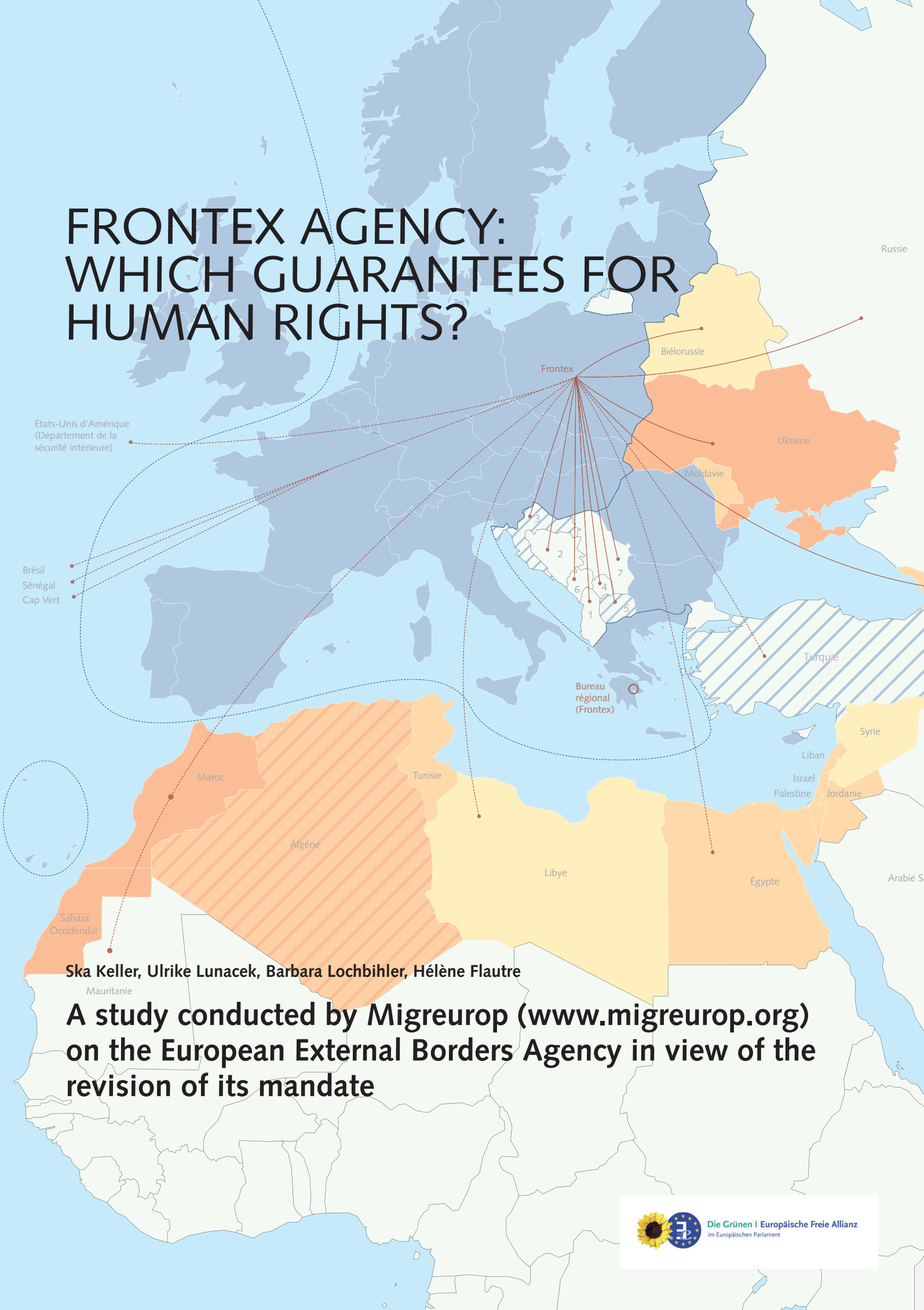


FRONTEX AGENCY: WHICH GUARANTEES FOR HUMAN RIGHTS?

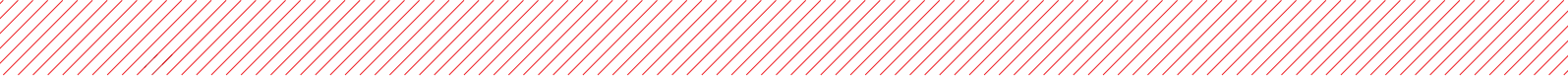


Ska Keller, Ulrike Lunacek, Barbara Lochbihler, Hélène Flautre

**A study conducted by Migreurop (www.migreurop.org)
on the European External Borders Agency in view of the
revision of its mandate**



Die Grünen | Europäische Freie Allianz
im Europäischen Parlament





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Dear reader

For the Green group in the European Parliament, it goes without doubt that Frontex has to respect fundamental human rights principles, both as regards its control of the European external borders and the expulsion of displaced people. In the past, however, reports have suggested that Frontex may have been involved in acts of violence and human rights violations.

It is therefore of utmost importance for Frontex to guarantee, protect and promote fundamental rights during its future missions – which, in turn, calls for an efficient and independent evaluation and monitoring system. Moreover, it is crucial that non-governmental organisations be involved more strongly in training activities of Frontex personnel, especially its operational staff on the ground. The present study, commissioned by the Green group in the European Parliament, highlights these and other human-rights-related implications of Frontex activities.

Beyond the present study, the Greens in the European Parliament will of course continue to critically analyse the work of Frontex.

MIGRATION



IS NOT A CRIME

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Introduction

Strengthening controls at the external borders has been a priority since the Member States of the European Union (EU) decided at the European summit in Tampere in 1999 to put in place a common asylum and immigration policy. Following several joint operations conducted on the basis of intergovernmental cooperation, the interior ministers of the first 15 member countries, at a meeting in Rome in May 2002, came up with plans to create a special body to monitor the EU's external borders. Enshrined in the Commission Communication of 7 May 2002 entitled Towards integrated management of the external borders of the Member States of the European Union, the project was officialised in June 2002 in the conclusions of the European Council in Seville (Spain).

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) was established in October 2004 and became operational in October 2005. The main objective of FRONTEX, which is based in Warsaw, is to improve the integrated management of the external borders of the Member States of the European Union. Border guards from each Member State and from States associated with the EU (Iceland, Norway, Switzerland) are made available for deployment of the surveillance operations organised by the Agency.

The Agency's budget is steadily increasing: from €6.3 million in 2005, it rose to nearly €42 million in 2007 and had topped €87 million by 2010. This increase allows the development of operations coordinated by FRONTEX. These are of two types: surveillance of border areas in order to remove third-country nationals from EU territory, and operations aimed at the group return of 'irregular' migrants from multiple Member States.

The first category of interventions, which take place at sea, on land borders and at the main European airports, comprises:

- pilot projects which are experimental operations, aimed at obtaining intelligence about regions considered to be sensitive. One of the aims of these missions is to convince European governments to give the Agency additional human and material resources, which are vital to organising long-term actions;
- joint operations established for limited, renewable periods, which are organised by one Member State and in which multiple countries participate;
- controls carried out by police officers from several Member States at one or more border crossings (focal points); arranged over a relatively long period, they enable each Member State to share experiences in this area.

These cooperation arrangements can be implemented with the support of border guards, customs officials and police authorities from non-European states.



In a situation of *“urgent and exceptional [migratory] pressure”*¹ at the borders of a Member State or a country with which FRONTEX has signed an agreement, the Agency can also, as of 2006, deploy Rapid Border Intervention Teams (RABITs). These groups – which comprised around 700 border guards at the start of 2010 – are intended to provide *“increased technical and operational assistance”*² in coordination with national units. RABITs intervened for the first time in November 2010 at the request of Greece.

