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## Introduction

### 1.1 Frontex Border Agency in an EU Legal and Political Setting

Immigration is increasingly perceived as an economic and cultural risk to European Union (EU) society. Populist parties across the EU are flourishing, and they reflect political pressures which are volatile and significant. Efforts designed to control irregular migration have been prioritised on both national and EU political agendas. In 2004, the EU established Frontex Border Agency (hereinafter Frontex or the Agency) with the aim of ensuring Member State operational cooperation at the EU's external borders and curbing flows of irregular migrants in the framework of an EU common policy. Frontex's border control practices – through which the EU and its Member States aim to prevent irregular migrants from entering EU territory – are now very salient in political, societal and legal dimensions. Yet measures taken to alleviate security concerns date from a time well before 2004, and this fuller context constitutes the political milieu out of which Frontex has grown. The entry into force of the Treaty of Amsterdam, integrating the Schengen *acquis* into the framework of the EU, has given the EU powers to develop policies on asylum, immigration and border control. Additionally, policy developments since the 1999 European Council meeting in Tampere have focused on the importance of ensuring the surveillance of external borders and the management of migratory flows.<sup>1</sup> The European Council in Tampere identified the development of common rules on asylum and immigration as a policy priority for the building of an Area of Freedom Security and Justice in the

<sup>1</sup> European Council, Tampere 15 and 16 October 1999, 16/10/1999, No. 200/1/99. See also European Council, Laeken, 14 and 15 December 2001, 14/12/2001, No. 300/1/01; European Council, Seville, 21 and 22 June 2002, 24/10/2012, No. 13463/02; European Council, Thessaloniki, 19 and 20 June 2003, 1/10/2003, No. 11638/03; European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ 2005 No. C53, p. 1; and European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens', 2 December 2009, OJ 2010 No. C115, p. 1.

EU.<sup>2</sup> Recently, in its Communication ‘The Global Approach to Migration and Mobility’, the European Commission reiterated the importance of preventing and reducing irregular migration and trafficking in human beings in the context of developing the external dimension of the EU’s Area of Freedom Security and Justice.<sup>3</sup>

Clearly, though, a preoccupation with security must not be the only EU priority in the management of irregular migration. The EU and its Member States are bound by protection obligations towards third-country nationals, and the permutations of these commitments must be scrutinised and kept clearly in view. International law and EU law uphold a framework of protection for those individuals trying to escape persecution and ill treatment. The prohibition against returning individuals to non-EU countries where they may be at risk – the so-called principle of non-refoulement – is at the core of the protection regime and must inform the policy choices of the EU as a whole. According to the EU Treaties,<sup>4</sup> the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.<sup>5</sup> Specifically, the Treaty on the Functioning of the EU requires the EU to develop a common policy on asylum in order to deal with any third-country national requiring international protection and to ensure compliance with the principle of non-refoulement.<sup>6</sup>

Given this legal and political setting, Frontex’s mandate is that of a specialist EU body responsible for managing operational cooperation at the EU’s external borders. It supports Member States’ border control activities. According to the Frontex Regulation, Frontex must carry out risk analysis so that the EU and its Member States can improve the management of the external borders; provide training at the EU level for national instructors of border guards; develop relevant scientific research; manage lists of technical equipment provided by the Member States; provide assistance in organising joint return operations; and

<sup>2</sup> The European Council brought this matter up at its meeting in Tampere because net migration to Europe rose to over 700,000 in 1999, having declined over the previous decade. See H. Brückner and Others, ‘Managing Migration in the European Welfare State’, [www.frdp.org/upload/file/paper1\\_23jun01.pdf](http://www.frdp.org/upload/file/paper1_23jun01.pdf) (accessed 13 November 2015), 5.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: ‘The Global Approach to Migration and Mobility’, COM (2011) 743 final.

<sup>4</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2010 No. C83, p. 1.

<sup>5</sup> Article 2 of the Treaty on European Union (TEU).

