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Normative power FRONTEX?

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third countries**

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Abstract

Human rights groups frequently criticise FRONTEX and the legality of the agency's operations has been questioned in scholarly literature. At the same time, recent studies have shown that humanitarian concerns are increasingly emphasised in FRONTEX's rhetoric. Drawing on Manners' concept of 'Normative Power Europe', and Niemann and de Wekker's framework for empirical analysis of normative power Europe, this paper assesses FRONTEX's cooperation with third countries with a focus on one norm: respect for fundamental rights. It examines to what extent the agency shows a genuine commitment to the implementation of fundamental rights and to what extent the agency is acting in a normative way, i.e. applying universal norms and showing willingness to listen to and learn from the experiences of third countries. The analysis suggests that the agency has moved towards a more genuine commitment towards fundamental rights implementation and that there is a fair degree of inclusivity and reflexivity to third country cooperation. However, the possibility of internal conflicts of interest as well as discrepancies between what is stated on paper and what is happening on the ground may stand in the way of the agency's exercising normative power.

Keywords

Agencies, EU external dimension, FRONTEX, fundamental rights, normative power

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Introduction¹

Without doubt, FRONTEX is one of the most hotly debated European Union (EU) agencies. Few agencies are the subjects of as much media coverage and receive as much public attention. Human rights groups frequently criticise the agency for its activities, and the legality of some of its operations has been questioned in the scholarly literature (Carrera, den Hertog and Parkin 2013; Papastavridis 2010; Baldaccini 2010; Pollak and Slominski 2009; Vara 2015). At the same time, recent studies (see for example Aas and Gundhus 2015; Pallister-Wilkins 2015; Perkowski 2016; Campesi 2014; Horsti 2012) have shown that humanitarian concerns have been given increased emphasis in FRONTEX's rhetoric. Several studies imply that humanitarian discourse is used to legitimise the agency's existence, but that there is 'intensified organizational focus on human rights' (Aas and Gundhus 2015: 14; see also Pallister-Wilkins 2015; Perkowski 2016). Campesi (2014), however, is less generous in his assessment and argues that the agency is using humanitarian rhetoric to legitimise its existence and gain more resources.

The importance of fundamental rights is written into FRONTEX's governing legislation and work programme. Respect for fundamental human rights is indeed a key principle of the EU. Commitment to this principle, together with other normative principles such as a peace, liberty, democracy and the rule of law, are enshrined in the *acquis communautaire*, and these norms are repeatedly iterated in official EU communication. In a series of publications, Manners (see for example 2002; 2008; 2009) has advanced the argument that the EU is a normative power in world politics, i.e. that it is based on a set of universally accepted normative principles, and that it can and should promote these principles in its external relations. EU external relations include a wide range of activities that are carried out by various actors. As regards joint EU cooperation with external actors on border management cooperation, FRONTEX is the prime actor.² The agency is governed by a management board composed of representatives of the 26 member states that are Schengen signatories, and two representatives of the Commission.

FRONTEX has always had an external dimension in the form of cooperation with third countries to its mandate, but the number of legal provisions related to this aspect has increased substantially between the founding legislation of 2004, and the 2016 legislation establishing the European Coast Guard Agency. Accepting Manner's normative proposition, this paper starts from the premise that, as an EU agency with a clear external dimension to its operations, FRONTEX is a representative of the EU in world politics. It can thus be conceptualised as a normative power that ought to apply the EU's fundamental normative principles.

¹ An earlier version of this paper was presented at the TARN Conference on the External dimension of EU agencies and bodies, the University of Luxembourg, 27-28 June 2017.

² Member states may also cooperate individually with third country authorities as long as it is in line with FRONTEX activity.

Whilst FRONTEX's operations have been examined from various angles, studies of agency interaction with third countries have so far only focused on legal aspects (Vara 2015; Fink 2012). Through its focus on the ideational dimension of FRONTEX's cooperation with third country authorities, this paper contributes with new insights to our understanding of FRONTEX's external dimension. Drawing on Manner's (2008) discussion of principles, actions and impact, and parts of the analytical framework developed by Niemann and de Wekker (2010) for empirical study of normative power Europe, this paper assesses FRONTEX's cooperation with third countries and concentrates on one norm: respect for fundamental rights.³ It addresses two questions: 1) To what extent does FRONTEX have a genuine normative commitment to the implementation of fundamental rights? 2) To what extent is the agency acting in a normative way, i.e. applying universal norms and showing willingness to listen to and learn from the experiences of third countries?

