

Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’

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Keywords

Frontex, ‘External Relations’ of EU Agencies, Working Arrangements, Extraterritorialisation of Border Control, Legal Personality of EU Agencies, Cooperation with Third Countries in EU Border Control, Area of Freedom, Security and Justice

Abstract

Practices of extraterritorialisation have become cornerstones of the European Union member states’ border control. Most of them are highly dependent on the willingness of third countries to cooperate. An increasingly important phenomenon is that cooperation is secured through relationships established by administrative authorities. This article deals with the challenges arising from the active engagement of Frontex in setting up cooperation structures.

It is argued that the so-called working arrangements concluded between Frontex and the respective authorities of third countries, in their current form, show considerable deficiencies from the perspectives of the rule of law, democracy and human rights protection. They are not open to judicial review, the Parliament is not involved in their conclusion and they are not disclosed to the public. Furthermore, the human rights record of cooperating authorities is not considered. Concerns in this respect are frequently attempted to be dispelled by recourse to the ‘technical’ as opposed to ‘political’ nature of working arrangements. Likewise, it is assumed that merely ‘technical relationships’ cannot affect individuals. These arguments are not convincing. Quite the contrary, the political implications of working arrangements and their operation in a highly human rights sensitive field demand conformity with the fundamental values the European Union is based on.

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I. Introduction

It is estimated that around 100,000-120,000 people cross the Mediterranean Sea every year, without possessing the necessary documents to enter the EU.¹ The fight against this irregular migration is high on the political agenda of EU member states. Some of their practices trigger critique as regards their compliance with human rights. In June 2011, the Parliamentary Assembly of the Council of Europe launched an investigation into the responsibility for the loss of life of more than 1,000 'boat people' that are thought to have perished in the Mediterranean Sea since January 2011 while fleeing unrest in North Africa. The appointed Rapporteur will in particular look at the way boats are intercepted by the coastguards.² The practice of interception is part of a general trend towards border control activities that are aimed at preventing migrants from leaving their home shores or those of transit countries or at shifting responsibility to third countries.

Many terms have been used in order to describe this phenomenon of 'polic[ing] the EU borders at distance'.³ 'Remote control'⁴ and 'extraterritorialisation'⁵ refer to actions aimed at controlling the movement of people before they reach the EU borders. The first measures that were taken in this regard are visa policies,⁶ but they also include carrier sanctions and interception of migrants at sea.⁷ The term 'externalisation' often focuses in particular on the practices of outsourcing migration control and shifting responsibility to countries of origin and transit in order to construe a 'buffer zone' around Europe.⁸ For the purpose of this paper, I will use the term 'extraterritorialisation'.

Many of the measures related to extraterritorialisation are highly dependent on the cooperation of third countries.⁹ Where EU Member States engage in joint operations outside the territory of the EU under the auspices of Frontex, the EU Agency for the Management of Operational Cooperation at the External Border, collaboration of third countries can be secured through working arrangements between Frontex and the respective authorities of third countries.¹⁰ It is becoming of increasing importance that administrative authorities are ever more taking the initiative to enter into external relations and build cooperation structures.¹¹ Even though international cooperation is to be welcomed for the numerous benefits it can deliver, the challenges such cooperation poses need to be addressed. In the case of EU agencies, there is by far no clear line to distinguish lawful from unlawful international cooperation.¹²

The purpose of this paper is to analyse whether working arrangements provide for an adequate basis for the practice of involving the authorities of third States in the border control of the EU. I start with a brief outline of the background of Frontex' relationships with third countries, especially highlighting the importance attached to this cooperation (Section II). Subsequently, I deal with the limits and provisions on Frontex' 'external relations' (Section III) and proceed to examine the legal nature of working arrangements and their shortcomings (Section IV). In Section V, I deal with the argument that as 'technical relationships', working arrangements do not trigger legitimacy and rule of law concerns. My findings will show that this argument is based on two assumptions that are not convincing, which leads me to my suggestions for the future conclusion of working arrangements (Section VI).

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- 1 A Fischer-Lescano, T Löhner and T Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 256-57; M Baldwin-Edwards, 'Migration in the Middle East and Mediterranean' (2005) *Global Commission on International Migration*, 18.
 - 2 PACE, 'PACE Inquiry into Responsibility for Loss of Life in the Mediterranean Sea: Visit to Italy' (Council of Europe Press Release, 2 September 2011).
 - 3 E Guild and D Bigo, 'The Transformation of European Border Controls' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 257, 258.
 - 4 A Zolberg, 'Guarding the Gates in a World on the Move' (2002) *Social Science Research Council - After September 11*; V Guiraudon, 'Before the EU Border: Remote Control of the "Huddled Masses"' in K Groenendijk, E Guild and P Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003) 191, 191; A Pérez, 'The Externalization of Migration Control in Spain and Its Impact on Moroccan and Ecuadorian Migration' in R Zapata-Barrero (ed), *Shaping the Normative Contours of the European Union: A Migration-Border Framework* (CIDOB 2010) 97, 100.
 - 5 B Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 3; J Rijpma and M Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law' (2007) *EUI Working Papers LAW* 2007/01.
 - 6 Zolberg (n 4).
 - 7 Ryan (n 5).
 - 8 Pérez (n 4) 101; Rijpma and Cremona (n 5) 12.
 - 9 Guiraudon (n 4) 206.
 - 10 Their content will be discussed in more detail in Section V.A. They basically aim at establishing a partnership between Frontex and the respective authorities of third countries in order to counter irregular migration by means of border control. The working arrangements foresee cooperation in various fields like risk analysis, joint return operations, Frontex-coordinated joint operations, Pilot Projects, training of border guards and technical cooperation in the field of research and development.
 - 11 C Möllers, 'Verfassungs- und Völkerrechtliche Probleme Transnationaler Administrativer Standardsetzung' (2005) 65 *ZaöRV* 351, 351-55.
 - 12 E Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 *Common Market Law Review* 1395, 1426.

II. Background

Frontex has an important role in the coordination of the operational cooperation between EU Member States in the field of management of external borders.¹³ Even though it is contested whether there is a legal basis for the involvement of Frontex in operations beyond EU territory,¹⁴ Frontex also coordinates operations outside the territory of the EU, which includes patrols on the high seas as well as the territorial waters of third States.

A well-known example of a joint operation outside EU territory with the involvement of third countries is Joint Operation *Hera II*.¹⁵ *Hera II* ran from 11 August 2006 to 15 December 2006. The participating member states patrolled the coastal areas of Senegal, Mauritania, Cape Verde and the Canary Islands.¹⁶ The goal was to prevent migrants from leaving the African coasts. If they had managed to do so, the aim was to intercept them in the territorial waters of the third country and hand them over to the authorities of the respective authority.¹⁷ As will be discussed in more detail in Section V.A, in the territorial sea the coastal State enjoys sovereignty. Therefore, for operations carried out there, consent of the coastal State is needed. Collaboration is even more essential if the intercepted migrants are to be handed over to the authorities of the coastal State. Spain concluded bilateral agreements with Senegal and Mauritania respectively. These agreements, which have not been made publicly available,¹⁸ provided the basis for the operation and both non-EU countries were involved with assets and staff.¹⁹ *Hera II* was most commonly considered a success, not least because of the willingness of the third countries in question to cooperate.²⁰

As opposed to *Hera II*, Joint Operation *Nautilus* did not turn out to be a success. *Nautilus*, requested by Malta, was aimed at strengthening the Central Mediterranean maritime border mainly against immigrants departing from Libya.²¹ It was launched after the operation *Jason I*, which was meant to cover a much larger area, could not be carried out because of Libya's refusal to allow EU vessels into its territorial waters. Libya made its cooperation conditional upon receiving assistance in order to control its southern border.²² The first phase of *Nautilus II* unexpectedly ended at the beginning of August 2007, *inter alia* due to Libya's lacking willingness to cooperate in taking back intercepted persons.²³ These two operations show how crucial cooperation with third countries is when carrying out operations outside EU territory in order to obtain an outcome which is considered a success.

