thus retain its greater role in the returning of migrants to their country of origin, but only following executing decisions taken by Member States authorities.

## **Section II. Recommendations with regard to the European Border and Coast Guard**

After a short study of the Proposal and its main innovations, *Section II* makes detailed remarks and puts forward specific recommendations in the light of the human rights sustainability of the future Agency and cooperation mechanism as stipulated in the Proposal. *Subsections I and II* demonstrate that instead of a ‘legitimising human rights cloak’ the future regulation needs to be underpinned by human rights through real commitments with a view to safeguarding the respect for the human rights of migrants that will cross its path. *Subsection III* assesses the promissory but incomplete efforts taken to tackle the Agency’s deep-rooted ‘accountability complex’, such as the identification of border guards and the complaints mechanism. Finally, *Subsection IV and V* show that the future regulation does not guarantee the establishment of a strong and independent fundamental rights structure and monitoring mechanism.

### **Subsection I. Human rights and refugee protection cloak around strong external borders**

As will become clear from reading the following subsections, by reason of excellent campaigning by several human rights organisations and European political parties, lots of relevant fundamental rights safeguards were added to the original text of the Commission’s EBCG Proposal. Furthermore, the possibility of ‘mixed return operations’<sup>302</sup>, in other words the returning of people from one third country to another was deleted from the text and the complaints mechanism was strengthened.<sup>303</sup> Nevertheless, the reiteration of the Council’s call for enlarging Frontex’s mandate on return to include the right to organise JROs on its own initiative, as well as to acquire travel documents for returnees, was not deleted from the final text.<sup>304</sup> Still, the provisions on return of the future Regulation were more cautiously formulated and do not go as far as to specifically allow such activities by the Agency itself.<sup>305</sup>

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<sup>301</sup> Art 27 European Parliament Legislative Resolution.

<sup>302</sup> Art 27(4) EBCG Proposal.

<sup>303</sup> Art 72 EBCG Proposal

<sup>304</sup> Recital 20 and 21a European Parliament Legislative Resolution.

<sup>305</sup> Section 4 European Parliament Legislative Resolution.

However, when reading through the final version of the Proposal, it becomes clear that human rights and refugee protection are clearly an afterthought and are used as a ‘legitimising cloak’ for the core aims of the new Agency: border defence and efficient returns. Another expression of the border defence focus, particularly with the Words Matter! Campaign in mind, is the remarkable change from using the notion ‘irregular’ to ‘illegal’ in combination with the term migration in the final version of the future Regulation.<sup>306</sup> Such vocabulary creates and maintains a criminalising discourse with regard to irregular migration, enabling the authorities to justify the use of more restrictive or forceful measures with regard to migrants.

In addition, the EU disregarded the opportunity to broaden the mandate of Frontex beyond “assistance in the support of search and rescue operations” at sea<sup>307</sup>, despite the rising number of deaths in the Mediterranean. Furthermore, in the line of the EU’s policy of outsourcing its responsibilities regarding border management, under this new Regulation the Border Agency will be able to engage in border control operations in third countries beyond EU borders, in countries such as Libya with a deteriorating human rights situation.<sup>308</sup>

As has been observed above, the Proposal gives the Agency a key role in the ‘Hotspot approach’. While more leeway might be more advantageous to implement the approach in practice, it should be concluded that additional discretion for Frontex in combination with the absence of a detailed legal framework for the ‘Hotspots’ themselves, will result in an unreasonable focus on border control, instead of upholding the right to international protection, which is arguably currently already the case.<sup>309</sup> A recital clarifying that “in hotspot areas the different agencies and Member States should operate within their respective mandates and powers” does not amount to a clear division of tasks, let alone a detailed legal framework.<sup>310</sup>

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<sup>306</sup> E.g. compare art 4(d) EBCG Proposal and the same article in the European Parliament Legislative Resolution.

<sup>307</sup> Recital 9 and art 13(da) European Parliament Legislative Proposal.

<sup>308</sup> Art 2(3)(c), 13(2)(c), 18 (2)(c), 26 (a) European Parliament Legislative Proposal.

<sup>309</sup> D. NEVILLE, ‘Study: On the frontline: the hotspot approach to managing migration’ (Policy Department C: Citizens' Rights and Constitutional Affairs May 2016) 29.

