

BILAN

**THE MANDATE
OF FRONTEX IS
INCOMPATIBLE
WITH HUMAN
RIGHTS**

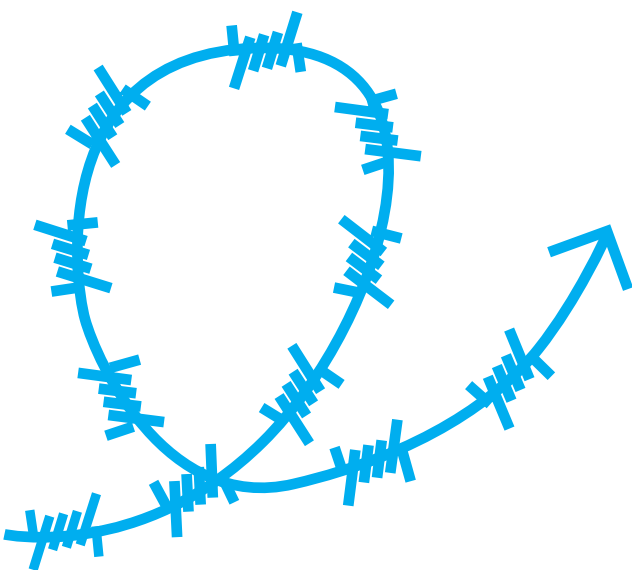
FRONTEX

[EXIT]

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INTRODUCTION

Ever since a strategy to counter irregular migration was adopted at the European Summit held in Tampere in October 1999, the development of an area of “liberty, security and justice” has been conditioned upon the set up of surveillance and control mechanisms at the European Union’s (EU) external borders. The EU has since then never ceased to develop new means of cooperation between its Member States and third countries to help “manage migration inflows” as early as possible before the latter reach its borders.

In 2004, the EU established a border surveillance tool, the Frontex Agency, without taking into account the obligations of Member States - Frontex’s primary users - in terms of right to seek asylum and the fundamental rights of migrants.

The EU Agency was created to develop common means of surveillance at the external borders, thereby mutualising resources to ensure the deployment of border guards at the different “entry points” for migrants into Europe. The establishment of Frontex is reflective of the EU’s broader security-oriented border management policy, which is geared towards the “prevention of risks”, “the identification of threats” to combat, as if they were two comparable issues, “the fight against irregular immigration and cross-border crime”.

Indeed, the objectives set in Frontex’s mandate as well as its *modi operandi* makes the Agency a tool which, by nature, is dedicated to deterring migrants deemed “irregular” or “clandestine” and preventing them from reaching the European Union, without first knowing whether they are in danger or in need of international protection. Frontex is tasked with intercepting those who manage to reach EU territory, without identifying potential asylum seekers and without any guarantee that the Member States in which they are disembarked will do so. The Agency’s mission also entails cooperation with third countries, who are then in charge of intercepting migrants as early as possible before they reach the EU’s borders.

Serious concerns regarding Frontex’s activities in Libyan territorial waters and their impact on the death toll at sea were already raised in 2007 to the LIBE Committee of the European Parliament.¹ Nowhere in the official publications was it considered that migrants intercepted by the Agency could have been in need of international protection. In a 2007 Communication, the Commission proposed that teams of experts be set up to identify asylum seekers in cases of refugee crises, but this proposal was not adopted.

In 2010, a group of MEPs voiced doubts on Frontex’s compatibility with the respect of fundamental rights, on the basis of the findings of a report it commissioned to Migreurop and which included a large number of testimonies from migrants.²

- Nothing much has changed, despite the revision of Frontex’s mandate in 2011 following criticism of its ability to ensure the respect of migrants’ rights at the EU’s borders, i.e. the adoption of the “fundamental rights” strategy which includes the instatement of a Fundamental Rights Officer and the establishment of a consultative forum made of, inter alia, human rights organisations.
- Frontex’s objectives, mentioned above, in and of themselves entail a risk of human rights violations, and in particular of two fundamental principles in international law:
 - The right to leave any country including one’s own (Article 13 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Civil and Political Rights) ;
 - The rights to seek asylum (Geneva Convention relating to the Status of Refugees, Article 18 of the EU Charter of fundamental rights) and the non-refoulement principle (Article 33 of the Geneva Convention relating to the Status of Refugees).

¹ By the Migreurop network, which has initiated the Frontexit campaign : <http://www.migreurop.org/article1299.html>

² <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>

Several articles in Frontex’s mandate³ reflect this incompatibility with the respect of fundamental rights:

- Identifying migration flows – perceived as sources of pressure and potential threats – at European borders : risk analyses (Article 4), data collection and data exchange (Articles 6, 11 & 13) in Europe and in third countries (Article 14)
- Coordinating or initiating border control operations, including the potential interception of migrants, at strategic entry points (Articles 2, 3, 4)
- Training border guards so they can identify irregular migration flows and intercept migrants in Europe (Article 5) and beyond (Article 14)
- Deploying high tech equipment at the borders (Article 7), either made available by Member States or which belongs to the Agency (Article 7)
- Establishing interception strategies before irregular migrants reach the border through cooperation with third countries (Article 14) and disembarkation of migrants in third countries (Article 10 of the Regulation on maritime interceptions during Frontex operations⁴)
- Returning irregular migrants to third countries through joint return operations (Article 9), facilitated in certain cases working arrangements concluded with third countries (19 working agreements signed to date)
- Improving the detection of “threats” at EU borders : administration of the European surveillance system EUROSUR (Article 2 ; Article 6 of the Eurosur Regulation⁵), as well as promotion of research and development in the field of border management technologies (Article 6)