<sup>6</sup> Article 78 of the Treaty on the Functioning of the European Union (TFEU).

facilitate operational cooperation between Member States and third countries. In 2011, the Frontex Regulation was amended by Council Regulation (EU) 1168/2011 so as to enhance the role of Frontex and bring it into line with a policy objective of introducing an integrated management of the external borders of the Member States.<sup>7</sup> Importantly, Frontex's control of the EU's external borders presently extends to coordinating joint operations at land, sea and air borders. Joint operations consist of the deployment of additional border guards and technical equipment to those EU border areas that are under significant pressure. The aim is to prevent third-country nationals circumventing border controls at the EU's external borders by making border checks and carrying out border surveillance. Such activities may involve a refusal of entry to EU territory, or the interception of third-country nationals before they reach the EU's borders, or a refusal of onward passage. It is in the realm of these activities that the potential for violating the principle of non-refoulement arises (notably, if individuals are returned to territories where they may be at risk). Frontex's activities have intensified within the mandate outlined, and this, in turn, intensifies the need to address persistent areas of contradiction or potential risk which pertain to the Agency's legal setting. One such problem arises from the Agency's increasing dependence on Member States' contributions in terms of equipment and deployed personnel. Another is an inadequate self-monitoring mechanism relating to compliance with fundamental rights obligations which has generated concerns with the European Ombudsman and which may adversely affect Frontex's operations. A further unresolved issue involves the risk that the Agency's support of border control activities conducted by third countries with poor human rights records may call into question the legality of its action in the external sphere. There is also a need to deal prudently with pressure

<sup>7</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 OJ 2004 No. L349, p. 1 as amended by Regulation (EC) 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers OJ 2007 No. L199, p. 30 and by Regulation (EU) 1168/2011 of the European Parliament and the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union OJ 2011 No. L304, p. 1 (hereinafter the Frontex Regulation). Article 1 of the Frontex Regulation. I will analyse the concept of integrated border management in Chapter 2, Section 2.2.2.1.

and questions as to whether Frontex should be more urgently involved in search and rescue at sea operations in a climate intensified by the rising number of migrants dying in failed bids to cross the Mediterranean.

At first sight, control of the external borders of the EU seems to have a strictly territorial dimension. According to the Schengen Borders Code, which contains the rules governing the movement of persons across EU borders, the control of the external borders consists of border checks carried out at border crossing points and ‘surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours’.<sup>8</sup> The intensification of Frontex’s joint operations has contributed to moving the borders of the EU.<sup>9</sup> In some instances, the borders have moved from the territorial borders of the Member States to the high seas where Frontex’s joint operations take place. In other instances, the EU’s borders are now sometimes within the territories of third countries – a process facilitated by working arrangements between Frontex and third countries, by international agreements between Member States and third countries, and by Frontex’s contribution in setting up the EU’s Network of Immigration Liaison Officers (ILOs), operating in the territories of third countries. ILOs consist of Frontex’s officers deployed in third countries with the aim of collecting information for operational use and identifying third-country nationals.<sup>10</sup>

Defining the EU’s borders for the purposes of Frontex’s joint operations is essential to effectively examine the application of the principle of non-refoulement, since it is the attempt to enter the EU that gives meaning to the prohibition of refoulement. Patrolling the territorial waters, the contiguous zone and the high seas entails preventing irregular migrants from reaching the territories of the EU. Also, by virtue of agreements with various third countries, Member States are allowed to patrol their territorial waters whose shores border the Mediterranean in order to prevent the transit of irregular migrants towards the EU. This has been part of joint operations.<sup>11</sup> It is also

<sup>8</sup> Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 No. L105, p. 1, Article 2 (10) and (11).

<sup>9</sup> For a detailed analysis of other factors contributing to the moving of the borders of the EU, see Jorrit J. Rijpma and M. Cremona, ‘The Extra-Territorialisation of EU Migration Policies and the Rule of Law’ (2007) *EUI Working Papers Law*, 2007/01.

<sup>10</sup> European Parliament and Council Regulation (EU) 493/2011 of 5 April 2011 amending Council Regulation (EC) 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network OJ 2011 No. L141, p. 1.

