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**Keywords:**

Irregular migration, EU border control, Maritime security, Frontex

## Executive Summary

A consensus is emerging across Europe that the EU needs a much more effective and coordinated maritime border control policy, enabling national and EU law enforcement and counterterrorism agencies to work more closely in tackling emerging threats and challenges. Policymakers stress that more effective border controls and maritime security depend both on new equipment and enhanced operational capabilities, as well as on achieving tighter cooperation and interoperability between maritime players within each nation and in coordination with EU agencies. For the first time, almost all nations now agree that the maritime environment must become a controlled one, similar to air space. This represents a substantial shift in thinking.

Migratory pressures on the southern European border pose a tremendous challenge to European policymakers. So far, the development and strengthening of the EU border-management strategy has been framed at the official level as a key policy priority on the EU agenda. The EU has managed to construct the first generation of Integrated Border Management (IBM). This includes a common codification of the *acquis* on internal and external borders, the Schengen Borders Code; the creation of Frontex, an EU agency tasked with coordinating operational cooperation between Member States in the field of border security; and a commonly agreed definition of what IBM means at a European level.

The EU model of border management defines Frontex as the main institutional actor in charge of putting the integrated and global paradigm into practice. Frontex encapsulates the need to have a common European approach and to promote European solidarity in addressing the challenge of irregular migration.

## Introduction<sup>1</sup>

Border security has taken on a Community dimension. National border authorities in Europe are being challenged as never before. This is mainly the result of the new political, social, economic and security-related phenomena that Europe has faced in the past 10–15 years. These include a growth in migration, increased international travel and international trade, and heightened security demands, especially since 11 September 2001.

Hundreds of millions of people are now travelling around the world. Geopolitical instabilities in poor regions, as well as religious and ethnic conflicts, are increasing in number and scale. The external borders of the European Union are crossed by more than 300 million travellers a year and this trend is growing. The EU is one open area of free movement, which means that some countries control sections of the EU's external borders on behalf of others. The United Nations Population Division estimates that in 2010 the number of migrants in the world, defined as persons residing outside their country of birth or citizenship, equalled 214 million. As of 2007, there were 18.5 million immigrants from outside the EU—third-country nationals—legally established in the 27 EU countries, representing about 4% of the total population. As for irregular immigration<sup>2</sup> into the EU, the European Commission estimates that there are at least 4.5 million irregular immigrants spread across the EU. Each year authorities in EU countries apprehend about

<sup>1</sup> I am deeply grateful to Dr Maria Gianniou, one of the most talented research assistants with whom I have worked.

<sup>2</sup> The terms 'irregular migration' and 'migrant workers in irregular status' are the preferred terms increasingly accepted by the International Labour Office (ILO) and other international organisations, while 'illegal' is considered to have a negative connotation. Although the EU uses both terms, in this paper we use 'irregular' throughout.

500,000 irregular immigrants within EU territory. About 40% of them are sent back to their home countries, or to the countries from which they travelled to the EU.<sup>3</sup>

It should be noted, however, that the nature of irregular migration makes it extremely difficult, if not impossible, to find accurate data. The enormous range of figures produced by those attempting to estimate the numbers indicates their unreliability. Therefore, all estimates in this area must be considered with extreme caution.<sup>4</sup>

According to a 2007 report to the European Parliament by the United Nations Refugee Agency (UNHCR), as many as 120,000 migrants are able to enter the EU illegally each year. Immigration affects Member States differently. Some have no external borders other than their airports; others, the Mediterranean Member States in particular, are, by their position, vulnerable to illegal immigration on a scale with which they can barely cope. In terms of migratory pressures at the sea borders, Spain registered 16,000 illegal border crossings in 2008, Malta 2,000, Italy 35,000 and Greece 32,000, while figures for other Member States were negligible. Current migration trends suggest that special focus needs to be placed on the EU's southern maritime borders to achieve integrated border-management structures that can safeguard one of the most tangible and appreciated benefits the Community has brought to its citizens: the free movement of people.

This paper will address not only the principles which should guide the involvement and activities of Frontex, but also whether the overall political mandate and the operational

<sup>3</sup> European Commission, *An Opportunity and a Challenge: Migration in the European Union*, Publications Office of the European Union (May 2009), 10.

<sup>4</sup> International Labour Office, *International Labour Migration: A Rights-based Approach* (2010), 32.

planning and contingencies need to be better defined and extended. At the same time the paper will assess a number of possible proposals and recommendations—organisational, operational and technical—for the development of the Mediterranean area into a space of security and safety in accordance with fundamental human rights, the principles of democracy and the rule of law.

## The Mediterranean maritime border environment

### General characteristics and challenges

A recent Eurostat survey on key figures for coastal regions and sea areas reveals that the length of the coastline for the 22 EU Member States with a sea border is estimated to be 136,106 kilometres. These coastal regions are the home territory for 43% of the European population that lives by the sea.<sup>5</sup>

On its southern borders, the European coastline is 34,109 kilometres long.<sup>6</sup> The Mediterranean, Europe's largest shared sea, constitutes a source of both prosperity and turmoil as people and goods shuttle back and forth daily. Nearly 25%

<sup>5</sup> Eurostat, Unit E1, Agro-environment and Rural Development, *Nearly Half of the Population of EU Countries with a Sea Border is Located in Coastal Regions*, Statistics in Focus 47/2009. The survey also underlined that Malta has the highest population density.

<sup>6</sup> United Kingdom, House of Lords, European Union Committee, *Frontex: The EU External Borders Agency*, 9th Report of Session 2007–8 (2008), 17.

of the world's sea-borne oil traffic and 30% of the world's sea-borne trade transits through its waters.<sup>7</sup>

At the same time, through its geographic position, the Mediterranean constitutes a maritime border for Europe, Asia, the Middle East and Africa, and is a strategic seaway for the increasingly trans-boundary nature of regional and international activities. The Mediterranean EU Member States and the EU as a whole are consequently exposed to a number of challenges and threats affecting their security and internal stability, such as ongoing armed conflicts; terrorism; trafficking in humans, drugs, conventional weapons and weapons of mass destruction; and irregular migration flows.

The recent political upheavals in the Arab world have underlined the importance of this proximity factor: societal change in the Maghreb and the Middle East has had a number of effects on Europe. The past few months have demonstrated that the EU must find ways to deal with a possible disruption in oil supplies and cope with a renewed wave of irregular migrants and asylum seekers. At the same time it must elaborate a revamped regional response that provides the means to cooperate with its southern partners in light of the as yet unknown political, social and economic outcomes.

<sup>7</sup> European Commission, *Towards an EU Integrated Maritime Policy and Better Maritime Governance in the Mediterranean: Questions and Answers* (2009), accessed at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/387&format=HTML> in May 2011.

## Reinforced southern maritime borders

All of this accentuates more than ever the need to reinforce the management of Europe's southern maritime borders. This idea is not new. In 2006 the European Commission published a communication calling for 'immediate and decisive action at both national and European levels, in order to safeguard the Schengen system'.<sup>8</sup> An effective managerial system should, therefore, incorporate the integrated management of all European external borders; a common body of legislation; operational cooperation between Member States; and, above all, respect for the principles of solidarity, mutual trust and co-responsibility.

This should be achieved through concrete actions and productive dialogue, not only among European states but also between the Mediterranean EU states and their southern partners. Moreover, increased migratory pressures on Europe's southern flank are complicated by the Mediterranean EU Member States' current economic crises. This is particularly evident in Greece.