<sup>310</sup> Recital 16b European Parliament Legislative Proposal.

Regardless of the ambition to overcome current shortages in staff, the Proposal does not envisage the Agency having its own European Border Guards. The Agency's 'pools' will continue to be populated by 'national border guards' and will thus remain subject to the capacity and goodwill of the Member States. The Proposal therefore does not establish a permanent and stable EBCG system as was envisaged in 2003<sup>311</sup> deployable along the whole of EU's external borders, but rather an enhanced form of cooperation between the national border guards. As the design of the 'right to intervene' shows, the new Agency will thus predominantly remain 'crisis-driven' with a focus on some specific frontline States.<sup>312</sup>

### **Subsection II. Lacking a clear commitment to uphold the human rights of migrants**

Firstly, border management is intrinsically a human rights sensitive task, as it includes the possibility of use of force, the possible denial of access to international protection, to name a few issues. While there is reference to respecting fundamental rights in the recitals of the Commission's EBCG Proposal<sup>313</sup> and more references were added in the later stages<sup>314</sup>, the Proposal should integrate human rights safeguards in a substantial manner throughout several important sections, not the least because of the ambiguous status of recitals *per se*.

More specifically, the notion of the European Integrated Border Management as referred to in the Proposal lacks a strong reference to human rights obligations.<sup>315</sup> A mention in a recital does not amount to a certain commitment.<sup>316</sup> The tasks of the EBCG<sup>317</sup> should also include a clear reference to the integral role of fundamental rights in the Integrated Border Management in which the EBCG will play an important part.<sup>318</sup> In addition, the wording of art 33 (1) of the Proposal on the protection of fundamental rights and a fundamental rights strategy suggests it is only looking at *non-refoulement* in terms of access to international protection, whereas the principle applies beyond the notion of international protection. The article should be rephrased to include reference to "international human rights law".

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<sup>311</sup> European Commission 'Towards integrated management of the external borders of the Member States of the European Union', 7 May 2002, COM (2002) 233 final.

<sup>312</sup> S. CARRERA AND L. DEN HERTOOG, 'A European Border and Coast Guard: What's in a name?', Papers in Liberty and Security in Europe (88) (Brussels, CEPS March 2016) 12.

<sup>313</sup> Recital 29 EBCG Proposal.

<sup>314</sup> E.g. recitals (9)(c), (21)(c), (22)(c), (23), (28)(a) and (b) of the European Parliament Legislative Resolution.

<sup>315</sup> Art 4 EBCG Proposal.

<sup>316</sup> Recital 2 European Parliament Legislative Resolution.

<sup>317</sup> Art 7 EBCG Proposal.

<sup>318</sup> Art 7 (pa) Draft European Parliament Legislative Resolution.

Furthermore, the risk analyses<sup>319</sup> and vulnerability assessments<sup>320</sup> should incorporate access to procedures and fundamental rights. Nevertheless, in this regard, the LIBE Committee<sup>321</sup>, introduced a few meaningful amendments<sup>322</sup>, which were retained in the Plenary<sup>323</sup>, making provision for the submission of the risk analyses and the vulnerability assessments to the European Parliament. The amendments are a step in the right direction, though not sufficient as the submission to the European Parliament is merely an *a posteriori* review.

Fundamental rights should also be explicitly taken into account when planning and carrying out operations. On the one hand, there should be a fundamental rights assessment prior to any operational engagement whether in the form of JOs, RABITs, Return Operations in cooperation with the Member States, or in operations with third countries.<sup>324</sup> The amendments by the European Parliament<sup>325</sup> positively introduced such assessment prior to all operational engagement. On the other hand, with regard to the actual carrying out of the operations, the main safeguards in place are (1) the FRO who is tasked with monitoring the respect for fundamental rights in Frontex's activities and, (2) the possibility of suspension or termination of operational activities by the ED. However, both the FRO and the suspension and termination mechanism are not without flaws themselves as the following paragraphs will show.

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<sup>319</sup> Art 10 EBCG Proposal.

<sup>320</sup> Art 12 EBCG Proposal.

<sup>321</sup> European Parliament, 'Committee on Civil Liberties, Justice and Home Affairs Draft Report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015)0671 – C8-0408/2015 – 2015/0310(COD))', 22 March 2016, PE578.803 ('LIBE's Draft Report').