Against this background, it comes as no surprise that the Frontex Regulation makes provisions for establishing relationships between Frontex and third countries.²⁴ Article 14(2) allows the agency to cooperate with the authorities of third countries in

13 Council Regulation 2007/2004/EC of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EU) 1168/2011 of 25 October 2011, [2011] OJ L304/1, hereinafter 'Frontex Regulation', art 2(1)(a); V Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice?* (Hart Publishing 2007) 359, 369.

14 A Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 229, 245; E Guild and others, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) 2011, 19-20.

15 *Hera* has by now become a permanent operation, which is carried out throughout the year: see V Moreno Lax, 'Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean' (2010) Working Paper Series RefGov-FR-28, 6.

16 Frontex, 'Longest FRONTEX Coordinated Operation – HERA, the Canary Islands', Press Release 19 December 2006.

17 S Carrera, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands' (2007) CEPS Working Document No. 261, 21.

18 Moreno Lax (n 15) 6; Carrera (n 17) 22.

19 Frontex Press Release (n 16).

20 Migreurop, 'European Borders: Controls, Detention and Deportations' 2009/2010 Report, 20; Frontex, General Report 2009, 9, stating: 'The most successful joint operation coordinated by Frontex has been HERA. The success was possible mainly thanks to close cooperation with West African countries.'

21 Baldaccini (n 14) 229, 240.

22 Rijpma and Cremona (n 5) 22.

23 R Weinzierl and U Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights, December 2007) 24; B Kasperek, 'Von Grauzonen und Legalisierungen der anderen Art' in IMI (ed), *Widersprüche im erweiterten Grenzraum* (IMI August 2009) 26, 28; for further information on the events and the further development of *Nautilus* afterwards see Moreno Lax (n 15) 6-7.

24 Even though the focus of this paper will be on working arrangements concluded according to Article 14, it is important to stress here that this is not the only context in which Frontex established relationships with third countries. Frontex also cooperates with third countries within the scope of Mobility Partnerships. [Guild and others (n 14) 22-23, 100] The agency furthermore maintains informal relationships with third countries. These are, of course, much more difficult to trace down and quantify but are no less important than formal relationships. According to Frontex, the possibility of establishing relationships outside formalised agreements was examined during a meeting in April 2010 with officials from 17 selected African countries. This concerned, among other things, the exchange of relevant information and production of joint migration-related risk assessments. Frontex envisages pursuing this activity further in 2011. [Frontex, General Report 2010, 12.].

the framework of working arrangements.²⁵ It is argued that Frontex seems to be the only agency originally established under the Treaty Establishing the European Community ('TEC') having 'anything like the wide autonomous external relations powers granted to Europol'.²⁶ In its General Report 2009, Frontex highlights developing structured operational cooperation with neighbouring Mediterranean countries as the overriding priority for 2010.²⁷ So far, Frontex has concluded sixteen working arrangements with the respective authorities of third countries. Very recent agreements are those concluded with the authorities of Cape Verde and Nigeria and these are the first agreements with African countries.²⁸ A further draft agreements was prepared with Mauritania.²⁹ Mandates given by the Management Board for the conclusion of new working arrangements include *inter alia* Turkey, Egypt, Libya, Morocco and Senegal.³⁰

III. Frontex 'External Relations'

The starting point of international legal relations generally lies with the national governments. Upon the government's initiative the state makes international commitments that are implemented by the subordinate authorities. This makes sense from the perspective of the requirement of uniform presence of the State in foreign relations as well as the democratic legitimisation of public action.³¹ An increasingly important phenomenon is that subordinate administrative authorities themselves take the initiative to enter external relations and build cooperation structures.³²

In the EU context, the tasks in external relations are divided between the institutions. As Aust noted: 'Anything to do with the European Communities is complex, and this is particularly so for the law governing their external relations.'³³ What is more, the 'external relations' of agencies reach a highly complex level going 'well beyond that normally considered in the studies on European administrative integration'.³⁴ The complex nature of this cooperation is met with a huge diversity in the different provisions on the agencies' 'external relations', which makes an analysis of the nature of the respective instruments employed extremely difficult.

At a very early stage, the Court of Justice of the European Union ('the CJEU' or 'the Court') formulated the criteria under which the delegation of powers is permissible under EU Constitutional law. The so-called *Meroni* principle³⁵ functions as a constitutional limit to the delegation of powers.³⁶ According to the CJEU, the delegate is bound by the same constraints as the delegator.³⁷ As part of the institutional system of the EU, Frontex is bound by the structural foundations the Union is based on.³⁸ More specifically, the nature and powers of Frontex are subjected to the structural foundations of the Area of Freedom, Security and Justice, under which the agency was established. This can also be seen as an expression of the general principle of *nemo plus potestatis transferre potest quam ipse habet*. It is clear that any action taken by Frontex, including cooperation agreements, has to comply with the general objectives the EU is based on.

In *Meroni*, the Court set out further that powers involving a wide margin of discretion cannot be delegated.³⁹ The Court drew on the guarantee of the balance of powers as a characteristic of the institutional structure of the Union and held that 'to delegate a discretionary power, by entrusting it to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective'.⁴⁰ The institutional balance in the case of the external representation of the Union in areas covered by the Treaty on the Functioning of the European Union ('TFEU') is governed by Title III of the TFEU which foresees a division of tasks. Generally, an

25 Frontex Regulation (n 13) art 14(2).

26 S Peers, 'Governance and the Third Pillar: The Accountability of Europol' in D Curtin and R Wessel (eds), *Good Governance and the European Union* (Intersentia 2005) 253, 264.

27 Frontex, General Report 2009, 10.

28 Frontex, General Report 2010, 10.

29 *ibid* 12.

30 House of Lords, Frontex: The EU External Borders Agency. Report with Evidence (HL Paper 60 2008) para 148 at n 75.

31 Möllers (n 11) 352-55.

32 *ibid*.

33 A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) 55.

34 Chiti (n 12) 1415.

35 Case 9/56 *Meroni & Company Industrie Metallurgiche SpA v High Authority* [1958] ECR 133 (*Meroni*).

36 P Craig, *EU Administrative Law* (Oxford University Press 2006) 161.

37 *Meroni* (n 35) 150.

38 A Fischer-Lescano and T Tohidipur, 'Europäisches Grenzkontrollregime: Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX' (2007) 67 *ZaöRV* 1219, 1261.

39 Craig (n 36) 161.

40 *Meroni* (n 35) 152.

international agreement binding the Union is to be concluded according to the procedure outlined in Article 218 TFEU. Therefore, the Council of Ministers ('the Council'), with different degrees of involvement of the European Parliament, is called upon to conclude the treaty on behalf of the Union, which was negotiated by the European Commission ('the Commission'). On the other hand, according to Article 220 TFEU, the Commission is in charge of the maintenance of relations with international organisations.⁴¹ For the purpose of maintaining said relationships, Article 220 TFEU implicitly grants the Commission the power to conclude agreements with international organisations.⁴² These agreements are referred to as cooperation agreements,⁴³ administrative arrangements⁴⁴ or working arrangements.⁴⁵