The second category comprises ‘joint return operations’ (JROs), which have increased considerably in number (1,622 persons returned in 2009, compared with 428 in 2007). Moreover, the Agency’s budget for coordinating JRO flights has risen from €0.5 million in 2005 to over €7 million in 2010.

In February 2010, FRONTEX reported that it possessed 26 helicopters, 22 light aircraft and 113 vessels. According to the Agency, the CRATE database (Centralised Record of Available Technical Equipment) lists 476 items of technical equipment used to combat ‘illegal’ immigration, including mobile radars, thermal cameras, CO2 detectors, heartbeat detectors and a passive millimetric wave imager (PMMW). This equipment, which is based in various EU countries, is made available to Member States upon request. In view of the means employed, the operations carried out by FRONTEX at the EU’s external borders are tantamount to a military deterrent force. For example, Operation Poseidon, in which 21 Member States took part in 2009, mobilised 23 vessels (performing over 11,000 patrolling hours), six aircraft and four helicopters (802 patrolling hours).

By carrying out this type of operation, FRONTEX has become a key player in the deployment of European asylum and immigration policies at the EU’s external borders. As early as 2006, the Agency defined itself on the basis of its initial experience as *“a trustworthy operational European coordinator and contributor which is fully respected and supported by Member States and third countries”* (FRONTEX, 2006: 5). It therefore saw itself becoming *“a powerful operational ‘centre’”* (FRONTEX, 2006: 2). By 2008, *“Frontex aims to be the central player for promoting harmonisation of doctrines, needs, operational and administrative procedures, and technical solutions supporting effective management of the EU external borders”* (FRONTEX, 2008: 9). One year later, the Agency referred to itself as *“the anchor stone of the European concept of Integrated Border Management”* (FRONTEX, 2009: 2). Its Executive Director welcomed the fact that he *“could act independently in his role as Authorising Officer”* (FRONTEX, 2006: 20) to achieve these results, while in 2007 he stated: *“We are proud of what we have accomplished, and we are prepared to do more”* (FRONTEX, 2007: 4).



¹ Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

² Ibid.

**The stakes associated with an amendment of the Frontex Regulation:
a threat to respect for fundamental rights at the borders?**

Enabling FRONTEX *“to do more”*: this is the objective of the revision of the Regulation establishing the Agency which the European Commission proposed in February 2010 in order to strengthen its action.

This strengthening of the Agency's powers would take place at various levels: firstly, by offering the *“possibility for increased financial support”*³, and also by making the Agency more independent of Member States. Indeed, FRONTEX could have its own teams of border guards on surveillance operations. It could also *“decide to finance or co-finance”*⁴ joint return operations using its own aircraft. Internally, the Agency could *“itself initiate joint operations and pilot projects in cooperation with Member States”*⁵.

Externally, the proposed Regulation also increases the Agency's powers by allowing it to enter into working arrangements with and finance projects in third countries, e.g. by deploying immigration liaison officers to combat illegal immigration at source.

All of these powers raise serious concerns about their compatibility with respect for fundamental rights. Moreover, in its impact assessment⁶, the European Commission highlights the risk of having an EU body and its staff exposed to situations of possible violations of fundamental rights. If FRONTEX is in a co-leading role, these difficulties could indeed increase, because its staff would be more involved in specific operations. This concern comes on top of the many grey areas already surrounding the operation of FRONTEX and the dilution of responsibilities between the Agency and the Member States, despite the new institutional framework introduced by the Lisbon Treaty.

A new institutional framework: the Treaty of Lisbon

Will the entry into force of the Treaty on the Functioning of the European Union (Treaty of Lisbon) in December 2009 and the adoption of the Stockholm Programme by the European Council of 10-11 December 2009, which requires *“a clarification and enhancement of the role of FRONTEX regarding the management of the external borders of the European Union”*, have an impact on the Agency's mission?

Under the Lisbon Treaty, the Charter of Fundamental Rights – conceived as one of the foundations of the European Union – acquired binding legal status. FRONTEX is henceforth subject to this Charter and could be called upon to account for its actions before the Court of Justice of the European Union (CJEU), which has seen its supervisory power expanded and now has jurisdiction to give preliminary rulings on matters relating to visas, asylum, immigration and the movement of persons.

³ COM (2010) 61 final, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24 February 2010.

⁴ Ibid.

⁵ Ibid.

⁶ SEK(2010)150

In addition, the role of the European Parliament is strengthened, because thanks to the expansion of the codecision system it will be more involved in areas relating to immigration management as well as to justice, security and freedoms. However, these changes are mitigated by the fact that many of the Treaty's provisions continue to preserve the pre-eminence of the Member States. The intergovernmental approach, which remains in place, allows European governments to retain responsibilities in certain key areas.

In this context, it is questionable whether these new requirements will be sufficient to regulate the activity of FRONTEX. Increasingly, the Agency is acting as a cover for the Member States, which tend to prioritise a hard-line approach to combating 'illegal' immigration over the obligation for members of the teams coordinated by the Agency, under the terms of its Regulation, *"to perform their duties in full respect of fundamental rights and human dignity"*.

PART I: SOME EXAMPLES OF FUNDAMENTAL RIGHTS VIOLATIONS

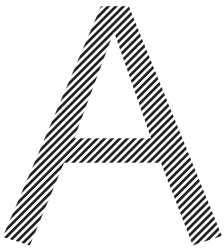
In a Resolution adopted in December 2008, the European Parliament called “for the mandate of FRONTEX to explicitly include an obligation to meet international human rights standards and a duty towards asylum seekers in rescue operations on the high seas”, and called for a review of that mandate “so as to eliminate legal vacuums (...), setting out in particular the precise legal conditions for its sea rescue operations”⁷.

An optimistic reading of this Resolution might see it as encouraging improvements in the way FRONTEX operates. However, it also highlights a highly disturbing fact: in the European Parliament’s view, FRONTEX, which in its annual reports over the past four years has prided itself on reducing the number of arrivals of ‘irregular’ migrants, most notably through its maritime interception operations, does not, as things stand, offer sufficient guarantees about respect for human rights and the right of asylum, and the conditions of its operations are not clearly regulated in legal terms.

The Parliament does not raise these serious shortcomings without good reason.

On several occasions since the Agency’s creation, the conditions in which operations coordinated by FRONTEX have been conducted have made them especially closed to outside scrutiny. Human rights violations have been exposed by eyewitness accounts, observations made by international organisations or NGOs, and by ex-post analysis of events reported in the media. This section attempts to piece together the main violations uncovered, most of which were committed in the course of the two FRONTEX activities that are most likely to compromise respect for fundamental rights: control operations at the EU’s external borders aimed at turning back migrants to neighbouring countries, and so-called ‘joint return operations’, a euphemism for what are often essentially collective expulsions.

⁷ European Parliament, Resolution on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (Eurosir) (2008/2157(INI)), 18 December 2008.



Violations of the right of asylum

Article 33 of the Geneva Convention on Refugees

1 — 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.

2 — The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

1. During interceptions at the borders of the European Union

The Agency's annual reports focus deliberately on statistical results in terms of detection, apprehension and “*refusal of entry of illegal immigrants*” at the main borders of the EU (FRONTEX, 2006: 7, 12). The 2007 report, for example, states that 130,000 third-country nationals were refused entry to the EU; in the 2008 report the figure is 140,000. Neither report mentions the possible presence among those refused entry of potential asylum seekers or vulnerable individuals (lone minors, etc.). The specific protection needs of migrants do not appear to be taken into account, and nowhere is reference made to the principle of non-refoulement as laid down in Article 33 of the 1951 Geneva Convention. This silence is made all the more disturbing by the fact that FRONTEX is only too willing to comment on the growing number of ‘bogus asylum seekers’ allegedly trying to cross the EU’s borders, without referring to any method enabling it to distinguish between ‘bogus’ and ‘genuine’ asylum seekers.