<sup>322</sup> Amendments 20 and 29 of LIBE's draft report.

<sup>323</sup> Articles 10 (2) and 12 (6)(a) of the European Parliament Legislative Resolution.

<sup>324</sup> Articles 15, 16, 27 and 53 EBCG Proposal.

<sup>325</sup> Amendments 69-70, 84 and 129-130 Draft European Parliament Legislative Resolution and arts 15 (53)(d) and (i), 27 (3), (5) and (6)(a), 53 (1) and (2) European Parliament Legislative Resolution.

Secondly, the Commission and the Council wished to enable the EBCG to coordinate and organise return operations from third countries after issuing a return decision to other third countries.<sup>326</sup> The only requirement is that the former should be bound by the ECHR. This clause would have enabled the EBCG to carry out JROs from countries such as Turkey, Russia and several Western Balkan countries. Human rights advocacy organisations and the Greens<sup>327</sup> argued the requirement of ECHR membership should not be read as a presumption that cooperation with that State is per definition human rights compliant, as those third countries are not subject to EU law, nor to remedies before the Court of Justice of the EU. They called for the deletion of the clause and succeeded.<sup>328</sup>

Thirdly, the suspension or termination of operations remains at the discretion of the ED and thereby lacks transparency.<sup>329</sup> The suspension or termination mechanism should be altered in the sense that the criteria for taking such a decision should be laid down in a public document. This was envisaged in the Draft European Parliament Legislative Resolution<sup>330</sup>, but not retained in the final version.<sup>331</sup> Furthermore, the FRO should be able to suggest the suspension or termination of the operations and the possibility of suspension or termination should be expanded to all EBCG operations, as expressed in the Draft European Parliament Legislative Proposal<sup>332</sup>, but watered down in the final version to mere consultation of the FRO.<sup>333</sup>

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<sup>326</sup> Article 27(4) of the Commission's EBCG proposal which was retained in the Council's Negotiating Mandate.

<sup>327</sup> Amnesty International, International Commission of Jurists and ECRE, 'Joint briefing on the European Border and Coast Guard regulation', 4 April 2016, 9; S. KELLER, 'More Power for Frontex – No Boost to Human Rights: The New European Border and Coast Guard System' (*Ska Keller*, 7 May 2016) <<http://www.skakeller.de/en/topics/refugees-migration/more-power-for-frontex-no-boost-to-human-rights-the-new-european-border-and-coast-guard-system.html>> accessed 21 May 2016.

<sup>328</sup> Amendment 84 Draft European Parliament Legislative Resolution and art 27 European Parliament Legislative Resolution.

<sup>329</sup> Art 24(3) European Parliament Legislative Resolution.

<sup>330</sup> Art 24 (3) Draft European Parliament Legislative Resolution.

<sup>331</sup> Art 24 (3) European Parliament Legislative Resolution.

<sup>332</sup> Amendment 81 Draft European Parliament Legislative Resolution.

<sup>333</sup> Art 24 (3) European Parliament Legislative Resolution.

Moreover, in order to provide an imperative response to reported violations there should be an express link between the complaint mechanism and the powers of the ED or of the Agency to suspend or terminate operations in case of serious or persistent fundamental rights violations.<sup>334</sup> The amendments by the Parliament did facilitate such synchronisation by making provision for the suspension or termination of operations due to persistent fundamental rights violations.<sup>335</sup> However, the efficacy in practice will depend on how the ED will exercise his mandate as he is in charge of the suspension, termination or withdrawal of financing and at the same time tasked with the treatment of most of the incoming complaints. The FRO only decides on the admissibility of complaints<sup>336</sup> and will merely be consulted with regard to the possible withdrawal of financing of operations.<sup>337</sup>

Fourthly, the proposed forced return monitors<sup>338</sup> should be independent and report to the EBCG and the FRO on fundamental rights compliance in the carrying out of return operations. The addition that the forced return monitors and escorts remain subject to the disciplinary measures of their home Member State might not have the desired effect.<sup>339</sup> Furthermore, within the pool of forced return monitors and escorts<sup>340</sup> there should be a sufficient number of child protection profiles. The latter has been echoed in amendments by the Parliament<sup>341</sup> which have made it to the final version.<sup>342</sup> Ideally, operational plans should explicitly mention the provision of the necessary amount of monitors and escorts with such profiles. Instead, the Management Board, the decisions of which are not automatically made public, will adopt a decision on the profiles and the number of border guards to be made available for the European Border Guard Teams and the Rapid Reserve Pool.<sup>343</sup>

Finally, as the use of force in the context of the EBCG operational activities should not only comply with national law, but also with international standards and EU human rights law, this should have been explicitly mentioned in the final version.<sup>344</sup>

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<sup>334</sup> See *Subsection II, §3*.