Ott has argued that 'especially for agencies set up by the Council in the second and third pillars a delegation of certain functions which go beyond simple management of external relations would be in line with the powers of the Council in external relations'. In contrast, this would not be the case for agencies set up to aid the Commission in its administrative tasks, as this would not be in line with the functions of the Commission in external relations.⁴⁶ The assessment of the question regarding which powers can be delegated to Frontex in the area of external relations in this vein would depend on who the 'principal' of those powers is.⁴⁷ However, with regard to the delegation of powers to Frontex in external relations, there are especially two challenges. First, the requirement of non-disruption of the institutional balance does not mean that every institution can delegate its powers, even if it only delegates its own powers to a body that is subordinate to it. Even if it is the Council delegating powers to Frontex, it could still not delegate discretionary powers since that would mean that the preferences of the Council would be replaced by those of Frontex.⁴⁸ Hence, as Article 218 entrusts the Council with the maintenance of external relations of the Union, it cannot delegate these powers with regard to a whole area to Frontex. Second, it is difficult to tell who actually delegated powers to Frontex. The transferral of powers to agencies is usually approached in a manner that conceives the creation of an agency as a delegation of powers from the Commission.⁴⁹ This approach has also been advanced by the Commission itself.⁵⁰ However, it is argued that the 'principal-agency model' is analytically inadequate for studying agencies in the framework of the EU.⁵¹ According to Guild and others, this is especially true for the EU Home Affairs agencies, Frontex, Europol and EASO, due to their experimental governance strategies and their areas of intervention.⁵²

Frontex was established under the former Community pillar. Nevertheless, it has been argued that it is not entirely clear who actually delegated powers to Frontex.⁵³ On the one hand, the tasks being delegated are sometimes transferred vertically, meaning that they belonged to the member states before, rather than to the EU institutions. In the case of Frontex, it is argued that the Council did not transfer its own executive powers, or those of the Commission, but rather powers exercised by the Member States before.⁵⁴ At least, it constituted a shift from a previously intergovernmental cooperation within the Council to a more supranational approach within a Union agency.⁵⁵ On the other hand, there can be multiple principals involved in setting up an agency.⁵⁶ In the case of Frontex, it seems that to a certain extent the Commission and the Council can be considered as principals. Even though the institutional design is similar to one of the other Union agencies,⁵⁷ which

41 A Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) 13 *European Foreign Affairs Review* 515, 521; J Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs' (2004) 9 *European Foreign Affairs Review* 395, 398.

42 K Schmalenbach, 'Artikel 220' in C Calliess and M Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta* (Beck 2011) para 8.

43 *ibid.*

44 P Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 144.

45 C Tietje, 'Vorbemerkung zu Art. 302-304' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (Beck 2009) para 6; M Nawparwar, 'Die Außenbeziehungen der Europäischen Union zu internationalen Organisationen nach dem Vertrag von Lissabon' [2009] *Beiträge zum Europa- und Völkerrecht*, 27.

46 Ott (n 41) 539.

47 See 'principal-agent model' with regard to EU agencies: R Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-principals Model' (2008) 31 *West European Politics* 789.

48 See Meroni (n 35) 152.

49 D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 *European Law Journal* 523, 527.

50 Dehousse (n 47) 792.

51 *ibid.* 790.

52 Guild and others (n 14) 90.

53 *ibid.* 90; Curtin (n 49) 529.

54 Curtin (n 49) 528-29.

55 J Rijpma, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (PhD thesis, European University Institute Florence 2009) 257; A Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) 47 *Journal of Common Market Studies* 333, 343.

56 Curtin (n 49) 528.

57 Rijpma (n 55) 263.

also exerts considerable influence,⁵⁸ it has been argued that it is leaning towards the Council as principal.⁵⁹ The Frontex set-up, it is argued, is a mixture of intergovernmental and supranational control.⁶⁰ In any case, there is no clear cut delegation from one principal to an agent which complicates an assessment of the admissibility of the delegation of powers as well as of their nature. This, however, is argued to be ‘a corollary of the spirit that inspired European construction itself’, rather than ‘an anomaly or a transitional situation’.⁶¹ According to Rijpma, Frontex can be best conceived as an agency with a ‘dual identity’. It is on the one hand ‘a more “classic” regulatory agency which assists in the implementation of an EU policy through the provision of technical and informational assistance’. On the other hand, it is ‘endowed with the coordination of operational cooperation between law enforcement agencies of the kind one could previously observe only under the Third Pillar’.⁶²

As regards Frontex’ powers in external relations, these seem to be closer to the powers of the Commission. The Regulation establishing Frontex authorises the agency to cooperate ‘in the framework of working arrangements’.⁶³ Working arrangements are not unknown in EU law as the Commission’s cooperation with international organisations under Article 220 TFEU is frequently conducted through such instruments. Hence, if the use of this terminology is meant to have any limiting effect with regard to the nature of powers transferred, it is most likely that the powers resemble the cooperation arrangements entered into by the Commission. This view is supported by the recent amendments to the Frontex Regulation. According to a new provision, Article 14(8), the conclusion of a working arrangement by Frontex ‘shall be subject to receiving a prior opinion of the Commission’. It would seem not to make sense to introduce such a provision if Frontex, with respect to its ‘external relations’, had powers of the nature of those of the Council.

The permissible content according to EU law and the legal nature under international law of working arrangements entered into by the Commission are controversial. From the perspective of EU law, they shall only be concerned with the establishment and the shaping - this is to say the fields and modalities - of the relations with international organisations.⁶⁴ They are not meant to be of a political nature but instead are to relate to administrative tasks only. Article 14(2) of the new Frontex Regulation holds that Frontex’ cooperation ‘shall be purely related to the management of operational cooperation’. This seems to refer to a limit to the nature of the powers conferred to Frontex in external relations, setting out that the relationships should only be of an administrative and not of a political nature.

IV. The Legal Nature and Shortcomings of Working Arrangements

A. Legal Nature of Working Arrangements under International Law

An international agreement can only be entered into between subjects of international law.⁶⁵ Therefore, if Frontex was to conclude a treaty in its own name, this would presuppose the agency’s international legal personality. The only other possibility for Frontex to conclude treaties would be to act under the umbrella of the EU’s international legal personality. This means that Frontex would have to be equipped with the powers to bind the Union as a whole. Otherwise, the contacts with the respective authorities of third countries can only be such that they do not require international legal personality and they would therefore have to be considered less than treaties.

Almost all EU agencies have been provided with legal personality,⁶⁶ which enables them to fulfil their tasks independently from the EU institutions.⁶⁷ In Article 15 of the Frontex Regulation, it is stated that the agency ‘shall have legal personality’. In the first place, this means that Frontex has the legal capacity to act within the national legal systems of the member states.⁶⁸ Van Ooik has interpreted this broad formulation as encompassing the ability of the agency in question to act on the international plane.⁶⁹ However, the mere fact that an entity is granted legal personality on the national level does not mean

58 Carrera (n 17) 13-4.

59 Curtin (n 49) 528.

60 Neal (n 55) 343.

61 Dehousse (n 47) 795.

62 Rijpma (n 55) 259.

63 Frontex Regulation (n 13) art 13, 14(2).

64 Schmalenbach (n 42) para 8; Tietje (n 45) para 8.

65 Aust (n 33) 47; K Ipsen, *Völkerrecht* (Beck 2004) 117.

66 R van Ooik, ‘The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance’ in D Curtin and R Wessel (eds), *Good Governance and the European Union* (Intersentia 2005) 125, 132.

67 G Schusterschitz, ‘European Agencies as Subjects of International Law’ (2004) 1 *International Organizations Law Review* 163, 169.

68 *ibid.*

69 Van Ooik (n 66) 132.

that the same is true for the international plane. The potential international legal personality of EU agencies is a controversial topic. Whereas some authors categorically deny it,⁷⁰ others detect certain indications of the agencies international legal personality. Where member states have concluded headquarters agreements with the agencies residing in their territory, resembling classic headquarters agreements with international organisations, Member States have treated the agencies like subjects of international law.⁷¹ It is argued that Member States would have invoked Article 218 TFEU and concluded the agreement with the EU, if the Member States had not at least acknowledged a restricted international legal personality.⁷² These observations do not imply a further reaching international legal personality, as the legal personality detected here is limited to the power to conclude treaties regarding the seat of the agencies.