A number of testimonies from the media, NGO reports and migrants forced to return to the territory they had left show that the principle of non-refoulement enshrined in the Geneva Convention has been undermined on multiple occasions.

The most telling example occurred in June 2009, when 75 boat people intercepted off the Italian island of Lampedusa were handed over to a Libyan naval patrol by Italian coastguards, assisted by a German helicopter operating as part of Operation Nautilus IV. This incident was the subject of a Human Rights Watch report, which clearly denounces a violation of the non-refoulement principle:

“On June 18, 2009, for the first time in its history, a Frontex operation resulted in the interdiction and push back of migrants in the central Mediterranean Sea to Libya. A German Puma helicopter operating as part of Operation Nautilus IV coordinated Italian coast guard interception of a boat carrying about 75 migrants 29 miles south of Lampedusa. The Italian Coast Guard reportedly handed the migrants over to a Libyan patrol boat, which took them to Tripoli where they were reported to have been “handed over to a Libyan military unit”⁸.

While not acknowledging the facts in full, FRONTEX stressed the need to provide assistance to the boat people, and declined any responsibility for the risk that the individuals turned back in this way would not have their requests for international protection considered. According to Gil Arias Fernandez, the Deputy Executive Director of FRONTEX:

“Our agency does not have the ability to confirm if the right to request asylum as well as other human rights are being respected in Libya”⁹.

⁸ Human Rights Watch (2009) Pushed Back, Pushed Around Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers, 98 p. [available online] ; Karl Stagno-Navarra, Handover of Migrants to Italy Results in Forced Repatriation, Malta Today (21 June 2009)

⁹ Ibid.

This merely confirms that the agreement signed on 13 June 2008 between FRONTEX and the UN Refugee Agency (UNHCR) – aimed at ensuring that the actions of the Agency do not infringe the rights of refugees “*and persons requesting international protection, in particular as regards non-refoulement*” (cf. Part II) – is confined to ‘awareness raising’ of police officers by UN personnel. This statement places no emphasis at all on actual respect for the right to asylum during operations coordinated by FRONTEX. It should be noted that, prior to the signing of this agreement, FRONTEX activity reports referred merely to “contacts” with UNHCR, which suggests that situations relating to the right of asylum were not considered at all.

2. During identification operations

As part of the Attica pilot project, implemented in Greece in 2009 to assist the local authorities to identify migrants and send them back to their countries of origin, representatives from FRONTEX and experts mandated by the Member States took part, alongside Greek officials, in interviewing persons who had crossed the border illegally and had been placed in detention camps. In its 2009 report, FRONTEX welcomed the deployment of interpreters speaking various languages, which had made it possible to identify a significant number of individuals passing themselves off as nationals of countries experiencing civil war or ethnic violence. However, it failed to indicate either the status of the interpreters or the scope of their role (did they simply interpret or were they involved in decision-making about removal orders?). The media reported the protests of a Greek official, who criticised the lack of consultation between the Greek authorities and the FRONTEX officers, who allegedly took decisions alone – on the basis of the interviews they had conducted – about the identification and transfer with a view to repatriation of several dozen migrants. This incident leads local NGOs to fear that the principle of non-refoulement may have been violated in relation to some migrants¹⁰.

Moreover, the Office of the UNHCR in Greece expressed concern about this confusion of roles and recommended that a clear cooperation framework be established between the Greek authorities and FRONTEX, in particular so that administrative decisions taken in relation to foreign nationals can be contested¹¹.

¹⁰ Migration: Fortress Europe Starts With Greece, IPS, 31 January 2010

¹¹ UNHCR, press release, 16 June 2010.

B

Obstacles to the 'right to leave any country'

Article 13.2 of the Universal Declaration of Human Rights (UDHR) of 10 December 1948

Everyone has the right to leave any country, including his own, and to return to his country.

Article 12.2 of the International Covenant on Civil and Political Rights (ICCPR)

Everyone shall be free to leave any country, including his own.

The deployment by FRONTEX of operations in the territorial waters of third countries, with the assistance of the police or security forces of those countries, poses serious risks in terms of respect for the principle laid down in the UDHR and the ICCPR. A fruitful area for analysis in this connection is the HERA operations, which have taken place since 2006 with the aim of protecting the Canary Islands from the arrival of *cayucos* (small boats) loaded with migrants from the coasts of Mauritania and Senegal. In 2006, FRONTEX hailed these operations as a great success because they had helped to virtually dry up this migration route to Europe.

One component of the HERA operations relates to the identification of migrants who have arrived on the Canaries by sea and been placed in detention centres. In its 2006 general report, FRONTEX notes approvingly that its experts and the Spanish authorities had been able to identify "100% of the illegal migrants" that they had interviewed. It goes on: "*Through the information collected during the interviews, it was possible to detain several facilitators mainly in Senegal and to avoid the departure of more than one thousand people.*" This statement prompted Amnesty International to wonder "*what the number of 1,000 prevented departures was based on*"¹². We can add to this question by asking how many of the "one thousand people" alleged to have been prevented from leaving Senegal would have been entitled to international protection if they had been allowed to enter Spain?

Incidentally, as with the Greek case discussed above, we might also ask what interrogation techniques were used to achieve this impressive "100%" success rate...

Three years later, with HERA now being implemented on a permanent basis, the same scenario is highlighted in relation to the departure of migrants from Mauritania and Senegal. Thus FRONTEX (2009) notes approvingly that there has been a reduction in the number of migrants intercepted in the region thanks to "*optimized aerial and maritime surveillance*" close to the territory of the two countries, i.e. before would-be migrants have even left the African coast. The Migreurop network, which saw documents of the Mauritanian police force (Sûreté nationale) reporting that individuals had been "*intercepted following an attempt to undertake an illegal journey to Europe*" (29 September 2009), confirms these obstacles to the right to leave the territory of a country (in this case Mauritania)¹³.

What is at issue here is the 'deterritorialisation' of operations coordinated by the Agency. In a context of dilution of responsibilities (cf. Part II), it is difficult to identify who, out of FRONTEX, the Member State authorities collaborating in the operations and the authorities of third countries involved in the operations based on agreements concluded with the Agency or as part of their bilateral partnership with a Member State, is accountable for any violations committed.

¹² Amnesty International, Mauritania: "Nobody wants to have anything to do with us": Arrests and collective expulsions of migrants denied entry into Europe, July 2008, AFR 38/001/2008. [available online]

¹³ Migreurop, "Sahel-Saharan countries, Europe's new sentries" in European borders: Controls, detention and deportations, 2009/2010 Report.



Inhuman and degrading treatment

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 of the Charter of Fundamental Rights of the European Union

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Collective expulsion of aliens is prohibited.

Article 19 of the Charter of Fundamental Rights of the European Union

1 — *Collective expulsions are prohibited.*

2 — *No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

1. In countries of return

We have already seen, in the statement made by its Deputy Executive Director on the case of the boat people handed over to Libyan coastguards in June 2009, that FRONTEX does not consider itself responsible for assessing whether or not human rights are respected in the countries to which migrants are returned during operations that it coordinates (see above). It should be noted that this is a very worrying position considering that the Agency is authorised to enter into arrangements with third countries that are not subject, in the same way that EU Member States are, to binding commitments on fundamental rights, or which are known to violate them.