<sup>335</sup> Art 24 (3) European Parliament Legislative Resolution.

<sup>336</sup> Art 72 (4) European Parliament Legislative Resolution.

<sup>337</sup> Art 24 (3) European Parliament Legislative Resolution.

<sup>338</sup> Art 28 EBCG Proposal.

<sup>339</sup> Articles 28(3)(a) and 29(3)(a) European Parliament Legislative Resolution.

<sup>340</sup> Art 29 EBCG Proposal.

<sup>341</sup> Amendments 85 and 86 of the Draft European Parliament Legislative Resolution.

<sup>342</sup> Arts 28 (2) and 29 (2) European Parliament Legislative Resolution.

<sup>343</sup> Art 61(1)(ce) and (cd) European Parliament Legislative Resolution.

<sup>344</sup> I.e. in art 39 (6) on the tasks and powers of the members of the teams.



### Subsection III. Accountability

#### **§1. Lack of clear delineation of competences and activities**

Similar to Frontex, one of the main tasks of the EBCG encompasses the organisation of JOs. The EBCG will also finance these operations and coordinate the actions of the Member State actors involved. As previously mentioned, external border control is an inherently human rights sensitive task. The drafters of the EBCG Regulation should therefore draw on the lessons learnt from Frontex and ensure there is an appropriate human rights accountability mechanism in place.

Considering the previously discussed legal and practical difficulties in determining the existence and extent of the accountability of the involved Member States and Frontex, causing issues of accountability, it is crucial that the EBCG Regulation sets out the precise role and powers of all actors involved, as well as the distribution of accountability among them.<sup>345</sup> The significant reinforcement of the tasks of the Agency, as well as the explicit affirmation of shared responsibility for European integrated border management<sup>346</sup>, will merely exacerbate the existing puzzle as regards shared accountability. The Proposal would thus have benefited from a clear delineation of responsibilities with regard to each operational activity<sup>347</sup> and in each operational plan, as the mere confirmation of the general division of competence under international conventions does not amount to the required delineation.<sup>348</sup>

#### **§2. Visibility and identification of individual border guards**

Another essential element for providing effective remedies and establishing accountability for fundamental rights violations, is visibility and identification of individual border guards. The Commission's Proposal initially did not require border guards to wear visible personal identification, crucial in ensuring transparency and accountability. After an amendment proposed by LIBE<sup>349</sup>, the final version<sup>350</sup> requires visible personal identification, instead of a mere blue armband.<sup>351</sup>

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<sup>345</sup> M. FINK, 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex' genetic defect.' (*EJIL*, 10 March 2016).

<sup>346</sup> Recitals 5, 8, 12 and art 5 European Parliament Legislative Resolution.

<sup>347</sup> Articles 10, 15, 16, 27 and 53 EBCG Proposal.

<sup>348</sup> Recital 27a European Parliament Legislative Resolution.

<sup>349</sup> Amendment 110 LIBE's Draft Report.

<sup>350</sup> Article 39 (4) European Parliament Legislative Resolution.

<sup>351</sup> Article 39 (4) EBCG Proposal.

### **§3. Common complaint mechanism**

A welcome new feature in terms of accountability of the EBCG is the establishment of a common complaint mechanism in those situations where an individual's fundamental rights might have been violated during the EBCG's activities. However, as the potency of the mechanism is limited in several ways, a number of concerns remain to be addressed.