Even if these financial developments might temporarily discourage migration, a trend in this direction has not yet been observed and is unlikely to occur. The general social and economic well-being of the European model still constitutes an attractive pull factor for potential asylum seekers and irregular immigrants. A sound European immigration policy should not only be oriented towards the protection of its external borders, but should also address the roots of the problem, the push factors that force people to migrate.

Management of Europe's Mediterranean borders is currently based on a set of principles and objectives set out by the European Commission in its 2006 communication.

<sup>8</sup> European Commission, *Reinforcing the Management of the European Union's Southern Maritime Borders*, Communication, COM(2006) 733 final (30 November 2006), 3.

The recommendations given outline a process aimed at securing Europe's border. In this respect, special attention is paid to the upgrading of Frontex and to the need to provide the agency with the necessary means to produce more targeted risk analyses and to become more effective. This means providing access to information, pooling of technical equipment under the agency's management, cooperating with international organisations, and continuous control and surveillance operations in the Mediterranean.

The European notion of an integrated border-management platform is dependent on the creation of specific tools such as a permanent coastal patrol network, regional command centres, a common European surveillance system, a pool of available experts and so on. At the same time, the use of European funds should be maximised, with particular priority given by the European Commission to the definition and determination of the preferred methods for intercepting vessels at sea.<sup>9</sup>

## Irregular migration and trafficking: the situation today and future trends

During 2010 a total of 104,049 detections of illegal border crossings were registered at Europe's external land and sea borders, about the same as was recorded for 2009. Compared with 2008, when the number of illegal detections reached

159,092, the lower levels of 2009 and 2010 are practically identical. It is, however, interesting to note that 2010 was marked by visa liberalisation in the Western Balkans, a consequent increase in passenger flows and a considerable divergence in modus operandi as far as irregular migration routes are concerned. This suggests that immigration patterns are neither homogenous nor unique as far as concerns the origins of migrants, their chosen routes, the differentiation between economic immigration and asylum seekers, and so on.

### Shifting migration trends

Migration trends in the greater Mediterranean region are not the same as they were years ago, but have shifted from the western to the eastern part of the basin: irregular migration towards Europe through western Africa has considerably decreased while an abrupt increase in migration flows has been recorded in the Eastern Mediterranean, particularly at the Greek–Turkish land border. In 2010 Greece became the EU country receiving the greatest bulk of irregular immigrants and asylum seekers, and Turkey became the main transit country.<sup>10</sup>

The land and sea border between Greece and Turkey represents Europe’s main challenge in dealing with irregular migration. Between 2009 and 2010 detected illegal border crossing by migrants who intended to transit Greece to settle in other Member States increased by 45%. In 2010 alone Greek authorities reported 47,706 detentions at the land border with Turkey. In the Canary Islands, by comparison, the highest number of detentions ever recorded

<sup>9</sup> Ibid.

<sup>10</sup> Frontex, *Annual Risk Analysis 2011* (April 2011), 5.

was 30,000 in 2006, and the highest on the island of Lampedusa in Italy was 31,000 in 2008.<sup>11</sup>

**Table 1 Frontex Risk Analysis Network (FRAN) indicators**

	2008	2009	2010	% change over a year ago
<b>Illegal entries between BCPs<sup>12</sup></b>	159,092	104,599	104,049	-0.5%
<b>Clandestine entries at BCPs</b>	-	296	242	-18%
<b>Facilitators</b>	9,881	9,171	8,629	-5.9%
<b>Illegal stays</b>	441,230	412,125	348,666	-15%
<b>Refusals of entry</b>	121,294	113,029	108,500	-4.0%
<b>Applications for asylum</b>	223,180	219,814	203,880	-7.2%
<b>False travel document users</b>	-	7,872	9,439	20%
<b>Returns (for 10 Member States)</b>	-	65,828	74,110	12%
<b>Other indicators</b>				
<b>Visas issued</b>	13,493,948	12,486,676	-	NA
<b>Passenger flow</b>	713,000	660,000	-	NA

Source: Frontex, *Annual Risk Analysis 2011*, 9.

<sup>11</sup> Ibid., 14.

<sup>12</sup> ‘BCP’ stands for ‘border crossing point’.

Currently, Mediterranean EU states are finding themselves under intense pressure. The events of the past few months in the basin's southern states have not only generated hope for a better future based on respect for democracy and human rights, but have also caused a wave of people to flee towards Europe to escape economic insecurity in North Africa. Italy, Malta, Greece and Cyprus are directly exposed to these migratory pressures and are called upon to deal with both irregular migrants and asylum seekers needing international protection. The efforts to deal with this pressure should not be limited to measures taken on a national level, but should be supervised and sponsored by the EU as a whole, according to the spirit of European solidarity.

This is not going to be easy. By April 2011 more than 23,000 people had arrived on the island of Lampedusa from Tunisia,<sup>13</sup> while the number of people leaving Libya destined for Europe and other non-EU countries, mainly Tunisia and Egypt, increases by the day.<sup>14</sup> In 2011, 650,000 people left Libya to escape violence and conflict. The European Commission estimates that a great number of these people are economic immigrants and should be returned to their countries of origin.<sup>15</sup> At the same time, measures should be taken to help refugees, asylum seekers and temporarily displaced persons who are in genuine need of protection.

<sup>13</sup> During winter, the island has a stable population of 5,000 inhabitants.

<sup>14</sup> Council of Europe, Parliamentary Assembly, Resolution 1805, 2011.

<sup>15</sup> European Commission, *Communication on Migration*, Communication, COM(2011) 248 final (4 May 2011), 5.

## Modus Operandi

Records of irregular migration in the Mediterranean region indicate that border crossing by sea was traditionally the preferred route. However, recent figures suggest an increase in land-border crossings from 55% in 2009 to 86% in 2010.<sup>16</sup> This strategy involves crossing the border in small groups, often a short distance from check-points. The identity of most immigrants is not easily determined because they enter with false documents, or none at all, to avoid being repatriated. Afghans or Palestinians entering Greece, for example, are unlikely to be returned to Turkey, and if they are detained by police they consider it a stopover on their journey into the EU.<sup>17</sup>

The question of identification illustrates the challenge EU authorities face, which is how to make the distinction between economic migrants and people with legitimate claims. Many Member States have reported migrants applying for asylum only after they have been arrested. An increase in asylum applications from Afghan nationals has been observed in Germany, particularly after the Federal Constitutional Court ruling on the suspension of returns to Greece, the country of entry to EU soil. At the EU level, in the second and the third quarters of 2010, asylum applications rose by 28%, the highest percentage increase since regular data collection began in 2008.<sup>18</sup>

All of this suggests the need for a coordinated EU effort to tackle migration and offer international protection to people genuinely in need. To achieve this, efforts will have to concentrate on pinpointing the mechanisms and tools

<sup>16</sup> Frontex, *Annual Risk Analysis* 2011, 27.

<sup>17</sup> *Ibid.*, 28.

<sup>18</sup> *FRAN Quarterly* 3, July–September 2010, 20.

that facilitate identification procedures. This entails not only coordination between Member States through the creation of national coordination centres, for instance, but also between the national authorities themselves, by way of properly functioning reception centres.