The paper is structured as follows. First, agency cooperation with third countries is described. This is followed by a brief literature review on normative power Europe, in which the concept of 'Normative Power Europe' (NPE) is explained. The analytical framework, method and operationalisation are then presented. The sections that follows contain the empirical analysis: first, normative intent is examined, and second, normative process is examined. The paper ends with some concluding remarks.

FRONTEX's cooperation with third countries

Cooperation with third countries has always been part of FRONTEX's mandate, but it is reasonable to assume that it has gained in importance in connection to the refugee crisis starting in 2015. The current FRONTEX legislation from 2016 contains significantly more paragraphs devoted to third country cooperation in comparison with the founding legislation from 2004. Cooperation is mainly with border management agencies of third countries, which is very much an integral part of the EU's integrated border management strategy. Whereas provisions related to third country cooperation can be found throughout the current legislation, the key points are summarised in article 54. Details on the European integrated border management are found in article 4.

Article 54, point 2 states that in its cooperation with third countries, FRONTEX shall 'act within the framework of working arrangements concluded with those authorities in accordance with Union law and policy', and these working arrangements 'shall specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation'. Draft arrangements require the Commission's prior approval, and the European Parliament shall be informed in advance of the agency's concluding of working arrangements. Working arrangements should be approved by the management board (art. 62).

³ 'Fundamental rights' and 'human rights' refer to the same substance.

To date FRONTEX has concluded working agreements with eighteen countries: the Russian Federation, Ukraine, Moldova, Georgia, the former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan and, without prejudice to positions on status, Kosovo. In addition, the agency has agreements with the Coordination Service of the Commonwealth of Independent States (CIS) Border Commandants' Council and the Migration, Asylum, Refugees, Regional Initiative (MARRI) Regional Centre in the Western Balkans. All of these working agreements are available to download from the FRONTEX web site. The agency is at various stages of negotiations with Niger, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Tunisia.

FRONTEX cooperates with third countries in a number of ways. Cooperation is based on risk analysis, and '[t]he primary objective is to intensify existing bilateral cooperation with EU's neighbouring countries, as well as with countries of origin and transit for irregular migration' (FRONTEX 2017a). A lot of the cooperation comes under the heading technical or operational cooperation. This involves risk analysis, training, information exchange, research and development, joint operations (including return operations) and pilot projects. For instance, the agency has information exchange networks involving third countries, and makes their Core Curriculum on border guard training available for third countries. Examples of joint operations that involved third countries include *Nautilus* and *Hera II* (Fink 2012). The agency may deploy liaison officers to third countries (Regulation EU 2016/1624, art. 55).

Another form of cooperation with third countries concerns technical assistance projects funded by the EU. FRONTEX is currently implementing two such programmes: Eastern Partnership Integrated Border Management Capacity Building Project (EaP) and Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey (IPA II). The agency has previously (2014-2016) participated in 'Promoting the participation of Jordan in the work of EASO as well as the participation of Morocco and Tunisia in the work of EASO and Frontex (ENPI)' (FRONTEX 2017a).

In addition to cooperation where FRONTEX is a lead actor, the agency is also involved in other EU-led initiatives on border related activities, such as 'initiatives stemming from the Global Approach to Migration and Mobility, for example the Migration and Mobility Partnerships, the Eastern Partnership Initiative or the Building Migration Partnerships' (FRONTEX 2017a).

Normative power Europe

The idea of normative power in the international system has been around for a long time, but the idea of the 'Normative Power Europe' (NPE) rose to prominence in academic discussions following Manners' (2002) article 'Normative Power Europe: a Contradiction in Terms?'. This seminal article suggests a need to go beyond conceptualisations of the EU as either a military power or a civilian power as these conceptualisations focus too much

on how state-like the EU is. Instead, Manners (2002: 39) claims, the EU's 'ability to shape conceptions of "normal" in international relations needs to be given much greater attention'. Shifting the focus towards the influence of ideas, and away from discussions of economic and military capacities, can lead to a better understanding of how the EU exercises power in the international system.