³ <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>

⁴ <http://register.consilium.europa.eu/doc/srv?l=FR&f=PE%2035%202014%20INIT>

⁵ <http://register.consilium.europa.eu/doc/srv?l=FR&f=PE%2056%202013%20REV%202>

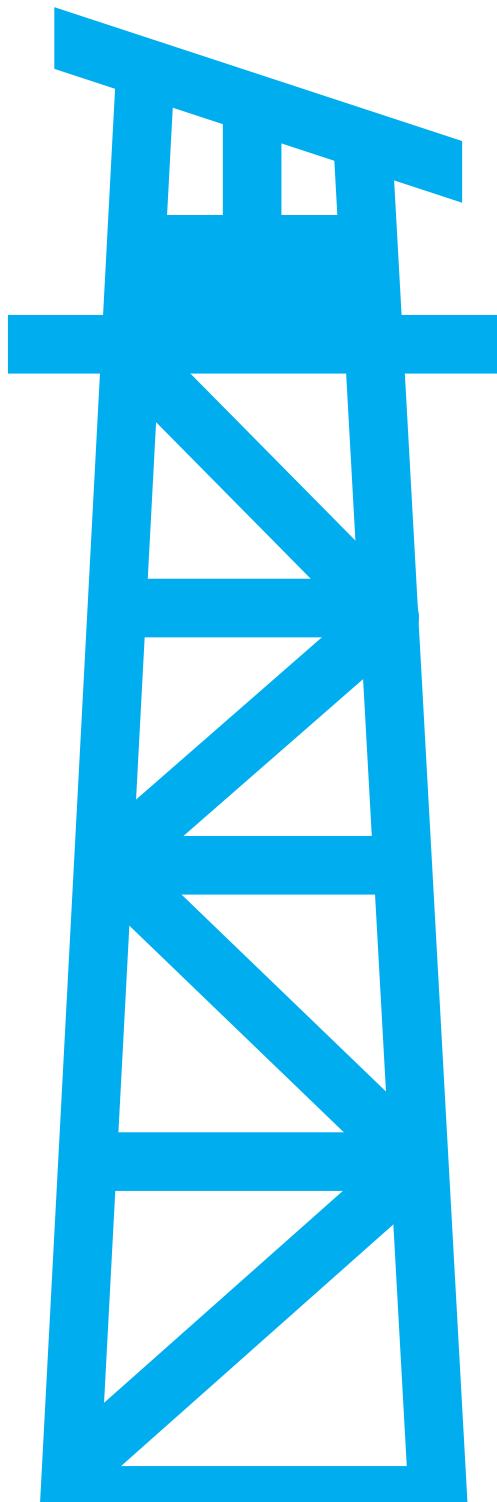
Despite changes to Frontex’s mandate in 2011, concerns persist among many human rights defenders. In 2012, the European Ombudsman launched a call for contributions on Frontex’s “fundamental rights” strategy, where NGOs reiterated their reservations. Moreover, both the United Nations Special Rapporteur on the Human Rights of Migrants and the EU Fundamental Rights Agency consider that the “improvements” made in 2011 are insufficient and have underlined the persistence of human rights violations.

In June 2013, the co-chair of Frontex’s Consultative Forum acknowledged that neither the Consultative Forum nor the Fundamental Rights Officer were in a position to solve “the structural issues in the work of Frontex”,⁶ thereby highlighting the intrinsic incompatibility of the Agency’s activities with protection of human rights.

Since 2011, the Agency’s mandate has expanded to include the following: initiation of joint operations ; capacity to buy equipment ; exchange of information including personal data with Europol and soon with Eurojust ; deployment of liaison officers in third countries ; administration of EUROSUR ; disembarkation in third countries of migrants intercepted at sea. Its increase in power, combined with its lack of transparency regarding its activities as well as its strategy of avoidance with regards to its responsibilities has reinforced this incompatibility.

⁶ Stefan Kessler, *JRS Europe, Discussion paper for LIBE committee meeting 27-06-2013, point 7*: “ All members of the Forum are, however, much aware of the fact that neither we nor the Fundamental Rights Officer can solve the more structural problems of Frontex’s work. The Forum is not a decision-making body but can only give recommendations. It cannot by itself change the unclear and non-transparent distribution of competences and responsibilities among the agency on one hand and the national border authorities of the member states on the other. We cannot substitute the control and oversight by the European Parliament.”

Civil society organisations and a number of parliamentarians have on repeated occasions called for a profound reform of the EU's border and migration policy, to no avail. The FRONTEXIT campaign was therefore launched to question policy-makers about their choice to implement irresponsible policies, of which Frontex is the best example, and to demonstrate that despite its recent cosmetic change, Frontex's mandate remains incompatible with the respect of fundamental rights.



Frontexit is an international, inter-associative campaign calling for the respect of migrant rights at the European Union's external borders. The campaign is run by 21 associations, researchers and individuals representing civil society in the Northern and Southern Mediterranean. The campaign members decided to target Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) in particular, because Frontex is the showcase of the EU at its borders and because numerous reports have questioned the compatibility of its activities with the respect for the fundamental rights of migrants.

Frontexit has a double objective: to inform the general public about the human rights violations resulting from Frontex operations and to denounce these abuses to the political representatives directly concerned.

More concretely, through investigations, litigation, awareness-raising and political lobbying, we have investigated Frontex's transparency, its responsibilities and the nature of its actions to demonstrate the persistent incompatibility of its mandate with the respect of fundamental rights.

Since the beginning of 2013 we have attempted to obtain responses to our questions about the grey areas identified by campaign partners in some of the Agency's main domains:

- the role of the Agency in intercepting vessels and the compatibility of this with the right to seek asylum and the principle of non-refoulement (not turning back asylum seekers);
- the conditions of forced repatriation flights;
- the control of agreements with third countries in cases where these states cannot guarantee the rights of migrants on their soil.
- the conditions under which Frontex gathers information to carry out its "risk analyses";
- the guarantees offered by the "Fundamental Rights Strategy" put in place by the Agency since the reform of its regulation in 2011 and their true impact on the situation of migrants.