### Future trends

Drawing hasty conclusions on future migration trends in the Mediterranean basin would be unwise. Data collection so far describes fluctuating operational patterns. In the first three months of 2010, for example, a significant decrease was observed in all irregular immigration indicators on the EU's external borders. Detections at sea were less than one-tenth of the peak of 33,600 reported during the third quarter of 2008. This was the result of several developments: reduced employment opportunities for immigrants resulting from the economic crisis in Europe, effective asylum policies and restriction measures adopted by Member States, and the conclusion of bilateral agreements between Member States and key countries of origin.<sup>19</sup>

Yet during the same period detections rose along the land border between Greece and Turkey, suggesting a shift from the traditional access by sea. Moreover the recent events in the Arab world have caused massive waves of movement towards Europe, creating, as will be analysed later, frustration between Member States and cracks in European solidarity. During the early days of June 2011, hundreds of Syrian nationals fled to Turkey, fearing major assaults

<sup>19</sup> Frontex, 'Irregular Immigration Hits New Low in First Quarter 2010, Facilitator Detections Up 13%', press release, 7 July 2010, accessed at: [http://www.frontex.europa.eu/newsroom/news\\_releases/art68.html](http://www.frontex.europa.eu/newsroom/news_releases/art68.html) on May 2011.

from security forces loyal to President Bashar Al-Assad and creating the risk of a refugee crisis.<sup>20</sup>

Even if patterns change, immigration will continue to affect Europe. The recent rise of far-right parties throughout the continent highlights inflexible attitudes towards migration and indicates that European perceptions of 'the other' are increasingly related to employment and personal security, and fed by the fear of terrorism and European perceptions of Islam. In this context Europe is turning into what many analysts characterise as Fortress Europe, alienating itself from the notion of open borders.<sup>21</sup>

## Policies at the national level

Irregular immigration directly affects the EU's southern Member States. Their concerns were evident in February 2011 when the home affairs and internal security ministers of Cyprus, Greece, Italy, Malta and Spain issued a joint communiqué underlining their concerns about the humanitarian situation in North Africa and the consequent migratory flows.<sup>22</sup>

<sup>20</sup> Sebnem Arsu and Liam Stack, 'Fearing Assault, More Syrians Flee into Turkey', *New York Times*, 9 June 2011, accessed at: [http://www.nytimes.com/2011/06/10/world/middleeast/10syria.html?\\_r=2](http://www.nytimes.com/2011/06/10/world/middleeast/10syria.html?_r=2) on June 2011.

<sup>21</sup> M. Ilies, *Irregular Immigration Policy in the European Community: Action at all Stages of the Irregular Migration Flow* (WP), Working Paper 38/2009, Real Instituto Elcano (17 July 2009), 3.

<sup>22</sup> For the communiqué, see: [http://www.frontex.europa.eu/rabit\\_2010/background\\_information/](http://www.frontex.europa.eu/rabit_2010/background_information/), accessed on 25 May 2011.

Their call for more pronounced European action was reiterated on 19 April 2011 when the Mediterranean EU states demanded the strongest financial and operational support consistent with the spirit of European solidarity in their efforts to handle immigration from the Maghreb.

They specifically urged the EU to

1. present and implement proposals on the Global Approach to Migration, as well as on Mobility Partnerships;<sup>23</sup>
2. speed up the conclusion of operational working arrangements between Frontex and countries in the region;
3. call on Frontex to continue its ongoing operations in the Mediterranean, to expand them if necessary in the eastern part of the basin and to enhance its monitoring capacities based on risk analysis;
4. strengthen the operational capacity of Frontex's office in Piraeus;
5. amend the Frontex regulation as soon as possible;<sup>24</sup>
6. conclude readmission agreements with third countries and promote the development of voluntary return programmes;

<sup>23</sup> Mobility partnerships are negotiated agreements between the EU and third countries which are prepared to better manage migration flows and to fight irregular migration in particular. In exchange, third countries acquire enhanced mobility between the EU and the home country for their citizens, both in terms of legal migration and short-term stays.

<sup>24</sup> Council of the European Union, 'Council Regulation No 2007/2004 of 26 November 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', *Official Journal of the EU* L 349, (25 November 2004), 1–11.

7. change the Dublin II regulation in order to accommodate Member States facing significant migratory pressures;
8. deliver financial assistance to those Member States in need;
9. give the European Asylum Support Office the means to offer technical and logistical support to the Mediterranean Member States.

Migratory pressures are not equally distributed throughout the EU, not even between the Mediterranean Member States themselves. In 2006 Spain and Italy were overexposed to migration flows, while in 2010 Greece had to face immense numbers of people seeking refuge in the EU.

### Greece under scrutiny

Over the past year particular pressure has been put on Greece, which has shifted the migration burden away from the Western Mediterranean. In January 2011, Frontex's risk-analysis network emphasised that the increase in detected irregular border crossings at the EU level was 'almost exclusively the result of increased pressure in Greece, where around four-fifths of all detections in the EU were reported'.<sup>25</sup> From January to October 2010 the Greek authorities reported more than 75,000 detections across external EU borders in Greece, 39,000 of them registered at the land border with Turkey – one of the highest figures ever recorded at the EU level.<sup>26</sup>

<sup>25</sup> *FRAN Quarterly* 3 July–September 2010 (January 2011), 3.

<sup>26</sup> Frontex, 'Current Migratory Situation in Greece, 29 November 2010', accessed at [http://www.frontex.europa.eu/rabit\\_2010/background\\_information/](http://www.frontex.europa.eu/rabit_2010/background_information/) in May 2011.

Most detections take place on a single 12.5 kilometre stretch near the Greek city of Orestiada, and most of the apprehended immigrants are of Afghan, Iraqi and Pakistani origin. An increase was also recorded in Algerian nationals during 2010.<sup>27</sup>

Greece was unable to manage these considerable migratory pressures. This is why the first Rapid Border Intervention Team (RABIT) was deployed to the northern part of Greece in November 2010. Commitments in both material and human resources were made by Member States, including the deployment of 175 specialist border control personnel who took responsibility for monitoring and securing the Greek–Turkish border, conducting interviews to discover the nationality and identity of immigrants, and engaging in intelligence activities related to human trafficking.<sup>28</sup>

RABIT came to an end in March 2011 and was replaced by Joint Operation Poseidon, which had been active in the area prior to the deployment of RABIT. According to Frontex, RABIT was able to achieve its main objective during its operational period: securing Europe’s borders.

Poseidon, initially assigned to cover this border, was widened to include the Greek island of Crete, in an effort to tackle migration from Libya. Since its inception, Poseidon has registered a decline in illegal border crossings between Greece and Turkey. From 1 January until 24 March 2011, 5,281 migrants were detected, compared with 8,054

<sup>27</sup> Frontex, *Annual Risk Analysis 2011*, 12–13.

<sup>28</sup> For this operation, Frontex had technical equipment from the Centralised Record of Available Technical Equipment (CRATE) at its disposal. This included 1 helicopter, 1 bus, 5 minibuses, 19 patrol cars, 9 thermo vision vans, 3 Schengen buses and 3 office units. See Frontex, ‘Greece RABIT 2010 Deployment’, 2010, accessed at [http://www.frontex.europa.eu/rabit\\_2010/background\\_information/](http://www.frontex.europa.eu/rabit_2010/background_information/) in May 2011.

arrivals in November and December of 2010. The majority of migrants are of Afghan (25%), Pakistani (14%) and Bangladeshi (12%) origin.<sup>29</sup>

**Table 2 Detections at the land border between Greece and Turkey<sup>30</sup>**

<b>January 2010–October 2010</b>	39,000
<b>November 2010–December 2010</b>	8,054
<b>January 2011–March 2011</b>	5,281

Greece is the host country for the first Frontex Operational Office, and is responsible for providing regionally based support for Frontex-coordinated activities. The aim is to implement this pilot project in other crucial regions on Europe’s periphery. This goal reflects the conclusion of discussions about the enhancement of the agency’s operational capacity for border management, joint operations in the Mediterranean and situational awareness in the greater region.