A first point about NPE is that the EU is regarded as different from other political entities. Here, Manners (2002: 240) observes that 'the EU's normative difference comes from its historical context, hybrid polity and politico-legal constitution'. Having just come out of a disastrous war, the founding member states of the EU's predecessor, the European Community, were willing to pool resources in order to preserve peace and liberty (Manners 2002: 240). The organisation that was to become the EU then evolved into a hybrid polity with supranational as well as intergovernmental forms of governance. As Manners (2002: 241) explains, '[t]he constitution of the EU as a political entity has largely occurred as an elite-driven, treaty based, legal order', and '[f]or this reason its constitutional norms represent crucial constitutive factors determining its international identity'. Over time, universal norms and principles have increasingly been placed at the centre of EU relations with member states, third countries and international organisations (Manners 2002: 241). Indeed, as Manners (2002: 241) points out, the EU's external relations are 'informed by, and conditional on, a catalogue of norms which come closer to those of the European convention on human rights and fundamental freedoms (ECHR) and the universal declaration of human rights (UDHR) than most other actors in world politics'. The fact that the EU is different to 'pre-existing political forms' and that this difference 'pre-disposes it to act in a normative way' are at the core of Manners (2002: 242) argument.

The EU's normative basis has been successively built up through treaties, declarations, criteria and conditions (Manners 2002: 242). Manners (2002) identifies five core norms, all of which are present in the core legal texts. These are peace, liberty, democracy, the rule of law, and respect for human rights and fundamental freedoms. In addition to these core norms, four minor norms can be identified (although these are more contested). These are social solidarity, anti-discrimination, sustainable development, and good governance (Manners 2002: 242-243). As Manners (2002: 243) points out, all of these norms clearly have a historical context to them.

The idea of the EU as a normative power for good has been challenged. Coming from a neo-realist angle, Hyde-Pryce (2006) argues that the EU is used by member states as a means to attain foreign policy goals that are beneficial to them. Bicchi (2006) questions the universality of the norms the EU promotes, arguing instead that the EU may claim to promote universal norms but in reality it merely seeks to enforce its own norms on others. Sjursen (2006) shares these criticisms, claiming that the EU may either seek to model the rest of the world to fit with its own values or use its power to promote its own interests under the guise of promoting universal values. Further empirical work is needed in order to determine if the EU acts out of self-interest or if it acts according to norms, Sjursen (2006) argues (see also Niemann and de Wekker 2010). Niemann and

de Wekker (2010: 6) also point to the fact that discussion of NPE has been very internally focused, and that a lot of EU ‘foreign policy action does not appear to seek change in partner countries, but rather to satisfy certain domestic groups’.

These critiques of NPE in general are relevant also when considering FRONTEX as a representative of the EU in world politics. As previously mentioned, recent studies have pointed to an increased focus on humanitarian rhetoric in FRONTEX’s official communication. Given that the agency has received significant criticism, including from domestic interests such as members of the EP (Ekelund 2010), one can assume that it has incentives to satisfy these groups. Moreover, as FRONTEX is governed by a board composed of representatives of member states and the Commission, the same tensions that exist at the level of EU decision-making may be present in FRONTEX internal decision-making. To investigate whether the agency really does act as a normative power seeking to implement and apply fundamental rights, empirical work is indeed needed.

Niemann and de Wekker (2010) develops a framework to empirically examine NPE, and distinguish three levels that are important to the operationalisation of NPE. The first level concerns normative intent, e.g. ‘the seriousness/genuineness of normative commitment’ (Niemann and de Wekker 2010: 7). The second level concerns normative process, e.g. ‘the extent to which an inclusive and reflexive foreign policy (promoting universal norms) is pursued (v. an ‘our size fits all’ approach)’ (Niemann and de Wekker 2010: 7). Normative impact, e.g. ‘the development of norms in third countries’, makes up the third level. Their framework has similarities with Manners’ (2008) framework, which emphasises principles, actions, and impact.

The research questions posed in this paper assessing FRONTEX relations with third countries relate to the first two levels of Niemann and de Wekker’s (2010) framework, i.e. normative intent and normative process. Operationalisations of these two levels are outlined in more detail below.

Analytical framework, method and operationalisation

Normative intent

Whilst norms and interests cannot always be separated (Diez 2005: 625), a normative actor for good would be committed to the norms themselves and not merely act out of self-interest whilst hiding behind normative rhetoric. To assess the extent to which FRONTEX is a normative actor we need to question the seriousness and genuineness of its normative commitment. Following Niemann and de Wekker (2010), four aspects will be considered here.