Other arguments in favour of international legal personality can be found by using systematic interpretation. Former Articles 281 and 282 TEC had a wording similar to the provisions on legal personality of EU agencies in the TFEU. They accorded 'legal personality' to the European Community and were widely interpreted as including the capacity to act on the international plane. Some authors have argued that international legal personality of agencies could be inferred from those formulations.⁷³ However, when coupled with an assessment of the functional need for international legal personality of the agencies in order to fulfil their tasks, most authors reach the conclusion that agencies lack such capacity.⁷⁴ As regards Frontex, even if, by way of a systematic interpretation, Article 15 of the Frontex Regulation was interpreted as being capable of according international legal personality to Frontex, a functional need for international legal personality would still have to be established. A functional need could in particular be conceived, if working arrangements were to be concluded as treaties.

The particular designation of an agreement as a 'working arrangement' or 'administrative arrangement' is not a relevant factor in deciding whether it is a treaty according to international law.⁷⁵ The working arrangements entered into by the Commission according to Article 220 TFEU were usually conceived as inter-agencies agreements, only governing the exercise of executive authority.⁷⁶ However, in newer literature, the view seems to prevail that these agreements should be seen as treaties.⁷⁷ Yet, it must be remembered that the essential element under international law distinguishing a non-binding agreement from a treaty is the intention to create a legally binding instrument.⁷⁸ All working arrangements concluded by Frontex contain a provision on their legal status.⁷⁹ These provisions establish that the respective working arrangement shall not be considered a treaty under international law and that its implementation shall not be regarded as fulfilment of obligations by the EU.

Thus, based on the wording of the working arrangements, it can be concluded that they do not constitute treaties under international law. Frontex neither wants to bind the EU, nor intends to enter contractual obligations in its own name. Hence, it is difficult to see how there could be a functional need for international legal personality of Frontex. Nevertheless, this assessment is subject to the future developments in the 'external relations' of Frontex. Especially the intensification of contacts with third countries and the steady increase of competences of the agency in this area could at some point mandate a different conclusion.

Furthermore, even if Frontex was deemed to conclude treaties this would not automatically mean that there was a necessity for international legal personality. On the one hand, provisions could be made for Frontex to act under the umbrella of the international legal personality of the EU in the sense that the working arrangements would be concluded according to Article 218 TFEU. For some EU agencies, provisions have been made in this regard. The EU Environmental Agency and the Fundamental Rights Agency can both establish relationships with international organisations and third countries by way of

70 W Hummer, 'Von der "Agentur" zum "Interinstitutionellen Amt"', in S Hammer and others (eds), *Demokratie und sozialer Rechtsstaat in Europa: Festschrift für Theo Öhlinger* (WUV 2004) 92, 107; T Oppermann, *Europarecht* (Beck 2005) 130; however, see T Oppermann, C Dieter Classen and M Nettesheim, *Europa-recht* (Beck 2009) 125, where the reference to agencies not having international legal personality has been omitted.

71 Schusterschitz (n 67) 163, 172-74.

72 *ibid* 175-76, 188.

73 L Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos 1977) 449, para 374; Schusterschitz (n 67) 179-81.

74 R Uerpman, 'Mittelbare Gemeinschaftsverwaltung durch Gemeinschaftsgeschaffene Juristische Personen des Öffentlichen Rechts' (2000) 125 *Archiv des Öffentlichen Rechts* 551, 583-84; M Hilf, 'Die Abhängige Juristische Person des Europäischen Gemeinschaftsrechts' [1976] *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 551, 583; Schusterschitz (n 67) 171.

75 Ipsen (n 65) 116.

76 Referring to views in older literature: Tietje (n 45) para 7; M Schröder, 'Vorbemerkung zu den Artikeln 302 bis 304' in H von der Groeben and J Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos 2003) para 17.

77 Tietje (n 45) paras 7-8; Schmalenbach (n 42) para 8; Nawparwar (n 45) 27.

78 Ipsen (65) 117.

79 The working arrangements are not publicly available. They were, however, provided to the author by Frontex upon request.

agreements concluded according to Article 218 TFEU.⁸⁰ This, however, is not the case for Frontex.

Even absent such provisions, it could be argued that Frontex can bind the EU, just like the Commission can in the framework of Article 220 TFEU. Whereas it was originally argued that the Commission's working arrangements should only commit the respective executive authorities rather than the organisations possessing international legal personality,⁸¹ in newer literature, the view seems to prevail that such working arrangements should be seen as treaties that are binding on the Union as a whole.⁸² It is important in this context to be aware of the different approaches of EU law and international law respectively. According to Article 46 of the Vienna Convention on the Law of Treaties, which can be assumed to reflect customary international law,⁸³ and Article 46 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, a violation of internal law or rules of the organisations regarding competence to conclude treaties cannot be invoked.⁸⁴ There are only two exceptions to this rule the Union could rely on. In order to invoke these the Union would have to show that Article 218 TFEU is considered to constitute a rule of fundamental importance and that the violation of Article 218 TFEU through trespassing the limits of Article 220 TFEU was manifest for the contracting party. Having in mind the gradual expansion of the treaty-making powers according to Article 220 TFEU, it is difficult to see how the misuse of powers could be manifest for the contracting party.⁸⁵ Hence, the Union can be bound irrespective of whether the Commission trespasses the limits posed by Article 220 TFEU.⁸⁶

It follows from the foregoing that working arrangements are not treaties under international law. There exist, however, possibilities for 'upgrading' them to the status of treaties. On the one hand, if the working arrangements are intended to be concluded by Frontex in its own name, a functional necessity for the agency to possess international legal personality could be established. On the other hand, Frontex could conclude the agreements under the umbrella of the EU's international legal personality, either by making working arrangements subject to Article 218 TFEU or by allowing Frontex to bind the EU in a fashion similar to how the Commission can bind the EU under Article 220 TFEU. However, it is highly doubtful whether this last option would be feasible. As we shall see below, this would not remedy the current shortcomings, but rather increase them.

B. *Challenges to the Fundamental Values of the European Union*

The legal nature of working arrangements has several implications. First of all, the role of the CJEU in EU international relations focuses on treaties. According to Article 218(11) TFEU, the CJEU can assess the compatibility of an envisaged agreement with the Treaties. Furthermore, the interpretation or validity of a treaty can be the subject matter of a reference for a preliminary ruling under Article 267 TFEU. The decision to conclude a treaty may also be the subject matter of an annulment action under Article 263 TFEU.⁸⁷ The same applies for the involvement of the European Parliament ('the Parliament'). The Parliament has increasingly gained power in the area of EU external relations. Particularly significant are the steps taken by the Lisbon Treaty.⁸⁸ Article 218(6) TFEU determines:

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases: [...]

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

80 Uerpman (n 74) 584; EU Environmental Agency: Regulation 401/2009/EC of the European Parliament and the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (Codified Version) [2009] OJ L126/13, art 19; EU Fundamental Rights Agency: Council Regulation 168/2007/EC of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1, art 9.

81 I MacLeod, I Hendry and S Hyett, *The External Relations of the European Communities* (Clarendon Press 1996) 167.

82 Tietje (n 45) paras 7, 8; Schmalenbach (n 42) para 8; Nawparwar (n 45) 27.

83 O Corten and P Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press 2011) 1092.

84 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not in force yet).

85 Schmalenbach (n 42) para 8.

86 *ibid.*

87 P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011) 353.

88 *ibid.* 336.

As a result of the continuous strengthening of the Parliament in the Area of Freedom, Security and Justice,⁸⁹ the new provisions of Articles 77(2), 78(2) and 79(2) TFEU provide for the application of the ordinary legislative procedure in the area of immigration and asylum law.⁹⁰ Hence, as working arrangements are concluded below the threshold of treaties, the Parliament is not involved in the conclusion. Furthermore, according to Article 297 TFEU, the decision of the Council concerning the conclusion of a treaty by the EU has to be published in the Official Journal. Even though publication of the treaty itself is not required by Article 218 TFEU, it is the EU's long standing practice to publish them.⁹¹ Working arrangements, in turn, are not made publicly available. This seriously impairs the possibility of a public debate before their conclusion.