Recent developments in migratory influx have shifted the EU’s attention towards Greece, Europe’s weakest and currently economically most vulnerable link. At the same time Greece’s national immigration policy and Frontex’s activities in its territory are being scrutinised by international and European non-governmental organisations (NGOs). These organisations not only criticise the lack of reliable quantitative data, but also stress the authorities’

<sup>29</sup> Frontex, ‘Update to Joint Operation Poseidon 2011’, press release, 26 March 2011, accessed at [http://www.frontex.europa.eu/newsroom/news\\_releases/art104.html](http://www.frontex.europa.eu/newsroom/news_releases/art104.html) in May 2011.

<sup>30</sup> Ibid.

inefficiency in dealing with migrants, pointing to human rights violations and the existence of an official rhetoric that blames immigrant influxes for rising unemployment, national insecurity and a disproportionate burden on public services.

Greece is particularly targeted for deficiencies in its asylum procedures. In fact, because Greece has been unable to develop a policy to expel illegal immigrants to Turkey, as Spain has done with Morocco, or Italy with Libya and Tunisia, migrants choose to cross the land border between Greece and Turkey and then move on to Western Europe either via the sea and Italy, or through the Balkans.

In January 2011 the European Court of Human Rights ruled that Belgium should not have deported an asylum seeker to Greece under the Dublin II regulation because Greece had failed to implement common EU standards, rendering the assumption of Dublin II on the safe transfer of asylum seekers between EU member countries virtually meaningless. Germany has also stopped sending asylum seekers to Greece so as not to impose a further burden on the Greek asylum system.<sup>31</sup>

Greece's main violations of the Dublin II convention concern deficiencies in its asylum procedure and detention conditions. In reality, less than 1% of asylum applications are granted in Greece,<sup>32</sup> while the authorities have constantly been accused of violating the country's asylum procedures.<sup>33</sup>

<sup>31</sup> Toby Vogel, 'Expulsion of Asylum Seekers to Greece "Illegal"', *European Voice*, 21 January 2011, accessed at <http://www.europeanvoice.com/article/2011/january/expulsions-of-asylum-seekers-to-greece-illegal-/70019.aspx> on May 2011.

<sup>32</sup> Migreurop, *Aux frontières de l'Europe, contrôles, enfermements, expulsions, Rapport 2009-2010* (October 2010), 76, accessed at <http://www.migreurop.org/IMG/pdf/Migreurop-2010-FR.pdf> in May 2011.

<sup>33</sup> Amnesty International, *The Dublin II Trap: Transfers of Asylum Seekers to Greece* (22 March 2010), accessed at <http://www.amnesty.org/en/library/asset/EUR25/001/2010/en/e64fa2b5-684f-4f38-a1bf-8fe1b54d83b5/eur250012010en.pdf> in May 2011.

Greek authorities are also often accused of not meeting the minimum standards for humane detention conditions. During the first nine months of 2010 the detention centres in the Evros and Rodopi regions— in the northern part of the country near the land border with Turkey— had to manage 31,219 irregular migrant arrivals. The corresponding figure for the first nine months of 2009 was 8,787.<sup>34</sup> This considerable increase in numbers was coupled with the deficiencies of the Greek system: the opaque allocation of European funds, unsuitable infrastructure, an inadequate capacity to deal with sanitary problems, limited staff, overcrowded centres and so on.<sup>35</sup>

### Western Mediterranean developments

The primary focus in this region is on developments in Spain and Italy, the two EU Member States most vulnerable to migratory pressures in the Western Mediterranean. Since 2006, Spain has registered relatively low, yet still considerable, numbers of irregular migrants. During the third quarter of 2010 there were 2,200 detections of illegal border crossings in the Western Mediterranean, more than twice as many as during the first quarter of 2010, and three times more than during the same period in 2009.<sup>36</sup> Yet, the overall decreasing trends are considered to be the successful outcome of Spain's bilateral agreements with the Western African countries of Mauritania, Senegal and Mali.

<sup>34</sup> Thanos Maroukis, 'Irregular Migrants in the Detention Centres of Northern Greece— Aspects of a Humanitarian Crisis', *Clandestino* (website), 19 November 2010, accessed at <http://clandestino.eliamep.gr/irregular-migrants-in-the-detention-centres-of-northern-greece-%E2%80%93-aspects-of-a-humanitarian-crisis/#more-1416> in May 2011.

<sup>35</sup> Ibid.

<sup>36</sup> *FRAN Quarterly* 3, July–September 2010, 14.

Spain's problems with migratory flows were accentuated during the crisis in the Canary Islands in March and April 2006. During the first months of the year the number of irregular immigrants rose to 31,863, compared with 4,790 in 2005.<sup>37</sup> Spain tried to convince its European partners that this was not only a national but also a European problem. Yet, Spain was criticised for its February 2005 amnesty programme, which according to many EU Member States attracted massive waves of irregular immigrants to Spanish shores. In the words of Spanish Prime Minister Zapatero, 'the process of normalisation is a preventative form because a controlled immigration detracts from illegal immigration'.<sup>38</sup> Still, this did not reflect everyone's point of view. The European Commission has stated, for example, that 'to a certain extent regularisations offer a form of encouragement to illegal migration'.<sup>39</sup> This stance ultimately prompted the Council to adopt a decision to establish a mutual information mechanism concerning measures that Member States take in the areas of asylum and immigration.<sup>40</sup>

Nevertheless, Spain's politicians Europeanised the issue through an intensive media campaign. The Spanish pressures eventually led to the launching of the Joint Operations Hera I, Hera II and Hera III.

During the past couple of years, detections of irregular immigrants on the Western Mediterranean route have been

<sup>37</sup> S. Carrera, *The EU Border Management Strategy. Frontex and the Challenges of Irregular Immigration in the Canary Islands*, Working Document No. 261, Centre for European Policy Studies (March 2007), 13.

<sup>38</sup> M. Sapp, 'Spain's Amnesty Programme Attracts Thousands', *EUObserver*, 24 February 2005, accessed at <http://euobserver.com/?aid=18491&rk=1> on May 2011.

<sup>39</sup> European Commission, *Communication on the Links between Legal and Illegal Immigration*, COM(2004) 412 final (4 June 2004), 10.

<sup>40</sup> 'Improving the Exchange of Information on National Asylum and Immigration Policies', Europa Press Release IP/06/1317, 5 May 2006.

relatively stable and fewer than in 2008. For example, during the third quarter of 2010 there were just 2,157 detections of illegal border crossings, while for the same period in 2008 authorities had registered around 16,000 detections.<sup>41</sup>

Immigrants reach the shores of Italy from both the east, on the country's maritime borders with Greece, and from the south. Yet, since the 2008 Treaty of Friendship, Partnership and Cooperation signed between Italy and Libya,<sup>42</sup> many potential immigrants who would have chosen to depart from Libya en route to Europe choose instead to go through Greece and from there to Italy via the Ionian and Adriatic seas. This phenomenon has been accentuated by the closure of the Spanish–Moroccan border.

Once in Italy, a great number of immigrants are captured by the authorities and sent back to Greece using the *refoulement* procedure, which directly conflicts with the basic principles of Dublin II. The Greek and Italian authorities justify these *refoulements* on the basis of a bilateral accord they signed on 30 March 1999 concerning the 'readmission of persons of irregular situation'.<sup>43</sup>

Even though it seemed that Italian authorities had, more or less, been controlling migratory flows from Libya, the eruption of revolutions in North African countries early in 2011 posed new challenges. Since December 2010 the Italian authorities have had to face a considerable influx of undocumented North African immigrants from Tunisia. In response they issued temporary residence permits

<sup>41</sup> *FRAN Quarterly* 3, July–September 2010, 14.