Firstly, the complaint mechanism envisaged by the EBCG Proposal in cases of alleged fundamental rights violations does not ensure independence and therefore would not qualify as an effective remedy for individuals. This is particularly problematic when it comes to the envisaged new responsibilities on returning refugees to their home countries. Its independence could be compromised by the fact that the FRO is only allowed to assess the admissibility of complaints and that respectively the ED (in the case of staff members) and the Member State (in the case of guest officers), for whose decisions there is no guarantee of impartiality or transparency, are entrusted with their investigation.<sup>352</sup> Secondly, the Proposal merely refers to an "appropriate follow-up" by the ED or the Member State. It failed to specify what an "appropriate follow-up" entails and which minimal remedies should be available in the case of well-founded complaints.<sup>353</sup>

To address the two above-referenced issues, human rights organisations advocated for the altering of the Proposal<sup>354</sup> to enable the FRO to establish transparent guidelines for the decision on disciplinary or other measures against officers who have violated human rights in the framework of EBCG operations, after consultation with the Consultative Forum, not only with regard to the admissibility stage, but also the merits and reparation stages, including any steps for disciplinary proceedings. Such safeguard was however not included in the European Parliament Legislative Resolution. Hence, the implementation of the complaints mechanism remains in the hands of the ED. Nonetheless, as a result of LIBE's amendments<sup>355</sup> the ED or Member State are now required to inform the FRO within a determined timeframe on how they followed up the matter.<sup>356</sup> As a result of the same amendments, the Agency will need to include "information" on the complaints mechanism in its annual report. Yet, due to the imprecise nature of "information", it is not clear whether it will lead to a real transparency safeguard.

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<sup>352</sup> Art 72 Commission's EBCG Proposal.

<sup>353</sup> Art 6 Commission's EBCG Proposal.

<sup>354</sup> Amnesty International, International Commission of Jurists and ECRE, 'Joint briefing on the European Border and Coast Guard regulation', 4 April 2016, 5-6.

<sup>355</sup> Amendments 93 and 94 LIBE's Draft Report.

<sup>356</sup> Art 72 (5) and (6) European Parliament Legislative Resolution.

Thirdly, human rights organisations rightly recommended<sup>357</sup> the proposal should make provision for the possibility of suspending or terminating all Frontex operational activities beyond JOs and RABITs, in case of serious or persistent fundamental rights violations, or to suspend the financing of return operations in case of fundamental rights breaches, including as a response to the findings of the complaints mechanism as well as the vulnerability assessment.<sup>358</sup> Such cooperation is now possible as the final version makes provision for the possible suspension because of fundamental rights violations in all operational activities.<sup>359</sup> However, as touched upon above, the functioning of the cooperative relationship between both mechanisms will depend on the interpretation of the ED, as the FRO will merely be ‘consulted’ with regard to the possible suspension, termination or withdrawal of financing of operations.

Fourthly, to ensure access to an effective remedy the complaints mechanism should be accompanied by an explicit obligation to make information available on the existence of the complaints mechanism as well as to provide guidance, assistance and explanation on the complaint procedure to persons affected by activities carried out by or coordinated by the Agency, in a language they understand, with the necessary support for children. This duty of guidance should also be taken into consideration while designing operational plans for each activity. The final text does now oblige the Agency to inform third-country nationals of the complaints mechanism. In that respect, operational plans for JOs and RABITs are now required to lay out a mechanism to receive and transmit complaints for breaches occurring during these operations.<sup>360</sup>

Lastly, and most importantly, an administrative procedure cannot automatically substitute the right to an effective remedy, which, under article 47 EU Charter, entitles individuals to judicial redress in case of a violation of their rights. One of LIBE’s amendments<sup>361</sup>, which was not withheld in the final version, put forward a partial solution making provision for an obligation on the Member States to offer an appeal in cases where a complaint is declared inadmissible, is rejected, or where the follow-up is considered inappropriate by the complainant.

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<sup>357</sup> Amnesty International, International Commission of Jurists and ECRE, ‘Joint briefing on the European Border and Coast Guard regulation’, 4 April 2016, 7.

<sup>358</sup> Ibid 7.

<sup>359</sup> Art 24 (3) European Parliament Legislative Resolution.

<sup>360</sup> Art 15 (3) and 16 (6) European Parliament Legislative Resolution

<sup>361</sup> Amendment 95 of LIBE’s Draft Report, adding paragraph (8)(a) to art 72 of the Proposal which was not withheld in the final version.

The final version does not guarantee that it will be without prejudice to the right to a speedy, effective and enforceable remedy under the ECHR, for any person whose fundamental rights and freedoms have been violated in the exercise of EBCG operations, nor that the Member States' judicial authorities shall have the ultimate responsibility to ensure that this right is effective. Admittedly, the final version contains some relevant references in its recitals<sup>362</sup>, which can however not be considered a clear safeguard, not the least because of the dubious status of recitals.