Therefore, the legal nature of working arrangements, being below the threshold of a treaty, excludes them from the judicial review of the CJEU. Furthermore, the lack of substantial involvement of the Parliament on the one hand and the lacking public availability of the working arrangements on the other hand constitute shortcomings in relation to the principle of representative democracy.

Judicial review is an essential part of the rule of law. According to Article 2 Treaty on European Union ('TEU'), among other things, the Union is based on the rule of law.⁹² In what Joseph Raz has called 'one of the clearest and most powerful formulations of the ideal of the rule of law',⁹³ Friedrich A Hayek defined the rule of law as follows:

Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.⁹⁴

The notion of predictability, inherent in the rule of law, was also emphasised by Raz himself when he stated that 'in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance'.⁹⁵ Raz furthermore argued that courts have a 'central position [...] in ensuring the rule of law', which is why their 'accessibility is of paramount importance'.⁹⁶ In this vein, Rijpma and Cremona have argued that the extraterritorialisation of the rule of law would in particular require an effective judicial review of administrative action.⁹⁷

Not only the rule of law, but also the principle of democracy constitutes a fundamental value on which the EU is based.⁹⁸ Article 10 TEU specifies that 'the Union shall be founded on representative democracy'. In the course of the negotiations regarding the adoption of the new Frontex Regulation, the involvement of the Parliament in the conclusion of working arrangements was subject to considerable disagreement between the institutions. Whereas the Regulation's 'old' Article 14 did not contain any reference to prior consultation of any of the institutions, this has undergone some changes. The Commission's original proposal of February 2010 made the conclusion of working arrangements subject to receiving a prior favourable opinion of the Commission.⁹⁹ It, however, did not mention the Parliament. Whereas the Council proposed to delete this reference, the Parliament called for adding: 'and the European Parliament shall be immediately and fully informed'.¹⁰⁰ This proposal ended up in Article 14(8) of the Regulation, reading: 'and the European Parliament shall be fully informed as soon as possible'. Thus, even though there will be some involvement of the Parliament in future, this does not amount to requiring its full consent.

89 E de Capitani, 'The Evolving Role of the European Parliament in the AFSJ' in J Monar (ed), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (Peter Lang 2010) 113.

90 K Hailbronner, *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (Beck 2010) 3.

91 K Schmalenbach, 'Artikel 218' in C Calliess and M Ruffert (eds), *EU/VAEU: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta* (Beck 2011) para 12.

92 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).

93 J Raz, 'The Rule of Law and Its Virtue' (1977) 93 *The Law Quarterly Review* 195, 195.

94 F Hayek, *The Road to Serfdom* (Routledge 1944) 54.

95 Raz (n 93) 202.

96 *ibid* 201.

97 Rijpma and Cremona (n 5) 24.

98 TEU (n 92).

99 European Commission, 'Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', COM(2010) 61 final, art 14(7).

100 Multi-column document showing the positions of the Commission, Council, the European Parliament and the 'compromise' position in 1st reading trilogue discussions: Proposal for a Regulation amending Council Regulation 2007/2004/EC establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) Doc No 11475-11 (10 June 2011) Amendment 96.

Also the non-disclosure of working arrangements presents a challenge to the principle of representative democracy. According to Majone, procedural legitimacy includes that ‘agency decisions must be justified and are open to judicial review’.¹⁰¹ This is related to the requirement of transparency which triggers the possibility of controlling regulatory discretion through judicial review or public participation and debate.¹⁰² Also Griller and Rumler-Korinek have stressed transparency as an indispensable requirement of the principle of representative democracy. Only then ‘can citizens discuss and criticize government output in a well-founded manner’.¹⁰³

V. Working Arrangements as ‘Technical Relationships’

A. *The Content and Effects of Working Arrangements*

Joint operations that take place in the territorial sea of other States or on the high seas are subject to the legal regimes of the high seas and the territorial sea respectively.¹⁰⁴ In the territorial sea, the coastal State enjoys sovereignty. The only right which foreign ships generally enjoy is the right of innocent passage.¹⁰⁵ As this right does not include intercepting migrants or diverting ships, such measures are subject to the consent of the coastal State.¹⁰⁶ In contrast to the powers of States over their coastal waters, the high seas are characterised by the dominance of the freedom of the high seas and the exclusivity of flag State jurisdiction.¹⁰⁷ Interception would require a ‘right to visit’.¹⁰⁸ On the high seas, Article 110 allows a limited ‘right to visit’ for warships and any other duly authorised ships, for the grounds explicitly mentioned. Those grounds do not include transporting irregular migrants or refugees. Hence, for the interception of migrants in the framework of Frontex coordinated joint operations, Article 110(1)(d) of the Law of the Sea Convention (‘LOSC’), ‘the ship without nationality’, seems to be the most relevant ground. Article 110(1) LOSC furthermore suggests that interferences can also ‘derive from powers conferred by treaty’. For Frontex operations, the obligations to render assistance to those in distress at sea and the obligations of the coastal States relating to search and rescue facilities are frequently claimed as legal justifications.¹⁰⁹

Working arrangements concluded between Frontex and the authorities of third States do not alter this legal framework.¹¹⁰ Unlike certain agreements of the Member States, Frontex working arrangements do not provide for joint operations in the territorial waters of third States without informing the competent authorities.¹¹¹ They also do not contain a provision that would suggest a conferral of powers according to Article 110(1) LOSC.¹¹²

Working arrangements aim at establishing a partnership between Frontex and the respective authorities of third countries. The agreements concluded so far, are very similar with regard to their content. Among the objectives, the aim to counter irregular migration and related cross-border crime by means of border control as well as the strengthening of security at the borders feature very prominently. Other objectives include the development of good relations and mutual trust. The working arrangements foresee cooperation relating to risk analysis as well as the exploration of possibilities of cooperation in the field of joint return operations with the active participation of a representative of the contracting parties. Furthermore, they allow for the invitation of contracting parties’ representatives to participate in pilot projects and include provisions on cooperation in the field of training as well as on technical cooperation in the field of research and development. In some working arrangements, Frontex and the relevant authorities agree to promote the improvement of the interoperability between the respective border guard organisations.

101 G Majone, *Regulating Europe* (Routledge 1996) 291.

102 *ibid* 292.

103 S Griller and E Rumler-Korinek, ‘Democracy and New Modes of Governance in Europe: Some Basic Reflections’ (2005) NEWGOV Working Paper, 10.

104 For a detailed analysis of the law of the sea in the context of migration control see R Barnes, ‘The International Law of the Sea and Migration Control’ in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 103.

105 R Churchill and V Lowe, *The Law of the Sea* (Manchester University Press 1999) 87; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC) art 2(1), art 17.

106 LOSC (n 105) art 18 on the meaning of ‘passage’ and art 19 on the meaning of ‘innocent’. There is no provision of a ‘right to visit’, like art 110 with regard to the high seas.

107 For the freedom of the high seas and the exclusivity of flag jurisdiction see LOSC (n 105) art 87 and art 92 respectively; Churchill and Lowe (n 105) 203.

108 E Papastavridis, ‘“Fortress Europe” and FRONTEx: Within or Without International Law?’ (2010) 79 *Nordic Journal of International Law* 75, 82.

109 *ibid* 86; for the obligations in relation to ships in distress see LOSC (n 105) art 98; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278; International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97; for the legal justification forwarded by Frontex see Frontex Press Kit, ‘Joint Operations Background’.

110 As mentioned above (n 79), the working arrangements are not publicly available. They were, however, provided to the author by Frontex upon request.