<sup>11</sup> See Joint Operation Hera I and Joint Operation Hera II 2006, [www.frontex.europa.eu](http://www.frontex.europa.eu) (accessed 13 November 2015).

possible that in the future there will be agreements on joint operations between the EU and the third countries whereby the Member States' border guards will be deployed in third countries' territories with the aim of apprehending irregular migrants. Such arrangements may be made in the context of operational cooperation through Frontex. In this respect, the Frontex Regulation states that Frontex 'shall facilitate the operational cooperation between Member States and third countries' and that 'when concluding bilateral agreements with third countries ... Member States may include provisions concerning the role and competencies of the Agency'.<sup>12</sup> The aim of these arrangements is to prevent irregular migrants crossing EU borders. Any action which results in returning individuals to territories where they may be at risk may trigger the application of the principle of non-refoulement.

## 1.2 Aim and Scope

Within this context of broader, unresolved difficulties, my book examines the legal setting for joint operations between Frontex Border Agency and the EU Member States – operations which may result in push-back of third-country nationals trying to reach EU borders to countries where they may experience persecution, torture and other ill treatment in violation of the principle of non-refoulement. The book's abiding question is this: 'Which precise legal circumstances may expose the EU and its Member States to incurring responsibility for breaches of the principle of non-refoulement in Frontex's joint operations?'

What characterises joint operations under Frontex's auspices is that they enact a complex interdependence between the EU and its Member States. The media frequently reports push-back operations which occur off the coasts of Malta and Italy and at the Greek–Turkish border.<sup>13</sup> In many cases, it is alleged that push-back operations take place in the context of joint operations coordinated by Frontex. For instance, in December 2012 it was reported by the media that Syrian refugees, leaving Syria during the uprising against the rule of President al-Assad, tried to cross the Evros River into northern Greece. Without being registered, they were pushed back into Turkey by Greek border guards, thus facing the risk of being sent back to Syria. This push-back seems to

<sup>12</sup> Article 14(1) and (7) of the Frontex Regulation.

<sup>13</sup> *Human Rights Watch*, 30 January 2014, [www.hrw.org](http://www.hrw.org) (accessed 13 November 2015); *MaltaToday*, 9 July 2013 [www.maltatoday.com](http://www.maltatoday.com) (accessed 13 November 2015).

have taken place in the context of a joint operation coordinated by Frontex.<sup>14</sup> At issue here are various forms of legal exposure: and while the vulnerability and legal standing of irregular migrants garner media attention and loom largest in popular consciousness, this book focuses on the insufficiently scrutinised network of legal responsibility of the EU and its Member States related to the plight of these people.<sup>15</sup> I also wish to emphasise that the purposes of my book are not punitive. My analysis is not a prosecutorial search for specific infractions committed by Frontex, the EU or the Member States. The premise is that violations of the principle of non-refoulement *may* occur during Frontex's joint operations and that they *may* trigger the responsibility of the EU and of the Member States – and that these risks remain high unless the legal setting is sufficiently studied, applied and, if need be, reformed. A vital

<sup>14</sup> *The Guardian*, Friday 7 December 2012, [www.theguardian.com](http://www.theguardian.com) (accessed 13 November 2015).

<sup>15</sup> Until now, this topic has only been explored to a rather limited extent in the literature dealing with the principle of non-refoulement; see e.g., V. Moreno Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-refoulement in EU Law' in M.C. Foblets and P. De Bruycker (eds.), *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011); Efthymios Papastavridis, 'The EU and the Obligation of Non-refoulement at Sea' in F. Ippolito and Seline Trevisan (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press, 2016) and in works dealing with Frontex border control activities see J. Rijpma, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (DPhil thesis, European University Institute, 2009); and J. Rijpma, 'Frontex: Successful Blame Shifting of the Member States?' (2010), [www.realinstitutoelcano.org](http://www.realinstitutoelcano.org) (accessed 13 November 2013); and E. Papastavridis, '“Fortress Europe” and Frontex: Within or Without International Law?' (2010) 79 *Nordic Journal of International Law* 75; J. Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and Its Inherent Tensions: The Case of Frontex' in M. Busuioac, M. Groenleer and J. Trondal (eds.), *The Agency Phenomenon in the European Union – Emergence, Institutionalization and Everyday Decision-making* (Manchester University Press, 2012). Some very valuable contributions map extraterritorial migration-control mechanisms (including Frontex's border control activities) in connection with possible breaches of human rights and refugee rights, in particular the principle of non-refoulement, but they do not focus on a specific border control mechanism; see the contributions in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010); T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011); and M. den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012). Specifically on the European readmission policy, see N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff, 2009). In a 2011 article Guy S. Goodwin-Gill has specifically addressed the issue of the responsibility of Frontex and Member States and the principle of non-refoulement in the context of interception at sea; see G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement' (2011) 23 *International Journal of Refugee Law* 443.