First, are the universal norms ‘at the centre of relations’ with third countries or are they of peripheral importance? This is assessed by qualitative text analysis of FRONTEX’s governing legislation, with particular focus on provisions dealing with third countries,

and of working agreements concluded between the agency and third countries. The more emphasis given to fundamental rights and the more prominent the position given to statements of this norm, the more serious the normative commitment of the agency is deemed to be.

Second, do the norms serve or hurt FRONTEX's interest? If particular norms are applied despite hurting FRONTEX's or EU's self-interests, (for instance by bearing significant economic or political costs), this strengthens the case for a genuine normative commitment. Relevant questions to ask here include: 1) Are there any material interests at stake? And 2) is the agency implementing and applying norms despite forceful opposition? Answers to these questions are sought through consideration of the agency's governance structure and previous research.

Third, does FRONTEX communicate and act consistently, i.e. does it act in accordance with the norms it claims to apply? Text analysis of legislation, working arrangements and FRONTEX's Codes of Conduct is used to investigate if the same standards are applied internally (in this case in cooperation on border control between member states) as they are externally – i.e. towards cooperation with third countries – and if the same standards are applied to different third countries. A high level of consistency supports the idea of normative power FRONTEX, whereas a low level of consistency points in the direction of double standards.

Finally, coherence is considered. According to Niemann and de Wekker (2010: 8) '[c]oherence goes beyond consistency' as '[i]t is about the connectedness of claims or actions through shared principles'. If a critical reading of relevant documents show that claims and actions are connected through value-based principles, this is pointing to a normative power for good.

Normative process

The dimension 'normative process' concerns to what extent the EU has an 'inclusive and reflexive foreign policy' that promotes universal norms (Niemann and de Wekker 2010: 9). This is analysed by examining working arrangements concluded with different countries and FRONTEX information material on third country cooperation. To an extent, this is also triangulated with findings from previous research.

Reflexivity concerns the willingness to learn and adapt. For instance, does the agency accept ideas from third countries and adapt its behaviours in response to these? The level of reflexivity can be assessed by investigating to what extent standard templates and best practice are used in relation to third countries without taking the peculiarities of different countries into account (Niemann and de Wekker 2010: 9). If the agency does not take peculiarities into account and instead behaves in a routine fashion, this would indicate a low level of reflexivity. If the agency consciously and wilfully modifies its policies following external reviews, this would indicate reflexivity.

Inclusiveness concerns to what extent external actors are consulted in the development of policy, and if there is joint ownership of policy. Does the agency take into account the views of those who are affected? Or does it impose its own view?

Finally, are the norms applied universal? Or are they Eurocentric? To assess these points we will check if the norms are ‘recognised through the instruments of the UN system’ (Niemann and de Wekker 2010: 10; see also Manners 2008: 76).

Assessing cooperation with third countries

Normative intent

Centrality of fundamental rights norms

FRONTEX’s activities are governed by Regulation (EU) 2016/1624. Whereas recital 1 makes reference to strengthening control at the borders, and recital 2 to a large extent deals with how to ensure ‘a high level of internal security within the Union’, the necessity ‘to act in full respect for fundamental rights’ is stated already in recital 2. Recital 46 deals specifically with third country cooperation. Practical details on what cooperation can entail are followed by a reference to fundamental rights. It states that ‘[i]n the cooperation with third countries, the Agency and Member States should comply with Union law at all times, including fundamental rights and the principle of non-refoulement’, and ‘[t]hey should likewise do so when the cooperation with third countries takes place on the territory of those countries’. Section I of chapter III covers general rules that should guide FRONTEX’s work. These general provisions also apply to its cooperation with third countries. The first article of the section, i.e. article 34, concerns the protection of fundamental rights and ‘a fundamental rights strategy including an effective mechanism to monitor the respect for fundamental rights in all activities of the Agency’. Reports from the agency’s fundamental rights officer and consultative forum must be taken into account with regards to third country cooperation. Respect for fundamental rights and the principle of non-refoulement are mentioned in article 54, which is the first article focusing directly on cooperation with third countries. Fundamental rights are mentioned earlier in the legislation from 2016 in comparison with the founding legislation from 2004. The early mention and emphasis on fundamental rights suggest that the norm to respect these rights indeed is given a central role in the agency’s cooperation with third countries.

