

MARITIME BORDER CONTROL AND THE PROTECTION OF ASYLUM-SEEKERS IN THE EUROPEAN UNION

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Introduction

27.441 non-European nationals have been intercepted at maritime European external borders in 2007 alone – this is four times more than interceptions on land or at air borders (respectively 4.522 and 3.297)¹. Unlawful migration is a hot political topic for European countries which try to handle it through the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (Frontex). Frontex, created in 2004² and operative since 2006, is the new tool for implementing the EU policy of borders control that forms part of the process of European integration. This co-operation has an operative dimension, i.e. joint patrolling, which gives rise to doubts concerning its compatibility with member States' international obligations.

Pursuant to Art. 3 of the Frontex's constitutive regulation (hereinafter Regulation (EC) 2007/2004), it "shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States. The Frontex may itself, and in agreement with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States". The Frontex does not have any mean at its disposal to carry out such operations; the experts involved, and the aircraft and vessels participating in the operations are made available by participating States. Since summer 2006, the Agency and Member States have carried out several joint operations in the Mediterranean Sea. These operations include the interception of vessels and their redirection to the State of origin, i.e. the State from where they have started their trip and which is participating in the joint operation pursuant to art. 14.2 Regulation (EC) 2007/2004³. The operational co-operation has been taking place on the high seas along the coasts of the interested Member States and, when agreed, also in the territorial waters of the participating third States. On this basis the Member States units can operate outside European territorial waters within the framework of international law. These operations particularly strain the terms of the 1982 United Nations Convention for the Law of the Sea (UNCLOS) (II.) and to human rights law, in particular the rights of asylum-seekers (III.).

I. Frontex and the Law of the Sea: the Legality of Interdiction Programmes

An analysis of the operative dimension of the Frontex joint operations supports their conceptualization as "interdiction programmes" despite the fact that the Agency never uses this

wording in its official documents. The practice of treaty-based naval interdiction on the high seas usually includes the following elements: a single or more State(s) aim(s) at exercising the right of visit in relation to criminal activities that are not listed in article 110 UNCLOS⁴ and that are performed by ships without nationality or by vessels sailing the flag of a State or a group of States. According to the General Report 2006, the Frontex operations HERA II and III⁵ were aimed at intercepting and diverting vessels carrying unlawful migrants coming from Senegal and Mauritania. The General Report 2007 indicates that during operation HERA III 2020 illegal immigrants were intercepted, among those 1559 (this is 77%) were diverted back.

Frontex patrols also intervened in the territorial waters of Mauritania and Senegal, third States in relation to European Union member States, on the legal basis of agreements concluded between these two countries and Spain. According to Frontex, these agreements allow not only Spanish patrols but also those of other member States to intervene in the territorial waters of these two countries. According to international law, coastal States exercise their full sovereignty in their territorial sea with the only limit of the right of innocent passage (art. 17 UNCLOS) and of treaty-based self-limitation. In contrast to the assertion by Frontex, the agreement with Mauritania provides that the Contracting Parties, Mauritania and Spain, might intercept and divert in any place of their territory, including the territorial sea, any Third State national who does not comply with the entry conditions in force in the two States (arts I.1, VI.i(ii) and IX.1(a)); no permission to extend the patrolling prerogative to a State different from Spain can be found at any place in this agreement⁶.

Moreover, there are two problematic aspects related to the nationality of the patrolling vessels and of the vessels that are intercepted. Concerning the vessels patrolling in the territorial seas of Mauritania, Frontex does not specify the nationality of the acting units in any documents and usually speaks of “member States’ vessels”. This expression suggests that not only Spanish craft may intervene in Mauritanian waters. If they did so, this would indeed be in violation of international law, unless the acquiescence of Mauritania can be shown.

With regard to the nationality of the vessels that are intercepted and diverted, it is important to recall that according to art. 92.1 UNCLOS vessels can sail under the flag of only one State and are under its exclusive jurisdiction. In territorial waters a vessel is subject to the coastal State’s jurisdiction within the limits of arts 17ff UNCLOS; the coastal State might delegate, on the basis of a treaty, part of its powers in the territorial waters to a third State. Pursuant to the above mentioned agreement, Spain has been authorized to exercise its jurisdiction, even in relation to third States’ vessels/nationals, but only in Mauritanian waters. On the high seas, outside the case of its own or Mauritanian vessels, Spain could only intervene against vessels which do not have a flag or have

more than one (art. 92.2 UNCLOS) or pursuant to the authorization of the flag State (art. 110.1 UNCLOS).

According to Frontex, “[a] Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States’ assets and is always responsible for the diversion”⁷. This presence provides a legal basis for the operation carried out in the Mauritanian and Senegalese territorial waters and testifies to the acquiescence of Mauritania and Senegal. Doubt remains in cases of an incident occurring during operations that constitutes a wrongful act: can such an act be imputed to Mauritania and Senegal? Is the presence of a law enforcement officer on board of participating member States’ vessels an adequate criterion for international responsibility’s attribution? The rules of engagement, unavailable to the present author, could help to give an answer to this doubt. Furthermore, the presence of a Mauritanian or Senegalese officer has no effect on regards the right of deployed Member States’ craft to intervene on the high seas against any vessel coming from the coasts of these two States; neither does this provide a legal basis for the diversion.

II. Frontex and Asylum Law: the Legality of Diverting Operations

Interdiction programmes at sea can challenge the principle of *non-refoulement* guaranteed by art. 33 of the 1951 Geneva Convention on the Status of Refugees (hereinafter Geneva Convention) which protects asylum-seekers and refugees against the return or the extradition to the country they are fleeing or any other country where their life and freedom can be endangered. All European member States are parties to the Geneva Convention. The European Community cannot be a party to the Geneva Convention but is bound by it in its asylum policy pursuant art. 63.1 Treaty establishing the European Community (TEC).