complementary thread running through my analysis of international responsibility is my examination of the specificities of Frontex's mandate which endeavours to further our understanding of the legal position of the EU vis-à-vis the management of its external borders.

A comprehensive approach is adopted in addressing the book's abiding question, cited above. Structurally, this involves the use of sub-questions. First, the book looks at the underlying reasons for the establishment of operational cooperation at the external borders of the EU. The focus is on how Frontex Border Agency was shaped and defined by the setting up of a common policy on external border control in the fast-developing EU Area of Freedom Security and Justice. This part of the book also addresses the way Frontex's joint operations are structured in order to understand the circumstances in which the EU and its Member States may incur responsibility for violations of the principle of non-refoulement.

Second, inter-dependent questions are studied. Since Frontex's joint operations bring together the EU and its Member States, should responsibility for joint operations fall upon the EU (via its agency, Frontex), the involved Member States or both? Frontex is an EU body and its mandate is to enable Member States in their exercise of border controls at the EU's external borders. Since such external border control activities may directly result in individuals not reaching Member State territories to submit asylum applications, the question of the EU's responsibility – via Frontex – matters significantly. On this point, the Frontex Regulation provides that 'the responsibility for the control and surveillance of external borders lies with the Member States'.<sup>16</sup> However, Frontex's operational capabilities have been strengthened, especially since the adoption of the amendments to the Frontex Regulation. Frontex's mandate now seems to entail more than the simple coordination of joint operations. This concern was recently expressed by the Parliamentary Assembly of the Council of Europe with these words:

A dangerous mindset still exists which views Frontex's activities as being no more than those of Member States, with responsibilities lying with individual Member States and not with the Agency. While progress has been made in accepting that this is not always the case, the recourse to this argument is still too frequently made when looking at issues involving human rights responsibilities.<sup>17</sup>

<sup>16</sup> Article 1(2) of the Frontex Regulation.

<sup>17</sup> Parliamentary Assembly of the Council of Europe, 'Frontex: Human Rights Responsibility', Resolution 1932 (2013); see also 'Frontex: Human Rights Responsibility', Recommendation 2016 (2013).

Thus, a vision much clearer than this ‘mindset’ and a fuller understanding of who may be responsible for breaches of human rights and refugee rights in the context of joint operations are necessary.

Third, consideration is given to push-back operations which, if they occur, may have the potential to trigger EU and Member State responsibility if they result in the return of an individual to a territory where he or she is likely to face persecution, torture or other ill treatment in violation of the principle of non-refoulement. This principle is included in both international human rights instruments and EU primary and secondary legislation. This plethora of legal sources embodying the principle of non-refoulement prompts an investigation of what the principle consists of in EU law and whether protection against refoulement is ensured in the specific relevant legislation on Frontex’s joint operations. The principle of non-refoulement acquires particular relevance in the case of Frontex’s joint operations, since Frontex’s action is carried out in different legal regimes (i.e. from the territories of the Member States to, potentially, the territories of third countries). An analysis of the extent to which protection is provided pursuant to the principle in the different legal regimes sheds light on the obligations of the EU, through Frontex, and the Member States when carrying out such operations. Moreover, EU legislation on Frontex’s joint operations and external border control, especially after the 2011 amendments, indicates the importance of the principle of non-refoulement when joint operations are carried out by Frontex and the Member States: ‘the mandate of the Agency should therefore be revised while ensuring that all measures . . . fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement’.<sup>18</sup>

### 1.3 Structure of the Book

By examining the tension and interplay between intergovernmentalism and supranationalisation in the EU, Chapter 2 explores the impetus for setting up a common policy on external border control through an analysis of EU policy papers. Additionally, this chapter examines the competence of the EU to establish the common policy, juxtaposing this with what I have chosen to term ‘safeguard clauses’ of Member State sovereignty. Chapter 2 offers an analysis of the EU common policy that includes the relevant features of operational cooperation at the external

<sup>18</sup> Recital 9 of the Frontex Regulation.



borders through Frontex. The first of the aforementioned sources of legal risk and compromise – Frontex’s escalating reliance on Member States’ contributions – is a dynamic which is illustrated throughout the chapter.