111 Rijpma (n 55) 341.

112 Even though it is open to doubt whether working arrangements would constitute ‘treaties’ under the LOSC, art 110.

In the context of cooperation related to joint operations, working arrangements are aimed at securing the collaboration of the relevant authorities. As illustrated above, this cooperation is indispensable for carrying out joint operations outside EU territory. This is most obviously so in the case of operations in the territorial sea of a third State, where the consent of the coastal State is needed. Hence, working arrangements envisage that joint operations at the borders of the contracting parties shall be conducted in close cooperation and with the participation of their competent authorities. The agreements with the relevant authorities of Macedonia, Bosnia and Herzegovina, Albania, Montenegro and Serbia, unlike the other agreements, make this cooperation subject to the consent of the hosting EU Member State.

Even though the working arrangements therefore do not establish the prior consent of the third country to enter their territorial waters, Frontex' enhanced effort to cooperate with countries of origin and transit in general 'is likely in the future to increase significantly the number and scale of joint operations involving the cooperation of third countries'.¹¹³ In other words, the working arrangements provide for the third country 'to play a greater part in preventing would-be immigrants to the EU from leaving its shores, and taking back those who do leave while they are still in its territorial waters, in its search and rescue area, or on the high seas'.¹¹⁴ Working arrangements can provide the basis for the actual involvement of a third country in Frontex operations.¹¹⁵ This participation leads to a situation where a mix of actors is involved in EU border control. The increased reliance on the involvement on third countries 'complicate[s] the operation of the rule of law in this field'.¹¹⁶

Working arrangements furthermore envisage that the participation of the authorities of third countries may be financed by Frontex. More detailed terms and conditions are left for later agreement on a case-by-case basis. According to Rijpma, the agency, parallel to the working arrangements, concludes Financial Partnership Agreements which contain more detailed terms and the conditions for operational activity. Without this being explicitly provided for by EU law, Frontex indeed co-financed the participation of third countries in joint operations.¹¹⁷ The existence of such Financial Partnership Agreements was not confirmed on the part of Frontex upon request by the author. However, it was indicated that reimbursement of certain costs incurred by third country border security authorities with which Frontex has concluded working arrangement would be carried out *ad hoc* in line with Frontex internal financial rules. Further, it was communicated that Frontex considered developing Financial Partnership Agreements.

Article 14(5) of the new Frontex Regulation gives the agency the possibility to launch and finance technical assistance projects in third countries. Such projects are not subject to formal prior approval of any of the EU institutions. Before the adoption of this provision, Gil Arias, Deputy Executive Director of Frontex, argued that this new possibility would be beneficial for effective cooperation between Frontex and third countries. In his view, a major disadvantage for the negotiation position of Frontex is that the Agency can only offer training, intelligence and a prospect of working together, which does not provide Frontex with enough weight. According to him, in their relations with the EU, those countries are used to receiving material assistance in terms of equipment, money or visa relaxation for their nationals which are more tangible benefits. For that reason, Gil Arias suggested that the possibility for Frontex to launch agreements of that nature with funds of the EU would mean better chances of getting North African states on board with Frontex operations and would make it easier to get their help in the fight against irregular immigration.¹¹⁸ It has been argued in this context that there is a risk that 'rather controversial assistance, for instance the supply of border management equipment to third countries with a less than perfect human rights record, could be channelled through the Agency, without implicating the Commission'.¹¹⁹

Hence, the effect of working arrangements is, on the one hand, that through the involvement of third countries they contribute to the complication of the operation of the rule of law in that field. On the other hand, they can provide the basis for financial or technical aid to third countries. This shows that it at least seems difficult to clearly differentiate technical relationships from what would be a political relationship or a relationship with political implications. Furthermore, it shows that working arrangements indeed do not impose rights and obligations on individuals. However, this says nothing about whether the arrangements can or cannot affect individuals at all. These two issues will be dealt with in the following two Sections respectively.

113 Baldaccini (n 14) 254.

114 House of Lords (n 30) 149.

115 Baldaccini (n 14) 252.

116 Rijpma and Cremona (n 5) 16.

117 Rijpma (n 55) 334.

118 G Arias, Deputy Executive Director of Frontex, Interview available at <<http://www.euractiv.es/entrevistas/entrevista=335>> accessed 12 April 2012.

119 Rijpma (n 55) 335.

It is frequently argued that working arrangements do not trigger concerns in the light of the fundamental principles the EU is based on, as they only constitute ‘technical relationships’ and are hence of such a nature, that they are simply not required to be open to judicial review, consent by the Parliament or disclosure to the public. This argument apparently rests on two convictions. First, it is emphasised that the relationships established do not have political implications. The cooperating activities of Frontex - just like the role of the agency with regard to its other tasks - are largely presented as a technocratic task of a merely technical nature. With regard to cooperation with neighbouring countries, Frontex Executive Director General Ilkka Laitinen pointed out that because such arrangements are not concluded with the respective governments but with the border control authorities, Frontex does ‘not establish a partnership with a country or a government but [with] the border control authority of that third country’.¹²⁰ In this vein, it seems to be understood that because working arrangements are not political they do not need to be passed by the legislature or disclosed to the public. Second, the restrictions in terms of judicial review are rooted in the assumption that technical activities cannot affect individuals.¹²¹ In the case of Frontex, this is also the basis for the lack of attention for the human rights implications of a working arrangement when Frontex concludes such an arrangement.¹²²

The assumption that technical relationships cannot affect individuals also seems to be inherent in the approach adopted with regard to the new Frontex Regulation. Article 14(2) of the Regulation states that Frontex’ own cooperation with third countries ‘shall be purely related to the management of operational cooperation’. It appears that this is meant to ‘codify’ that Frontex’ ‘external relations’ shall only be of a technical nature. An explicit mention that the cooperation with third countries shall be in full compliance with human rights was omitted. This as such is not surprising, as Frontex is bound to respect human rights regardless. However, interestingly, Article 14(1) of the Regulation, which is related to the agencies’ facilitation of cooperation between Member States and third countries, adopts a different approach. It establishes that it will have to take place ‘in the framework of the European Union external relations policy, *including with regard to human rights* [emphasis added]’. Furthermore, it sets out, ‘The Agency and the Member States shall comply with the norms and standards at least equivalent to those set by the EU legislation also when cooperation with third countries takes place on the territory of those countries.’ This difference in Article 14(1) and (2) of the Regulation is indeed remarkable. The omission of a reference to compliance with human rights in Article 14(2) of the Regulation appears to be based on the assumption that technical cooperation cannot affect individuals. It is, however, difficult to see how the mere facilitation of operational cooperation requires explicit mention of human rights, whereas it seems to be understood that operational cooperation itself does not. In the following sections these two assumptions will be tested as to their validity.

C. *The ‘Grey Area’ Between ‘Technical’ and ‘Political’ Cooperation*

The first assumption rests on the conviction that Frontex working arrangements are merely technical relationships. In the context of EU agencies more generally, shortcomings in terms of democratic legitimacy are often explained by recourse to so-called ‘output-oriented-legitimacy’.¹²³ In a nutshell, this means that a certain degree of autonomy is legitimate because the output serves the interest of the people. As opposed to input-legitimacy, this concept therefore draws on the benefit for the people rather than on the will of the people.¹²⁴ The rationale for the creation of agencies, and especially for granting of autonomy to agencies, is embedded in the concept of output-oriented-legitimacy. As they are merely technical bodies, their autonomy is legitimised by them being experts in the respective fields. In the words of Majone: ‘accountability by results, can substantively legitimize the political independence of regulators’.¹²⁵

Not only is their autonomy legitimised, but rather deemed necessary as the credibility of the output rests on their independence of political interference which allegedly preserves their ‘objectivity’.¹²⁶ In this vein, Majone argues that in the context of ‘non-majoritarian institutions’¹²⁷ it seems that reliance ‘upon qualities such as expertise, credibility, fairness or independence has

120 House of Lords (n 30) Q268.

121 Chiti (n 12) 1426.

122 Moreno Lax (n 15) 8.

123 For the two concepts see F Scharpf, *Regieren in Europa: Effektiv und Demokratisch?* (Campus Verlag 1999); Grillner and Rumler-Korinek (n 103) 9-10.