The above suggestions obviously depend on the presence of a strong, independent human rights structure. To establish a strong, effective and independent complaints mechanism, would require strengthening the current human rights structure of Frontex. This would entail, among others, but not exclusively, modifying the mandate of the FRO, strengthening the office, including more staff, and entrusting them with the required institutional independence, and a clear competence to assess the merits of the complaints and further resources, alternatively, entrusting another independent fundamental rights body with such competence, the necessary staff and resources. Recital 28b which was added during the final stage reciprocates the call by human rights organisations for a strengthened human rights structure by emphasising the importance of a solid fundamental rights strategy and allocating further resources to the FRO.<sup>363</sup> Again, those positive developments would have had a less ambiguous status if they would have been added to article 71 on the FRO.

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<sup>362</sup> Recitals (29) and (30) European Parliament Legislative Resolution.

<sup>363</sup> Amnesty International, International Commission of Jurists and ECRE, 'Joint briefing on the European Border and Coast Guard regulation', 4 April 2016, 10-11.

#### Subsection IV. Need for a more robust monitoring mechanism and a strengthened fundamental rights structure

It is regrettable that the Proposal not only misses the opportunity to improve the existing fundamental rights structure of Frontex, and arguably rather weakens it. Firstly, and most importantly, the obligation for the Agency to establish an effective monitoring system for human rights stemming from the current Frontex Regulation was abandoned in the current Proposal.<sup>364</sup> Frontex's current Regulation includes a reference to the establishment of "an effective mechanism to monitor the respect for fundamental rights in all activities of the Agency".<sup>365</sup> Nevertheless, the envisaged roles of the Consultative Forum<sup>366</sup>, the FRO<sup>367</sup>, the Coordinating Officer<sup>368</sup> and forced return monitors<sup>369</sup>, fall short of the robust, efficient mechanism required to monitor activities and operations of the EBCG, as the latter will have an even broader mandate than Frontex. Nevertheless, it should be admitted that the obligatory submission of a report to the FRO on every return operation by the forced return monitor constitutes a positive amendment to the Proposal.<sup>370</sup>

As referenced above, the FRO and the Coordinating Officer do not bear the degree of independence, mandate and capacity required of a fundamental rights mechanism.<sup>371</sup> The Consultative Forum's tasks are limited to recommendations and consultations and will thus merely have an advisory role. On the basis of the final version, the FRO will no longer report to the Consultative Forum, but only to the Management Board.<sup>372</sup> Instead, the FRO will "cooperate" with the Consultative Forum which possibly constitutes a step backwards in terms of the independence of the FRO and the transparency of his/her activities, as the scope of this cooperation remains unclear. The FRO's obligation to report to the Consultative Forum should thus be added to the text separately, or as part of a description of the content of the duty to cooperate.

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<sup>364</sup> Ibid 7.

<sup>365</sup> Article 26a (1) Frontex Recast.

<sup>366</sup> Art 70 European Parliament Legislative Resolution.

<sup>367</sup> Art 71 European Parliament Legislative Resolution.

<sup>368</sup> Art 21 European Parliament Legislative Resolution.

<sup>369</sup> Art 28 European Parliament Legislative Resolution.

<sup>370</sup> Art 27 (5) European Parliament Legislative Resolution.

<sup>371</sup> Not the least because they are appointed respectively by the Management Board (art 61 (1)(r) European Parliament Legislative Resolution) and the Executive Director.

<sup>372</sup> Article 71 (2) European Parliament Legislative Resolution.

A robust, efficient mechanism would entail a Fundamental Rights Unit with a mandate to monitor the entirety of the EBCG's institutional and operational structure, possessing the necessary resources to be able to decide on its own working methods without any interference of the governing bodies of the EBCG or the Member States, supported by a professional and independent administration. Above-referenced recital 28b expressing the intention to continue to contribute to a solid fundamental rights strategy and allocating further resources to the FRO arguably does not amount to such mechanism, as it does not entail a commitment to establish a detailed structure for such mechanism, and, again, as a result of the uncertain status of recitals.