Not wishing to dwell at length on the manifest risks facing persons sent back to Libya, the situation of migrants and refugees in that country having been widely documented in numerous studies, analyses and investigations as well as by the media¹⁴, we will cite the example of Mauritania, which is an equal cause for such concerns. Time and again in recent years, observers have reported ill-treatment inflicted on migrants in Mauritania, either when they are arrested for residing in the country illegally – and sometimes even if they are working legally – or when they are interned in the Nouadhibou detention centre (dubbed *Guantanamo* by migrants). In its 2009-2010 report on European borders, the Migreurop network, drawing on its own investigations as well as the reports of other organisations, most notably Amnesty International, the Spanish Commission for Refugee Assistance (CEAR) and the Mauritanian Association for Human Rights (*Association mauritanienne des droits de l'homme*), deals at length with these repeated human rights violations in Mauritania, consisting of violence, humiliation, theft, racketeering and arbitrary behaviour by law enforcement officials¹⁵. This well-known state of affairs does not prevent FRONTEX, in its 2009 general report, from citing HERA as the “*the most successful*” operation carried out by the Agency, thanks to “*close co-operation with West African countries*” – among them Mauritania – and in particular to the arrests made there, thereby totally ignoring the treatment endured by the arrestees.

2. During operations led by Frontex

The idea of arranging flights for use by multiple Member States to expel a large number of foreign nationals to their countries of origin was launched in Evian in July 2005 by the interior ministers of five EU countries (France, Germany Italy, Spain and the UK). The plan was based in particular on the Regulation establishing FRONTEX, Article 9 of which provides for the organisation of “*joint return operations*”.

Between 2006 and 2009, FRONTEX considerably accelerated the rate of joint expulsions, from 1 to 28 charter flights (equivalent to almost 1 % of all expulsions carried out by EU Member States over the same period). Meanwhile, the total number of foreign nationals expelled rose from 801 in 2008 to 1,622 in 2009. The budget is increasing all the time and is set to total around Euro 9.4 million in 2010.

¹⁴ See, for example, the numerous articles on violations of migrants' rights on the Fortress Europe website

¹⁵ Migreurop, op. cit.

Until 2009, Nigerians were the nationality most affected by these operations: in 2007 there were two flights carrying around 100 people, compared with 17 flights carrying over 800 people in 2009. In 2009, joint expulsions to Nigeria were organised by Austria (4)¹⁶, Italy (3), Ireland (2), the Netherlands (2), the United Kingdom (2) and Switzerland (1). Virtually all Member States participated in these operations.

Table 1 – Joint return operations under the aegis of FRONTEX

Year	2006	2007	2008	2009	2010*
Joint returns	1	15	15	32	32
Number of persons involved	-	428	801	1622	-

Source: Frontex

(-) Information unavailable

* The statistics for 2010 only relate to the first nine months of the year.

Violence

These operations – aimed at returning people to their countries of origin against their will – often give rise to violence. It is rarely possible to corroborate information about the conduct of these operations because the individuals concerned are forcibly removed and we do not generally know what fate befalls them upon arrival in their home country. It is therefore difficult to establish or maintain contact with them. However, expelled persons regularly report violence in the form of humiliation, insults, aggression, blows and even beatings during attempts to remove them. This brutality causes acute distress to the individuals concerned: their legs may be bound and their wrists handcuffed, their mouths are sometimes covered to prevent them from speaking or crying out, and in some instances disabling sprays are used to prevent them from shouting. The actions of the – often uniformed – officials tasked with carrying out these coercive measures leave a mark on both their victims and the other foreign nationals housed in the detention centres; they become “*transmitters of inhumanity*”¹⁷.

Several Member States are involved in each operation. Consequently, some aircraft have to stop at several European airports. These successive stops result in disproportionately long waiting times for the foreign nationals, who are in some cases restrained, thereby jeopardising the health of the individuals concerned.

¹⁶ The figure in brackets indicates the number of operations that the country coordinated with the Agency.

¹⁷ Agier Michel (2002) *Aux bords du monde, les réfugiés*, Paris, Flammarion, 187 p.

Two reports from expelled foreign nationals who stayed in contact with friends in Europe speak of ill-treatment suffered during joint flights coordinated by FRONTEX. They have been posted online on the website Mille Babords¹⁸:

- Joint-flight expulsion on 3 February 2010, from the United Kingdom to Nigeria. The account is provided by PBBB. He was transferred by bus, along with other individuals, from the Tinsley House detention centre to the airport. He was on the bus from 11 a.m. to 6 p.m., was unable to leave the vehicle and was not allowed to stand up – each detainee being escorted by two security guards – until they boarded the plane. According to PBBB, “*children were crying (...) as they saw how their parents were being treated. Minors separated from their parents had sadness written all over their faces*”. During a stopover in Dublin, more deportees were brought on board, handcuffed and complaining that they had been beaten. The plane then stopped in Madrid, where security staff noticed that PBBB, who has serious circulation problems, was experiencing pain in his legs due to prolonged immobility. The medical team was summoned and said that he was not in a fit state to be on a deportation flight. The security staff then allowed PBBB to walk around. “*It was in Spain that things were most horrendous (...) a lot of people were mistreated, (...) the detainees were insulted, the police verbally assaulted them and beat them*”. When PBBB asked the Spanish police officers the reason for this ill-treatment, they began to hit him until the British police officers told them to stop because of his condition.
- Joint-flight expulsion on 10 March 2010, flight from Paris to Lagos (Nigeria) with stopover in Madrid (Spain), organised by France, coordinated by Frontex. The account is reported as being that of one of the deportees, named Ricky, who was loaded onto the flight at Schiphol airport. During the transfer to the airport, the police handcuffed him and restrained him around the waist using a BodyCuff. At the airport they also tied his feet and then expelled him on a private flight bound for Paris, escorted by three police officers and a doctor. The journey between Amsterdam and Lagos lasted almost 24 hours in total. At Lagos, he was removed from the plane without being given a medical certificate or any medicine, as his lawyer had been promised by the Department of Repatriation and Departure. Ricky was given €50 to pay for his transport and to live on for the first few days. Here is his account:

“Eight Nigerians from Norway, 5 from Denmark, between 8 and 10 from France and 1 from the Netherlands were loaded onto a very old Egyptair plane. Another 20 Nigerians were loaded on in Spain. The travellers included 10 to 15 women and 2 or 3 children. Each deportee was personally escorted by 3 police officers from the country expelling them, as well as medical personnel from the Netherlands and France. All the deportees had their hands and feet handcuffed (with a strap connecting the handcuffs on the wrists to those on the feet) and were restrained using a BodyCuff (which keeps an individual’s hands adjacent to their waist). They were only released from these just before arriving in Lagos. There was a delay at Madrid, due to around 20 deportees resisting boarding. During the flight, no hot meal was served, just bread and cheese, which was totally inadequate. There was no television or radio on the flight. The deportees were released in the cargo area of Lagos airport.”

¹⁸ www.millebabords.org/spip.php?article13938

Deception

Migreurop heard the testimony of a Nigerian national – Chigozie Emegoakor (this is his real name as Mr Emegoakor wishes his plight to be known)¹⁹ – whom the Cypriot authorities sent to Austria on a fraudulent pretext. The Cypriot police had assured him that he had to travel to Vienna to have his asylum application re-examined²⁰. In reality, he was being transited via Vienna before being deported to Nigeria on a joint flight coordinated by Austria and FRONTEX.

"I was deported on 3 March 2010 after spending two years and three months at immigration detention centre of Block 10, located in Nicosia. On the day of the event, I was informed by the immigration officer that I was due for transfer to Vienna to meet the new constituted European council responsible of asylum seekers. I accepted this move without knowing that I was heading for deportation, this means that I made no previous plan. I requested to go with my valuable but this opportunity was denied by the immigration who promised that I must be back in Cyprus in two days time. We met a man in the Airport Mr Androu Marous who confirmed that he worked in the Ministry of Finance, he also confirmed that we shall return after two days in Austria. An immigration officer forcefully pulled the handcuff and inflicted wounds on my wrist and it bleed.