However, all working arrangements concluded with third countries were signed before Regulation (EU) 2016/1624 entered into force, and an analysis of these arrangements paints a different picture with regards to the centrality of human and fundamental rights. All working arrangements emphasise control and/or security as objectives of cooperation. None mentions human rights implementation as an objective. Of the eighteen working arrangements concluded with individual third countries, only five

explicitly mentions human rights.⁴ Here respect for human rights is mentioned as a basic or general principle for cooperation. These five arrangements were all concluded after 2012. The arrangements with Nigeria, Armenia and Turkey, which were concluded in 2012, state that FRONTEX and the relevant authorities ‘afford full respect for human rights’. The arrangement with Azerbaijan, concluded in 2013, includes the same phrase but with an addition: ‘afford full respect for human rights, related international laws and principles’. The latest arrangement – i.e. the Working Arrangement on establishing operational cooperation between FRONTEX and the Ministry of Internal Affairs of Kosovo, signed in 2016 – is yet more detailed: It states that the relevant authorities ‘afford full respect for human rights, enshrined in international laws and principles, in particular they shall ensure that the rights of persons in need of international protection and other vulnerable groups are respected during all joint activities’. The lack of reference to human and fundamental rights in the earlier working arrangements, suggests that the implementation and application of these norms were not central to the agency’s external relations at the time when these working arrangements were concluded. There appears to be a change in 2012, which may be a reflexion of FRONTEX having its governing legislation revised in 2011.

Do norms serve or hurt FRONTEX’s interests?

Arguably, the implementation of human and fundamental rights is in FRONTEX’s interest. Legitimacy is important for all organisations that wish to survive or grow in terms of power and resources. To obtain organisational legitimacy, organisations ‘seek to establish congruence between the social values associated with or implied by their activities and the norms of acceptable behavior in the larger social system of which they are a part’ (Dowling and Pfeffer 1975: 122). Standing up for fundamental rights is socially desirable, and could lead to organisational legitimacy. This applies to the EU as an organisation at large, and to FRONTEX as a representative of the EU. More specifically current debates on legitimacy of EU institutions and bodies tend to draw on Schmidt’s (2012) discussion of input, output and throughput legitimacy. In their examination of FRONTEX – focusing on legitimacy – Wolff and Schout (2013) clearly demonstrated that FRONTEX, with the mandate it had at their time of writing, experienced legitimacy problems related to lack of control over agency activities that impact on fundamental rights. It is thus in the interest of EU decision-makers to address this issue, and it is in the interest of FRONTEX to show a firmer commitment to the implementation of fundamental rights. Although scholars differ in their assessment of to what extent discourses focusing on fundamental rights translate into actual FRONTEX practice, there appears to be a consensus that humanitarian rhetoric is used by the agency in order to build legitimacy for the organisation and its activities (Campesi 2014; Aas and Gundhus 2015; Horsti 2012; Pallister-Wilkins 2015; Perkowski 2016).

⁴ The arrangement with the United States does not mention human rights, although article 6 states that ‘[a]ll activities under this Working Arrangement are to be carried out in accordance with applicable laws, regulations, and policies.’

However, some EU member states claim to be under pressure from large-scale migration and call for strict border control. Their priorities feed into the EU political process. Political forces in favour of stricter migration regimes are strong in parts of Europe, and decision-makers at national as well as at EU level can have an interest in satisfying demands by these forces. Member state priorities feed into the EU political process, for instance when the agency budget is decided. More directly, member state representatives channel interests into FRONTEX decision-making through the management board. This can be relevant in situations where cooperation with third countries play an important part. Commenting on operations in the Mediterranean, organisations such as Human Rights Watch, Statewatch and Frontexit have raised concerns that operations in which FRONTEX is involved can lead to early detection, interception and push back of migrants in ways that violate fundamental rights. An analysis of what happens on the ground during FRONTEX operations is beyond the scope of this paper. However, we can conclude that, as some interests that feed into agency priorities may rank strict border control enforcement higher than fundamental rights, there is some ambivalence as to what is in the agency's interest.