We corresponded with Frontex via a series of letters, to which the Agency responded. Indeed, the Agency (through letters signed by its executive director or his deputy) responded relatively rapidly as required by rules on public access to European documents and we have seen an effort by the Agency to be transparent in this regard.

Many of the questions still remain unanswered, however, notably due to a lack of access to information. Only two operational plans⁷ out of the twelve requested were provided to the campaign (AENEAS and Poseidon, both from 2012). Furthermore, a great deal of the information contained in these operational plans was not divulged in application of the public interest protection clause stipulated in Article 4(1) of the European Regulation No.1049/2001, concerning public access to documents of the European Parliament, the Council and the Commission.

⁷ Operational plans are documents which serve as the legal basis for Frontex operations.

I – RESPONSES TO MARITIME INTERCEPTIONS

Nevertheless, the responses received clearly show the areas where the Agency remains disturbingly vague. In order to establish the compatibility of Frontex’s mandate with fundamental human rights, it is necessary to identify how responsibilities are shared. What are the domains and situations where the Agency would be responsible, should rights violations arise? At what point do Member States become responsible? On this subject, Frontex either remains silent regarding its own responsibility or consistently refers this responsibility back to Member States. In addition, some of the responses received contradict one another.

Other contacts with the Frontex Consultative Forum⁸ (CF), with its Fundamental Rights Officer – (FRO) and with the person responsible for the Frontex’s regional office in Piraeus, Greece confirmed the limits of the Agency’s public communication strategy.

As will be demonstrated in this note, which synthesizes the information collected by the Frontexit Campaign, Frontex’s answers to our questions and the lack thereof confirm the assertion – the starting point of the campaign – that the Agency’s mandate in itself does not allow for the full respect of the fundamental rights of migrants.

The applicable legal framework regarding maritime interception is now the Regulation “establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU”, adopted on 30 April 2014.⁹ This document is legally binding and reinforces Frontex’s obligations and powers, further expanding the scope of its actions during interceptions. Although the notion of “non-refoulement” as well as elements relating to rescue are added, the spirit that underpins European border management remains the same:

“The objective of Union policy in the field of the Union external borders is to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives. The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against those persons who have crossed the border in an irregular manner. Border surveillance should be effective in preventing and discouraging persons from circumventing the checks at border crossing points. To this end, border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to steps such as intercepting vessels

suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion.” (preamble I).

⁸ The Consultative Forum is comprised of associations, European agencies and international organisations. Its objective is to advise Frontex’s director and board of directors in order to improve respect of fundamental human rights in Agency activities.

⁹ Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union <http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2035%202014%20INIT>

Regarding cooperation with third states: “Cooperation with neighbouring third countries is crucial to prevent unauthorised border crossings, to counter cross-border criminality and to avoid loss of life at sea. In accordance with Regulation (EC) No 2007/2004 and insofar as full respect for the fundamental rights of migrants is ensured, the Agency may cooperate with the competent authorities of third countries, in particular as regards risk analysis and training, and should facilitate operational cooperation between Member States and third countries. When cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards at least equivalent to those set by Union law”. (preamble 5).

Frontex’s responses to our requests pre-date the adoption of this new Regulation as they were based on the text formerly in force, i.e. Council Decision 252/2010.¹⁰

Neither the Decision nor Frontex’s responses clarified how responsibilities are shared during interception and rescue operations, or during maritime operations more generally that are undertaken under the auspices of the Agency. In particular, the new Regulation does not clarify the crucial issue of who is responsible – the Agency or Member States – in the framework of these operations. This persistent lack of clarity is also illustrated in Frontex’s responses to our questions.

INSUFFICIENT GUARANTEES AGAINST REFOULEMENT

The non-refoulement principle, enshrined in the 1951 Geneva Convention relating to the Status of Refugees requires that “no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Article 33).

The 2010 Council Decision does not propose any concrete measure that would guarantee the respect of this fundamental principle. We therefore asked Frontex about the application of this principle during maritime interception operations, and, notably, about how the Agency plans to reinforce it given the *Hirsi Jamaa and Others vs. Italy* judgment by the European Court of Human Rights (ECHR) of 23 February 2012.¹¹

Frontex assured us, in a letter dated 23 April 2013 (Q 30) that the operational plans for operations coordinated by Frontex do not allow for disembarkation in a third country, which means absolute protection of the non-refoulement principle.

Nevertheless, this statement is in direct contradiction with the Poseidon Sea 2012¹² operational plan, which stipulates that: “If the operational plan does not state otherwise, priority is given to disembarkation in the third country from which the vessel originated.”

Frontex seems to assure¹³ that the non-refoulement principle is respected even if at the heart of the operation, priority is given to disembarking in a third country. This is because the same operational plan also states that the Member State hosting the operation, Greece in the case of the Poseidon operation, must accept the disembarkation of individuals intercepted/rescued in Greek ports.



¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:111:0020:0026:EN:PDF>

¹¹ *ECHR Hirsi Jamaa and Others vs. Italy*, request 2776509, 23 February 2012.

¹² Page 14

¹³ Response from the Frontex Agency of 23 December 2013.

These elements are contradictory and do not provide clarity concerning the prioritised option (debarkation in a third country or in Greece?).

Moreover, despite the clear mentioning in Article 4-1 the non-refoulement principle, the new Regulation allows the Agency, in its Article 6-b, to order a vessel to divert its route away from the territorial waters or the contiguous zone, and to escort the vessel to make sure it does so. In the absence of any explicit reference to Article 4 and the non-refoulement principle, and without any procedure in place to facilitate the evaluation of the situation of migrants or allow them to ask for protection, this provision alone raises serious doubts as to whether push-back operations can be carried out.