The principle of *non-refoulement* may be violated when the interdiction programme includes the forced diversion of the intercepted migrants to the departure country, or to a country they do not choose, or do not want to go to, or to an unsafe third country. In fact, the *non-refoulement* principle does not contain a duty to receive the migrants. However, to simply repel them on the high seas might violate other international law rules such as the duty to render assistance at sea (art. 98 UNCLOS), this especially likely when bearing in mind that migrant boats are generally unsafe.

In the wording of Frontex, migrants diverted back are “[p]ersons that were intercepted during Joint Operation (...) at sea who have either been convinced to turn back to safety or have been escorted back to the closest shore”⁸. This statement does not indicate that Frontex fully respects the principle of *non-refoulement*; to the contrary, the words “convinced” and “escorted” suggest that European agents might coerce migrants to redirect.

The joint operations of Frontex can also imply a violation of the right to emigrate guaranteed by art. 13 of the Universal Declaration of Human Rights (UDHR) and art. 3 Protocol IV of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and of the right to search asylum in another country than their own guaranteed by art. 14 UDHR and indirectly by art. 3 ECHR. Art. 3 ECHR guarantees the right not to be submitted to torture and inhuman and degrading treatment. The European Court of Human Rights has interpreted this provision as protecting against the risk of *refoulement* and thus as an expression at the European level of art. 33 Geneva Convention. The principle of *non-refoulement* is the only legal tool guaranteeing to asylum-seekers the access to the procedures and thus the exercise of the right to search asylum.

On 18 June 2008 Frontex has concluded working agreements with the UNHCR establishing a framework for cooperation between the two bodies. According to press releases⁹, these working agreements “constitute a fair balance between the very different remits of Frontex and UNHCR and a common goal to promote an efficient EU integrated border management system, which is fully compliant with human rights”. This statement corroborates the suggestion that as of now Frontex’s activities are at least dubious under human rights and asylum law¹⁰.

Conclusion

The General Report 2007 opens on a self-congratulatory note with the observation that the inflows of illegal migrants have decreased between 2006 and 2007. Unfortunately data published by the same report indicate that controls on maritime borders defy this statement (21.769 intercepted third country nationals in 2006, 27.441 in 2007). The latest statistics related to the joint operations HERA 2008 and Nautilus 2008 state that until 9 September 2008 the patrols have already dealt with 22.764 arrivals.

It has been suggested above that member States participating in Frontex joint operations may violate their international legal obligations. It might be argued that the efficiency and effectiveness of the operations and the pursuit of Frontex’ aims has to take priority; but such an argument would be appalling from any rule of law perspective. Legality must not be sacrificed for the benefit of some necessity that evokes efficiency or effectiveness as normative yardsticks.

Moreover, interdiction programmes at sea dealing with migration are usually carried out with the same operative actions as are used in preventing the smuggling of arms or drug trafficking. But unlike arms and drugs traffickers, migrants and smugglers of migrants often try to be intercepted and rescued, in particular playing on the unsafe condition of the craft. Thus, the approach cannot be the same as for drug smuggling, or even for traffic of human beings, because

unlawful migrants are not goods; they are “customers” of a service, a very expensive service that can even cost their lives.

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¹ FRONTEX GENERAL ANNUAL REPORT 2007, p. 18, *available at* http://www.frontex.europa.eu/annual_report (last visited Sept. 30, 2008).

² Council Regulation (EC) 2007/2004 of 26 October 2004, OJ L 349/1, 25 (November 2004), *available at* http://www.frontex.europa.eu/gfx/frontex/files/frontex_regulation_en.pdf (last visited Sept. 30, 2008).

³ “The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities, in accordance with the relevant provisions of the Treaty....”.

⁴ The possibility to conclude such an agreement is provided by Article 110(1): “*Except where acts of interference derive from powers conferred by treaty*, a warship which encounters on the high seas a foreign ship [...] is not justified in boarding it unless there is reasonable ground for suspecting....” (emphasis added).

⁵ Operation HERA has been created on request of the Spanish government for assistance in the management of the coastal borders of the Canarias Islands. Starting in July 2006, it has been articulated in three phases: the first concerning the creation of experts units and the organisation of reception conditions; the second and the third concerned the joint patrols at sea.

⁶ *Acuerdo entre el Reino de España y la Republica Islamica de Mauritania en material de inmigración*, Madrid, 1 July 2003, *Boletín Oficial del Estado*, No. 185, 4 August 2003, 30050-30053.

⁷ FRONTEX, *HERA 2008 and NAUTILUS 2008 Statistics*, News Releases 30 September 2008, *available at* http://www.frontex.europa.eu/newsroom/news_releases/art40.html (last visited September 15, 2008).

⁸ FRONTEX, *HERA 2008 and NAUTILUS 2008 Statistics*, News Releases 30 September 2008, *available at* http://www.frontex.europa.eu/newsroom/news_releases/art40.html (last visited September 15, 2008).

⁹ FRONTEX, *Frontex-UNHCR: reinforces cooperation*, News Releases, 18 June 2008, *available at* http://www.frontex.europa.eu/newsroom/news_releases/art39.html (last visited September 30, 2008).

¹⁰ FRONTEX, *Statement on alleged violation on Human Rights during Frontex coordinated joint operation*, News Releases, 4 September 2008, *available at* http://www.frontex.europa.eu/newsroom/news_releases/art44.html.