Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea

Anneliese Baldaccini*

1. Introduction

The establishment of migration control measures in areas beyond State borders is part of the EU border management strategy. These measures are implemented by individual Member States and in joint operations involving several EU States and/or third States coordinated by Frontex, the EU Border Agency. The current focus of EU policy is particularly the reinforcement of border protection and management along the EU’s southern maritime borders, where in recent years the pressure of irregular migration from North African and Sub-Saharan countries has been growing, as has the death toll of migrants attempting the journey on unseaworthy boats.¹

This paper will assess Frontex’s sea operations and consider the legal and jurisdictional aspects of maritime border control as operated by this Agency. EU cooperation in this area is based on operational plans but also involves Community law and international obligations that are binding on Member States. There are special concerns for human rights protection in connection with Frontex-led sea operations. These arise from the fact that it is not clear how the guarantees and protections under the EU legal framework can be applied to joint border operations, or how compliance with international obligations with regard to the conduct of these operations and the handling of

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* Anneliese Baldaccini was previously a Committee Specialist for the House of Lords Select Committee on the European Union, in which capacity she helped prepare its report on *Frontex: The EU External Borders Agency* (March 2008). The views expressed herein are personal to the author.

¹ The International Centre for Migration Policy Development (ICMPD) has estimated that some 100,000 to 120,000 irregular migrants coming from sub-Saharan Africa, the south and east Mediterranean and other, mainly Asian and Middle Eastern countries, cross the Mediterranean each year. Further estimates indicate that over the last decade a total of at least 10,000 persons have died trying to cross the Mediterranean and reach Europe’s southern shores: ICMPD, *Irregular transit migration in the Mediterranean—some facts, futures and insights* (Vienna, 2004).
migrants who are intercepted and rescued at sea can be monitored. There are also questions as to the extent to which Frontex, as an Agency of the EU, is itself responsible for ensuring that operations are respectful of human rights. The common wisdom is that Frontex is a technical actor with a focus on coordination and facilitation and that the overall responsibility for protection of the external borders still rests firmly with the Member States. However, Frontex’s mandate and governance structure, and its practice, suggest otherwise. While Frontex has clearly not (yet) taken over responsibility for guarding the external EU borders, the establishment and development of Frontex does represent a shift in the exercise of powers which are traditionally the domain of the State, without there being the same degree of legal and political accountability that Member States’ authorities would be subjected to in the domestic sphere. The lack of clarity and transparency regarding the exact scope of Frontex’s coordinating role, and the way in which Frontex operations are conducted make it difficult to establish which authority can ultimately be held responsible by an individual. In addition, when sea operations are shifting further beyond the external EU borders – into the high seas or the territorial waters of third countries – the very possibility of legal protection of an individual becomes chimical.

2. The establishment of Frontex, the EU Border Agency

Frontex, the EU Border Agency, was established on 1 May 2005 by Council Regulation 2007/2004, and started work on 3 October 2005. It is an Agency of the Community with headquarters in Warsaw. Its main task is to co-ordinate joint operations by Member States at the external sea, land and air borders of the EU. Other tasks specifically set out in the Regulation concern the training of border guards, undertaking risk analysis, the development of research relevant for control and surveillance of external borders, technical and operational assistance to Member States at the external borders, and support for Member States in joint return operations. The Agency is led by an Executive Director and a Management Board and is endowed with a budget.

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3 Regulation 2007/2004 Article 2(1).