This Article is also in potential contradiction with the directive on procedures for granting protection¹⁴ which stipulates that people who ask for international protection in territorial waters should be disembarked in a member state.

Besides, Article 7-2 b (interception in the high seas) may also contradict the judgment in the above mentioned Hirsi case, as the article refers to the possibility of either bringing a vessel or the people on board a vessel to a third country, or to hand them over to a third country. Yet again, no reference is made in this provision to Article 4.

Nevertheless, article 4-2 calls for operational plans to allow disembarkation in a third state and stipulates that the operational plan include a prior evaluation of the human rights situation in a third country before deciding whether or not a migrant should be disembarked there (article 4-3).

However, as mentioned earlier, operational plans are not made public. What's more, the evaluation of the situation in a specific country will be based on government information. It is therefore possible that such evaluations might not be based on sufficiently current information when the maritime interception takes place; NGOs frequently produce reports on human rights violations which, in certain countries, have not yet prompted official state recognition.

It is also stipulated that the decision to disembark a migrant in a third country will take into consideration the existence of migration and asylum projects financed and coordinated by the European Union in the country of disembarkation. However, the European Union finances and coordinates projects in countries which do not respect the rights of migrants, such as Libya, Tunisia, Morocco, Turkey or Ukraine.

In addition, in the preamble (2a) to the compromise text, it is strongly recommended that the Agency reinforce its cooperation with third countries in order to stop illegal sea crossings and to combat criminality. This element raises doubts about the intentions of Member States as regards respect of the right to leave any country,¹⁵ corollary to the respect of the non-refoulement principle. Moreover it is important to recall that essentially all the countries situated on the "south bank of the Mediterranean" where debarkation could potentially take place either penalise or criminalise irregular migration, with nationals risking penal sanctions for non-authorized departure. The European Union Agency for Fundamental Rights has alerted the European institutions to this point.¹⁶

When a vessel is intercepted on the high seas, the Regulation allows the possibility of disembarking in the country where the intercepted migrants are supposed to have embarked (Article 10 §1 (b) without prejudice to the non-refoulement principle). The same holds for rescue operations: individuals can be disembarked in a « safe place ».

14 Directive 2013/32/EU, 26 June 2013

15 Article 13 of the Universal Declaration of Human Rights

16 <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>

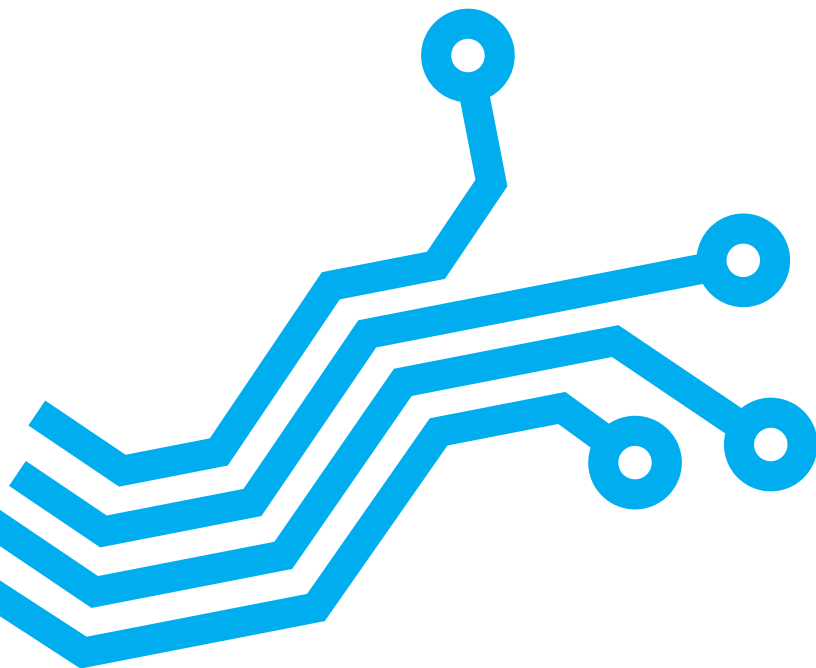
However, the notion of a « safe place » for disembarkation is not limited geographically to those countries where the respect of fundamental human rights is in accordance with European Law. The Regulation includes several criteria for determining whether a country is « unsafe », defining it as a country where the individual could be executed, submitted to inhuman or degrading treatment or persecuted on the grounds of his/her religion, ethnicity or sexuality. Unsafe countries are also those where there is a risk that the individual could be sent to another country where he/she would be mistreated (“chain refoulement”).

It seems nevertheless that the notion of protection from torture, and thus the safety of the individual, implies so-called “negative” obligations (absence of the risk of torture) and so-called “positive” obligations, i.e. mechanisms which ensure the protection of individuals and respect of their fundamental rights.

Although Italy was condemned by the European Court of Human Rights in February 2012 for violating the non-refoulement principle, in practice « push-back » operations have always taken place, especially at the Greek-Turkish border.¹⁷

These practices are well known to the Agency, which has also been witness to them. Frontex’s Fundamental Rights Officer has already heard testimonies from Frontex agents in this respect, but can do nothing officially except undertake internal investigations and issue a warning to relevant authorities. Frontex has also shared, at the request of the Campaign, a list of incidents reported to the Agency by Frontex officers and which occurred between September 2012 and January 2014 at the Greek-Turkish border. These reports include cases of refoulement during the Joint Operations Poseidon Sea and Land (10 cases of refoulement to Turkey by the Greek border guards/coast guards).