<sup>42</sup> 'Berlusconi da Ghaddafi, siglato l'accordo: Uniti sull'immigrazione', *Corriere della Sera*, 30 August 2008, accessed at [http://www.corriere.it/esteri/08\\_agosto\\_30/berlusconi\\_libia\\_gheddafi\\_bengasi\\_478ee3f4-767e-11dd-9747-00144f02aabc.shtml](http://www.corriere.it/esteri/08_agosto_30/berlusconi_libia_gheddafi_bengasi_478ee3f4-767e-11dd-9747-00144f02aabc.shtml), in July 2010.

<sup>43</sup> Migreurop, *Aux frontières de l'Europe, contrôles, enfermements, expulsions*, 74.

for humanitarian protection, automatically granting them the right to move freely within the Schengen territory.<sup>44</sup> This provoked a strong reaction from France, which then introduced internal border checks between France and Italy. Hundreds of immigrants have thus been pushed back either to Italy or to Tunisia, and France has been accused of acting against the spirit of the Schengen *acquis*. French Minister of the Interior Claude Guéant emphasised that the Italian initiative did not conform with the Schengen convention and that French border controls were to be made 20 kilometres away from the border line.<sup>45</sup>

Although Italy complied with its obligation under Article 34 of the Schengen Borders Code and informed the European Commission about its intention to issue temporary residence permits, its actions drew attention to the fragile nature of the Schengen system, which functions in an environment of conflicting national interests. Italy's intention in issuing the permits was to meet a genuine need to grant humanitarian protection, but was also a political manoeuvre to force European solidarity on the migration hot potato.<sup>46</sup> It raises, therefore, the question of how to deal with irregular immigration while avoiding burden sharing on an EU level by transferring responsibility from one Member State to another.

<sup>44</sup> Italy, Ministry of Interior, 'Maroni: Ai migranti un permesso di soggiorno temporaneo', press release, 7 April 2011, accessed at [http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala\\_stamp/immigrazione/000069\\_2011\\_04\\_07\\_informativa\\_Maroni\\_alla\\_Camera.html](http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stamp/immigrazione/000069_2011_04_07_informativa_Maroni_alla_Camera.html) in April 2011.

<sup>45</sup> 'Immigration: l'Italie n'obtient pas le soutien des pays européens', *Le Monde*, 11 April 2011, accessed at [http://www.lemonde.fr/politique/article/2011/04/11/immigration-l-italie-n-obtient-pas-le-soutien-des-pays-europeens\\_1506112\\_823448.html](http://www.lemonde.fr/politique/article/2011/04/11/immigration-l-italie-n-obtient-pas-le-soutien-des-pays-europeens_1506112_823448.html) in April 2011.

<sup>46</sup> S. Carrera et al., *A Race against Solidarity. The Schengen Regime and the Franco-Italian Affair*, Centre for European Policy Studies (April 2011), 9.

## EU policy initiatives and developments

Frontex's role is limited to providing support and expertise to EU Member States. Its involvement in on-the-ground operational activity is limited to the coordination of specific joint operations between Member States' border guard authorities. Frontex neither replaces national border guard duties nor has independent executive powers. For its operations it remains largely dependent on Member States' assets and personnel.

An overview of Frontex's basic operations illustrates not only the volume of irregular immigration in the Mediterranean region but also the joint efforts that the EU Member States are willing to make—or not—in order to tackle this phenomenon.

### Frontex activities: joint operations

The increase in funding is reflected in the increased interest and costs connected with joint border operations, which make up more than 75% of Frontex's total operational costs. These operations are the core of Frontex's activities and are the main focus for many stakeholders, especially Member States with exposed external borders. Hera, Minerva, Nautilus and Poseidon have been the most important operations coordinated by the agency.<sup>47</sup>

<sup>47</sup> The presentation of the joint operations is based on information from Frontex found at <http://www.frontex.europa.eu/structure/opertaions> and [http://www.frontex.europa.eu/examples\\_of\\_accomplished\\_operati](http://www.frontex.europa.eu/examples_of_accomplished_operati).

### Joint Operation Hera

At the request of the Spanish authorities, Frontex launched operation Hera in 2006 to support Spain in tackling the migration flow towards the Canary Islands, based on the results of a prior fact-finding mission. The legal basis for this operation was Article 8 of the Frontex regulation. The operation consisted of two modules: expert assistance (Hera I) and joint operations at sea (Hera II).

Hera I deployed experts from around the European Union. Their task was to identify migrants and establish their countries of origin. Hera II was a joint surveillance operation. It brought together technical border surveillance equipment from several Member States with the aim of enhancing control of the Atlantic Ocean between the West African coast and the Canary Islands. In practice this meant diverting vessels carrying migrants on the open sea. The operation was first carried out in the territorial waters of Senegal and Mauritania and in close cooperation with these states. During the two operations almost 5,000 irregular immigrants were prevented from setting off on their voyages.

A third Hera operation started in April 2007 and lasted until December. Its aim and background was similar to those of the previous Hera operations. What is interesting about this joint operation is that it involved air and naval surveillance of the waters close to Mauritania and Senegal to improve the early detection of migrants at sea. A total of 6,890 irregular migrants were intercepted and 3,127 diverted.

### Joint Operation Minerva

The Minerva operation was launched in 2007 as a result of migratory pressure on the EU's external borders on the southern coast of Spain. It had been noticed that irregular migrants were trying to blend in with the regular flow of passengers in the seaports and on boats heading towards the Costa del Sol, Almeria and the Spanish enclaves of Ceuta and Melilla. The enclaves attract many migrants because of their location on the African Coast. The operation was hosted by Spain in cooperation with Austria, Belgium, Germany, France, Italy, the Netherlands, Poland, Portugal, Romania and the UK. It involved exhaustive border controls in the seaport of Ceuta as well as in the coastal waters near Almeria; both were receiving a large influx of nationals from Algeria and Morocco.

### Joint Operation Nautilus

Nautilus 2007 was started after a risk analysis showed that the Central Mediterranean route from the Libyan and Tunisian coasts towards the Italian islands of Lampedusa, Pantelleria and Sicily, and towards Malta, was an important migratory route. The operation was divided into two periods of one month each and was hosted by Malta and Spain. A range of Member States took part and significant resources were available. During the mission, 1,182 migrants were detected inside and 1,991 outside the operational area. A total of 3,173 irregular migrants were intercepted.

During Joint Operation Nautilus 2009 there was a remarkable decrease in the number of third-country nationals arriving at Malta. However, a significant obstacle to the effectiveness of the joint operation lay in the contrasting

interpretations of the international Law of the Sea by Member States, and in the definition of the operational area. This led to a limited maritime surface contribution from Member States to the joint operation. A total of 13 experts from 11 Member States provided assistance to the local authorities by interviewing and identifying irregular migrants.

Joint operations are generally regarded as successful in improving cooperation and knowledge sharing among Member States, as well as in streamlining procedures, and they ensure an increased degree of uniformity in the handling of irregular immigrants, traffickers and so on. Moreover it seems that they produce results on the ground. Frontex reported a decline in illegal border crossings in 2009. According to its 2009 annual report there were 165,700 detected illegal border crossings and refusals of EU entry in 2009, a 22% decrease from 2008.

