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A normative assessment of the aims and practices of the European border management agency Frontex

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Contents

Introduction	3
1 Setting the stage	5
2 The European Union, Community of Values	8
From an Economic Community to a Community of Values	8
Values embraced by the European Union and Frontex	9
3 The establishment of Frontex	10
Situating the agency: The historical context	10
The emergence of a compromise	11
Goals and values in the establishment of Frontex	12
4 Frontex oversight and management	18
5 Frontex operations and practices	21
Recalling the past: Operations HERA I and II	21
Historical developments and a shift toward fundamental rights	26
Examining the present: Operation HERMES in the Mediterranean	27
Conclusion	30
References	33

Glossary

<i>AFSJ</i>	Area of Freedom, Security and Justice
<i>the Commission</i>	European Commission
<i>the Council</i>	Council of the European Union
<i>ECRE</i>	European Council on Refugees and Exiles
<i>EU</i>	European Union
<i>FRA</i>	Fundamental Rights Agency
<i>Frontex</i>	European Agency for the Management of Operational Cooperation at the External Borders
<i>HERA I and II</i>	Operations conducted by Frontex
<i>HERMES</i>	Operation conducted by Frontex
<i>NGO</i>	Non-Governmental Organisation
<i>RABIT</i>	Rapid Border Intervention Teams
<i>SCIFA</i>	Strategic Committee for Immigration, Frontiers and Asylum
<i>UN</i>	United Nations
<i>UNHCR</i>	United Nations High Commissioner for Refugees

'The respect of Fundamental Rights (...) is unconditional for Frontex and is fully integrated into its activities. In fact, Frontex considers the respect and promotion of fundamental rights as integral part of an effective border management and both concepts go, therefore, hand in hand.'
Frontex note to the European Parliament, 8.10.2010

'As regards fundamental rights, Frontex is not responsible for decisions in that area. They are the responsibility of the Member States.'
Ilkka Laitinen, Director of Frontex, at the Interparliamentary Committee Meeting of the LIBE Committee on 'Democratic Accountability in the Area of Freedom, Security and Justice, Evaluating Frontex', 4.10.2010

Both cited in Keller et al. 2011: 22.

Introduction

The first months of 2011 have seen historic changes in Northern Africa and the Middle East: thousands of people around the region rose – and are still rising – in what the Western media has portrayed as a struggle for democracy and freedom. The European Union (EU), self-declared champion of human rights, welcomed these developments and proclaimed its support for those struggling against repression (European Council 2011). At the same time, however, the consequent irregular arrival of almost 40,000 people from Northern Africa in Southern Europe caused considerable discomfort among EU governments, and prompted the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) to launch operation HERMES in the Mediterranean, seeking to 'detect and prevent illegitimate border crossings' (Frontex 2011a). This reaction is reflective of the growing importance accorded to matters of immigration control within the EU in recent years (Léonard 2009: 375, Lavenex 2007). The Council of the European Union (hereafter: the Council), the European Commission (hereafter: the Commission), and the European Parliament have repeatedly declared the protection of EU external borders one of the top priorities of community policy making (Pollack and Slominski 2009: 904). The assumption that irregular immigration¹ is to be prevented, and can be averted by patrolling the high seas, has been championed for years – in fact, the very establishment of Frontex in 2005 was driven by this belief. However, since its inception Frontex has been criticised by NGOs like Amnesty International, Human Rights Watch, and the European Council on Refugees and Exiles (ECRE) for undermining international legal obligations such as the non-refoulement of refugees and the protection of migrants' human rights (Amnesty International and ECRE 2010, Frelick 2009, Andrijasevic 2010, Carrera 2008, Carrera and Guild 2010, Jelpke et al. 2010, Klepp 2010, Léonard 2009, Léonard 2010, Pro Asyl 2008, Pro Asyl 2010, Toğral 2011, Trevisanut 2009).

¹ While within EU institutions, the term 'illegal immigrant' is still widely used, scholars, activists, and the UN object to the terminology. It is seen as linguistically and legally wrong, as only acts and not people can be illegal, and has been criticised for strong negative connotations and its potentially manipulative impact on public opinion. In this dissertation, 'irregular' or 'undocumented' will be used interchangeably, and 'illegal' will be employed only in direct quotations or in references to EU discourse (Paspalanova 2008).

Despite this criticism, the agency has been judged successful by external evaluation, and by EU institutions – the Commission, for instance, considered its quantifiable results in 2008 ‘impressive’ (Baldaccini 2010: 242, Monar 2010: 150, COWI 2009). When exploring the apparent contradiction between EU and civil society’s evaluation of the agency’s work it emerges that, thus far, there has not been a thorough and systematic assessment of Frontex. Despite criticism and evaluations, a critique which analyses the goals Frontex was set up to achieve, the values it ascribes to, and which also measures the agency’s practices by its own standards, has not been undertaken. This is peculiar given the spectacular growth in both budget and staff of the agency on the one hand, and the increasing news of migrants dying en route to the EU on the other (Léonard 2010: 247, Squire 2011: 2, Neal 2009: 347).

Using the approach of immanent critique, this dissertation seeks to fill the existing gap, and assesses Frontex according to its own goals and values. Particularly, it seeks to answer the following questions: *What are the aims Frontex was set up to achieve and which values do the agency and its founding institutions ascribe to? Do Frontex’s working arrangements, practices and the implications thereof match the values and aims aspired to in its foundation?* In doing so, it follows Diez’ (2005: 636) call for the tracing of contradictions within European discourses, and the continuous deconstruction of European norms and practices. As there is no unified EU identity, it will look at different institutions’ roles and interests in establishing and maintaining Frontex (Manners 2006: 178).

In the first chapter, the conceptual framework used throughout the paper is laid out and situated in the field of normative political theory, and the methods employed for analysis are introduced. Chapter 2 explores fundamental values of the EU and Frontex, tracing the construction of the Union as a ‘Community of Values’, particularly since the 1990s. The importance of key values, such as democracy and human rights, for the political identity of European citizens is explored, and it is noted that the legitimacy of the Union towards both its own citizens and the outside world depends on it upholding these core tenets. In Chapter 3, the historical context in which debates regarding European border control emerged is explored, and the establishment of Frontex as a compromise between upholding national sovereignty and creating greater communitisation of border control is examined. Furthermore, the arguments justifying the creation of the agency will be disentangled and assessed using methods of immanent critique. In a fourth chapter, the management and oversight mechanisms of Frontex are scrutinised, and their measurement against the embraced values of democracy, accountability, and transparency is assessed. In Chapter 5, the practical work of Frontex will be evaluated. First, the 2006 HERA I and II operations will be introduced, and the justifications for launching them will be critiqued according to immanent standards. Given a number of significant shortcomings in these and other operations, particularly regarding a lack of respect to non-refoulement and human rights, significant pressure has been exerted by NGOs on Member States. It is examined how European institutions and Frontex itself have responded to such criticism, and how a rights-based discourse has become more prominent within official documents. The practical implications of this discourse are assessed by evaluating the currently-ongoing HERMES operation in the Mediterranean as far as is possible with limited information publically available.

The European Parliament stated, ‘if the promotion of human rights outside the Union is to be credible, we must begin by examining the human rights situation at home’ (Williams 2010: 140). This dissertation seeks to provide such an examination of an EU agency’s work. It will be shown that there are numerous tensions between fundamental values and the goals Frontex was set up to accomplish, which are demonstrated in its management as well as operational work. The existence of inherent contradictions in the justifications for setting up the agency means a mere strengthening of its human rights discourse is unlikely to resolve these tensions, calling for a more fundamental rethinking of EU immigration policy and Frontex’s role therein.

1 Setting the stage

In liberal democracies, politicians tend to justify their policy proposals based on normative grounds and empirical analyses (Fischer 2006). They thus engage in moral reasoning, making normative and empirical assumptions to support their arguments (Kagan 1998). Agents executing policies have been shown to subscribe to such moral justifications – including border guards. In a recent study, it was shown that Frontex officers believe in the morality of their actions, including the interception of migrants at sea. They justify their practices by alluding to greater goals of fighting migrant smuggling, preventing economic breakdown within the EU, strengthening the security of EU citizens, and, importantly, saving migrant lives (Ioannides and Tondini 2010: 101). Normative justifications have implications for the attitudes of executing agents and of the public, but they also impact on practices. They constitute discourses, and are as such ‘practices that systematically form the objects of which they speak’ – they do not merely describe, but simultaneously make the world (Foucault, cited in Wodak and Meyer 2009: 40, see also Fairclough 1993, Gee 2011b).

In the context of this dissertation, reality is thus understood as socially constructed (Berger and Luckmann 1966). Accordingly, textual description and analysis need to go hand in hand with social analysis and critique (Fairclough 2003: 16, Gee 2011a). As Fairclough (2005) noted, there is a dialectical relationship between discourses and social practices. Finnemore and Sikkink (1998) explored the dynamics of this dialectic in international relations, focusing on the emergence of norms. A new norm is first promoted in speech acts by few norm entrepreneurs. Once states increasingly ascribe to that norm, a tipping point is reached, resulting in the institutionalisation of the norm. Thereafter, pressure by other states, NGOs, or international organisations leads more countries to adopt the new norm through a process of socialisation: a *norm cascade* takes place. In a last stage, the new norm becomes dominant in international politics, and conformity to it becomes internalised. While initially, states choose to advocate for certain norms, and might do so purely for instrumental reasons, ‘once established, norms will serve to constrain even the most powerful states in the international system’ (Wheeler 2000: 7). This dynamic is visible in relation to norms advocated for by the EU, which offer opportunities for other actors to criticise EU actions, and which act as constraints on EU institutions.

As Skinner notes, it is irrelevant whether the Union is sincere regarding the values advocated, since

even if the agent is not in fact motivated by any of the principles he professes, he will nevertheless behave in such a way that his actions remain compatible with the claim that these principles genuinely motivated him (Skinner, cited in Wheeler 2000: 9).