Finally, additional Fundamental Rights Officers should be provided for within the EBCG, including some with child protection profiles, in order to meet the needs of the expanded mandate and to ensure appropriate support for compliance with fundamental rights.

#### **Subsection V. Consultative Forum**

Following calls by human rights organisations, the legal framework around the Consultative Forum was altered to make provision for an independent Consultative Forum which shall have absolute access to all information relevant for the carrying out of its tasks, including information related to the respect of fundamental rights in all activities of the Agency.<sup>373</sup> In addition, an express safeguard was added to the framework by enabling the Forum to decide on its own working methods without any interference of the governing bodies of the EBCG.<sup>374</sup> The modifications to its structure regrettably do not go as far as to provide support by an independent administration with full authority, its individual financial resources, which is a prerequisite for its independent functioning. Furthermore, the mandate of the Forum should refer to assisting the EBCG as a whole and not only the ED and the Management Board.<sup>375</sup>

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<sup>373</sup> Articles 70 (1) and (5) European Parliament Legislative Resolution.

<sup>374</sup> Art 70 (2) European Parliament Legislative Resolution.

<sup>375</sup> Article 70 (1) European Parliament Legislative Resolution.

## Conclusion

It must be admitted, that the EU and its Border Agency are facing an enormous challenge. Wars, conflicts and persecution have forced more people to flee their homes and seek refuge and safety elsewhere than at any other time. In addition, contemporary migration is increasingly ‘mixed’, meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. Consequently, the flows cannot be addressed with blanket measures.

At the same time, the solidarity and willingness of nations to work together and share the burden is being tested. It is safe to say that the European answer, under the thumb of the Member States, has predominantly been a more restrictive Border Policy. This has led people to try to reach Europe in dangerous circumstances, often in overcrowded, unseaworthy, ill-equipped boats which may be piloted by smugglers who are indifferent to the passengers’ safety.

The objective of this thesis was to assess the role the EU Border Agency plays in the EU Border Policy and the impact it exerts on the human rights of the migrants trying to reach Europe. *Chapter II* confirmed that Frontex was created to serve as the EU’s Border Control Agency with a fitting border control focus and tasked with the mere facilitation of the cooperation between the national border guards. However, already from the start the role bestowed upon Frontex went beyond a mere facilitative role. In addition, Frontex’s activities involved a great deal of experimentation and crisis-driven reactive adaptation. Soon the Agency was planning, coordinating and implementing air, land and sea operations; providing emergency responses through European Border Guard Teams; assisting the Member States in the return of migrants and; is now greatly involved in the management of the ‘Hotspots’ in Greece and Italy.

With the fast broadening of its tasks, the Agency was compelled into gradually adding additional safeguards to its structure to ensure the upholding of human rights during border control activities. The in 2011 designated FRO and Consultative Forum did make considerable progress in mainstreaming the respect for human rights into Frontex’s activities. Nevertheless, due to their limited strength and competences they did not succeed in influencing the whole of Frontex’s structure and functioning. Let alone, that they would have succeeded in the setting up of a comprehensive fundamental rights monitoring mechanism.

The accountability aspect which goes hand in hand with human rights protection, has persistently been the ‘Achilles heel’ of the Agency’s structure. Furthermore, as the EU Border Agency engages in new operational activities with similar complex responsibility pictures, in particular in the ‘Hotspots’ and an increasing focus on partnerships with third countries, the accountability question becomes even more pressing. The untying of the accountability knot established that there are grounds to hold the Agency responsible for its involvement in operational activities, whether on the basis of having aided and assisted or in breach of its positive obligation to prevent human rights violations, and less so as a co-author due to the strict notion of effective control.

However, the actual problem lies in the implementation of accountability. First, this exercise is complicated because of lack of transparency on Frontex’s operational activities, which impedes the determination of which party involved has the control and command. Secondly, an individual trying to hold Frontex accountable for an alleged human rights breach, will encounter enormous difficulties in finding a forum available for obtaining redress.

After having studied the institutional framework, activities and human rights impact of the current EU Border Agency, Frontex, *Chapter III* analysed the EBCG Proposal put forward in 2015 in light of the findings which emerged from *Chapter II*. *Chapter II* showed that the ‘EU way to go’ about crises often has been the strengthening of the EU Border Agency. Yet, this time, the reinforcement of the Border Agency is meant to be more than a budget raise. It aspires to address the solidarity issue between Member States in controlling the common external borders. Where Member States are not cooperating, they may have to accept an Agency-led operation on their territory to manage the ‘illegal’ migration flows.