When we got to Vienna, a combined police team (Cyprus and Austrian Police) dehumanized me, tied me up and threw me into the flight. This is one of the worst things I have experienced so far. I requested to be deported with my family, I also asked for my valuables, money. They promised to give me when we get to Nigeria but such never happened.

On 4 March 2010, we got to Nigeria. The Nigerian immigration seized all travelling documents. I was told to go to Alagbo Police station if I need the documents. I refused to go with the immigration insisting that I must be given my money, they brought Nigerian police in the flight who over powered me. Finally, I was left stranded in the Airport."

This situation is not exceptional. The deportee's family circumstances were not taken into account at all: the only thing that seemed to matter was capitalising on the joint flight. Chigozie Emegoakor has two children, aged two and seven, who were born and live in Cyprus, where they remained with his wife.

Following the deaths of a number of individuals during expulsions organised by Member States²¹, some governments drew up rules specifying techniques for immobilising deportees and the equipment that law enforcement officers are permitted to use. The lack of clarity in the division of responsibilities between Member States and FRONTEX (cf. Part II) makes it impossible to know whether these rules are applied during joint return operations (JROs). There is no information about the rules applying during joint returns involving multiple Member States, and the Agency has never mentioned the existence of any protocols implemented during the returns that it coordinates. Given the large number of individuals deported in JROs presided over by FRONTEX, there is legitimate cause for concern about the risks of such incidents occurring.

¹⁹ Testimony recorded by Olivier Clochard in September 2010.

²⁰ Consequently, he did not take any of his personal belongings and was unable to collect the money he had earned during the years he had lived in Cyprus.

²¹ Details of the individual circumstances can be found on the Statewatch website.

Table 2 – Nigerian, Colombian and Ecuadorian nationals the main targets of joint return operations (2007 – 2009)

Destination(s)	2007		2008		2009		Total	
	Nationals	Number of flights	Nationals	Number of flights	Nationals	Number of flights	Nationals	Number of flights
Albania and Kosovo	36	1	-	-	203	4	239	5
Armenia and Georgia	-	-	-	-	56	2	56	2
Bangladesh	-	-	69	1	-	-	69	1
Benin and Togo	13	1	-	-	-	-	13	1
Cameroon	29	2	-	-	-	-	29	2
Cameroon and Ghana	28	1	-	-	-	-	28	1
Cameroon and Nigeria	-	-	-	-	52	1	52	1
Cameroon and Togo	47	2	-	-	-	-	47	2
Colombia and Ecuador	132	2	293	3	183	2	608	7
Côte d'Ivoire and Togo	-	-	-	-	6	1	6	1
Gambia and Nigeria	-	-	102	2	30	1	132	3
Ghana	-	-	6	1	-	-	6	1
Georgia	-	-	-	-	89	3	89	3
Kosovo	22	1	17	1	-	-	39	2
Mongolia	-	-	44	1	124	2	168	3
Nigeria	98	2	164	4	767	15	1029	21
Pakistan	23	1	106	2	-	-	129	3
Vietnam	-	-	-	-	112	1	112	1
Totals	392	12	801	15	1419	28	2612	55

Source: Frontex

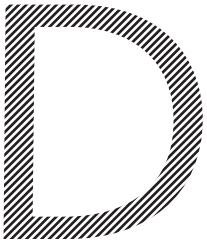
III-treatment

In a report broadcast in October 2009 by the German TV channel ARD, witnesses accused FRONTEX of having denied refugees access to drinking water during a maritime interception operation. The same allegations had been reported a few days earlier by the organisation Human Rights Watch. Following the broadcast of this documentary, MEPs questioned the European Commission about these allegations of inhuman and degrading treatment²². In its response, the Commission, after noting that *“the responsibility for border control lies with the Member States, not with the Frontex Agency”*, merely stated that neither it nor the FRONTEX Agency was in a position to verify the allegations due to a lack of evidence²³.

It is not possible to conclude from this response whether or not the allegations made against FRONTEX are substantiated. It merely confirms that the operational framework for operations led by the Agency does not make it possible to monitor the circumstances in which those operations take place. This observation is all the more worrying given that, as will be seen later on (Part II), the legal framework surrounding the functioning of FRONTEX is wholly unclear.

²² Parliamentary questions put to the European Commission on 27 October 2009 by Birgit Sippel (S&D), Alexander Alvaro (ALDE), Ulrike Lunacek (Greens/EFA), Nirj Deva (ECR), Sabine Lösing (GUE/NGL) and Martin Ehrenhauser [available online].

²³ Parliamentary questions, Answer given by Mr Barrot on behalf of the Commission, 18 December 2009, E-5353/2009 [available online]



Right to the protection of personal data

Article 8 of the Charter of Fundamental Rights of the European Union

1 — Everyone has the right to the protection of personal data concerning him or her.

2 — Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

In April 2009, FRONTEX informed the European Data Protection Supervisor (EDPS) about plans to implement the collection of personal data required for the organisation of joint return operations for foreign nationals deported by air from EU territory. According to FRONTEX, this collection, which had not previously been carried out by the Agency, was necessary for the smooth organisation of joint flights in order to:

- have exact knowledge of the number and identification of returnees;
- provide the airlines involved with a passenger list;
- know the risks linked to the returnees and for the security of the JRO;
- know the health state of returnees in order to secure appropriate medical assistance during the JRO;
- know if any minors take part in the JRO.

The data is largely processed electronically, but occasionally in paper form. In principle, the data are destroyed 10 days after the operation, except where FRONTEX charts aircraft itself, in which case the passenger list (which does not include information about passengers' state of health and the risks associated with them) is kept for five years in a secure area.

In an opinion dated 26 April 2010, issued after several exchanges with FRONTEX, the EDPS states that this move towards collection of personal data on persons deported by FRONTEX is necessary to the extent that the Agency's role includes monitoring joint return operations and the collection is compatible with application of Regulation (EC) No. 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community. It considers that the requirements of Article 4 of the Regulation, which states that collected data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed", appear to be fulfilled.

Lack of transparency

However, in view of the answers provided by FRONTEX to several of the questions which the EDPS asked it, the latter notes that the planned mechanism does not meet the Regulation's requirements on transparency with respect to the data subjects and the right of access to data concerning them. In particular, it notes that there are no arrangements whereby, in accordance with the provisions of the Regulation (Article 12), when data have not been obtained from the data subjects, the latter are informed of the identity of the controller, the purposes of the processing operation and the recipients of the data, as well as of the existence of the right to access to, and the right to rectify, the data concerning them. The EDPS adds that, considering the specific characteristics of the data subjects (language problems, illiteracy, stress, state of distress), specific arrangements should be made to ensure that the information required under Article 12 of the Regulation is actually understood by the returnees.

The EDPS concludes his opinion with a recommendation to FRONTEX that, before the collection mechanism is implemented, it should ensure compliance with Article 12 of the Regulation requiring data subjects to be informed, including about their right of access to data, *"except if the Member States provide the information"*²⁴.

This reference to the responsibility of the Member States raises the problem of the division of powers between the Agency and the States, a problem which, as will be seen in Part II, represents the main 'black hole' in the functioning of FRONTEX in relation to respect for fundamental rights.

²⁴ European data protection supervisor, Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) concerning the „Collection of names and certain other relevant data of returnees for joint return operations (JRO)“, 26 April 2010 (Case 2009-0281).