The lack of a more significant reaction, or of public recognition, possible sanctions and compensation of victims sheds doubt on the effectiveness of the Frontex’s operational Code of Conduct. According to this Code, which is not legally binding, anyone taking part in a Frontex operation who witnesses human rights violations is supposed to inform a supervisor as soon as possible so that appropriate measures can be taken.¹⁸ This internal mechanism does not allow for an independent control of operations coordinated by the Agency.



17 “Pushed Back” Pro Asyl, 2013

18 Code of Conduct, March 2011 (Article 11)

In addition, Frontex has refused to implement the recommendation by the European Ombudsman to put in place a complaints mechanism to be used by migrants whose rights are violated in the framework of the Agency's operations.¹⁹ Frontex is thus the only European agency for which there is no complaints procedure, not even one that is internal to the Agency. This is reflective of the reluctance of both Frontex and European Institutions to hold the Agency accountable, and further fosters a sense of impunity.

The guarantees with regards to the principle of non-refoulement principle leave too much discretion to Member States, who have already violated the principle on several occasions. Moreover, Member States are allowed by the new regulation to return intercepted vessels back to the country of departure without any obligation to register asylum claims from those on board. Frontex is witness to numerous push-back and refoulement cases and its refusal to establish a complaints procedure illustrates the extent to which the Agency attempts to rid itself of any responsibility.

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SCREENING PROCEDURES AND THE RESPECT OF THE RIGHT TO ASYLUM

We questioned Frontex about its procedures for informing intercepted individuals about their right to request asylum.

It seems that the Agency's Code of Conduct and its operational plans obligate Member States border guards on mission for Frontex ("Guest Officers") to inform competent authorities about individuals whom they have identified as needing protection. In its response to our letter, Frontex explained that border guards are trained in this area, but did not give further details regarding the procedures adopted; Frontex merely mentioned that it "wants to work on it" with the European Asylum Support Office – EASO) (Reply dated 23 April 2013, Q 15, 23).

Thus, although the Agency is responsible for this, since the word "obligation" is included, no precise procedure to carry out this identification process was put in place as of March 2014. At the same time, however, Frontex's mandate does not include the identification of asylum seekers. As such, its response is confusing and instigates additional questions regarding what really happens during interception operations: do Member States expect the Agency to identify asylum seekers? The new Regulation provides no clarification on this point.

These ambiguities exacerbate the risks associated with the lack of safeguards regarding people in need of international protection. This procedural gap has existed since Frontex's creation, and is a clear sign that Member States are not willing to facilitate the examination of individual cases at sea during Frontex maritime interception operations, despite what is required under European law.

¹⁹ See the Statewatch analysis: <http://www.statewatch.org/news/2014/feb/eu-omb-summary-concerning-frontex.pdf>

MARITIME INTERCEPTIONS AND RESCUES

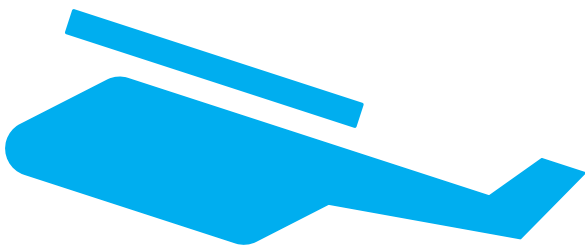
Frontex's responses regarding how it determines that a vessel is contravening the dispositions of the Schengen Code (notably unlawful entry) are quite elliptical and seem to depend on a certain number of technical considerations regarding the size of the vessel, the number of persons aboard, the vessel's flag, etc. (Reply from 23 April 2013, Q 14).

In addition, the Regulation concerning maritime surveillance during Frontex operations proposes that operational plans include a certain number of obligations when vessels in "uncertain", "alert" or "distress" situations are intercepted (Article 9). The vessel's situation must be described as quickly as possible by the Frontex patrol to the competent rescue operation coordination centre in the Search and Rescue zone where the vessel is sighted, specifying certain facts about the individuals on board (number of people, state of the vessel, request for assistance for passengers – and for the latter point, it is stated that such a request does not necessarily qualify the vessel as being "in distress"). After this, the sea patrol must wait for instructions from the rescue centre contacted. During this wait, it must take appropriate measures to ensure the safety of the passengers (Article 9(g)); but nothing is said about the conditions of this type of rescue. This spotting procedure might not be appropriate when there is an urgent need to rescue a vessel. The growing number of ship sinkings in spite of the presence of Frontex boats in the Mediterranean is indicative of the fact that rescue at sea needs to be urgently codified in texts and in practice.

Indeed, we followed the cases of three vessels spotted by Frontex during air surveillance operations: one in the straits of Gibraltar in October 2012, the other two off the coast of Italy in July 2012 (in Lecce province in the region of Puglia). In the Gibraltar case, the boat's departure from the Moroccan coast and the possibility of its being in distress due to bad weather in the Mediterranean Sea were signalled to Frontex and to the Moroccan authorities by the Spanish authorities. Eight hours later, a Frontex plane detected the vessel, but a Spanish rescue operation was only initiated fifteen hours after this detention. During this lapse of time, the boat sank, 14 people died and 41 others disappeared in the process. In the Lecce case, the Agency flew over two vessels for 24 and 10 hours respectively before the Italian authorities intervened to rescue them. Following this rescue, 13 people had to be urgently treated given the critical state of their health. In these cases the question is not about whether a patrol is present, but rather about what happens after the detection of a vessel that should be intercepted or that is at risk of sinking. Why did neither the national authorities nor the Agency's agents intervene earlier? Must a boat be in distress before it is "rescued", putting the lives of those on board at risk? Is Frontex responsible for its inaction? In spite of having detected a vessel, the Agency seems to consider that only the States concerned are responsible for its rescue.