This dissertation is situated in the broader field of critical theories, which ‘want to produce and convey critical knowledge that enables human beings to emancipate themselves from forms of domination through self-reflection’ (Wodak and Meyer 2009: 7). Methodologically, I will engage in an immanent critique, seeking to assess through rigorous analysis how far Frontex measures up to the goals it was set up to achieve, and to the values it ascribes to and is bound by. The normative foundation of critique, as it is understood here, lies in the moral conviction that there should be a society without exclusion, without a marginalised ‘other’ (Boltanski and Honneth 2009: 110). The approach chosen relies on immanent benchmarks mainly because there cannot be universal standards of sociological critique: all critique is historically contingent (Rosa 2009: 29). Problematically, transcendent critique risks lacking a sound normative basis – if external standards are used to evaluate practices, the evaluation remains alien for those criticised, and they can easily reject it (Wesche 2009: 204). While immanent critique will be employed, this cannot occur without regard to some transcendent criteria. A purely internal critique, which identifies the values ascribed to by an organisation and assesses in how far these are respected in practice, risks approving of highly unjust practices (Jaeggi 2009: 285). Critique, as it is used here, thus aims to expose internal contradictions in institutions’ reasoning and practices, while linking these practices to some wider standards of moral justifiability (Boltanski and Honneth 2009: 110). To conduct an immanent critique, institutionalised and agreed-upon norms will be reconstructed and identified in Chapter 2. The starting point of critique is an injustice or suffering – in the present case, the analysis is motivated initially by the suffering of thousands of people who have died attempting to enter EU territory, and the seeming unwillingness or incapacity of Frontex to alter this situation (Wesche 2009: 200-202).

The dissertation adheres to a realist approach to normative reasoning, seeking to theorise possible change of the status quo, rather than hypothesising about an ideal normative world (Carens 1996). In order to conduct an immanent critique, critical discourse analysis will be drawn upon as a method, as it aims to analyse structural relationships of power, dominance, and discrimination as they are expressed and legitimated through language. It is of particular use in the context of immanent critique as it seeks to reveal contradictions between and within discourses, the limits of what can be said and done, and the means by which discourse makes statements seem rational and beyond doubt. It thus shares a theoretical understanding with critical theories, and supports a transdisciplinary, multi-method application (Fairclough 2003, Fairclough 2005, Gee 2011a, Gee 2011b, Fairclough 1993, Wodak and Meyer 2009). In addition to critical discourse analysis, and in keeping with the understanding of critique outlined above, non-discursive practices will be assessed, and the effects of specific practices will be evaluated.

As noted, normative reasoning relies on empirical and normative premises. The argumentative structure of normative arguments will be disentangled in this dissertation, tracing the premises and seeking to clearly outline justifications by following this basic argumentative structure:

Given that

- a) Normative premise(s) and / or
- b) Empirical premise(s)

We have to do c) normative conclusion as this will lead to d) empirical premise(s) II.

Normative and empirical premises will be reconstructed through the critical analysis of policy documents leading to the establishment of Frontex, as well as documents relating to its current work. The justifications identified will then be subjected to an immanent critique.

Three principle applications of normative critique will be used (Glover 1977). Firstly, any logical inadequacies between premises and conclusion will be exposed, asking among other questions, *'do the fundamental ideals that underpin the foundation of Frontex provide a basis for the practices the agency engages in? / for the structure of the agency?'* Secondly, the conceptual definitions used in the argumentation for the establishment of Frontex as well as Frontex's argumentation for operational practices will be analysed. Specifically, it will be examined which concepts are relied on, what their implications are and whether the reasoning depends on blurred or incoherent concepts. Thirdly, the accuracy of empirical premises within normative arguments will be scrutinised. Erroneous descriptions of empirical realities will be exposed by comparing European institutional premises to those of Frontex and of third parties, such as NGOs, scholars, and UNHCR. Unintended consequences of actions taken will be traced by analysing NGO reports and EU level reports, which will then be compared to Frontex reports. It will be asked whether the agency fulfils its stated objectives and whether its practices have unintended effects which offset their objectives. A fourth method of critique, the identification of silenced or overlooked alternatives that are implicit in current practices, is employed (Sonderegger 2009: 63). The application of this fourth method will be used to ask *'which alternative argumentations exist, and what do they propose instead of current practices?'* (Fischer 2006).

For the analysis, a variety of data was identified for use including key policy documents by the Council of the European Union, the European Commission and the European Parliament leading up to the establishment of the agency, as well as those materials developing its role and assessing its work thereafter. Moreover, Frontex press releases, annual reports, and programmes of work were examined in depth, as was an external evaluation of the agency. These 'official' accounts were triangulated with scholarly literature on Frontex and border management, and with NGO reports as well as newspaper articles related to the topic. Importantly, the choice was made to look at documents from 1999 onwards only. In 1999, the Treaty of Amsterdam went into force and, it could be argued, the communitisation of migration and asylum policies truly began.

While the method of immanent critique is a strong one, assessing the agency on its own turf, it also has a number of weaknesses. Habermas notes that the critical theory approach chosen here manages to effectively question foundations and to denaturalise social and political hierarchies, but is weak in providing alternatives (Butler 2009: 223). However, this weakness can be mitigated by exploring challenges to the current discourse and alternative moral argumentations. Further, as an immanent critique stays within the values ascribed to by a value community, misapprehensions of this community are not exposed – the critique can only be partial. As Wodak and Meyer (2009: 8) note, dominant ideologies in such an approach appear as neutral and are not challenged. Drawing on Gramsci, Wesche (2009: 203) remarks that an immanent critique cannot go beyond hegemonies of ideas and beliefs. Accordingly, issues such as the legitimacy of the international system of nation states as well as states' rights to control their borders will not be addressed in the framework of this dissertation, nor will the right of states to discriminate between citizens and non-citizens – which does not mean that these ideas are not highly morally problematic and in need of deeper normative analysis. A third limitation of this analysis is practical in character. As will be elaborated upon later, the vast majority of Frontex documents are not declassified to the public – while this will be taken up as a point of criticism, it also limits the data available to access and evaluate, and thus the scope of this paper's analysis (Carrera 2008: 14).

2 The European Union, Community of Values

From an Economic Community to a Community of Values

In 1957, when the European Economic Community was established, human rights played at most a marginal role in legal documents and political discussions. Today's claims by the Commission, the Council, and the European Court of Justice that they were fundamental values in the creation of the Union are plainly myths (Williams 2010: 110). Rather, human rights began to be recognised on the community level instrumentally, largely to avoid challenges from national courts (Williams 2009: 564). Nevertheless, the EU now defines itself as a community of values, and gives considerable importance to shared fundamental values in its central treaties (Pace 2007: 668, Richardson 2002). This is a consequence of a perceived need, dominant since the 1990s, to foster a collective EU identity rooted in shared beliefs (Williams 2010: 6). In 2003, the EU Presidency described Europe as 'a Community of Values' (Papandreo, cited in Wagnsson 2010: 1098). The evolution of normative principles has peaked with their constitutionalisation in the Lisbon Reform Treaty (Manners 2002: 48). While there are scholarly debates regarding the reality of the EU as a Community of Values, as opposed to mere self-representation as such, by now its discursive construction is well-developed (Heit 2005) and most EU politicians, whether in the Council, the Commission, the Parliament or on Member State level, mobilise this normative discourse (Diez 2005: 620).²

² For a detailed and insightful analysis of the mobilisation of human rights in liberal-democratic states through history, see (Douzinas 2007).

As Cerutti and Lucarelli have noted, this discourse has been of prime importance for the development of a common identity, a sense of political community in the absence of a shared *ethnos* (Canivez 2010: 859). We can recognise ourselves as ‘us’ in shared values – as Wiener (2007: 6) put it, ‘fundamental norms keep a community together.’ However, policies do not create identity by themselves; they can only do so if individuals recognise the values advocated as meaningful to their own self-perception as European, and as coherent with the image of Europeans they would like to see projected to the outside world (Cerutti and Lucarelli 2008: 5). As the fundamental values the EU claims to be based on are of importance to European identity and to European legitimacy, not implementing them in EU policies potentially has strong negative effects and threatens the legitimacy of the European project – both in EU citizens’ eyes as well as in the perception of third country nationals (Canivez 2010: 864). Policies on admission to EU territory are intimately related to questions of “what kind of polity we wish to have’ and ‘who we choose to become” – planning these policies according to EU fundamental values, therefore, should be of particular concern (Kostakopoulou 2009: 186).

Values embraced by the European Union and Frontex

While it has been established that the Union represents itself as a Community of Values, further enquiry needs to be made regarding the nature of the values embraced. According to a large majority of EU citizens, human rights, peace and democracy are the values most representative of the Union (Canivez 2010: 862, Balfour 2008: 165). Moreover, values that are regarded as fundamental are spelled out in the Consolidated Version of the Treaty of the European Union, as amended by the Lisbon Treaty. Article 2 reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (European Union 2010).

In Article 3.5 and 21.1, the EU pledges to uphold among others the values of solidarity and equality, the protection of human rights, democracy, the rule of law, and the strict observance of international law in its relations with the ‘wider world.’ In Article 6.1 it is stated that the Charter of Fundamental Rights of the European Union shall be legally binding. In the Charter, a whole range of fundamental rights is embraced, a number of which are relevant to external border control. Most important are the articles on human dignity (Art. 1), the prohibition of torture and inhuman or degrading treatment or punishment (Art. 3), the right to liberty and security (Art. 6), the protection of personal data (Art. 8), the right to asylum (Art. 18), protection in the event of removal, expulsion or extradition (Art. 19), and the right to an effective remedy and to a fair trial (Art. 47) (European Union 2000).

Looking at the Copenhagen Criteria, which new accession states have to fulfil to become part of the EU, the fundamental values of the Union can also be derived. Again, these are democracy, the rule of law, human rights and respect for and protection of minorities (European Commission 2010a). When examining specifically the values applying to the control of external borders, the Schengen Borders Code is of crucial importance. In it, among others, non-refoulement (Art. 3(b)), the right to apply for asylum (Art. 13(1)), and respect for human dignity (Art. 6(1)) are acknowledged as important principles.