Discrimination

One of the effects of the introduction of common European rules and a legal framework on the crossing of external borders (Schengen Borders Code) should be equality of treatment and compliance with the principle of non-discrimination. However, questions can be raised about the objectives and process of certain FRONTEX joint operations targeting specific national groups. The Frontex General Report 2007 reports on Operation HYDRA, which took place at 22 airports in 16 Member States. Aimed explicitly at tackling “illegal Chinese immigration by air”, it resulted in the arrest of 291 Chinese nationals in April-May 2007²⁵. Another example from the same year is Operation SILENCE targeting immigration from Somalia. This type of targeted intervention clearly raises the question of racial discrimination in the Agency’s operations.

Article 21 of the Charter of Fundamental Rights

1 — Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2 — Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

²⁵ E. Guild, S. Carrera and A. Eggenschwiler, Informing the Borders Debate, CEPS Background Briefing, 2009.

PART II: A LEGAL FRAMEWORK THAT FAVOURS THE DILUTION OF RESPONSIBILITIES

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

FRONTEX note to the European Parliament regarding fundamental rights, 8 October 2010

"As regards fundamental rights, FRONTEX is not responsible for decisions in that area. They are the responsibility of the Member States."

Ilkka Laitinen, Director of FRONTEX, at the interparliamentary committee meeting of the LIBE Committee on "Democratic Accountability in the Area of Freedom, Security and Justice, Evaluating FRONTEX", 4 October 2010

Since the establishment of FRONTEX and its arrival on the border surveillance scene, it has not been easy to pinpoint the powers of the various actors who control the external borders, still less to establish accountability for the treatment of persons attempting to enter the territory of the European Union. According to Article 1 of Regulation No. 2007/2004 establishing FRONTEX²⁶, the Member States are legally responsible for the control and surveillance of external borders. However, the same regulation gives FRONTEX legal personality and allows it to enter into arrangements autonomously with international organisations and third countries. The statements of Member States and the FRONTEX Agency illustrate the lack of clarity that exists in this area. However, does this autonomy make it obliged to respect fundamental rights and can the Member States shift this responsibility onto the Agency?

The statements of the Member States and the FRONTEX Agency on this subject are contradictory. Whereas FRONTEX portrays fundamental rights as an integral part of its activity, its Director says that the Agency assumes no responsibility in this area (cf. box). In his view, this responsibility resides with the Member States. However, the Member States do not necessarily agree with one another on this matter: the Dutch Minister of Justice, for example, was required on 3 September 2010 to clarify his government's position on responsibility for the treatment of asylum seekers and refugees intercepted at sea during FRONTEX operations²⁷. According to him, when a Dutch vessel takes part in an operation, the ship's commander is not authorised to receive asylum applications. Consequently, a precondition for Dutch participation in any maritime operations coordinated by the Agency is the inclusion of an explicit provision in the operational plan stating that the Member State hosting the operation is responsible for handling any asylum applications made on board the Dutch ship²⁸.

At around the same time, a member of the European Commission²⁹ stated that officers on service during FRONTEX operations – who are not Agency employees – remain under the authority of the Member States³⁰. According to the Commission, the objective of FRONTEX is to facilitate application by the Member States of the Schengen Borders Code³¹ and of the Return Directive³², and acts liable to cause damage which are committed during these operations are the sole personal responsibility of the participating individuals.

²⁶ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, O.J., 25 November 2004 (hereafter referred to as Regulation 2007/2004).

²⁷ The procedure to be followed in these operations is set out in Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, O.J., 4 May 2010, pp.20-26.

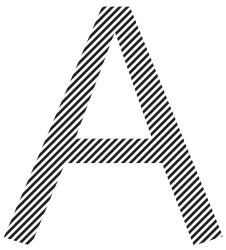
²⁸ The Netherlands: Government's position on asylum claims made at sea, ECRE weekly bulletin (16 September 2010); Dutch Govt position on Asylum Requests Made at Sea (14 September 2010) [available online]

²⁹ Head of the Border Management and Return Policy Unit of DG Home Affairs.

³⁰ Lars Henrik Nielsen, at the hearing A new mandate for FRONTEX: Beyond the security obsessions, a human rights perspective? organised by the Greens/EFA group in the European Parliament on 15 September 2010.

³¹ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J., 13 April 2006, pp. 1-32.

³² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J., 24 December 2008.



Member States, FRONTEX, European Union: who is responsible for the activities of the FRONTEX Agency?

It is important to determine who – whether the Member State, the Agency or the European Union – is liable for any damage caused to other persons during a FRONTEX operation. Do the border guards carrying out a control create liability on the part of the Agency to whom they are seconded or of the State that seconded them?

To maintain, as the Commission does in the above-quoted statement, that all responsibility lies with the personnel alone, is legally untenable, even in the absence of clear rules assigning liability for acts that may cause damage. Officers can only be held personally liable in exceptional cases, in case of serious misconduct severable from their service or when the officer is responsible for a crime under international law.

1. Texts insufficient to determine responsibility for controls carried out by the Agency: from legal impasse to political schizophrenia

According to Jean Matringe, *“there is no clear rule for attributing actions liable to cause damage. Consequently, it is difficult to determine which entity should be held accountable for them, which leads to a legally and politically untenable vacuum. The system resulting from the previous texts combined with the proposed revision constitutes a legal monster”*³³. In other words, at a time when the Agency is undergoing a process of transformation, the framework governing its action and issues of its accountability appear not to be clearly defined.

The Lisbon Treaty extends the jurisdiction of the Court of Justice of the European Union (CJEU) – which was initially confined to oversight of the institutions – to cover acts of the FRONTEX Agency with respect to reviewing legality³⁴, actions for failure to act (Article 265) and preliminary rulings concerning the validity of acts (Article 267). The Agency must therefore answer to the Court for certain kinds of behaviour, according to the appeal procedures provided for. However, the possibility of obtaining compensation for damage incurred during operations is not addressed.

The Treaty does not extend the jurisdiction of the CJEU to cover the responsibility of agencies³⁵. However, Article 19 of Regulation 2007/2004 provides that FRONTEX should assume its non-contractual responsibility before the Court of Justice for all disputes concerning the reparation of damages caused by the Agency's departments or their staff in the performance of their duties. According to Jean Matringe, *“in this respect, the Court has jurisdiction over disputes concerning the reparation of damages. The problem is deciding who should answer for behaviour on a case by case basis: at what point should the Agency be held accountable? How should accountability be determined in cases involving other people whose responsibility is not covered by this provision? Should the host country issue instructions, or should responsibility be shared between the host country and the Agency who, together, draw up the operational plan?”*³⁶

³³ Jean Matringe, at the hearing A new mandate for FRONTEX: Beyond the security obsessions, a human rights perspective? organised by the Greens/EFA group in the European Parliament on 15 September 2010.

³⁴ Action for annulment (Article 263 TFEU) and plea of illegality (Article 277 TFEU).

³⁵ Articles 268 and 340 TFEU establish the responsibility of the Union only for damage caused by the institutions and the ECB or their staff

³⁶ Jean Matringe, op. cit.

The texts do not clearly address the issue of damages suffered by individuals, nor do they sufficiently set out the conditions for potential actions for damages.

Might the FRONTEX Agency be suffering from schizophrenia? It acts as both a cooperative organisation where responsibility for monitoring borders lies with Member States, and as an integration body. It has a legal personality, distinct from the European Union and Member States, but is at the same time linked to and controlled by the EU institutions and Member States. Because the line between independence and control is so blurred, the Agency's responsibilities are being diluted. How can such a situation be tolerated when the Commission's proposal to revise the Regulation is clearly intended to extend the competencies of the Agency and even give it the power to make its own decisions and act on its own initiative? Frontex can already put itself in charge of joint operations and pilot projects in cooperation with Member States, deploy human resources and technical equipment, and finance or co-finance joint operations, especially with regard to expulsions (using the Community budget). The Agency even has the right to collect individual data itself in connection with joint return operations (see Part I, D).