Norm consistency

Article 34 states that FRONTEX 'shall guarantee the protection of fundamental rights in the performance of its tasks'. The importance of observing fundamental rights is reiterated numerous times throughout the legislation in connection to provisions detailing individual tasks. Article 54 specifically covers that this applies also in cooperation with third countries. Importantly, article 54 states that FRONTEX 'shall comply with Union law, including norms and standards which form part of the Union *acquis* also when cooperation with third countries takes place on the territory of those countries'. An example of such cooperation may be so-called 'collecting return operations', i.e. operations where the agency provides assistance, coordinates or organises 'return operations for which the means of transport and forced-return escorts are provided by a third country of return' (article 28). Here it is clear that the agency is expected to apply the values to which it adheres to agents of third countries.

The deployment of liaison officers is another case in point to compare the norms governing the agency's work in cooperation with EU member states and its work with third countries. A task of liaison officers in member states is to 'contribute to promoting the application of the Union *acquis* relating to the management of the external borders, including with regard to respect for fundamental rights' (article 12.3.e). Liaison officers to third countries are expected to respect fundamental rights and act 'in compliance with Union law' when they establish and maintain contact with third country authorities 'with a view to contributing to the prevention of and fight against illegal immigration and the return of returnees' (article 55.3). Article 55.1 states that '[L]iaison officers shall only be deployed to third countries in which border management practices comply with minimum human rights standards'. The same norms apply, but if anything, the demands placed on the agency's internal work are higher.

Furthermore, the governing legislation makes it very clear that the agency is required to draw up and develop ‘a code of conduct applicable to *all border control operations coordinated by the Agency* and *all persons participating in the activities of the Agency*’ (article 35, emphasis added). This code ‘shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights’ (article 35). This has been done, and the expectation that anyone involved with FRONTEX’s work ought to follow it is made very clear (FRONTEX n.d.a). There is also a code of conduct especially designed for joint return operations that applies ‘during all return operations and return interventions coordinated or organised by the Agency’ (article 35; see also FRONTEX (n.d.b)). Thus, there is consistency in terms of what everyone involved with the agency is expected to follow.

The legal provisions on cooperation with third countries that are available in the governing legislation apply to all third countries. As no exceptions are given, this means that the same fundamental rights norms should apply no matter what third country the agency is cooperating with. However, cooperation is also informed by the working arrangements concluded between FRONTEX and the relevant third country authorities. Human rights are only specifically mentioned in working arrangements concluded from 2012 and onwards. It is not entirely clear to what extent this has any impact on cooperation in practice. However, article 25.4 specifies that the executive director shall ‘withdraw financing’, ‘suspend or terminate, in whole or in part’ a range of activities, including working arrangements, ‘if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist’.

Coherence

The agency’s actions are coherent to the extent that the fundamental rights standards it applies are linked to widely acknowledged sources of fundamental rights provisions (see discussion of universal norms below). The fact that respect for human rights is only written into the working arrangements with some third countries shows a lack of coherence, however. Supposedly, as the most recently concluded working arrangements include such references, this discrepancy can be explained by the fact that the agency’s governing legislation has changed over time to put more emphasis on fundamental rights. This said, there is no motivation given why the earlier working arrangements have not been revised to reflect the change in the agency’s mandate. The agency’s involvement in return operations has always been a controversial point. Whilst the current legislation makes it clear that fundamental rights must be respected throughout the entire operation (article 8), it is not obvious what happens once the returnees are back in the third country. If the fundamental rights of the returnees can be guaranteed in the third country, the agency’s action can be deemed coherent. If, on the other hand, FRONTEX contributes to returning people to countries where their rights are not guaranteed, the agency’s behaviour is incoherent.

Normative process

Reflexivity

According to article 54.2 working arrangements between FRONTEX and third countries ‘shall specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation’. With the exceptions of the agreements with Turkey, Russia, CIS and MARRI, the working arrangements appear to follow the same template. However, they all, in one way or the other, emphasise aspects such as mutual interest, reciprocity and building trust. This suggests an element of reflexivity on behalf of the agency. FRONTEX is also obliged to take the views of its consultative forum, which includes several civil society organisations with activities in a range of countries, into account when carrying out tasks in cooperation with third countries (article 34.4).⁵

FRONTEX cooperates on risk analysis and information exchange with third countries through the information-sharing networks Africa-Frontex Intelligence Community (AFIC), Eastern European Borders Risk Analysis Network (EB-RAN), Turkey-Frontex Risk Analysis Network (TU-RAN) and Western Balkans Risk Analysis Network (WB-RAN) (FRONTEX 2017b). Within each network the participating authorities use the same methodology. As with any data-gathering this is necessary for comparability, so it is hardly surprising that the same template is used. The results of the risk analyses feed into operational plans for joint operations, and as joint operations ‘shall be preceded by a thorough, reliable and up-to-date risk analysis’ (art. 15.3), the agency is willing to adapt its actions according to information coming in from third countries. Indeed, FRONTEX (2017b) makes strong claims to reflexivity here by stating that ‘[t]he knowledge generated within these networks feeds into planning of participants’ own border management activities but also to higher level strategic and even EU funded capacity building activities’.