In a similar vein, it is important to note that the respect of the obligation to rescue at sea when a vessel is detected by a satellite is not addressed in the Regulation.

The rules for rescue included in the Regulation set out the obligations of Frontex maritime patrols, but these do not go beyond what is already enshrined in the law of the sea, and could lead to unacceptable delays in emergency situations.



2 – RESPONSES REGARDING SCREENING (RISK ASSESSMENTS) AND DEBRIEFING (INFORMATION-GATHERING)

Screenings and debriefings are among the most common “support” operations carried out by Frontex for Member States. They can be carried out anywhere foreigners are detained (detention centres, police stations, sea- and airports, and so on). The haziness surrounding the prevailing objectives and procedures during such operations was not alleviated through either the information gathered through correspondence with the Agency, or the witness accounts collected during the Frontexit mission on the Greek-Turkish border in October 2013.

The Regulation on maritime interceptions does not bring more clarity to the legal framework applicable during these operations.

- **Debriefing interviews** are intended to complement the “risk analysis” by collecting information on migration routes.²⁰ In its letter, Frontex did not reply to questions concerning interviews with migrants (Reply from 23 April 2013, Q 25), and in particular whether they have the option to refuse to respond, despite the portrayal of the interview as being voluntary.²¹ Moreover, Frontex simply referred to the stated Agency policies for interviews. Despite our repeated requests²² for access to these documents, Frontex refused to fulfil this demand, claiming that criminal groups who facilitate irregular migratory flows were constantly trying to learn more about the methods used to thwart their activities. In the interests of enabling the border guards to carry out their duty, the Agency considers that it cannot distribute these guidelines to the public.

20 FRAN Quarterly, Issue 2, April-June 2012, p.25. http://frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q2_2012_.pdf

21 Interview with Mr. Grigorios Apostolou, coordinator of the FOO, 11 October 2013

22 Ibid. 165

A witness account given by a migrant²³ during the mission to the Greek-Turkish border suggests that the purpose of the debriefing interview is not only to better understand the routes taken by migrants but also to establish the profile of the migrant. It was equally apparent that the person had not been clearly informed of the objectives of the interview, nor of its voluntary basis (the possibility to refuse participation in the interview).

It seems that such interviews do not take place within any well-defined legal framework. The migrants have no guarantee that what they say will not be used against them.

- **Screening interviews** aim to determine the nationality of migrants. Usually these interviews are carried out by agents of Member States, accompanied by interpreters sent to assist the national authorities. The purpose of the Member State agents is to determine the nationality of the persons, while the decision on their nationality remains within the remit of the authority hosting the operation. Frontex is thus present at these interviews and can sometimes lead the discussions.²⁴ Nevertheless, according to this investigation, it would appear that the opinion of the invited agents is very often followed without any other form of re-examination by national authorities, who use them to justify procedures for returning and detaining persons as a function of their presumed nationality.

23 Interview in October 2013

24 Witness accounts collected in October 2013.

In 2011, Human Rights Watch denounced Frontex's role in the mistreatment – and particularly the systematic detention – of migrants intercepted at sea by the Agency, who were subsequently handed over to the Greek authorities.²⁵ They were handed over despite the fact that Greece's systemic negligence of its obligations to respect the fundamental rights of migrants, most notably with regards to detention, was widely known. It has been condemned by both the European Court of Human Rights (January 2011) and the European Court of Justice (December 2011).

Other witness accounts collected during the October 2013 mission have given weight to the assertion that Frontex's operations to "assist" Member States (briefing and screening) can entail supplementary rights violations, including modification of nationality and age, for example.

The information collected at the present date confirms the lack of a legal framework, the lack of transparency, the lack of clear objectives, and the vagueness about the data collected during these interviews.



²⁵ "EU's dirty hands, Frontex's involvement in ill-treatment of migrant detainees in Greece", Human Rights Watch, September 2011

3- RESPONSES REGARDING JOINT FLIGHTS

At the request of a Member State in conjunction with one or several other Member States, it is within Frontex's mandate to coordinate joint flights to a non-Member State who will receive its returned citizens no longer desired on European soil.

We were able to collect very little information on this aspect of the Agency's work. While the Agency has effectively put into place a system for archiving these operations, the indicators in this database seem very thin relative to what they could be, given the human rights issues at stake. Thus, the publicly available information on the Agency's website only allows one to identify the host country of the operation, the participating Member States, the date of the flight, the destination country, the budget allocated to the operation, and the number of deported migrants per country. The Agency has specified in a reply to our letter on joint flights that only citizens of the destination state can be sent back in the context of these joint flights.

Moreover, it seems that the Agency also supports Member States in the organisation of national flights. The Agency has repeatedly referred in its 2012 annual report to the Attica operation at the Greek-Turkish border whose "principal objective was to support Greece in the reinforcement of its capabilities concerning returns: either by helping to organise national return flights, to make sure that escorts are properly trained, obtaining travel documents and creating a group of experts trained in interviewing in order to determine the nationality of irregular migrants through screening."²⁶ What then is the state of affairs when the screening procedure is distorted, or if there is an error in the identification of the person? As mentioned above, according to several witness accounts gathered during the mission to the Greek-Tur-

²⁶ Frontex general report, 2012, p.54.
http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2012/EN_General_Report_2012.pdf

kish border,²⁷ it can be the case that the nationality or even the age of the person is modified.

The Agency also informed us that no allegation of human rights violations had been filed during the flights carried out 2012. It further specified that the coordinator of the joint returns, the only Frontex agent aboard the flights, must report everything he or she sees or hears. The system of reporting serious human rights incidents was only put in place in 2012. What can be said for the preceding seven years? What follow-up can be expected from the witness accounts²⁸ of those deported in 2009 who reported having been the victims of violence during a joint flight coordinated by Frontex? Furthermore, how is the independence of these reports guaranteed?