A political decision must therefore be made: FRONTEX must be either an interstate instrument whose actions are the responsibility of the States themselves, or an international agency, independent of the States and accountable for its own actions. In the former case, the Agency would have no legal autonomy.

To maintain, as the European Commission's representative does, that the role of FRONTEX is merely to facilitate the implementation of the Schengen Borders Code is to ignore what is happening on the ground, as operations are carried out most often in the exclusive economic zone or on the high seas. We face an impasse with regard to responsibility whenever the Schengen Code is transposed outside the territorial seas and contiguous zone, i.e. the areas where States can legally carry out migration controls³⁷. According to Jean Matringe, *"the Agency was established to implement the Schengen Borders Code across the land and sea territory of the Member States, not in international territories or the territorial waters of third countries. This arrangement leads to shortcomings that the proposed revision will only accentuate"*³⁸.

Both the FRONTEX Regulation and the proposed revision of that Regulation shrug off the issue of responsibility. At the same time, the common desire of Member States to reduce illegal immigration has led to dramatic situations in which people have died because they did not receive help soon enough, disputes between Member States about who should shoulder the 'burden', and the diversion of ships to third-country ports³⁹.

³⁷ United Nations Convention on the Law of the Sea (1982), signed at Montego Bay.

³⁸ Jean Matringe, op. cit.

³⁹ Migreurop, Illegal refoulement of 500 migrants to Libya: the EU must condemn Italian authorities, 11 May 2009.

2. Extraterritoriality of Community provisions

Article 3 of the Schengen Borders Code on the principle of non-refoulement can be applied extraterritorially. This interpretation is based on Annex VI of the Code⁴⁰ and the Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders, which states that *“no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle”*⁴¹. The Commission itself said that it supported the applicability of the Schengen Borders Code⁴². Wherever interceptions are carried out by Member States at sea for the purposes of border control, those interceptions should be seen as a component of the Code and as such subject to its provisions on the principle of non-refoulement.

Under the Decision of 26 April 2010, Member States are obliged to provide rescued and intercepted persons with the appropriate information so that those individuals may explain why disembarking in the proposed location would contravene the principle of non-refoulement⁴³. Then, Member States should – but are not obliged to – inform the coordination centre about the presence of any such persons. The coordination centre should subsequently relay this information to the competent authorities of the host Member State. The operational plan is supposed to help determine which follow-up measures can be taken⁴⁴. Not only does this provision appear in the non-binding part of the Decision of 26 April 2010, but there are also no established measures with regard to procedural guarantees, access to representation or legal aid or even the possibility of appeal. Yet compliance with the principle of non-refoulement means affording any intercepted or rescued person access to legal proceedings before a competent authority that can guarantee the safety of any return to a third country. This is only possible if entry into Member State territories is granted.

In addition, neither Regulation No. 2007/2004⁴⁵ nor Regulation No. 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams (RABITs)⁴⁶ sets out the applicable legislation, competent court or liability incurred where damage is caused during an operation coordinated by FRONTEX and taking place outside the territory of a Member State, despite the majority of operations taking place in the third-country territories, i.e. international areas (high seas). If individual members of a team open fire on migrants in extraterritorial waters, the Regulation states neither which party, i.e. the States (host State or State of nationality) or the Agency, should be responsible, nor which court has jurisdiction.

⁴⁰ Namely the rule laid down in paragraph 3.1.1. “Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship’s arrival or departure, in the territory of a third country”.

⁴¹ Council Decision of 26 April 2010, op. cit., para. 1.2.

⁴² Where ships are diverted to Libya – under an existing agreement between Libya and Italy – the European Commission reiterated that Italian-Libyan controls must take into account the provisions of the Schengen Borders Code (Letter from Commissioner Barrot to the Chairman of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) dated 15 July 2009).

⁴³ Council Decision of 26 April 2010, op. cit., para. 1.2.

⁴⁴ Ibid., para. 2.2.

⁴⁵ Article 10 of Regulation No. 2007/2004 attempts to resolve the issue of responsibility for implementation measures and stipulates that “Exercise of executive powers by the Agency’s staff and the Member States’ experts acting on the territory of another Member State shall be subject to the national law of that Member State”.

⁴⁶ Article 9 of Regulation No. 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams (RABITs) and amending Council Regulation No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, O.J., 31 July 2007, pp. 30-39, provides that “while performing their tasks and exercising their powers, members of the teams shall be authorised to use force, including service weapons, ammunition and equipment, with the consent of the home Member State and the host Member State”, defined as “a Member State on the territory of which a deployment of a Rapid Border Intervention Team takes place”. Article 10 of Regulation No. 863/2007 deals with civil liability and provides that “where members of the teams are operating in a host Member State, that Member State shall be liable in accordance with its national law for any damage caused by them during their operations”.

3. International law applicable to FRONTEX operations on the high seas

The United Nations Convention on the Law of the Sea (UNCLOS) provides that “ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas” (Article 92). Ships taking part in FRONTEX operations are therefore subject, in principle, to the exclusive jurisdiction of the State assuming responsibility for them.

Under Article 90 of the UNCLOS, every State has the right to sail ships flying its flag on the high seas. However, Article 110 of the Convention recognises the right of warships to board other ships with a view to inspecting their flags, provided there is reasonable ground for suspecting that:

- the ship is engaged in piracy or the slave trade;
- the ship is engaged in unauthorised broadcasting from the high seas;
- the ship is without nationality or, though flying a foreign flag or refusing to show its flag, is in reality of the same nationality as the warship.

Although migration is not cited among the above reasons, ships ‘illegally’ transporting migrants frequently refuse to show their flags. As a result, FRONTEX ships on the high seas can often inspect ships not flying a flag or deemed suspicious. In the event of boarding, international rules relating to human rights and refugees apply. Furthermore, where ships decide to intercept, the ‘jurisdiction’ of the State assuming responsibility for those ships – i.e. the State’s territorial jurisdiction – extends to the boarded vessel. Consequently, crew carrying out checks on migrants aboard another ship must comply with the laws of the relevant State, especially the protection laws to which the State has voluntarily agreed⁴⁷.

Regulation of boarding

Boarding operations on the high seas are also covered by the Protocol against the Smuggling of Migrants by Land, Air and Sea (supplementing the United Nations Convention against Transnational Organised Crime). The Protocol states that, before a ship flying a flag can be boarded, authorisation must be requested from the flag State⁴⁸. If a ship without nationality is suspected of being engaged in the smuggling of migrants, the ‘inspecting’ vessel may immediately board the ship in question⁴⁹. To be justified, such operations must be motivated by the fight against the illegal smuggling of migrants. However, although Regulation No. 863/2007⁵⁰ cites the fight against human trafficking as a reason for border checks, this is by no means the main aim of FRONTEX.

Detainment of migrants

In addition, the rules applicable to sea border operations coordinated by the Agency do not comply with the aforementioned text. Under the Decision of 26 April 2010⁵¹, if suspicions that a ship is without nationality prove to be well founded and if there are reasonable grounds to suspect that the vessel in question is engaged in the trafficking of migrants by sea, certain measures can be taken during the surveillance operation, including the arrest of those on board⁵². However, the Protocol against the Smuggling of Migrants to which the Decision refers does not state that the relevant persons may be detained. Rather, it provides that the State should take “appropriate measures”⁵³. In the Medvedyev case, the European Court of Human Rights judged that the expression “appropriate measures” in Article 17 of the

⁴⁷ Hathaway J.C. (2005) *The Rights of Refugees in International Law*, Cambridge University Press, p.342.

⁴⁸ Article 8(2), Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime, 15 November 2000.