124 Grillner and Rumler-Korinek (n 103) 10; Scharpf (n 123) 16.

125 Majone (n 101) 295.

126 M Busuioc, D Curtin and M Groenleer, ‘Agency Growth between Autonomy and Accountability: The European Police Office as a “Living Institution”’ (2011) 18 *Journal of European Public Policy* 848, 849.

127 Majone defines ‘non-majoritarian institutions’ as follows: ‘public institutions which, by design, are not directly accountable either to voters or to elected officials’; see Majone (n 101) 285

always been considered more important than reliance upon direct political accountability'.¹²⁸ In determining whether this is the case for a given situation, the purpose is decisive. In his view, the essential distinction has to be drawn between efficiency and redistribution, in order to decide 'whether the delegation of policy-making authority to an independent regulatory body has at least *prima facie* legitimacy'.¹²⁹ He defines redistribution as a 'zero-sum game since the gain of one group in society is the loss of another group'. Efficiency on the other hand are 'positive-sum games where everybody can gain, provided the right solution is discovered'.¹³⁰

According to Majone, 'the delegation of important policy-making powers to independent institutions is democratically justified only in the sphere of efficiency issues, where reliance on expertise and on a problem-solving style of decision-making is more important than reliance on direct political accountability. Where redistributive concerns prevail, legitimacy can be ensured only by majoritarian means'.¹³¹

There are several challenges that arise in the specific context of migration and border control. As a side note, output-oriented-legitimacy would seem to warrant at least a possibility of assessing whether the output indeed serves the benefit of the people. In the context of working arrangements, it is difficult to see how this could be done without the disclosure of the agreements to the public. Against this background, it seems that these arguments in any case cannot explain the missing disclosure.

It is inherent in the nature of migration that it is always closely linked to diverse questions of redistribution on all kinds of levels. From the view of a single State, their models of collective redistribution, financed by taxes, is often argued to be challenged by migration. Furthermore, immigration can in many ways shape income redistribution. From a more global view, migration can serve as a motor for the redistribution of wealth. This of course is not necessarily what Majone meant with this term in the narrower sense. It nevertheless clearly shows that there might be difficulties in applying this model to migration and border control issues.

Apart from those more general considerations, there are specific challenges that arise in the context of Frontex working arrangements. As outlined above, in constellations where all interests can be met - hence where mere coordination is at stake - the required degree of legitimacy would be relatively low.¹³² However, output-oriented-legitimacy cannot be isolated from input-oriented-legitimacy.¹³³ This especially concerns the identification of areas where output-oriented-legitimacy cannot fully meet the requirements demanded by the principle of representative democracy. Whereas for 'technical' decisions, the expertise of the body taking the decision can be enough to legitimate the decision, this is not the case for 'political' decisions. As the CJEU noted in *Pfizer*, '[s]cientific legitimacy is not a sufficient basis for the exercise of public authority'.¹³⁴ Hence, output-oriented-legitimacy finds its limits where political decisions are at stake. As Craig noted: 'Agency technical expertise does not translate into specialist skills in balancing broad public interest'.¹³⁵ This means that in this context only an input-oriented approach grants the sufficient legitimacy to the body taking the decision at stake. Hence, the different goals, effective decision-making free from political interference on the one hand and respecting the limits posed by the principle of representative democracy on the other hand, have to be reconciled.

The argument that working arrangements only constitute technical relationships, and hence do not need to satisfy the requirements of input-oriented legitimacy, is based on the differentiation between those who can enter into political relationships and those who can only enter technical relationships. Because the arrangements are deemed not to have any political content, they can be argued to be legitimated by way of recourse to the output-oriented-legitimacy. However, sometimes the difference between technical and political is artificial and does not mirror clear limitations.

The above analysis of the contents and effects of working arrangements does not mandate the conclusion that they are necessarily inherently technical. It seems difficult to clearly differentiate this notion from what would be a political relationship or a relationship with political implications. As already mentioned above, Frontex Executive Director General Ilkka Laitinen has attached importance to the fact that arrangements are not concluded with the respective governments but with the border

128 *ibid* 294.

129 *ibid*.

130 *ibid*.

131 *ibid* 296.

132 Scharpf (n 123) 220.

133 Griller and Rumler-Korinek (n 103) 10.

134 Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3303, para 201.

135 Craig (n 36) 174.

control authorities instead.¹³⁶ However, it is not the role of the contracting party in its respective state in itself that does makes a relationship technical or political. Even though this has certain implications, it is the actual content of the agreement, the way it is carried out and its consequences that are decisive for the nature of a relationship. But quite apart from that, it has to be noted here that the border control authorities General Laitinen referred to are the relevant ministries in about half the working arrangements. Hence, arguing with role of the contracting parties in their respective States in this case does not seem to fully serve its purpose.

Moreover, in a sensitive area like migration policy, it is difficult to conceive Frontex' action as technical and non-political.¹³⁷ It is argued that the relationship with border control authorities at the EU level is part of the overall political relationship between the EU and the country in question. It can be argued that this cooperation entails that the migration policy of the third State is approved implicitly. In any case, the ways in which the border control authorities carry out their work as cooperating partners and the ways they treat migrants are implicitly approved.¹³⁸ Even if this might be considered too far-reaching in such general terms, these considerations seem to apply at any rate to operations that are carried out together with the authorities of third countries. This is particularly true if one of the explicit goals is to hand the intercepted migrants over to the authorities of the cooperating country.¹³⁹ In those cases, it does not seem farfetched that the cooperation signals approval for the way in which the involved border control authorities carry out their work and how they treat migrants.

In any case, clearly, the term 'technical' does not indicate practical implications. As Vos rightly outlined, 'the functioning of agencies in the "grey zone" between "pure" administration and politics' is a problematic issue.¹⁴⁰ It is argued that this 'masquerade' of inherently sensitive tasks 'constitutes an attempt to prevent discussion of their potential fundamental rights implications' and an 'attempt to "depoliticise" what they do while they are inherently political'.¹⁴¹ Against this background, recourse to the technical nature of working arrangements does not seem to dispel the concerns with regard to the principle of representative democracy that are inherent in the current procedure of conclusion of working arrangements. It seems that through these soft law instruments of non-binding 'quasi-legal' instruments 'democratic decision-making and a political pluralistic debate about the decisions and actions being taken' is being avoided.¹⁴² Due to the importance, the sensitivity and the political implications, a political debate before concluding a working arrangement is imperative. A procedure should be designed that provides the possibility of prior political debate that involves particularly the European Parliament. It is also important that the arrangement is disclosed to the public and that it can be subjected to judicial review. It seems that this can only be achieved by moving away from non-binding working arrangement towards treaties governed by international law. One could envision allowing Frontex to cooperate in the framework of treaties concluded according to Article 218 TFEU.

D. *Human Rights Sensitivity of Migration and Border Control*

It is furthermore assumed that working arrangements, like technical relationships, are not capable of affecting individuals. As discussed above, the term 'technical relationships' originates from the differentiation between technical and political decisions. It is, however, not contended that technical decisions cannot affect individuals because only political decisions can do so. Consequently, reference to the technical nature of working arrangements for the purpose of dispelling concerns regarding human rights and the possibility of judicial review, is unsuitable.

An important consideration in this regard is that the EU and its Member States have recently been subject to heavy criticism from a human rights perspective because of their practices in the control of the EU external borders. Concerns does not remain limited to the Member States themselves but increasingly focus on the role of Frontex.¹⁴³ This has been especially highlighted in a recent Human Rights Watch report, where not only the ill treatment of migrants in Greek detention facilities

136 House of Lords (n 30) Q268.

137 Rijpma (n 55) 333, who points out that Frontex acts in a 'highly politicised environment'; Baldaccini (n 14) 235, arguing that the 'underlying sensitivities of this project are evident'.