The Code was supplemented by a Council Decision in April 2010 with specific regard to Frontex operations at sea, clearly binding Frontex missions to respect fundamental rights and the principle of non-refoulement, as well as the specific needs of persons requiring international protection (European Council 2010).

Frontex's Founding Regulation explicitly recognises fundamental values and rights in its preamble:

This Regulation respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. (Council of the European Union 2004b: § 22).

Moreover, as an agency of the EU, Frontex is legally bound by the Charter of Fundamental Rights of the European Union, and subject to the jurisdiction of the European Court of Justice. It should be remarked that all values ascribed to by Frontex and the EU more generally are rather vague, and can be interpreted in a number of ways. Throughout this dissertation, it will be sought to assume a minimal consensus regarding their content, and to assess Frontex according to this minimal standard. While there are widely varying understandings of democracy for instance, it seems clear that the promotion of the value of democracy does, necessarily, entail the promotion of the values of transparency and accountability toward those governed. In addition to making use of such minimal understandings, legal norms and scholarly opinions will be drawn upon to engage with concepts such as human rights, international law, or freedom.

3 The establishment of Frontex

Situating the agency: The historical context

When examining Frontex in its historical context, it becomes clear that the agency is only one part of a larger shift towards more surveillance, including the increasing use of 'smart' control, technology and especially biometrics for 'security' reasons (see for instance Bigo 2011, Baldaccini 2008, Walters 2011). Its establishment came as a response to the perceived need for enhanced cooperation in EU external border control, arising due to three major developments. Firstly, with high levels of media coverage and public concern, migration had become a contentious issue in the 1990s when the Cold War had ended and migratory patterns changed (Mitsilegas et al. 2003). Secondly, the eastern enlargement of the Union posed new challenges regarding border management. Thirdly, 9/11 led to the increasing association of migration with terrorism, which in turn increased states' determination to secure their borders (Léonard 2009: 376-377). While immigration by some is described as having been securitised since the 1970s (Chebel d'Appollonia 2008), the late 1990s and early 2000s saw a more intense securitisation (Düvell and Vollmer 2011, Balzacq and Carrera 2006, Bigo 2006, Bigo 2008, Karyotis 2007, Kostakopoulou 2009, Léonard 2009, Léonard 2010, Léonard 2011, Squire 2009).

The concept of securitisation was strongly shaped by Buzan, who defined it as a speech act

through which an intersubjective understanding is constructed within a political community to treat something as an existential threat to a valued referent object, and to enable a call for urgent and exceptional measures to deal with the threat (Buzan and Wæver 2003: 491).

As a consequence, space for political debate is decreased, and the resolution of the issue framed as an existential threat is given high priority. As Huysmans (2006) points out, raising an issue as a threat is an instrument in the struggle for power and legitimacy. Importantly, however, 'securitisation does not create a safer society but one that lives in permanent fear from real or perceived threats' (Karyotis 2011: 23). As Karyotis notes, securitisation frequently turns out to be harmful for the elites that initiate it. It creates an unrealistic demand for border control and closure among the constituency, and restricts politicians' space for action in the longer term. This can be seen in the consequences of the securitisation of irregular immigration especially: any apparent failure to stop what has been framed as dangerous irregular immigration threatens to undermine the legitimacy of political actors (Mitsilegas et al. 2003: 54). While measures to tighten border control pre-dated the terrorist attacks of 2001, 9/11 consolidated the shift toward securitisation regarding border control and immigration (Chebel d'Appollonia and Reich 2008).

The emergence of a compromise

As part of the Schengen agreement, cooperation regarding immigration and asylum had developed from the 1980s onwards – albeit merely as interstate cooperation between some Member States. With the 1992 Treaty of Maastricht, cooperation on immigration within the EU framework began (Léonard 2010: 233). The 1997 Treaty of Amsterdam introduced the concept of an 'Area of Freedom, Security and Justice' (AFSJ) and consolidated a further communitisation of migration matters (Kostakopoulou 2009: 187, Pellerin 2005). An emphasis was placed on the relationship between the EU and its citizens – the Union sought to deepen its ties to citizens, and to increase its legitimacy. Amsterdam, moreover, constituted a continuation of the securitisation of immigration (Lavenex 2001, Lavenex 2005). With the 1999 Tampere European Council, the externalisation of asylum and immigration policies was officially embraced for the first time:

in contrast to a preventive comprehensive approach addressing the factors which lead people to leave their countries of origin, European policies focused on the repression of undesired inflows through externalisation (Lavenex 2007: 134, Samers 2004).

In 2001, Germany and Italy presented an initiative to establish a European Border Police, and a feasibility study on Community border control was conducted (Léonard 2009: 377). While Germany, Italy, the Commission, and Parliament were firmly in favour of the idea, the UK and Scandinavian countries were less enthusiastic about giving up part of their sovereign powers (Neal 2009: 340, Jorry 2007: 8, Monar 2005). Their reluctance led to the omission of the term 'border guard' in the Laeken European Council Conclusions (Council of the European Union 2001). Shortly afterwards however, the attacks of 9/11 gave new legitimacy and priority to security concerns (Pellerin 2005). While the Commission initially held onto the idea of an operational European Border Guard, the Council effectively dropped the idea in June 2002 (European Commission 2002a: 12, Council of the European Union 2002).

As the need to improve cooperation in border control was seen as pressing, an External Borders Practitioner Common Unit tasked with the coordination of Member States was established under the already existing Strategic Committee for Immigration, Frontiers and Asylum (SCIFA) working group as a compromise. This Common Unit was, however, perceived as ineffective by the Commission and several Member States (Neal 2009: 342, Léonard 2009: 377). At the Thessaloniki European Council in 2003, the Council therefore called for the examination of

the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure, in order to enhance operational cooperation for the management of external borders (Council of the European Union 2003a: §14).

The Commission seized this opportunity and proposed a European Border Management Agency, which could pursue border management activities more systematically and permanently – it then took less than a year for the agency to be established (Neal 2009: 342, European Commission 2003b). The speed of the process allowed the establishment of Frontex without active involvement from the European Parliament.³ While the European Council largely agreed with the Commission's proposal, it amended the proposal so that each Member State would have a representative on the agency's Management Board. The European Parliament, which could only consult, suggested a number of changes to strengthen the *communautarian* character of the agency and its accountability, especially as regards fundamental rights (European Parliament 2004: amendment 47, European Commission 2003b). Its amendments, however, were ignored (Léonard 2009: 380).

As outlined, the Commission played a crucial role in pursuing a European solution to border management – Frontex is, ultimately, a compromise between their community-focused approach and Member States' reluctance to abdicate power (Léonard 2009: 381, Kasperek 2010). Legally, Frontex was created on the basis of Article 62§2a) and Article 66 of the Treaty on European Union, as amended by the Amsterdam Treaty (Jorry 2007: 9). Since its inception, it experienced the most intensive upgrading to its resources and staff of all agencies founded in recent years (Pollack and Slominski 2009: 904).

Goals and values in the establishment of Frontex

The Europeanisation of immigration has been characterised by a struggle between universal human rights on the one hand and particularistic concerns with internal security and sovereignty on the other (Lavenex 2001). The justifications for the creation of Frontex are examined in this section, which builds on the analysis of key documents by the Council and the Commission dated 1999 till 2004. There are several arguments for border management cooperation and the creation of Frontex in these documents – the most common ones are discussed in the following section.

³ After the entry into force of the Treaty of Amsterdam, there was a five year transition period in which the Commission and Member States were sharing the right of legislative initiative, decisions in the Council had to be taken unanimously, and the European Parliament was only consulted. Making a decision on Frontex quickly avoided the involvement of the European Parliament through the co-decision procedure (Léonard 2009).

One of the main strands of reasoning is what might be called the *safeguarding freedom* argument. The premises and conclusion emerging in relation to the value of freedom are as follows:

- 1) Freedom is a fundamental value of the EU. It encompasses freedom of movement on the one hand, and the freedom to live in a law-abiding environment on the other hand (Justice and Home Affairs Council 1998: §6, Council of the European Union 1999: §1-4).
- 2) Freedom is meaningless without security and justice (Justice and Home Affairs Council 1998: §5-9, Council of the European Union 2004b: §1, Council of the European Union 1999: §2,§5).
- 3) Security has become of new urgency after 9/11 (Council of the European Union 2004a: §14).
- 4) External border management enhances security and combats terrorism, illegal immigration and people smuggling (Council of the European Union 2001: §42, European Commission 2003b: 4).

Ergo, borders need to be secured to safeguard the value of freedom in the EU.

When analysing this argument according to the four modes of critique introduced in Chapter 1, it becomes clear that the concept of freedom needs to be scrutinised carefully. Freedom is named as a foundational value of the AFSJ – upon closer analysis of the discourse however it becomes clear that the value of freedom is subordinated to security (Bigo 2006, Squire 2009, Balzacq and Carrera 2006, Karyotis 2007, Léonard 2010). The linking of freedom, security and justice has been pursued since the 1970s, when a single, free market with unrestricted movement of people was constructed as posing inherent security problems (Kostakopoulou 2009: 188, Bigo 2004). The dominance of security over freedom becomes apparent for instance in the Hague Programme, as Bigo noted: freedom

is seen as the creation of a 'safe area without intruders.' (...) A second objective of strengthening freedom is to police the economically disadvantaged with the help of their governments. Their freedom is not important (Bigo 2006: 37).

Freedom is thus subordinated to security, and moreover reconceptualised as the defence of 'us' from unknown 'others'⁴ – this not only perverts its original meaning, but is counterproductive.

⁴ There is an interesting difference here between the European Council, which does not refer to 'justice' at all in relation to immigration issues in its Tampere and The Hague Programmes, effectively excluding non-citizens from claims to justice, and the Commission, which calls for 'respect for fundamental rights, and in particular effective judicial protection for *everybody*.' This reflects what Kaunert (2009) described as the Commission acting as supranational norm entrepreneur – it seems that the Commission seeks to root the immigration discourse more firmly in fundamental rights, and seeks to establish these as norms.