However the agency has been quite clear that a decrease was to be expected because of the impact of the global economic crisis on irregular migration to the EU. In a 2009 analysis produced in cooperation with the EU Joint Situation Centre it indicated that the economic recession in the vast majority of Member States had led to a sharp increase in unemployment rates, prompting numerous governments to introduce measures to protect domestic labour markets. The measures amounted to new immigration restrictions aimed, successfully, at reducing the influx of migrants and encouraging their departure.<sup>48</sup>

The Tailored Risk Analysis managed to establish a strongly negative statistical correlation between rising unemployment rates in Member States and the detections

<sup>48</sup> Frontex Risk Analysis Unit in cooperation with the EU Joint Situation Centre and International Organisation for Migration, *The Impact of the Global Economic Crisis on Illegal Migration to the EU* (August 2009), 4.

of irregular migrants. Notwithstanding the complexity of the issue, the correlation could signal that irregular migration is mainly a function of labour demand in destination countries and is largely predictable. As a result, the current decreasing trend in irregular migration represents a kind of a pause that will end when labour demand in Member States starts to rise.

### Current developments on the ground

Responding to the volatile situation in North Africa, Frontex decided to extend the operational area for Joint Operation Poseidon Sea<sup>49</sup> and to launch, in February 2011, Joint Operation Hermes 2011 in order to tackle the waves of migrants arriving on the Italian island of Lampedusa. The operation was the result of a request from the Italian authorities to Frontex, not only for assistance in the form of a joint operation, but also for a targeted risk analysis of the possible future scenarios generated by increased migratory pressure. During the first two months of 2011, around 6,000 irregular migrants reached Italy's shores.<sup>50</sup>

<sup>49</sup> Frontex, 'Update to Joint Operation Poseidon 2011', press release, 26 March 2011, accessed at [http://www.frontex.europa.eu/newsroom/news\\_releases/art104.html](http://www.frontex.europa.eu/newsroom/news_releases/art104.html) in May 2011.

<sup>50</sup> Frontex, 'Hermes 2011 Starts Tomorrow in Lampedusa', press release, 19 February 2011, accessed at [http://www.frontex.europa.eu/newsroom/news\\_releases/art95.html](http://www.frontex.europa.eu/newsroom/news_releases/art95.html) in May 2011.

**Table 3 Detections on Italian soil to 13 February 2011<sup>51</sup>**

	Inci- dents	Migrants landed	Male	Female	Minors	Accom- panied Minors	Unaccom- panied Minors
<b>Lampedusa and Linosa</b>	80	5,031	4,944	18	69	0	69
<b>Agrigento coast</b>	3	20	20	0	0	0	0
<b>Other places in Sicily</b>	21	211	210	0	1	0	1
<b>Apulia</b>	3	57	43	2	12	6	6
<b>Calabria</b>	8	192	152	14	26	12	14
<b>Sardinia</b>	1	15	15	0	0	0	0
<b>Total</b>	116	5,526	5,384	34	108	18	90

Source: Frontex, 'Situational Update: Migratory Influx to Southern Italy', press release, 15 February 2011.

## Institutional developments

Since Frontex's foundation, its tasks have not changed drastically. Nevertheless, considering its very broad mission statement, the interpretation of those tasks and its adherence tools are dynamic.

<sup>51</sup> Frontex, 'Situational Update: Migratory Influx to Southern Italy', press release, 15 February 2011, accessed at [http://www.frontex.europa.eu/newsroom/news\\_releases/art93.html](http://www.frontex.europa.eu/newsroom/news_releases/art93.html) in May 2011.

## RABITs

In July 2007 the Council amended the founding regulation to include the RABIT mechanism.<sup>52</sup> The amendment expanded the already existing authority to provide technical support to Member States when requested. The agency may now call up an expert pool consisting of some 450 national experts who can be deployed. They are available at short notice of up to five working days to any Member State whose borders are under urgent and exceptional strain from irregular migration. The degree of commitment has also been stepped up by suggesting an obligation to contribute. Joint missions, however, are still governed by the host Member State and consequently Frontex merely contributes to the coordination and the financing of the mission. As we have mentioned, a RABIT operation has already been deployed in the northern part of Greece.

## Agreements with third countries

A further development, though not as institutionalised, is the continuous contact that Frontex has with neighbouring and third countries. The 2006 Justice and Home Affairs Council clearly favoured such an approach since it included these activities in the definition of integrated border management. The founding regulation provides for cooperation with the authorities of third countries competent in matters covered by the regulation. In practice, such cooperation consists of purely technical arrangements, such as exchanges of information and experiences, as well as cooperation in

<sup>52</sup> Council Regulation No. 863/2007 of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) No. 1007/1004 as Regards that Mechanism and Regulating the Tasks and Powers of Guest Officers, *Official Journal of the EU* L 199 (31 July 2007), 30–9.

training. Consequently, all references to politics have to be removed when drafting documents for cooperation.

As of February 2011, Frontex had concluded working arrangements with the relevant authorities of 14 third countries: the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the US, Montenegro, Belarus, Canada, and Cape Verde, as well as with the Commonwealth of Independent States Border Troop Commanders Council and the Migration, Asylum, Refugees Regional Initiative Regional Centre in the Western Balkans.<sup>53</sup>

### 2008 Frontex assessment

In February 2008, the European Commission released an assessment of Frontex.<sup>54</sup> The main issues in the evaluation were whether Frontex should take on other tasks related to border management such as customs, how well the teams deployed by Frontex are functioning and whether there is a need for a European border guard system. The assessment examined the agency's progress since becoming operational in October 2005, recommended short-term improvement measures and outlined a long-term vision for the future development of Frontex.

The most significant of the short-term ideas were related to using the full potential of the technical equipment put at the disposal of Frontex by EU Member States, establishing specialised branches of the agency in critical areas and

<sup>53</sup> Frontex, 'External Relations, Background', accessed at [http://www.frontex.europa.eu/external\\_relations/](http://www.frontex.europa.eu/external_relations/) in May 2011.

<sup>54</sup> European Commission, *Report on the Evaluation and Future Development of the Frontex Agency*, Communication, COM(2008) 67 final (30 February 2006).

merging existing joint operations with the European Patrols Network in the Mediterranean area. Further improvements were suggested in the training of national border guards; in Frontex's risk analysis capability; in performing joint risk analyses with Europol, international organisations and relevant non-EU countries; in the follow-up of research activities of relevance to the control and surveillance of external borders; and in the assistance provided by Frontex in organising joint return operations. In addition the report recommended that RABITs, established in August 2007, should benefit from the technical equipment owned by the agency.

From a longer-term perspective, the assessment<sup>55</sup> underlined the crucial role of Frontex in the development of an integrated EU border-management system. The key point was to see how Frontex could provide added value both to the EU's integrated border management as a whole and to the separate components of this concept. As a result, two major strands needed to be engaged: the increasingly important cooperation with non-EU countries and the horizontal integration of measures being put in place at the borders, for instance in a bid to improve cooperation between customs and other border control authorities.

A further reflection on the allocation of financial and human resources to the activities of the agency and of the cost effectiveness of the mechanisms then operated by Frontex was also suggested. This was to go hand-in-hand with an assessment of whether some tasks assigned to national border guards could be transferred to border guards permanently working for Frontex. These proposed measures reflected the fundamental division of powers between the EU and its Member States. The latter would

<sup>55</sup> Ibid.

remain the sole authority responsible for controlling national borders. The role of the EU would continue to be focused on developing a common legislative framework, putting large-scale IT systems in place and cultivating practical cooperation between Member States.

### 2010 proposals for the strengthening of Frontex

On 24 February 2010 the European Commission presented its proposal to strengthen Frontex.<sup>56</sup> In essence, it drafted a new mandate for the agency. The proposal deals with amendments to the 2004 Council regulation needed to ensure the well-defined and correct operation of the agency in the coming years. The objective of the proposal is to adapt the regulation, in light of both the evaluations carried out and of practical experiences, to clarify the mandate of the agency, and to address identified shortcomings.