Some working arrangements mention training as a potential area for cooperation. Whilst recognising that countries use different border control systems and have different needs depending on geographical location, the aim of the FRONTEX-led training is to ‘promot[e] the development of a common European border guard culture with high professional and ethical standards’ (FRONTEX 2017c). Fundamental rights training is part of the Common core curriculum (CCC) for basic training of border guards (FRONTEX 2013), and, according to Horii (2012: 159) a few third countries have integrated ‘common training standards into their national training structures’. Although the third countries currently cooperating with FRONTEX may not have been directly involved in the design of the CCC, several interests external to FRONTEX itself have been involved in the process of CCC development. Examples of such interests are non-EU Schengen associated countries, UNHCR and the International Organization

⁵ For a list of current member organisations, see FRONTEX (2015a) Management Board Decision No 29/2015 of 09 September 2015 on the composition of the Frontex Consultative Forum on Fundamental Rights.

for Migration (Horii 2012: 168). The current legislation specifies that FRONTEX needs to consult its Consultative Forum when developing the CCC (article 36.5). Countries that have a working arrangement with the agency may take part in information exchange related to training (FRONTEX 2017c).

With regards to the deployment of liaison officers to third countries, there appears to be an element of reflexivity in the sense that this can be done on a reciprocal basis (article 55.2). Turkey was the first country to receive a liaison officer (FRONTEX 2015b), and in 2016 the management board decided to appoint one in the Western Balkans (FRONTEX 2016). Priority is given to third countries that ‘on the basis of risk analysis, constitute a country of origin or transit regarding illegal immigration’ (article 55.2). This suggests that the agency take peculiarities of countries into account. However, it also implies that the overarching goal of cooperation is to serve the aims of European border control, which may not be the prime concern of third countries.

If the various forms of operational cooperation with third countries have a fair degree of reflexivity to them, the technical assistance programmes in third countries currently implemented by FRONTEX focus on spreading European standards. The Eastern Partnership (EaP) Integrated Border Management (IBM) Capacity Building Project (n.d.) aims to bring the European template for integrated border management (IBM) to Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The aim of the ‘Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey’ project is ‘to introduce and share EU standards and best practices on migration management’ in Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Serbia, Montenegro and Turkey (FRONTEX 2017d).

Inclusiveness

Working arrangements cannot be concluded without the consent of the relevant third country authorities. A degree of inclusiveness is thus inherent to this process. An important question is of course how the cooperation turns out in practice once the agreement is signed. Hernández i Sagrera (2014: 173) suggests that the working arrangements are ‘soft law instruments with a structure flexible enough to adapt to the interests of the signatories’, which suggests that signatories on both sides can have significant impact on actual cooperation. As previously mentioned, third countries have input into FRONTEX work through their participation in information-sharing networks, and one could assume that participating countries have joint ownership of these networks. However, is not entirely clear to what extent this means that third countries also have joint ownership over activities that the agency decides to undertake on the basis of the information given. After all, the core task of the agency is to assist EU member states with their border management, and cooperation with third countries is maintained to fulfil this task. This is reflected also in the administrative assistance programmes implemented by FRONTEX in third countries.

Whilst the focus of the technical assistance programmes is not very reflexive, there is an element of inclusiveness. What capacity building activities that will be undertaken as part of the Eastern Partnership Integrated Border Management Capacity Building Project is determined by needs identified by the third country authorities, which suggests an element of joint ownership of the project. Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey is to ‘complement national efforts in the area of migration management’ (FRONTEX 2017a).

Are the norms universal?