A key pillar of the solidarity plan is undoubtedly ensuring effective returns, building on the ‘Hotspot’ approach and the novel European Return Office. However, without access to adequate national reception and asylum systems, the intercepted and registered migrants cannot be sent anywhere. At the same time, receiving migrants remains a voluntary exercise and there are no signs of a sudden leap forward in the temporary relocation programme.



Whereas the perspective of an Agency operation on their territory might achieve an imposed solidarity among the Member States, it arguably fails to address much of the challenges the thesis identified in *Chapter II*. One of the primary issues remains implementation of accountability which allows the blameshifting between the involved actors in the event of alleged human rights violations in the context of Frontex's activities. To make sure individuals do not lose their means of redress, it is important to establish clarity in the delineation of responsibilities and make a clear commitment to transparency, which is arguably lacking in the EBCG Proposal. A great deal of effort seems to have been put in making as many references as possible to transparency, without entailing a clear obligation, in other words, a legitimising cloak, an observation which can be made with regard to respect for human rights in the whole Proposal. The fundamental rights approach proposed by the Commission is in no way commensurate to the new tasks and competences of Frontex. The Proposal may lead to a further blurring of responsibilities between Frontex and the Member States and therewith to increased difficulty to uphold human rights obligations.

Admittedly, it is not all doom and gloom. Human rights organisations and the Greens succeeded in deleting the possibility of the highly problematic 'mixed return operations'. In addition, the complaints mechanism is an important new feature which could possibly have an important influence in providing legal redress to victims of human rights violations within the context of Frontex operations. However, a great deal will depend on how the ED will tackle his task and how he will interpret the 'consultation' of the FRO. In other words, this novel mechanism would benefit from the presence of a strong, independent human rights structure, which is arguably not envisaged in the Proposal.

The more complex accountability picture is beyond doubt natural to 'multi-actor' operations. However, more potential lies within the EU legal system to cure the Border Agency's accountability complex. Whilst providing a complaints procedure is evidently a positive step in providing redress for individuals, more needs to be done to cure the Border Agency's accountability complex.

The establishment of the ‘new – rather, beefed up – Agency offers the perfect opportunity to start with a ‘clean slate’ and address the Border Agency’s structural shortcomings. This would not only benefit the migrants having allegedly been subjected to human rights violations, but no less importantly, the Agency, the Member States and their personnel, in having some clarity on their responsibilities and accountability, which is for instance much needed in the Greek Chios ‘Hotspot’. Subsequently, *Section II* formulated some recommendations on how the future Regulation and Agency could address some of the remaining challenges.

On a more general note, the limited or at least inefficient legal means of immigration to Europe to seek refuge and reinforcing of external border controls, will more likely lead migrants to make use of alternative, longer and riskier routes and means, or ‘trap’ them in transit countries at the borders of the EU with often poor human rights records, rather than to deter them from trying to reach Europe. Providing incomplete solutions, prompted by the urge to reinforce the national and EU external borders together with the reluctance to provide internal solutions, will probable merely exacerbate the EU migration situation, for migrants and the European Union, not the least because of the high financial cost of the current restrictive Border Policy.

It seems that the European Union with universal values of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms, based on the principle of democracy and the principle of the rule of law, got disconnected from the latter. These norms and values, which go hand in hand with the concept of the Schengen area, are one of the greatest achievements of the EU. We should thus re-evaluate some of the choices which have been made in the area of the EU Border Policy and its Agency and swap the blameshifting tendency for a burdensharing energy, including transparency in accountability arrangements and genuine solidarity among receiving States.

However, as long as the Member States and their interests reign within Frontex and the broader field of Home Affairs it is unlikely that the legitimacy which it needs will be acquired. Until now we have only seen proposals concerning the field of border control, trying to stem the flow of migrants instead of viable long term strategies for a responsible, humane response to the crisis at its borders, also focusing on the field of asylum.

*“If we develop, regulate, organise mobility we will have, in the long run, much better results. But for that we need political leadership to happen. We need people who are able to say to that Sun journalist, “You are wrong and you should know that” “– F. CRÉPEAU in The Guardian of 22 April 2015*

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