Chapter 3 builds upon Chapter 2’s definitions of the legal and political framework and examines the legal and political interests which have specifically shaped Frontex’s present role. It achieves this by: (i) drawing upon the division of competence between the EU and its Member States illustrated in Chapter 2; (ii) examining the structure of Frontex, including an analysis of its legal personality and the structure of the joint operations it carries out; (iii) analysing the current relevant features and future directions of the European Border Guard Teams. The European Border Guard Teams are pools of border guards seconded by Member States and deployed in Frontex’s joint operations. The teams contribute to the implementation of operational aspects of external border management at land, air and sea borders. Chapter 3 offers an account of the Member States’ interests which illustrates their involvement and responsibility for the establishment of Frontex and the development of its mandate as of when the relevant legislation was drafted. The problematic presence within Frontex’s structure of a ‘self-monitoring’, inadequate mechanism of compliance with fundamental rights obligations is presented and analysed in this chapter.

Chapter 4 considers the potential responsibility of the EU and its Member States for internationally wrongful acts and draws upon two different bodies of law: public international law and EU external relations law. After examining the issue of the EU’s legal personality, I proceed in this chapter to identify the most suitable approach in establishing the EU’s responsibility. The choice is between the organic model of attribution and the competence model of attribution. After arguing in favour of the traditional organic model as reflected in the International Law Commission’s Article on Responsibility for International Organisations, I apply this model by examining the responsibility of the EU and its Member States by attribution via Frontex, studying cases of derivative responsibility pertaining to the EU for the internationally wrongful acts of its Member States. The analysis explores a theoretical problem: How *may* the EU and its Member States be held accountable should any violation occur in Frontex’s joint operations? Conversely, the chapter does not seek to assess EU/Member States’ responsibility by attempting citations of any previous violations tied to specific operational circumstance. The third legally problematic dynamic impacting Frontex’s activity – potential

support by the Agency for border control activities conducted by authorities of third countries with poor human rights records – is analysed in this chapter.

Chapter 5 analyses the interconnection of international law sources and EU law sources in order to examine what constitutes the principle of non-refoulement in the EU setting, whereas Chapter 6 examines the juridical space in which a State is responsible for ensuring that an individual is protected against return to persecution, torture or other ill treatment by analysing the relevant provisions of international law sources and case law. The international law sources include the 1951 Convention relating to the Status of Refugees, the Convention against Torture, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.<sup>19</sup> This chapter also examines whether the principle of non-refoulement is customary international law. Additionally, the chapter studies the nature of protection from refoulement afforded by EU legislation concerning Frontex's joint operations. The EU's legal sources include the EU Treaties, the general principles of EU law, the EU Charter of Fundamental Rights, the Schengen Borders Code, the Frontex Regulation and the EU Sea External Border Regulation.<sup>20</sup> Both Chapters 5 and 6 consider the conflicting EU priorities of security and border control, on the one hand, and protection of third-country nationals escaping persecution, on the other hand.

Building upon the analysis conducted in Chapters 5 and 6, Chapter 7 analyses the interaction between the legal regime for search and rescue at sea and the principle of non-refoulement. A section of the chapter is devoted to illustrating the problems related to any possible increased involvement of Frontex in search and rescue at sea operations. These issues constitute the fourth problematic legal dynamic affecting Frontex's activity underpinning the book's argument.

<sup>19</sup> 1951 Convention relating to the Status of Refugees (189 UNTS 137); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85); 1966 International Covenant on Civil and Political Rights (999 UNTS 171); 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (213 UNTS 222).

<sup>20</sup> Charter of Fundamental Rights of the European Union OJ 2010 No. C83, p. 1; Regulation (EU) 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 OJ 2014 No. L189, p. 93.