As an empirical critique, it needs to be noted that in claiming that ‘our’ freedom and security justifies limiting ‘their’ rights, ‘they’ are effectively used as scapegoats and excluded from ‘our’ societies (Karyotis 2011). In fostering a climate of fear in the name of freedom, EU governments encourage discriminatory attitudes and erode human rights of migrants – as will be shown in greater detail in Chapter 5 (Chebel d'Appollonia 2008: 204). The exclusion and marginalisation of immigrants at our borders is inseparable from that of those who are living in our societies and who will feel frustration and resentment as consequence of being labelled outsiders, threats, or criminals – potentially turning against their ‘host’ society (Karyotis 2011). More security, then, can lead to more insecurity (Chebel d'Appollonia 2008: 203, Bigo 2006: 40). As fear and mistrust grow and surveillance increases, the continuous securitisation of immigrants may, ultimately, even undermine the freedoms of citizens themselves (Bosworth 2008).

Conceptually, the notion of ‘security’ used is limited, and it ignores other understandings of security developed over the last two decades (Pugh 2004). While in EU documents, security almost exclusively refers to national security, an alternative understanding of the concept has been promoted by UNHCR. Instead of focusing on national security, which easily leads to the securitisation and criminalisation of migrants, UNHCR has promoted a new focus on the human security of migrants that is frequently threatened before, during, and after migration to the EU (Adelman 2001, Koser 2007, UNHCR 2006). This alternative discourse, however, seems to have been silenced or neglected within EU institutions, which continue to refer to a one-sided and limited understanding of security as the security of the state from outside threats.

A second prominent line of reasoning for the creation of Frontex is what might be referred to as the *safeguarding asylum, saving lives* argument:

- 1) The right to seek asylum and the 1951 Geneva Convention are fundamental values of the EU (Council of the European Union 2004c: 14, Council of the European Union 2004a: §14, Council of the European Union 1999).
- 2) Illegal immigration has social, economic and political implications in countries of destination (European Commission 2001: section 4.2.1.).
- 3) The European public only tolerates asylum if illegal immigration is stopped (European Commission 2001: 25).
- 4) Illegal immigration is increasing (European Commission 2002a: section 2.2.).
- 5) External border management contributes to combating illegal immigration (European Commission 2001: 17, European Commission 2002a: §2).
- 6) The EU serves first and foremost its citizens (hidden premise).
- 7) Insufficiently managed migration flows lead to humanitarian disasters, human tragedies, and loss of lives (Council of the European Union 2004c: 21).

Ergo, illegal immigration must be combated to safeguard asylum and to save human lives. This can be achieved in part by border controls.

Conceptually, one might criticise that in none of the key policy documents analysed is ‘illegal immigration’ defined, nor are its consequences ever spelled out – it is simply assumed that it should be stopped. This is illustrative of a greater lack of conceptual clarity – currently, there is no agreed definition in EU law of ‘illegal immigration’ (Challenge 2005, Mitsilegas et al. 2003: 42).

As a consequence,

illegal immigration operates as something of a phantom that haunts the space of migration and security policy. This problem is compounded by the fact that the EU typically places the appearance of the phantom sometime in the future: illegal immigration is discussed as something to be 'prevented' (Walters 2010: 83, see also Bigo 2005, Düvell and Jordan 2002).

A logical contradiction moreover emerges: potential refugees have few if any possibilities of entering the EU legally due to carrier sanctions and visa regimes (Andrijasevic 2006). According to ECRE (2004: 17), 90% of refugees rely on irregular entry to the EU. As Black (2003) notes, increasingly restrictive border controls effectively force refugees to rely on professional 'smugglers' in the process. It seems almost cynical to claim to promote the safeguarding of asylum by controlling external borders when, in fact, refugees' access to European territory is further undermined by such measures.

In addition, it is assumed that the public only supports asylum as long as irregular immigration is controlled – this is questionable, as public support might depend on issues such as media coverage and the securitisation of immigration, rather than on mere de facto control of external borders (see Pugh 2004). It seems problematic that any mention of the principle of non-refoulement was omitted from Frontex's Founding Regulation, particularly if one goal of setting up the agency was safeguarding asylum – there is a logical inconsistency regarding the claims made and the Regulation emerging out of them (Papastavridis 2010: 105-106).

Raising a further conceptual critique, it is noteworthy that both 'fight' and 'combat' are frequently used in conjunction with 'illegal' immigration – this creates a political imagination of Europe as a bounded region, distinct from and confronted by a chaotic, threatening outside (Walters 2010: 75). While the 'social, economic and political implications' of irregular immigration are neither spelled out nor explicitly labelled as a threat to Europe, the impression arises that 'implication' is a synonym for 'threat'. Karyotis (2011) however showed that dominant beliefs about immigration as threatening do not withstand empirical scrutiny. While it is frequently claimed that migration is a threat to language, culture, and national identity, these are never static or monolithic constructs. Economically, migrants are actually needed within the EU at the moment, and migration has been shown to have positive net impacts on European societies.⁵ Regarding societal safety, the impact of migration on crime rates has been grossly overstated. Empirically then, the construction of irregular immigration as a threat is questionable.

Additionally, the arrival of irregular immigrants is completely decontextualised from its causes in this argument:

framing the EU as innocent victims [of border transgressors, seemingly appearing from nowhere], it confers upon this political actor an expectation and a sovereign right to responding emphatically to the transgression. [...] the EU is framed not as active, but only as re-active (Walters 2010: 89).

⁵ However, other studies have shown that the economic effects of immigration differ and depend on a variety of factors, including migrants' age, skills, access to the labour market and social services, among others (see, *inter alia*, Borjas 1995, 1999, House of Lords 2008, Ruhs 2008, Rowthorne 2008).

The Union's own involvement in the causes of irregular immigration, through for instance trade agreements, arms deals, capital investment, tourism, and colonial legacies, is simply ignored (Cholewinski 2004, Castles 2003, Peers 2004). In the same light, Frontex (2009b) claimed years later that the two main determinants of irregular immigration were the availability of employment in Member States, and the likelihood of 'illegally' reaching European territory without being intercepted – the conditions in migrants' home countries were considered less important and the role of the EU in creating conditions which led to displacement were simply blanked out.

The claim that irregular immigration can be stopped by border control is, similarly, empirically questionable. While as in this case, 'control activities are [...] often justified on a humanitarian basis' (Hernández-Carretero 2009: 2, Léonard 2011), they lead to a diversification of migrants' strategies and the choice of more dangerous routes, contributing to more deaths (Sassen 2003, Triandafyllidou 2010a, Triandafyllidou 2010b, Hamood 2008, Walters 2010). As De Haas (2008: 1311) notes, the sheer length and space of land and maritime borders to the EU make it practically impossible to prevent all people from crossing – and as migrants know that, the lure to try a more dangerous route, and to escape the controls, will remain even if border controls are expanded significantly. The resulting increase in deaths is likely to be used as justification for even more border control, leading to a 'self-perpetuating cycle of border build-up' (Hernández-Carretero 2009).

Moreover, irregular status resulting from irregular entry is a minor factor regarding the presence of undocumented migrants in Member States – yet the focus on combating irregular immigration is primarily on those entering clandestinely (Düvell and Vollmer 2011, Bigo 2004, Wolff 2008). As Walter notes, 'there are particular assumptions about the racial and class identity of unauthorised migrants that are deeply encoded in the common policy' (Walters 2010: 85). Those who enter as clandestines are too poor to be granted a visa in most cases, and are non-white. Focusing so strongly on impeding their access has racist undertones, whether unwittingly so or not (Melis 2001, Nyers 2011, Toğral 2011). Alternative ways of controlling irregular migration, for instance through employer sanctions or legal immigration, are mostly overlooked or silenced in the documents analysed.⁶

Briefly, a final prominent justification for Frontex should be mentioned, which can be called the *weakest link* argument:

- 1) Security in the AFSJ is only as strong as its weakest link (European Commission 2002b: 10).
- 2) All Member States have an interest in external border control, but some bear more costs (Council of the European Union 2004b: §5).
- 3) An AFSJ needs trust. Trust can only emerge if external borders are perceived by all Member States as secure (European Commission 2001: 25, Council of the European Union 2004c: 13).

⁶ Moreover, there is an interesting gender dimension to border controls aimed at impeding irregular entry – while such analysis is beyond the scope of this paper, the reader is encouraged to consult (Campani 2011 and Schuster 2001).

- 4) An AFSJ requires all Member States to apply common rules, standards, and procedures, or else there are security differentials between states (European Commission 2002a: 10-14, European Commission 2003b: 2).
- 5) Solidarity, operational cooperation, and burden-sharing are needed in guarding external borders (Council of the European Union 2004b: §3, European Commission 2003b: 5-6).
- 6) The Common Unit was not effective in establishing these (Council of the European Union 2001: §38, Council of the European Union 2003c, European Commission 2003b: 37).

Ergo, an operational structure is needed to coordinate operational cooperation, thereby enhancing external border control and creating solidarity and trust (European Commission 2003a: 8, Council of the European Union 2004b, Council of the European Union 2003b).

When assessing the first few years of Frontex's work, an empirical critique emerges regarding the concept of 'solidarity.' It is claimed that the establishment of Frontex would increase solidarity. However, an increase of solidarity cannot result solely from the creation of an agency that depends on voluntary contributions from Member States. This became clear once Frontex was operating, and led to the idea of 'compulsory solidarity' with the establishment of Rapid Border Intervention Teams, which will be discussed in Chapter 5.

Despite the creation of Frontex, Member States were acting according to their own interests, rather than attempting to find common solutions (Wolff 2008: 266). For them, Frontex has been instrumental in fostering a specific image regarding external border control. As Rijpma (2010) noted, the agency was intended to restore EU citizens' trust in border control while at the same time allowing the Commission and Member States to shift the blame for deaths and suffering resulting from desperate attempts to circumvent ever stricter border controls to Frontex. The specialised agency now additionally takes the blame for any failures to control irregular immigration, distracting potential criticism from Member States.