The current legislation guiding FRONTEX’s work is the prime source on what norms inform cooperation with third countries. Recital 46 of this legislation states that in its cooperation with third countries, the agency ‘should comply with Union law at all times, including fundamental rights and the principle of non-refoulement’ (see also article 34 and article 54). Recital 47 covers from what legal texts fundamental rights are derived, and here it becomes very clear that the norms the agency needs to adhere to are very much regarded as universal. The legal texts informing FRONTEX’s concept of fundamental rights are: the Charter of Fundamental Rights of the European Union; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the United Nations Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Relating to the Status of Refugees; the United Nations Convention on the Law of the Sea; the International Convention for the Safety of Life at Sea; and the International Convention on Maritime Search and Rescue. The principle of non-refoulement, more specifically, has a firm grounding in international law and is undoubtedly acknowledged in the UN system. It has its origin in the 1951 Convention Relating to the Status of Refugees, and is also enshrined in the International Covenant on Civil and Political Rights (ICCPR) as well as in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (European Union Agency for Fundamental Rights 2016: 13).

Concluding remarks

The conceptualisation of FRONTEX as a normative power entails the understanding that it can and should implement and apply a universally accepted normative principle of respect for fundamental rights in its external relations. This paper set out to assess FRONTEX cooperation with third countries with focus on normative intent and normative process.

A close reading of FRONTEX’s governing legislation from 2016 shows that fundamental rights norms occupy a central role. References to such norms are placed in prominent places throughout the legislation and in the provisions on third country cooperation. However, cooperation is also governed by working arrangements signed by the agency and competent third country authorities, and all existing working arrangements were concluded prior to the coming into force of the current legislation on FRONTEX. With the exception of the few arrangements concluded from 2012 and

onwards, these working arrangements do not mention fundamental or human rights. There is no official information provided as to whether the working arrangements will be revised to reflect the increased attention to fundamental rights given in the agency's mandate. It is in the agency's interest to apply fundamental rights as this is socially desirable and helps the agency to legitimise its existence. However, a conflict of interest within the agency can be discerned in that some member states, which are represented on the agency board and within the EU institutions deciding on the resources given to the agency, may prioritise strict border control including operations leading to early detection, interception and pushback of migrants.

Since the coming into force of the 2016 legislation, there has been a high level of norm consistency with regard to fundamental rights norms. All actors whether internal to FRONTEX or third country officials taking part in joint operations are expected to live up to the same standards. The principles applied are part of a bigger picture, i.e. they can be deemed universal in that they are derived from established sources of international law, which suggests that the agency is coherent in the norms that it applies. However, even if the agency consistently expects the same standards of its officers and third country officers during the course of joint operations, the agency's actions can call coherence into question. If the agency is contributing to returning people to third countries where their fundamental rights will not be respected once FRONTEX's responsibility for the returnees comes to an end, this action is not consistent with the commitment to fundamental rights that is supposed to permeate every aspect of the agency's work.

Most working arrangements follow the same template, but they all emphasise aspects such as building trust and reciprocity, which indicates a degree of reflexivity. The results of FRONTEX cooperation with third countries on risk analysis and information exchange feed into activities and practices at both European and third country level. Similarly, information exchange and adaption of training show a willingness to be engage in reflexive practice. With regards to the deployment of liaison officers to third countries, this can be done on a reciprocal basis, but it is very obvious that the EU's concerns of securing its borders and reducing irregular migration are prioritised over any other concern third country authorities may have. The purpose of technical assistance programmes is clearly pronounced to be the promotion of European standards.

As mutual agreement is a requirement for the conclusion of a working arrangement, an element of inclusiveness is inherent to their conclusion. Moreover, the working arrangements are flexible and can be adapted in accordance with the wishes of third country authorities and FRONTEX. As the agency cannot force any third country authorities to take part in information networks, inclusiveness is a prerequisite and we can assume a degree of joint ownership of these networks. However, the degree of impact of third countries on what action is taken as a result of the information they provide is not certain. The technical assistance programmes have a high degree of inclusivity and joint ownership as the assistance provided is guided by needs identified with the participating third countries.

In conclusion, this analysis suggests that FRONTEX is moving towards a more genuine commitment towards implementing and applying fundamental rights, and that there is a fair degree of inclusivity and reflexivity to third country cooperation. These are promising signs for individuals affected by FRONTEX's work, and for the perception of the agency – and by extension, also of the EU – as a normative power. Yet, one cannot get away from the possibility of internal conflicts of interest getting in the way. Further research, for example in the form of interviews, is needed to uncover what is happening on the ground.

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