The proposal reflects the core objectives and activities of the agency with the aim of

1. revising existing provisions on the use of technical equipment in joint operations;
2. including mechanisms for Member States to contribute such equipment;
3. creating or revising mechanisms to improve the availability of border guards in joint operations;

<sup>56</sup> European Commission, *Proposal for a Regulation 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 (Frontex)*, COM(2010) 61 final (24 February 2010).

4. revising the role of the agency in preparing, coordinating and implementing operations, including with regard to sharing tasks between the agency and Member States;
5. expanding the mandate of the agency in cooperating with third countries on border management;
6. mandating the agency to collect and process personal data;
7. revising the mandate of the agency on return operations; and
8. mandating the agency to contribute to evaluations of Member States' performance in the area of border management.

The proposals include reinforcing the legal framework to ensure full respect of fundamental rights during Frontex activities and enhancing the operational capacity of Frontex to support Member States. The latter would put more equipment and more personnel at the agency's disposal. Frontex would be able to co-lead border patrol operations with Member States. It would also be allowed to provide technical assistance to third countries and deploy liaison officers to them.

The European Commission's goal for the new framework is to ensure that Frontex can provide appropriate technical and human resources for joint border patrols. EU countries would have to ensure that a pool of equipment such as boats and planes was at the disposal of the agency, which would also be able to gradually buy or lease equipment. The proposal introduces an explicit requirement for all border

guards taking part in operations to have been trained in fundamental rights, with the aim of ensuring that the rights of immigrants are respected, particularly the principle of non-*refoulement*. Operational capacity will be enhanced by clarifying the roles of Frontex and the participating Member States, while respecting the principle that each Member State remains responsible for controlling its section of the external border. Specific provisions are proposed concerning the operational plan, the evaluation of operations and incident-reporting schemes.

In February 2010, the European Council agreed on 29 measures for reinforcing the protection of external borders and combating irregular immigration.<sup>57</sup> The measures focused on the activities of Frontex, on the development of the European Surveillance System (EUROSUR), on the solidarity and integrated management of external borders by Member States, and on cooperation with third countries. In May 2011,<sup>58</sup> the European Commission proposed a series of short-term measures to cope with the crisis in North Africa and the resulting displacement of populations, while reiterating both the need for a more effective border-management strategy and for a constructive dialogue with Europe's southern neighbours.

<sup>57</sup> Council of the European Union, 'Council Conclusions on 29 Measures for Reinforcing the Protection of the External Borders and Combating Illegal Immigration', 25–26 February 2010.

<sup>58</sup> European Commission, *Communication on Migration*, Communication, COM(2011) 248 final (4 May 2011), and *A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries*, Communication, COM(2011) 292 final (24 May 2011).

## Challenges and concerns

Border management constitutes one of five steps the European Commission has identified as necessary for a more secure Europe.<sup>59</sup> Yet in its struggle to become 'a more secure Europe in a better world', Europe's actions to control irregular immigration are often considered to be at odds with respect for basic human rights, a principle strongly advocated by Member States as the guiding rule for their external policy framework.

### Human rights concerns

Arguably, Frontex has achieved as much, perhaps more, than most critics had anticipated. Yet, a number of problems remain, some of which may prove impossible to resolve. The challenge of controlling migration is huge. Europe has a major influx of irregular immigrants every year and many die trying to make the journey from the African continent or from Asia through Turkey.

The most frequently voiced concern centres on human rights. The post-9/11 experience has given a powerful boost to the security camp, but privacy concerns remain real. The European Parliament and various NGOs have already expressed their opposition at an early stage to what they consider to be an extension of Fortress Europe. Pro-migrant NGOs have generally been very critical of the actions of Frontex. They have focused in particular on the joint operations coordinated by the agency in the

<sup>59</sup> European Commission, *The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe*, COM(2010) 673 final (22 November 2010), 11.

Mediterranean and claim that those have prevented asylum seekers from reaching the territory of Member States in order to claim asylum. Some pro-human rights and pro-migrant NGOs have expressed concerns about potential violations of international law<sup>60</sup> that might take place during joint operations coordinated by the agency.<sup>61</sup> The bulk of the criticism focuses on whether mechanisms are in place to deal with the wider humanitarian needs, particularly the medical requirements, of persons rescued, intercepted or diverted during Frontex operations.

Critics point out that denying all potential irregular entrants physical access to the EU is indiscriminate, meaning that the lack of specific measures to safeguard the rights of people who are potentially in need of protection undermines the right of refugees to seek asylum.

#### Several key questions have been raised:

1. How does a border guard functioning under Frontex coordination respond when encountering someone who wishes to seek asylum?
2. How is this different when in EU territory, at the external border, in international waters or in third-country waters?
3. How does Frontex ensure that the operations it coordinates do not breach Member States' obligations, for example when diverting boats back to their place of departure?

<sup>60</sup> S. Trevisaut, 'Maritime Border Control and the Protection of Asylum-seekers in the European Union', *Touro International Law Review* 12 (2009), 157–61.

<sup>61</sup> United Kingdom, House of Lords, European Union Committee, *Frontex: The EU External Borders Agency*, 9th Report of Session 2007–8 (London, 2008), 166–9.

4. How can Frontex ensure that the operations carried out beyond EU borders do not lead to systematic violations of international law?
5. If violations do occur, who can be held accountable for them and how?<sup>62</sup>

These questions relate to diverging interpretations of the Law of the Sea, international rules on search and rescue, and refugee law. For example, in the past Frontex has been accused of helping the Italian coastguard in its controversial policy of intercepting boats of migrants in the Mediterranean basin and sending them back to Libya.<sup>63</sup>

#### Transparency and democratic accountability

The most common response is that Frontex uses financial conditionality towards its partners to uphold human rights. However, this argument weakens when one considers the low degree of transparency between Frontex and the European Parliament. The European Parliament was involved in setting up Frontex, but it does not receive any information except that relating to Frontex's finances. There is no institutionalised mechanism for prompt democratic oversight of the operational activities of Frontex. The one-sided composition of the Management Board<sup>64</sup> may make it unsuitable for the job of creating sensitive border-management strategies, or for ensuring the appropriate legal

<sup>62</sup> *Ibid.*, 114.

<sup>63</sup> UNHCR, 'Frontex "May be Helping" Italian Migration Policy', 24 September 2009, accessed at <http://www.unhcr.org> on May 2011.

<sup>64</sup> The Management Board provides regular supervision of Frontex activities. Each participating Member State appoints a representative on the basis of his degree of relevant experience and expertise in the field of operational cooperation on border management.

scrutiny of proposed or ongoing operations, for example the drafting of operational plans or the conclusion of working agreements with third countries.

Unfortunately, the regulation proposal of 24 February 2010 does not introduce anything that addresses the democratic deficit or improves transparency. According to Sarah Leonard, ‘overall it appears that the controversies about the impact on refugees and the legality of the operations coordinated by Frontex have decreased, rather than increased, the legitimacy of the EU policy on borders, asylum and migration in the eyes of the pro-migrant NGOs’.<sup>65</sup>

On this front a recent development is the conclusion of working arrangements with the UNHCR and the International Organization for Migration. There is a UNHCR liaison officer in Warsaw. Although Frontex is hesitant to give a larger role to the UNHCR in operational activities, UNHCR is now involved in the agency’s training routines. Cooperation with the Asylum Support Office and the European Fundamental Rights Agency would allow further progress to be made.