Conceptually, the use of 'solidarity' should also be critiqued. While it is employed in the documents to denote the sharing of costs and efforts for external border control among Member States, this form of solidarity seems to pre-suppose a de-solidarising with those outside of the EU, who are either denied entry or left to deal with those intercepted and returned. This in-group conception of solidarity has led to the description of the EU as a 'gated community', protecting an easy way of living for those inside while keeping those considered 'others' from entering its territory, constructing them as a threat to the wellbeing of EU citizens (Van Houtum and Pijpers 2007).

While clearly, there are a whole range of argumentative and conceptual weaknesses in the justifications for setting up Frontex, an immanent critique of the agency necessarily also entails an assessment of its current working practices and its historical evolution. In the next chapter, Frontex's management and oversight mechanisms will be scrutinised, before an evaluation of its operations and its change over time will be conducted in Chapter 5.

4 Frontex oversight and management

According to its founding regulation, Frontex has six main tasks, which are to:

- a) 'coordinate operational cooperation between Member States in the field of management of external borders;
- b) assist Member States on training of national border guards, including the establishment of common training standards;
- c) carry out risk analyses;
- d) follow up on the development of research relevant for the control and surveillance of external borders;
- e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;
- f) provide Member States with the necessary support in organising joint return operations' (Council of the European Union 2004b: Art. 2(1))

Since the precise structure of the agency is not justified in the documents analysed, the normative assessment in this section will focus on the workings of the institutional setup in practice, and their conformity with values of Frontex and the EU as discussed in Chapter 2. As Baldaccini (2010: 236) noted, 'there is no developed framework for the accountability of Frontex operations.' At the core of decision-making within Frontex is the Management Board, which consists of a representative of each EU Member State and two representatives of the Commission, and to whom the Executive Director is accountable.

In part, Member States agreed swiftly on the draft resolution establishing Frontex because the management structures of the agency are strongly dominated by Member States (Léonard 2009). The Management Board appoints an Executive Director after having received a proposal by the Commission. Moreover, it adopts a general report each year, which is forwarded to the European Parliament, the Council, the Commission, the Economic and Social Committee and the Court of Auditors, which is responsible for financial oversight. The Management Board also adopts an annual programme of work after the reception of an opinion by the Commission, which it forwards to the European Parliament, the Council, and the Commission. Both documents have to be published, and are thereby the only ways in which the agency is accountable to the public. Moreover, the Management Board is responsible for the structural setup of the agency (Council of the European Union 2004b: Art. 20(2)).

As noted above, the European Parliament could not influence the process of establishing Frontex, and is rather marginalised regarding its powers and competences to oversee Frontex's activities in the agency's current functioning. While it has control over Frontex's budget, it can do little to ensure the accountability of Frontex in the fulfilment of its mandate, including its compliance to refugee and human rights law (Baldaccini 2010: 236). The founding regulation gives the European Parliament the possibility to invite Frontex officials to report on the agency's work, which it has done in the past (Council of the European Union 2004b: Art. 25(2)). However, there is no obligation for Frontex staff to appear, and there have been instances where senior officials declined to participate in hearings (Baldaccini 2010: 236).

Regarding the budget of the agency, it needs to be noted that thus far, the European Parliament has chosen to repeatedly increase the budget that was proposed by Frontex and the Commission significantly, seeking to push Frontex to increase the length of its missions, and to improve communication with the Parliament (Taylor 2007, COWI 2009). Since in addition to individual states' contributions, the Community subsidy is by far the largest part of Frontex's budget, this has had major implications for the agency itself (Léonard 2009). In only six years, it faced an almost 5-fold increase in its budget⁷ – staff has increased from 72 at the end of 2006 (the first operational year of the organisation) to an expected 281 by the end of 2011 (Frontex 2010e, Frontex 2007a).

While Frontex was created to coordinate Member State cooperation, and all responsibility for operations thus rests with the latter, in practice the situation functions differently. The agency is divided into three divisions – Operations, Capacity Building, and Administration (Frontex 2006f). Its operations are mostly planned on the basis of risk analyses conducted by the Operations Division, not considerations of Member States – 'this means that Frontex effectively initiates the coordination that it engages in' (Baldaccini 2010: 234). Moreover, Baldaccini notes that Frontex's operational role emerges already in the Founding Regulation. In Article 10, provisions for executive powers of agency staff are made; Article 13 and 14 allow Frontex to establish working arrangements with third countries and organisations, and Article 8(3) permits Frontex to own operational resources and assets.

This operational character has been strengthened further by amendments to the Founding Regulation made in 2007, establishing a mechanism for the deployment of Rapid Border Intervention Teams (RABIT). The amendments have introduced what has been referred to as 'compulsory solidarity' into Frontex's work, obliging Member States to contribute resources and personnel to RABIT missions, which respond to situations of 'urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third country nationals trying to enter the territory of that Member State illegally' (European Parliament and Council 2007: Art. 8). While Member States request the deployment of a RABIT mission, the request is decided upon solely by the Executive Director, who shares the reasons for his decision solely with the Management Board.

As noted above, there has been a wealth of criticism regarding Frontex's management and oversight mechanisms (Léonard 2009: 383, Amnesty International and ECRE 2010, ECRE and Refugee Council 2007, Standing Committee of Experts on International Immigration, Refugee and Criminal Law 2008). Since the agency constitutes a shift away from the legislatively centred immigration policies of the EU, there are worries in particular regarding its accountability toward the European public (Gibbs 2010: 135-136). While the Founding Regulation recognises that Frontex needs to ensure that 'the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work' (Council of the European Union 2004b: Art. 28(2)), there is only limited information available on their website.

⁷ This calculation is based on the growth in budget between 2006 and 2011, roughly €19 million in Frontex's first operational year as compared to an estimated €86 million this year - which however will most likely be increased significantly due to the political upheavals in Northern Africa. The increase would be substantially larger were Frontex's 2005 budget used - which was roughly €6 million.

The annual report and programme of work are the most detailed documents available, and while they mostly provide information in advance or in retrospect of actual missions, they also present a superficial image of Frontex activities and missions, and leave the reader half-informed. The tailored risk assessments that missions are based on, the operational agreements underlying the operations, and the working arrangements that Frontex has set up with third countries and organisations are not publicly accessible – leaving the agency clouded in secrecy and making it nearly impossible to access timely information regarding its activities (Baldaccini 2010: 236-237, Pollack and Slominski 2009, Carrera 2008). The justification for the secrecy is that these documents entail sensitive information which could put the sources of information at risk – however, ‘by applying the secrecy rule the very source legitimising the operation can not [sic] be at all contested, reviewed and in the end made democratically accountable’ (Carrera 2008: 14).

This lack of access inhibits the possibilities for external, impartial control of the agency through, for instance, civil society organisations. As the Immigration Law Practitioners’ Association noted, Frontex’s Management Board is a weak method of scrutiny, and external evaluations take place only every five years (Léonard 2009: 383). Another lack of accountability emerged more strongly after the 2007 amendment of the Founding Regulation, which permits the use of force by Frontex officers. As Jorry (2007: 21) noted, the founding regulation’s Article 18 grants immunity to Frontex staff – this is unacceptable to uphold given that staff members are now, in the framework of RABIT missions, allowed to use repressive force, including the use of weapons. On the positive side, Frontex as an EU agency has been legally accountable to the European Court of Justice since the entry into force of the Lisbon Treaty (Baldaccini 2010: 237, Fischer-Lescano and Löhr 2007).

While the EU and Frontex are committed to the value of democracy, which necessarily includes accountability and transparency, and while the Council (1999: §7) has emphasised that ‘the area of freedom, security and justice should be based on the principles of transparency and democratic control the management structures and the practices of Frontex are not supportive of such values. On the Frontex website, no comprehensive and updated overview of documents other than General Reports and Programmes of Work can be found – even though this is required by Regulation (EC) No. 1049/2001 which regulates public access to EU documents (Rijpma 2010: 5). Accordingly, improved democratic control by for instance the increased involvement of the European Parliament as well as more extensive and timely information of the public regarding operations is needed (Balzacq and Carrera 2006: 28).

5 Frontex operations and practices

While, as previously discussed, Frontex has six different tasks, operations are what the agency spends most of its resources on. Since its inception, the operational budget has increased consistently, and has continuously been a large share of the overall budget. In 2011, operations were anticipated to amount to 60% of the entire budget (Frontex 2010e). Moreover, operations are seen as ‘the heart’ of Frontex’s activities by the agency, as ‘detecting the criminal networks behind the smuggling and trafficking of human beings, is the essence of what Frontex does’ (Frontex 2011d: 1). Within the operations budget, there is specific emphasis on operations at sea, which constitute 27% of the overall estimated 2011 budget.

As with other parts of Frontex’s work, operations are approved solely by the Management Board and the Executive Director. The initial impetus is either a Frontex risk assessment or a Member State proposal for a Joint Operation. Any operational ideas are discussed with the Management Board before the Executive Director decides whether to conduct an operation. The detailed operational plan is developed by the operations unit, discussed in the management meeting and endorsed by the Executive Director. When the operation is completed, an evaluation is presented to the Management Board, whose recommendations on follow up actions are forwarded to the Executive Director and his Deputy ‘for further considerations’ (Frontex 2007a: 8-9). As noted before, the operational agreements constituting the foundation of operations as well as their evaluations remain secret – only vague information is available on Frontex’s website.

In this chapter, the historical development of Frontex will be traced by comparing two missions. First, the 2006 HERA I and II missions will be introduced and evaluated, before outlining how Frontex responded to criticism of its operations and attributed increasingly greater importance to human rights in its documents. Evaluating the currently ongoing HERMES mission, the extent of the shift toward human rights will be questioned, and numerous tensions between fundamental values and the operation will be highlighted.