The Agency drew up a code of conduct for its escorts, Frontex personnel and all persons participating in joint return operations. This code aimed to ensure that joint flights would be carried out in a “dignified and humane” manner, in respect of fundamental rights. It created an instrument for “monitoring” the operations by independent agents who could relay observations, which it was then to publish in an annual report. If this system of independent control is not in place in the organizing Member States, operations will not take place. However, what will be the impact of these observations and of the annual report insofar as we are still dealing with an internal mechanism? Why was no complaints mechanism created?

Furthermore, the instrument does not address the question of potential violations of the ban on collective expulsions stipulated in Article 4 of Protocol 4 of the European Convention of Human Rights, and Article 19 of the Charter of Fundamental Rights.

The information handed over by Frontex on the subject of these flights remains meagre. The principal explanation is that the Agency systematically attributes all responsibility to Member States or to the European Commission:

- Member States, for all matters concerning deported persons (legal statuses, nationalities, etc.), but also the material conditions of the flights (inflight food, presence of a doctor, etc.);
- The Commission, for concerns related to European law, in particular the ‘Return’ directive, which sets out the procedures for expulsion by Member States. Again, the Agency is present and “operational”, but abdicates from any responsibility.

It should be noted that, since 2012, the Committee for the Prevention of Torture (CPT), a body of the Council of Europe, has the power to monitor the way in which these flights are carried out. The CPT made its first visit²⁹ in the context of a journey to the Netherlands between 16 and 18 October 2013. The report from this first visit is expected in 2014.

Neither the responses obtained with regard to joint repatriation flights nor the code of conduct published on the Frontex website dispel concerns about the risks of violating the ban on collective expulsions or about the violation of the fundamental rights of migrants during these flights.

27 *Witness accounts gathered between October and November 2013.*

28 *Paroles d'expulsé.e.s [Words of the Deported], Migreurop, December 2011*
<http://www.migreurop.org/IMG/pdf/rapport-exiles-05-12-11.pdf>

29 <http://www.cpt.coe.int/documents/nld/2013-10-22-fra.htm>

4- RESPONSES CONCERNING THE ISSUE OF RISK ANALYSIS

The risk analyses produced by the Risk Analysis Unit (RAU) play a decisive role in the strategic and operational plan and more broadly in the production of information towards the EU. The allocation of resources, the designation of priorities, as well as the operations coordinated by Frontex are systematically founded on the risk analyses produced by this unit. These analyses are also used when developing the EU's migration policies. Frontex has, for example, been designated to carry out the "post visa-liberalisation" evaluation for citizens of the Western Balkan states. Furthermore, EUROSUR, a system conceived and put together by the European border surveillance Agency, is now the competence of Frontex.

Frontex's risk analyses reflect an approach to migration issues that is principally preventative and security-based, while the methodology employed remains uncertain. Frontex's reply concerning the methodology employed for risk analysis (Q8) reveals several weaknesses, particularly concerning the information collected from non-Member States (for example, the Balkan countries). The methodology is based on the CIRAM (Common Integrated Risk Analysis Model) model, founded on the identification and response to the following key notions: "threats", "vulnerability", and "impact". The information exchanged with third countries provides the following information: detections of irregular border crossings, identification of smugglers, detection of irregular presence on the state's territory, refusal of entry, asylum requests and detection of fraudulent documents.

There are several problems.

Firstly, Frontex is not at all explicit about the manner in which it identifies the smugglers among intercepted migrants. Secondly, statistics on the number of people without papers do not appear to integrate the other variables that can explain irregular status on a given territory (which can, for example, be linked to delays in the processing of an application by the administration). Furthermore, one might ask what the link is between statistics concerning irregular pre-

sence on European territory – i.e. the administrative status of foreigners present on European territory – and Frontex's risk analysis relating to the external borders, given the fact that about 50% of irregular migrants present on European territory enter through regular channels.³⁰ This information, once integrated into the risk analysis, might stigmatise citizens of countries from which some irregular migrants originate, although the status of these people – many of whom entered Europe legally – is actually linked to the administrative conditions of the host country and the prevailing legislation.

With respect to third countries, Frontex does not for a moment seem concerned with the existence, or rather the absence, of any legal frameworks for data protection and for protection against violations of human rights and the implications for Member states who have obligations to respect human rights. In a general manner, the exchange of information is articulated around the notion of a migratory "threat", confirming the state of mind that prevails during the creation of these analyses. The information collected during the campaign confirms that these risk analyses do not take into account the "protection" dimension and the conditions and reasons for the departures.

Frontex's replies concerning the risk analysis confirmed the methodological bias of the procedure. In combination with the conditions in which the information used in these analyses is collected (see debriefing), and with the lack of transparency, this aspect of Frontex's operations is particularly worrying, all the more so given their increasingly important role in defining European policies.

³⁰ *Clandestino Project*, <http://cordis.europa.eu/documents/documentlibrary/126625701EN6.pdf>

5- RESPONSES CONCERNING WORKING AGREEMENTS

There are doubts as to the legality of the “working agreements” concluded between Frontex and third countries. Their “technical” dimension, used to justify their non-binding character and enabling them to escape scrutiny by the European Parliament, is subject to considerable critique. While the content of the agreements mentions technical aspects, it also contains an important political dimension. Frontex explained in one of its responses that “in most cases cooperation (in the context of agreements) does not turn into operational work, and that the impact of the activities therefore does not bear any direct consequences on any person.” (Q2)

Yet, these so-called “technical” reports, as well as the informal negotiations aimed at developing cooperation with third countries has proliferated, leaving considerable latitude to the Agency to operate in zones where human rights, and in particular migrant rights, are not respected.