The practice of *refoulement* has also prompted criticism of Frontex. As with the interpretation of international law, it primarily concerns potential asylum seekers and raises the following question: which Member State is responsible for processing asylum applications? On 26 April 2010 the European Council voted to supplement the Schengen Borders Code on the surveillance of external sea borders. The decision stated that Member States that have joint Frontex operations taking place on their territory should have responsibility for all irregular immigrants rescued off

<sup>65</sup> S. Leonard, ‘Frontex: The EU External Borders Agency—Exploring the Nature of the Beast’, paper presented at the 49th Annual International Studies Association Convention (San Francisco, 26–29 March 2008), 14.

their coast. This implies that asylum applications should be examined by the national authorities of these Member States. This, of course, triggered a reaction from the Mediterranean EU states, particularly Italy and Malta, which saw this as an unfair transfer of the immigration burden onto Europe’s southern states.

The new proposal for amending Council regulation (EC) No. 2007/2004 concerning the establishment of Frontex,<sup>66</sup> offers the agency a wide range of possibilities for action. Among other things, Frontex will be able to

1. collect and process suspects’ personal data regarding illegal activity on the borders,
2. send Frontex personnel to third countries outside the EU,
3. take the initiative for joint operations and pilot projects in cooperation with Member States,
4. acquire or lease equipment for border controls and joint operations,
5. have options for increased financial support,
6. evaluate Member States’ border management,
7. have a common nucleus of educational material for staff training,
8. adopt a code of conduct to be applied during joint return operations,

<sup>66</sup> European Commission, *Proposal for a Regulation of the European Parliament and 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 (FRONTEX)*, COM(2010) 61 final (24 February 2010). The next step in the legislative process was the European Parliament’s first reading. A plenary sitting took place on 12 September 2011.

9. have the responsibility for organising and conducting return operations in response to a Member State's request,
10. develop and operate information systems that allow swift and reliable exchanges of information,
11. have a reinforced role in monitoring and contributing to relevant research.

The last point is of particular importance, as it opens the way for Frontex to be involved in research and as a result to become the link between the EU institutional system and the European internal security industry.

## Conclusions and recommendations

Frontex has enjoyed some successes in its short existence.<sup>67</sup> It has established itself as the focal point for Community discussions on practical border management and has been given a key role in the evolution of an integrated EU border-management system with the aim of enhancing cooperation and data sharing among Member States. In the current situation, Frontex seems to represent an adequate tool for tackling irregular immigration in the Mediterranean. An enhanced agency, coupled with the political will of Member

<sup>67</sup> COWI, *External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Final Report* (15 January 2009), 6.

States, could offer the EU an effective mechanism for external border control management.

Since the creation of Frontex, its focus has been technical and operational—promoting cooperation and exchanges of information, exploiting technological advances and using risk analysis. This cooperation was most clearly tested when the Schengen area expanded in 2007, without any major hitches, to include nine more Member States.

Even though the agency has been operational for just a few years, it has become a very visible element of EU immigration policy, especially with respect to its sea operations. The developments of recent years—from the increase in border crossings in the south to infrastructure demands stemming from the expansion of the Schengen area—have led to Frontex's tasks being (over)extended considerably. It oversees joint patrols in the Mediterranean, such as Hera and Nautilus, and organises joint deportation flights from EU Member States. Moreover, Frontex has become a front-line actor with respect to working arrangements with third countries, which are an increasingly important component of external border control. A network of immigration liaison officers works with a range of bilateral and EU agreements which are managed by Frontex and include the exchange of operational information and intelligence and, in some cases, joint operations. These arrangements are closely linked not only to the emerging Global Approach to Migration, but also to the EU's various neighbourhood policies. Management of bilateral agreements has further extended Frontex's role in acting on behalf of Member States—and assuming some of their responsibilities—in the more difficult areas of border control.

However, experience has shown that Frontex's competences need to be rapidly strengthened in order to

put better tools at its disposal that will enable it contribute to more effective and flexible border control management. In general terms, the agency has to find a balance between respect for human rights and the enhancement of its capabilities on the ground. At the same time we need to keep in mind that immigration cannot be stopped. It can, nevertheless, be contained and controlled. A dual effort is needed: Europe should tackle the push factors by enhancing bilateral cooperation with the countries of origin in the Mediterranean littoral states and beyond, and also undertake measures that will allow the preservation and stability of the European social model. Bearing this in mind, the EU and Frontex should

1. respect and promote human rights. Since Frontex can only act with Member States' approval, it is associated with human rights violations that may occur when Member States undertake border control missions. In this respect, the agency should contribute to improving the sensitivity of national border guards on human rights protection issues. Within this framework, particular importance should be given to cooperation with the EU Fundamental Rights Agency and the European Asylum Support Office.
2. continue to develop operational and technical cooperation and conclude working arrangements with neighbouring Mediterranean third countries and key countries of origin. At the same time, EU Member States should conclude bilateral agreements with countries of origin or transit, following the examples of Italy and Spain. The EU should facilitate, in this respect, on a case by case basis, preferential access to visas for third-country nationals.

Member States should provide legal avenues for migration, for instance through seasonal work or circular migration.

3. encourage the creation of national coordination centres in all Member States located on the southern maritime and eastern land borders of the EU. Frontex should implement a pilot project to establish a communication network between the national coordination centres. The subsequent regionalisation of the agency could translate into a strengthened role and mandate.
4. work towards the highest possible integration of different aspects of EU maritime policy, such as control, policing, port surveillance, customs, trade, fishing and so on. Common standards should be developed to promote technical interoperability and to facilitate the coordination of joint European operations. The European Patrols Network should be further developed and extended to cover more maritime areas so as to facilitate cooperation between authorities and Member States.
5. take concrete steps towards a more interoperable surveillance system to bring together existing monitoring and tracking systems—those used for maritime safety and security, search-and-rescue activities, protection of the marine environment, fisheries control, control of external borders and other law enforcement activities—in order to enhance situational awareness and cost effectiveness. Where possible, surveillance information collected should be shared between law enforcement and military authorities to avoid duplication and enhance cost effectiveness.

6. establish, as required under Directive 2005/35, a European coastguard.<sup>68</sup> The Commission should undertake a feasibility study followed by a specific proposal. The concept of a coordinated EU-wide coastguard agency has significant value, not least because of its ability to provide consistent levels of service in areas such as search and rescue, pollution prevention and control, places of refuge, drug trafficking, smuggling and irregular immigration. A European coastguard should be required to provide guidance and assistance to ensure the same levels of training, resources and facilities across all Member States, and to establish common standards for communication and operations procedures.
7. assist the EU in adopting all the necessary tools for an integrated European border-management strategy, such as the creation of a system that could enable the automated verification of travellers' identity without the intervention of border guards or an electronic authorisation to travel as an alternative to requiring a visa.

Frontex is an overly politicised body whose compliance with the principle of legality may be open to debate. In general terms, the tasks carried out by the agency need to strictly comply with the law. Frontex remains vulnerable in its current form because it depends on Member States' solidarity and has an emergency-driven mandate. What Frontex does show is that the EU response to the challenge of irregular migration has largely focused on controls and

<sup>68</sup> The proposal is not new. It was put forward by Kostas Karamanlis, then Prime Minister of Greece, in October 2004.

deterrence. It is primarily a strategy of hard policy measures aimed at combating irregular migrants and containing migratory flows. In this respect, Frontex should function alongside existing EU policies of cooperation with third countries in the spirit of respect for human rights, the promotion of democracy and the rule of law.

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