Recalling the past: Operations HERA I and II

Operations HERA I and II have been described as possibly the best publicised operations Frontex ever conducted. HERA II was the first large-scale operation after the agency’s foundation, and both missions have been widely judged as successful (Kasperek 2010: 128, Keller et al. 2011: 13, Frontex 2006b). HERA I was based on a request from Spain in May 2006, started on 17 July, and lasted until 31 October 2006 after two extensions. It consisted of the deployment of experts supporting the Spanish police in identifying irregular immigrants, and in coordinating return flights. During the operational period, 18,987 irregular immigrants landed in the Canary Islands and 6076 were sent back (Frontex 2007a: 12). HERA I was largely a knowledge-gathering operation, during which deployed officers questioned immigrants about their countries of origin as well as the routes they had travelled.

HERA II was based on a second request made by Spain in June 2006. It began on 11 August and lasted until December 2006, having a budget of €3.5 million. The sea surveillance operation intercepted migrants travelling from Senegal, Cape Verde and Mauritania toward the Canaries, stopping them before they left African territorial waters. Legally, this was possible due to bilateral agreements between Spain and these countries, the specifics of which have remained undisclosed (Papastavridis 2010: 88, Guild and Bigo 2010: 269). In the course of the operation, 3887 migrants were intercepted and diverted, apparently by Senegalese boats cooperating with Frontex (Carrera 2008, Bailey 2006). Since then, there have been numerous follow up missions, and HERA now runs as a longer-term operation – having thus far produced costs amounting to €10 million, the operation has been the most expensive undertaken by Frontex (Baldaccini 2010: 239-240).

When seeking to unravel the justification for these operations, the scarcity of information is noticeable: two press releases and a few lines in Frontex's reports is the extent of the official, public documentation of HERA I and II. All available information reports on the ongoing or past operations, none covers the deliberation regarding their possible launching. In retrospect, the mission was said to have aimed to 'detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea' (Frontex 2006d), which appears almost like a humanitarian mission.

The justification for the specific operation in Frontex documents appears rather fragmented – nevertheless, two arguments can be identified. The first one posits that a situation of crisis existed in the Canaries:

- 1) Irregular immigration to the Canaries is one of the four main routes to the EU (Frontex 2007a: 12)
- 2) The migratory situation in the Canaries was out of control, assistance was needed (Frontex 2007a: 12).
- 3) Irregular immigration can be brought 'under control' by surveillance and interception (hidden premise).

Ergo, a Frontex surveillance and interception operation was needed to control irregular immigration to the EU and to resolve the disorderly situation in the Canaries.

It is assumed in the argumentation and the goal of the missions that irregular immigration should be decreased, and that this can be contributed to by intercepting boats, thus stopping migrants from leaving West Africa. As Kasparek (2010: 129-130) notes, these assumptions and the resulting operations lead to an externalisation of the European border, which is pushed south by thousands of kilometres. The situation in the Canary Islands was presented as 'an unprecedented humanitarian crisis in the whole of Europe' to which an 'urgent European solution' was required – according to Carrera (2008:12), this was an overstatement of the facts and a dramatisation of the situation. Carrera notes that the operations were launched due to high political pressure as a 'rapid solution', while there was a lack of clarity regarding the migratory situation.

Interestingly, the migratory route that HERA attempted to shut down had been established as a result of Spanish authorities' attempts to stop irregular migration crossing the straits of Gibraltar (Kasperek 2010: 129). This supports the empirical critique that in the long term, increased border controls are unlikely to reduce unauthorised immigration, even if this can be successfully achieved in the short term. As Hernández-Carretero (2009: 4) put it, 'the inherent fallibility of maritime patrols will continue to feed migrants' optimism over the possibility of completing their journeys undetected.' On the other hand, strengthening border controls to prevent irregular migration can have perverse consequences: it might make migrants more dependent on professionals for their journey, making them more vulnerable to violence and increasing the income of smugglers (Andrijasevic 2010: 160). Furthermore, aiming to prevent migrants from leaving African shores stands in stark contradiction to the human right to leave any country, enshrined in Art. 12(2) of the International Covenant on Civil and Political Rights, as well as in Article 3 of Protocol IV of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Trevisanut 2009). In General Comment 27, the Human Rights Committee made clear that this right can be violated not only by states that are to be left, but also by potential countries of destination (Papastavridis 2010: 109). Another point of critique is the fact that according to its Founding Regulation, Frontex has no mandate to operate beyond the external borders of the Union (Papastavridis 2010: 88).

A second line of argument justifying the operation runs as follows:

- 1) Migrants die because they make a dangerous journey to the Canaries in unseaworthy boats. They can be saved by being intercepted (Frontex 2007a: 12, Frontex 2006d, Frontex 2011d: 1).
- 2) Facilitators of smuggling are to be blamed for migrants' deaths and should be detained (hidden premise) – information gathered by talking to irregular migrants can help to further this (Frontex 2007a: 12).

Ergo, Frontex experts needed to conduct interviews with irregular immigrants in order to gather information helping to detain facilitators. A Frontex interception operation was needed to save migrants lives by preventing them from leaving African shores.

Strikingly, a humanitarian argument is thus prominent in the justification for the mission: the alleged saving of migrant lives by intercepting them and turning them back is positively referred to throughout Frontex's (scarce) documentation of the mission. Migrants were 'stopped from setting off for a dangerous journey that might have cost their lives' (Frontex 2007a: 12), and 'deterring irregular migrants from embarking on a perilous voyage from West Africa [...] to the Canary Islands across the high seas in unseaworthy small boats – without doubt prevented countless deaths' (Frontex 2011d: 1). However, there are major inadequacies within such an approach. As Carrera notes, preventively stopping people from travelling 'illegally' ignores the fact that the intercepted person might be hoping to seek asylum:

the process of externalisation implies the prevention of the 'would-be irregular immigrants' or 'would-be asylum seeker' from reaching the EU border and thereby from moving into any of these judicial categories (Carrera 2008: 25-26).

Presupposing ‘illegality’, on the other hand, easily leads to a disregard of fundamental rights during interception, including due process rights and the right to non-refoulement. The externalisation of border controls leads to a moving outside of the defined legal frameworks of the EU, implying ‘that the principles and mechanisms characterising the group of liberal democracies comprising the EU are left behind’ (Carrera 2008: 25-26). Frontex Executive Director Laitinen admits that this externalisation leads to legal uncertainty and different interpretations by Member States: ‘the right of boat people to claim asylum or other forms of protection outside [Member States’] territorial waters is not yet acknowledged Europe-wide’ (Ilkka Laitinen, cited in Tondini 2010: 17). In the same interview, he asserts that it is Member States’ responsibility to assess asylum applications when migrants are encountered on the high seas, and that this is not part of Frontex’s mandate – given the discrepancies between different countries’ interpretations, this leaves potential asylum seekers who are unlucky enough to be ‘rescued’ by the ‘wrong’ country without any access to refugee determination procedures. To claim that these people’s lives are ‘saved’ by preventing them from departing to the EU where they might be able to claim refugee status is logically indefensible.

While Member States according to Laitinen disagree on the application of the principle of non-refoulement to extraterritorial waters, scholarly and UNHCR opinions on this issue are clear. There is a wide consensus that when a state exercises effective control over a person, that person is under the de facto jurisdiction of that state – which means that international legal standards such as those deriving from the 1951 Geneva Convention Relating to the Status of Refugees and Article 3 of the ECHR do apply. Also in case law and General Comments by international human rights monitoring bodies, the consensus has grown that human rights obligations emerge due to exercise of state jurisdiction, whether extraterritorially or not (Goodwin-Gill and McAdam 2007: 244-253, Papastavridis 2010, Moreno Lax 2008, Baldaccini 2010, Refugees 2007, Hathaway 2005). Laitinen’s rejection of Frontex’s legal responsibility and his pointing to divergent understandings of Member States regarding the extraterritorial application of international law leads to the conclusion that apparently, ‘many of [Frontex’s] operations, especially in the maritime domain, are not in full consistency with international law’ (Papastavridis 2010: 110).

In addition to running the risk of undermining the principle of non-refoulement, the externalisation of border control as it occurred in HERA I and II has questionable effects for the right to effective legal remedy, which is legally binding and enshrined in the Charter of Fundamental Rights. In *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie*, the European Court of Justice ruled that the externalisation of immigration or asylum decision-making must not make the exercise of individual rights excessively difficult, and that the duty to provide effective legal remedy arises regardless of the location of the individual who is, for example, denied entry (Oosterom-Staples 2009: 76-77). When withholding permission to enter European territory, individuals have to be informed of their right to appeal such a decision.

While it is uncertain whether this information was in fact provided to people intercepted in the context of the HERA missions, in any case it does not require states to suspend the effects of the decision; effectively leaving those denied entry without a possibility to *exercise* their right to appeal (Hernández-Carretero 2009). As Oosterom-Staples (2009: 89) concludes, 'FRONTEX operations effectively infringe immigration and asylum rights by taking the means to reach the *de jure* external border away from the would-be immigrant.' The right to effective legal remedy, however, is of crucial importance in a democracy, as it constitutes part of the system of checks and balances aiming to ensure the state's legitimacy and its adherence to its own rules. 'Access to justice is thus an expression of the democratic accountability of the executive,' and withholding it is in fundamental contradiction with the value of democracy as embraced by Frontex (Oosterom-Staples 2009: 80).

In its documentation of the operation, Frontex seems to be drawing on a curious mix of portraying immigrants as victims who must be saved from drowning and from smugglers, and portraying irregular immigration as a threat, for instance by using statements such as 'tackling the flow of illegal immigrants from Western Africa' (Frontex 2006b). It was already argued in Chapter 3 that the threats most commonly cited as resulting from irregular immigration do not withstand empirical scrutiny. Similarly, portraying irregular immigrants as victims only is inaccurate – many are from 'reasonably well-off backgrounds' and often relatively well educated (De Haas 2008: 1308). Moreover, Black (2003) notes that while smuggling may entail elements of exploitation, harm or deceit, in most cases migrants migrate on their own initiative, have agency in the process, and accrue certain benefits from migration.