As mentioned above, the Regulation concerning maritime interceptions clearly focuses on the need for an effective collaboration between Frontex and third countries in order to stop migrants from attempting “dangerous” passage (preamble 5).

The text also mentions that Frontex may cooperate with third states on their territory or in their territorial waters.

Frontex, in its reply to our questions, explained that the Agency has a mandate to initiate negotiations with Brazil, Egypt, **Mauritania**, Libya, **Morocco**, Senegal, and **Tunisia**. We made inquiries with the EU delegations of the countries in bold as to their cooperation with Frontex, but received no formal reply. In Morocco and Tunisia, we were told to consult with the Spanish authorities who were said to constitute the keystone of the Agency’s cooperation in Africa.

The Agency did not respond, however, to questions about the way in which they handle cases of human rights violations in relations with third countries (Q3). According to the Agency, the action plan of the fundamental rights strategy includes a clause relating to these rights. It has been this way since 2012, as enshrined in the agreements signed with Nigeria, Turkey, Armenia, and Azerbaijan. Nevertheless, the inserted clause does not contain any sort of constraining obligation. And in the informal negotiations, this aspect seems to have no impact. Moreover, the working programme of the Fundamental Rights Officer does not foresee any analysis of the relations with these third countries. There is no working group on this question in the consultative forum of the associations.

In a more general manner, the collaboration with third countries carried out in the framework of operations coordinated by Frontex does not seem to be founded on any appropriate international legal basis. For certain countries, there is not even any written agreement formalising the relationship with the Agency. At the date of publishing, there is no European legislation applicable to extraterritorial migratory controls: for example, neither the Schengen Code nor the Frontex Regulation provides for the possibility of operations in these areas. Consequently, there are no corresponding guarantees relating to human rights.

In view of the issue of relations between the Agency and third countries, as well as the prevailing will to reinforce the role of Frontex in cooperation with the latter, it is obvious that the Agency’s mandate and the EU’s policy vis-à-vis third countries does not provide guarantees for the respect of fundamental rights.

6- FUNDAMENTAL RIGHTS STRATEGY

Since the reform of Frontex's mandate in 2011, several instruments, implemented with considerable delay, are supposed to create a "culture" of human rights within the Agency: this is embodied by the instatement of a Fundamental Rights Officer (FRO), the Consultative Forum, and different mechanisms for following up on human rights violations.

Generally speaking, the FRO attempts to raise awareness of human rights among agents involved in diverse operations. She intervenes in the drafting of operational plans and attempts to implement a system of internal control. The Standard Operating Procedure (SOP) is a document that specifies the chain of actions and reporting to be implemented in the case of a serious incident, in order to ensure the respect of fundamental rights. This is meant to enable Frontex to react in an 'adequate' manner. Information on these incidents is collected by operational units in the field, before being evaluated by the legal service of Frontex and the FRO. In the case of "serious and persistent violations" (there is no definition of the content and level of action required by this notion), a recommendation is sent to the Agency's Executive Director in order to stop or suspend the operation. However, as has already been mentioned above, this control mechanism remains internal, without independent control, and at present does not make it possible to react. Frontex simply interprets internally the meaning to be given to the term "serious violation." Furthermore, the absence of clear principles with regard to the distribution of juridical responsibilities in the framework of operational plans remains unchanged.

In practice, the Fundamental Rights Strategy does not ensure that activities coordinated by Frontex do not violate fundamental rights.



CONCLUSIONS AND DEMANDS

Since its creation in 2004, Frontex contributes to the implementation of a securitarian control and border surveillance policy at the EU's external borders. The revision of the Agency's mandate in 2011, with has led to the adoption of a « fundamental rights » strategy but also the reinforcement of Frontex's powers, has not changed the main purpose of its mission: prevent, deter, and apprehend migrants who breach or are suspected to be about to breach the EU's border crossing rules (through cooperation with third countries). It continues to do so without any regard for the potential international protection needs of these migrants.

The Frontexit campaign have sought to deepen the understanding of the how Frontex's mandate is implemented to illustrate what our organisations consider as the intrinsic incompatibility of the Agency's mandate with the respect of fundamental rights.

Whether it is during operations involving interception, detection, deportation to third countries, identification, expulsion, risk analysis or cooperation with third countries that do not apply the same norms as the European Union in terms of rights protection, there is a high risk that these actions contravene international and European obligations that must be respected by Member States and the Agency.

In effect, it is incumbent on European States to uphold the right to leave any country including one's own (Article 13 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Civil and Political Rights and article 2 of protocol 4 of the ECHR), protection against refoulement (Article 33 of the Geneva Convention, Article 18 of the EU Charter of Fundamental Rights), the right to seek asylum, the protection against inhuman and degrading treatment, and the right to life – to cite only the main rights. The revision of Frontex's mandate has not brought any change to mitigate these risks.

This EU's securitarian approach conflicts with the logic of protection. At the request of numerous international actors – including the Council of Europe, the United Nations Special Rapporteur on the Human Rights of Migrants, the European Ombudsman, the associations involved in the Frontexit campaign and other civil society actors, as well as the European Fundamental Rights Agency – numerous adjustments should be made to ensure that the Agency operates with utmost respect given to the rights of migrants. Yet in this context, the full respect of human rights can only be guaranteed by a body whose primary aim is the protection of migrants and asylum seekers. The Agency will never become this body, even if further amendments are made to its mandate and activities.

The partners of the Frontexit campaign denounce the incompatibility of Frontex's mandate with international and European law. They call on the EU institutions to acknowledge this incompatibility and to take action to halt all Frontex activities.

Member States must reconfigure the entirety of their securitarian policy into one which is based on the respect of human rights. Only through a reception policy that guarantees access to the European territory will the right to seek asylum be fully respected.

WWW.FRONTEXIT.ORG



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