138 House of Lords (n 30) 150, Q413.

139 Carrera (n 17) 21.

140 E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies' (2000) 37 Common Market Law Review 1113, 1130.

141 Guild and others (n 14) 93.

142 *ibid* 101.

143 See for example: Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (September 2011); Parliamentary Assembly of the Council of Europe [PACE] 'The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants' PACE Resolution 1821 (2011), para 5.4, holding that 'there are inadequate guarantees of respect for human rights and obligations [...] in the context of the joint operations it [Frontex] co-ordinates'; Human Rights Council, 'Mission to Greece Report submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (4 March 2011) A/HRW/16/52/Add.4; Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (September 2009).

was criticised but in particular the role Frontex and its RABIT operation played in this context.¹⁴⁴ Without doubt, border control as such is a human rights sensitive activity.¹⁴⁵ This sensitivity is intensified in extraterritorial border control, even more so when it takes place in the territorial waters of third States, a fact that is highlighted in a recent study requested by the European Parliament:

The European Parliament should call upon Frontex to no longer conduct any joint operation in the maritime territory of third states, as the consistency of this practice is not only questionable with respect to the rule of law principles of legal certainty and accountability, but it is also at odds with fundamental rights foreseen in the EU Charter.¹⁴⁶

A recent judgment of the Grand Chamber of the European Court of Human Rights [‘ECtHR’] further illustrates the additional human rights sensitivity of border controls carried out outside the territories of the member states. In *Hirsi Jamaa and Others v Italy*, it condemned the practice of interdicting vessels carrying migrants and forcibly returning them to the country of origin. These so-called ‘push-backs’, it ruled, violate the prohibition of *refoulement* as well as the prohibition of collective expulsion of aliens.¹⁴⁷ The case concerned the practices of Italy, handing migrants over to Libya on the basis of the bilateral ‘Treaty of Friendship, Partnership and Cooperation’, concluded in August 2008. However, as other Joint Operations show, interception and diverting back of vessels are practices also applied during Frontex-coordinated Operations. During Joint Operation *Hera* for example, according to Frontex, more than 3.500 migrants have been stopped close to African coast as of 19 December 2006.¹⁴⁸ During *Hera III*, more than 1.000 migrants were diverted back to their points of departure at ports along the West African coast.¹⁴⁹

Against the background of the human rights sensitivity of extraterritorial border control, concerns have been raised in the context of Frontex’ cooperation with third countries without considering their human rights records.¹⁵⁰ These very concerns seem to have been the driving force behind the amendments to Article 14(3) of the new Frontex Regulation. Interestingly, this provision limits the deployment of Immigration Liaison Officers to those countries ‘in which border management practices respect minimum human rights standards’. This appears to be based on the assumption that where the authorities of third countries are somehow involved in migration policies or border control of the EU and its member states these third countries should in principle respect human rights when carrying out those activities. Extraterritorialisation of migration control, generally being highly dependent on the willingness of third countries to cooperate, can involve third countries to a greater or lesser degree. Relying on the classification of interactions between the Union legal order and the one of third countries by Rijpma and Cremona,¹⁵¹ there are broadly speaking three categories. At one end of the scale, one can find actions taken by the EU alone, only showing effects in the legal order of third countries. The other extreme is the EU’s promotion of its *acquis*, which is adopted by the third country into its domestic legal order. In between, there are actions that are neither taken solely by the EU nor by the third countries. A classic form of cooperation in this category would be an international agreement, requiring the consent of both sides. However, there are also more complex interactions between the different authorities that involve autonomous EU action which can only work effectively if complemented with the consent or active cooperation of a third country. Examples of such relationships are the deployment of Immigration Liaison Officers and Frontex joint operations in the territorial waters of a third country, although such complex issues are difficult to categorise at all.¹⁵²

However, against this background it seems to be warranted to treat these relationships in the same manner when it comes to limits to cooperation with third countries. It follows that a similar limitation to the one contained in Article 14(3) of the Regulation would also make sense with regard to the conclusion of working arrangements. Such a provision effectively limits possibilities of cooperation with third countries to the extent that cooperation can only be carried out with those countries that respect minimum human rights standards. This could be one way to prevent aiding policies that do not respect fundamental rights.¹⁵³

144 Human Rights Watch (n 143).

145 J Jeandesboz, ‘Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and EUROSUR’, (2008) Challenge Research Paper No 11, 17; Guild and others (n 14) 57-61.

146 Guild and others (n 14) Recommendation 9 at 11, 114.

147 *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECHR, 23 February 2012) nyp.

148 Frontex, ‘Longest FRONTEX Coordinated Operation – HERA, the Canary Islands’, Press Release 19 December 2006.

149 Frontex, ‘Hera III operation’, Press Release 13 April 2007.

150 See for example Baldaccini (n 14) 252-3.

151 Rijpma and Cremona (n 5) 13-15.

152 *ibid* 14.

153 Guild and others (n 14) 64.

VI. Conclusion

The increasingly important practice of extraterritorialisation is highly dependent upon the willingness of third countries to cooperate. Where the cooperation is secured through relationships established by administrative authorities, several legal challenges arise. Frontex actively engages in setting up cooperation structures with the authorities of third countries, which is commonly viewed as essential for the success of operations outside EU territory. One of the instruments designed to secure the cooperation of third countries are working arrangements entered into by Frontex on the one hand and the authorities of third countries on the other hand.

Working arrangements are concluded under the legal threshold of treaties. The powers of judicial review, the involvement of the European Parliament and the obligation to inform the public about measures taken are linked to the conclusion of treaties. The nature of working arrangements therefore allows these arrangements to escape these requirements. It is argued that, as merely technical relationships, working arrangements do not trigger concerns regarding political participation, as they are inherently not political. Furthermore, it is assumed that merely technical relationships cannot affect individuals.

The term 'technical relationships' derives from the need to distinguish those who can enter political relationships from those who cannot. The findings have shown that it is virtually impossible to clearly differentiate technical relationships from what would be a political relationship or a relationship with political implications. Furthermore, the involvement of third countries in EU border control may indeed carry political implications. Hence, at best, there is a grey area between political and technical relationships, in which working arrangements operate. Consequently, the argument that working arrangements only establish technical relationships is not sufficient in order to dispel the concerns related to the possibilities of political participation. The analysis of the term 'technical relationships' has furthermore shown that it is no more than a mere assumption that they are incapable of affecting individuals. This assumption is neither proven nor entirely convincing. What is more, working arrangements operate in a highly human rights sensitive field. It can therefore be concluded that the mere assumption that technical relationships cannot affect individuals is not enough in order to explain the missing consideration of their human rights implications.

Hence, the analysis has shown that the content and effects of working arrangements as well as their field of operation would warrant a thorough political debate beforehand as well as careful consideration of their human rights implications and the operation of the rule of law. The working arrangements, in their current form, do not meet these requirements. Therefore, they do not provide an adequate basis for the involvement of third countries in EU border control. It follows that especially two things could be envisaged to improve the current situation.

Keeping the inherently political nature and the repercussions on fundamental rights in mind, it is indeed remarkable that the form chosen for the conclusion of working arrangements is not a treaty under international law. 'Upgrading' working arrangements to treaties would provide for the possibility of involvement of the European Parliament before the agreement is made as well as the possibility of judicial review. Thus, a solution could be to allow Frontex to cooperate in the framework of treaties concluded according to Article 218 TFEU.

Furthermore, rather than assuming that technical relationships cannot affect individuals, it follows from the above that a stronger consideration of the human rights implications of working arrangements is warranted. Therefore, the human rights record of participating third States should be considered before entering cooperation agreements. This would not even amount to an entirely new concept as this approach has already been adopted in other fields. ■