Ironically, it could be argued that where illegal migrants are really 'victims' is in the rising tide of legislation designed specifically to target those moving illegally, to refuse them access to legal instruments as basic as the Geneva Convention on refugees or the Universal Convention on Human Rights (Black 2003: 40).

Given concerns regarding a lack of respect for refugee and human rights, and a lack of effective legal remedy, it is especially worrying that Frontex did not provide transparent and reliable information regarding the impact of its operation on potential asylum seekers. While statistics regarding the mission were published, they only referred to 'migrants', and made no mention of particularly vulnerable groups – again, this is a point that needs to be critiqued conceptually (Frontex 2006c). Asked about applications for asylum, the agency declared 'Frontex is not aware of any claims of asylum which have been submitted to the national authorities' (Guild and Bigo 2010: 270). Whether people were offered to apply for asylum, as well as what happened to them after they were diverted back, remains unclear – as Carrera noted, there is 'a worrying lack of transparency about the precise conditions and effects of return and/or readmission of third country nationals, and the treatment that they receive in these countries' (Carrera 2008: 25-26). Justifying the operations as needed to save lives becomes absurd when the fundamental rights of those 'saved' are watered down through externalisation, and no inquiry is made as to their fates after interception and return.

Historical developments and a shift toward fundamental rights

The low priority Frontex accorded to human rights has been explained by pointing to the isolation of the European Parliament in the negotiations leading to the establishment of the agency (Léonard 2009: 385). The Parliament has, since then, sought to exert its influence to foster more respect for human rights. In 2009, its Civil Liberties, Justice and Home Affairs Committee ‘condemned the tendency towards a ‘zone of indistinction and arbitrariness’ regarding the application of human rights, which is ‘contrary to the EU values’ (Williams 2010: 149). Also among NGOs, Frontex’s seemingly blatant negligence of fundamental rights and the principle of non-refoulement provoked harsh criticism (Amnesty International 2007: 50, Amnesty International 2008: 276, Frelick 2009: 35-37, ECRE and Refugee Council 2007).

As a response to mounting pressure, a human rights discourse began to grow within the agency – while before 2008, no mention was made of fundamental rights, asylum, or protection issues in Frontex’s publications, in the 2008 and 2009 programmes of work, human rights were referred to once. In 2010, already 6 references were made, and by 2011 there were 13 references to human rights. However, no mention was made in any of the documents of the obligation to non-refoulement. While asylum was occasionally mentioned, it was frequently used in conjunction with ‘bogus’ asylum seekers. Similarly, the General Report 2008 mentioned fundamental rights for the first time (Frontex 2005a, Frontex 2005b, Frontex 2006a, Frontex 2006e, Frontex 2007a, Frontex 2007b, Frontex 2008a, Frontex 2008b, Frontex 2009a, Frontex 2009c, Frontex 2010a, Frontex 2010e).

Moreover, Frontex signed a working agreement with the UNHCR in June 2008 and with the EU Fundamental Rights Agency (FRA) in May 2010, and intends to integrate human rights into its border guard training (Léonard 2011: 32, FRA 2010, Frontex and FRA 2010, Baldaccini 2010: 244). In its 2010 programme of work, Frontex interestingly defines *humanity* as a fundamental tenet of its work: ‘full respect and promotion of fundamental rights, belonging to the value ‘Humanity’, is the most important corner stone of modern European border management’ (Frontex 2009c: 30). Clearly, the use of human rights language has been increasing in the agency in recent years, and outside criticism has been reacted to.

While the intra-agency discourse on human rights has been growing, Frontex’s obligations with regards to human rights, non-refoulement, and search and rescue at sea have moreover been clarified by EU legislation. In April 2010, a Council Decision made unmistakably clear that Frontex’s operations at sea must respect these principles at all times, and that border guards need to be trained accordingly (Council 2010). According to Kaunert (2009), the European Commission has acted as a norm entrepreneur regarding immigration policymaking, attempting to avoid a further securitisation of asylum and instead rooting it in the 1951 Convention Relating to the Status of Refugees. At the moment, a proposal to amend Frontex’s founding regulation is being discussed – this would strengthen the agency’s mandate and competencies, and also improve its accountability and elevate the position of human rights within Frontex’s work (European Commission 2010b, Amnesty International and ECRE 2010, UNHCR 2010). Apparently, EU institutions feel the need to respond to criticism against Frontex, and seek to oblige the agency more clearly to respect fundamental principles of human rights and refugee law.⁸

⁸ However, human rights might often be referred to instrumentally, and policies might still aim to further the securitisation and control of immigration. According to Kostakopoulou,

This change in discourse is not only reflected in annual reports and legislation, but has been introduced into the ongoing coverage of operations by Frontex. Regarding news on the RABIT mission deployed to Greece from November 2010 until March 2011, the increasing use of human rights terminology could be seen in the press releases issued concurrently. While the operation reacted to a request by Greece on grounds of ‘urgent and exceptional pressure’ on its borders, fundamental rights were frequently referred to in news statements by Frontex, which noted a compulsory introduction to fundamental rights that every deployed officer would receive (Frontex 2010b, Frontex 2010c, Frontex 2010d, Frontex 2010f). There still remains, however, a tremendous lack of information on the workings of Frontex missions on the ground, and their effect on people in need of international protection. This lack of transparency and external evaluation leads to a continuation of what has been referred to as a ‘culture of secrecy’ regarding Frontex’s operations (Keller et al. 2011: 44). For these reasons, scholars are sceptical regarding a true shift toward fundamental rights in Frontex’s practices, and point out that on the contrary, Frontex is contributing to the further securitisation of asylum and migration in the Union (Baldaccini 2010: 244, Rijpma 2010: 5, Léonard 2011: 21). Their scepticism seems justified when examining the current HERMES operation, which has been widely covered in the news.

Examining the present: Operation HERMES in the Mediterranean

While other HERMES operations have been implemented before, HERMES 2011 was launched as a response to the migratory movements following political events in Northern Africa in early 2011. Frontex issued an initial press release regarding the ‘migratory situation’ in southern Italy on 14th February, one day before Italy made a formal request for assistance (Frontex 2011e). On 20th February, the operation was launched, deploying experts, vessels, and aircraft to the region. Moreover, it was announced that Europol would cooperate in the operation, which aims at ‘detecting and preventing illegitimate border crossings to the Pelagic Islands, Sicily and the Italian mainland’ (Frontex 2011a). In March, it was announced that Frontex experts had found, by interviewing arrivals, that most migrants were Tunisians, and that about 20% had ‘indicated an intention to apply for international protection’ (Frontex 2011h). Later that month, it was revealed that the operation was extended geographically to include Sardinia and that it was to last an additional five months, now running until August 2011. Moreover, it was stated that the cost for the first 40 days of the operation had amounted to €2.6 million (Frontex 2011c).

While the numbers of experts and assets deployed to the region are listed in detail, there emerges a lack of information regarding the reasoning behind the deployment, and its justifications.

this is the case for instance in the European Pact on Immigration and Asylum from 2008: ‘Echoing the fashionable discourse on contractual relations, the European Pact on Immigration and Asylum illustrates the Member States’ hegemony over the framing of migration-related issues and their resurgent power to control legal entry, combat irregular migration and dictate the terms of migrants’ integration. There is little reflection and law-enforcement approaches on the formation of a European identity and the values underpinning the European project’ (Kostakopoulou 2009).

The following line of argument is the only one that can be identified, resting on a number of unarticulated, 'hidden' premises:

- 1) There is an extraordinary migratory influx to Southern Italy, particularly Lampedusa (Frontex 2011f, Frontex 2011e, Frontex 2011g).
- 2) Those Member States most immediately affected by the influx require the EU's concrete solidarity (European Council 2011: §10, Barroso, cited in Frontex 2011h, Frontex 2011f).
- 3) Irregular immigration needs to be decreased (hidden premise).
- 4) Irregular immigration can be decreased by the deportation of irregular immigrants who have already arrived (hidden premise).
- 5) Irregular immigration can be prevented by patrols and surveillance (hidden premise).
- 6) Irregular immigration goes hand in hand with criminal activities at the external borders (hidden premise).

Ergo, Frontex will demonstrate solidarity and give assistance to Italy and cooperating Member States in dealing with this exceptional situation by launching operation HERMES. This will entail the sending of screening experts, who will 'enable early detection and prevention of possible criminal activities at the EU external border,' the assistance in joint return operations, and the surveillance and patrolling of the seas (Frontex 2011a, Frontex 2011b).

Empirically, it has been critiqued that the current situation in Lampedusa is far from new, and that similarly high numbers of irregular migrants have entered in past years, even as late as 2008 (Monzini 2011: 5). Moreover, when seen in relation to current events in Northern Africa, and the numbers of people on the move, it becomes clear that the EU faces only a fraction of what other countries are currently experiencing in terms of irregular inflows (UNHCR 2011a, De Haas 2011). The myth of an invasion and unprecedented crisis that is being propagated by European governments seems to be influenced by domestic policy concerns and the growing influence of right-wing political parties, especially in Italy and France, rather than on solid facts (Donado and Cowell 2011).

Conceptually, it can be critiqued that throughout the press releases, Frontex refers to 'irregular migrants'⁹, some 20% of whom are reported to have expressed a willingness to apply for asylum. By not differentiating between 'irregular migrants' and 'refugees' or 'asylum seekers,' Frontex contributes to the blurring of these concepts in public discourse (Schuster 2001: 236). This is particularly worrisome as irregular immigration is associated with crime in Frontex's documents, which is used to justify the involvement of Europol in the HERMES operation. The framing of irregular immigration as a threat is also visible in a press release from 15th February, in which Frontex announces that Italy requested an enquiry into 'the possibility of the opening up of a further *migratory front* in the Central Mediterranean area' – a rather discomfiting metaphor considering that this 'front' would be 'battling' highly vulnerable people on the open seas (Frontex 2011f, emphasis added).

⁹ Despite concerns regarding this term, it is a laudable shift away from the previously used 'illegal migrants.'

As noted before, discourses do have real implications for practices and attitudes of border guards. The lack of differentiation between irregular migrants and the specific subgroup of asylum seekers and refugees at a time when migration is securitised can easily result in the framing of asylum seekers as threats, thereby undermining the fulfilment of international obligations toward people in need of protection.

Apart from one vague sentence stating that during the operation, ‘all needs, both operational and humanitarian, will be met in full,’ there is no mention of human rights or non-refoulement in any of the press releases related to HERMES 2011 (Frontex 2011f). In light of repeated reports of people drowning on their way from Northern Africa to Europe – UNHCR estimates that more than 1200 people have died since the beginning of the political crises in 2011 – this glaring negligence is particularly difficult to understand (UNHCR 2011b: 2, Monzini 2011). While no details regarding the operational agreements underlying HERMES or the tasks and practices on board the ships coordinated by Frontex are obtainable, the fact that what little information is available on the mission omits any mention of human rights and non-refoulement bodes ill for respect to these values in practice. A lack of comprehensive and timely information persists, which makes it virtually impossible to monitor the efficacy of the operation in achieving its goals, let alone its respect for human rights, the law of the sea, and non-refoulement, substantially undermining the values of democracy, accountability and transparency ascribed to by Frontex.

Also in this operation, contradictions inherent in the setting up of Frontex emerged anew. The goal of ‘preventing’ irregular immigration, thought to be achievable by interception, and in this case, return, is fundamentally at odds with the value of non-refoulement and fundamental human rights, including the right to emigrate. While thus far, EU institutions have recognised and criticised risks to these values in individual operations,¹⁰ it needs to be understood that this is not an isolated problem for only some Frontex missions but one that is inherent in the setup of the agency.

Flawed empirical reasoning used in the establishment of Frontex is repeated in the justification of this operation. It has been noted repeatedly that interceptions have not shown a deterrent effect on irregular migrants, even though Frontex’s work remains based on this premise (Tondini 2010). To reiterate, ‘Frontex operations might have an immediate effect in increasing apprehension and reducing migratory pressure but this effect wanes as soon as the operation is terminated’ (Baldaccini 2010: 243). The external evaluation of Frontex even noted that sea operations might increase migratory movements as migrants might speculate on having a better chance of surviving the journey with Frontex vessels patrolling the area, and protection from return by EU Member States due to non-refoulement (COWI 2009: 43). Karyotis (2011: 22) moreover remarks that restrictive policies such as interception measures might lead migrants into settlement and discourage them from temporary migration.

¹⁰ In June 2010, the European Parliament for instance reacted to criticism regarding human rights abuses against migrants returned to Libya in the framework of Frontex operations. It passed a resolution calling on ‘Member States that deport migrants to Libya, *in cooperation with Frontex* (...) to stop doing so immediately where there is a serious risk that the person concerned would be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment’ (European Parliament 2010, emphasis added).

This is also recognised by Frontex itself, which stated, ‘enhanced border management probably keeps in Member States a number of illegal migrants who would have otherwise left’ (Frontex 2009b: 4). Not only is the HERMES mission thus in tension with fundamental values ascribed to by Frontex, but it will also in all likelihood fail to achieve its proclaimed goals, which are the prevention and control of irregular immigration.

Moreover, the climate of fear that is created by depicting incoming migrants as threats or undesirable has negative consequences for social cohesion more generally, as was noted in Chapter 3. Current policies and practices seem to be built on a generalised distrust, which considers all immigrants a priori as potential lawbreakers (Gonzalez Fuster et al. 2009). These practices, the wider exclusionary discourse on irregular immigration by policymakers and the media, as well as the depiction of the current situation in the Mediterranean as a ‘crisis’ that needs to be solved, all fuel xenophobia and intolerance toward those entering the EU. Moreover, such negative discourse affects those immigrants already living in European societies, whose place in society is questioned and who might be subjected more frequently to humiliating checks of their papers and legal status, feeling increasingly excluded (Honig 2009: 217). This however is not only problematic for those marginalised, but also for society at large: It conveys messages about the character of the European community and its principles, as

any damage or hardship inflicted upon outsiders due to the restrictive and law-enforcement character of immigration policy is a cost, since it impacts negatively upon the scope and nature of the principles underpinning a polity. These normative reductions do not only inflict undue damage and hardship on outsiders, but they also compromise the fundamental values underpinning democratic political communities (Kostakopoulou 2009: 207).

Conclusion

Reacting to the current increase in irregular migration from Libya and Tunisia, European institutions have called for the strengthening of Frontex, and have urged acceleration to the process of adopting amendments to the founding regulation for that purpose (European Commission 2011: §3-4). On the other hand, Frontex has been the subject of intense criticism by scholars, politicians, and civil society organisations for years. Intrigued by this contradiction in the reactions toward the agency, this dissertation used immanent critique to systematically assess Frontex’s practices according to its own goals and values. Frontex was established as a response to the perceived need for stricter controls of EU external borders. It emerged as a compromise between Member States, which were largely reluctant to renounce part of their sovereign powers, and the Commission, which was strongly in favour of a European Border Guard.

It was shown that as an EU agency, Frontex explicitly ascribes to fundamental values such as human rights, democracy, human dignity, freedom, and the rule of law. When analysing the justifications for the establishment of Frontex, however, it becomes clear that the value of freedom advocated is a limited one, and is subsumed under a perceived need for security. Moreover, a number of logical inadequacies appeared, above all related to claims regarding the alleged protection of asylum seekers and/or irregular migrants through increased border controls, and the decreasing effect of border control on irregular immigration. Already in the setup of Frontex, then, do a number of fundamental contradictions and discrepancies between declared values and future tasks emerge.

It is not surprising that contradictions and tensions persist throughout Frontex's work. Its management and oversight mechanisms have been criticised repeatedly for failing to reflect the value of democracy, entailing the necessary components of accountability and transparency. A dearth of information exists regarding ongoing and past operations, as most of the documents remain undisclosed to the public. This leads to a lack of external oversight regarding Frontex's practices and operations, and increases the risk of disrespect for human rights and non-refoulement. As noted, comprehensive and updated information on operations as well as the increased involvement of the European Parliament in their planning and evaluation would contribute significantly to Frontex's accountability and transparency.

The contradictions apparent in the establishment of Frontex re-emerge when examining its operations. HERA I and II were aimed at decreasing irregular immigration to the Canary Islands by preventing irregular immigrants from leaving Africa – while claiming that this would save migrants' lives, it is striking that no information as to the fate of those turned back was given, and further, the practices regarding claims to asylum were also less than transparent. The operation, aiming to prevent irregular immigration to the EU by externalising border control, was inherently at odds with the principle of non-refoulement. While not strictly speaking returning refugees, denying them any possibility to access European territory where they should be guaranteed a Refugee Status Determination as well as the right to legal remedy undermines the international norm of non-refoulement. Due to intense criticism, Frontex has increasingly adopted a human rights discourse – however, this cannot address the fundamental contradictions in the initial setup of the agency whose tasks include the prevention of irregular migration toward the EU. The ongoing HERMES operation is a clear case in point, illustrating how in an 'emergency' situation, security concerns once again trump human rights, which have fallen off the radar in Frontex's documentation of the mission. Ultimately, 'immigrants have paid a heavy price for a fight which was not theirs' (Bigo 2008: 80). The demonisation of immigrants exposes, at its roots, a social and political crisis within European societies, leading Member States' governments to seek to prove the alleged invulnerability of their borders (Tsoukala 2011). Member States are, through Frontex, pretending to do what they cannot: controlling the movement of persons (Bigo 2005: 91). As Squire (2009: 34) observed, this 'failure of the territorial order to fully constitute itself is *projected* onto a supplementary 'other' who is excluded and looked down upon – and restrictive and exclusionary politics emerge.

While Frontex has been blamed for failing to pay full respect to fundamental rights and should be blamed for infringing on these rights in the future, it is somewhat deplorable that civil society actors seem to have focused their critique so exclusively on the agency. Frontex needs to be evaluated in context – despite a rapid growth in budget and staff, it is still relatively weak and largely controlled by Member States, as well as dependent on the European Parliament financially (Léonard 2011: 31). As Rijpma (2010) pointed out, Member States and the Commission have attempted shifting blame and responsibility for border control to Frontex – however, their involvement in and influence on the agency should not be forgotten. Indeed, the contradictions that are apparent within justifications for Frontex’s foundation might be reflective of inconsistencies within EU border control policy more generally, resulting to some extent from diverging interests of Member States and the European Commission.

Throughout this dissertation, it has been shown that EU fundamental values are at odds with Frontex’s goals and practices. Some might argue that this calls for a revision of these values – after all, if it is ever stricter border control that the Union needs, maybe this necessarily entails the re-evaluation of European values. As noted before though, values constitute the foundation for a European identity that has been fostered since the 1990s, and that cannot rely on ethnic affinities. Moreover, they serve to legitimise the European project toward its own citizens as well as to the outside world. While values were not central to the foundation of the Union, they have come to be seen as important by its citizens and decision makers. Renouncing human rights, as shared values, would have considerable negative effects on the EU political community, EU citizens’ collective identity, and their positioning toward the Union. Accordingly, it seems more reasonable to bring practices conducted by EU institutions such as Frontex into alignment with the values ascribed to (Manners 2008: 60).

The field of immigration policy in this regard is of particular importance. Whom we choose to admit into our community, and how we deal with those seeking admission tells a lot about our own collective identity: ‘migration policy makes and re-makes the sense of political community’ (Zapato-Barrero 2009: 16, Huysmans 2006). Despite the recent increase of human rights terminology in Frontex’s documents, there is thus far no evidence other than declarations that border guards are applying international human rights and refugee law coherently and consistently when intercepting migrants, also extraterritorially (Baldaccini 2010: 255). In the setting up and operating of Frontex, migrants’ rights have continuously been subordinated to a perceived need for security and border control. Among EU citizens, the belief prevails that human rights constitute a fundamental value of the Union. It is high time decision makers within the polity reconsidered practices which progressively undermine the basis of their newly emerging, ‘European’ identity.

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