⁴⁹ Article 8(7), Protocol against the Smuggling of Migrants, op. cit.

⁵⁰ See item 3 in the Preamble of Regulation No. 863/2007, op. cit.

⁵¹ Council Decision of 26 April 2010, op.cit.

⁵² *Ibid.*, para. 2.5.2.5, such as seizing the ship and arresting the individuals on board; ordering the ship to change course and leave the territorial waters and escorting the ship or remaining close to it until the latter takes the appropriate action; leading the ship containing the persons in question to a third country, or; handing over the ship containing the persons in question to the authorities of a third country; etc.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances did not constitute a legal basis for the arrest of the individuals aboard a ship on the high seas suspected of being engaged in drug trafficking⁵⁴. Consequently, where the Decision of 26 April 2010 calls for “*reasonable grounds to suspect that a ship is engaged in the smuggling of migrants*”, the Protocol goes further by demanding that those suspicions be substantiated by evidence.

Obligation to rescue, respect for right to asylum and the principle of non-refoulement

Any person in danger or distress at sea must be rescued (UNCLOS). Therefore, Member States are obliged to take control of a boat and disembark the persons in distress in a safe and secure location. The disembarkment of asylum seekers and refugees in territories where their lives or safety may be threatened is prohibited by the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) and the 1979 Convention on Maritime Search and Rescue (SAR Convention)⁵⁵. However, international law does not clearly specify where rescued persons should be disembarked, nor under whose responsibility they fall. The captain of the ship must identify a safe and appropriate location, taking into account special circumstances such as the need for protection and the principle of non-refoulement.

Both the European Court of Human Rights and the United Nations Human Rights Committee deem that the exercise of effective controls in areas outside one’s national territory⁵⁶ or on individuals⁵⁷, can be crucial in determining the responsibility of a State. In the case of a ship carrying out checks on the high seas, at what point should we consider it to be under the responsibility of its State? In the *Marine 1* case, the Committee Against Torture (CAT) stressed that any State taking part in an extraterritorial joint rescue operation assumed responsibility from the moment the ship was rescued as well as during the identification of individuals and the repatriation procedure. Accordingly, the CAT judged that those persons fell under the jurisdiction of the State in question⁵⁸.

Where a Member State exercises its jurisdiction, whether during a rescue or interception operation, it must secure the rights and freedoms laid down in the European Convention on Human Rights and the 1951 Convention relating to the Status of Refugees, chief among which is the principle of non-refoulement⁵⁹. Consequently, the State must ensure that the intercepted or rescued persons can be taken to a territory where their applications will be examined. Otherwise, that State may be held accountable for refoulement measures, which are prohibited under European and international law.

⁵³ Article 8(7), Protocol against the Smuggling of Migrants, op. cit.

⁵⁴ European Court of Human Rights, *MEDVEDYEV AND OTHERS V. FRANCE*, No. 3394/03, 10 July 2008, paras 57-63; decision upheld by the Grand Chamber, 29 March 2010.

⁵⁵ These conventions were supplemented by the Guidelines on the Treatment of Persons Rescued at Sea, published by the International Maritime Organisation (IMO).

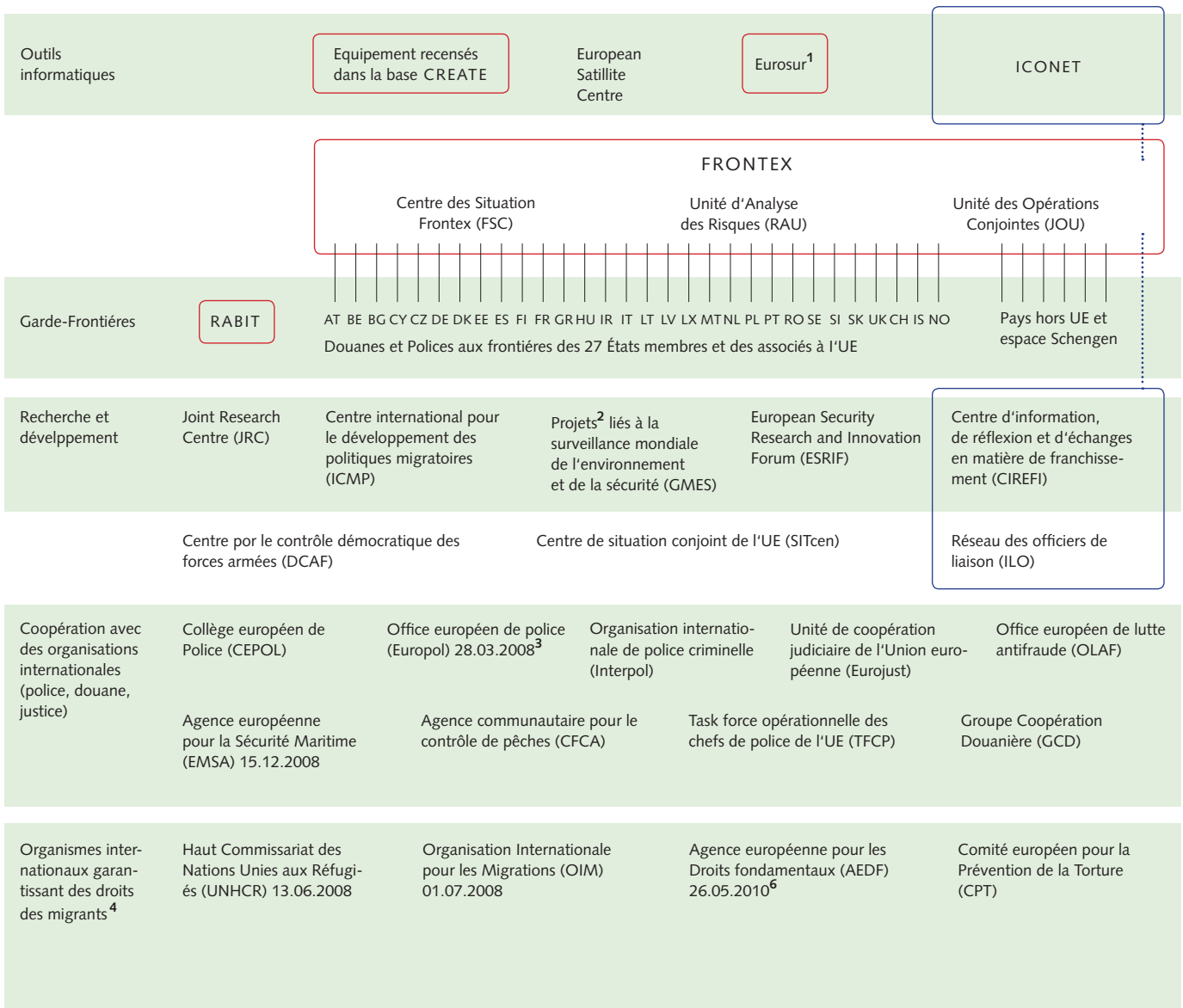
⁵⁶ European Court of Human Rights, *LOIZIDOU V. TURKEY*, No. 15318/89, 23 March 1995.

⁵⁷ European Court of Human Rights, *ISSA AND OTHERS V. TURKEY*, No. 31821/96, 16 November 2004; *OCALAN V. TURKEY*, No. 46221/99, 12 May 2005; HRC, *DELIA SALDIAS DE LOPEZ BURGOS V. URUGUAY*, Communication No. 52/1979, 29 July 1981.

⁵⁸ CAT, *J.H.A. V. SPAIN*, Communication No. 323/2007, 10 November 2008, para.8.2.

⁵⁹ Severijns R. (2009) *FRONTEX operations. Interception under International and European Law*, pp.42-43.

Avec qui travaille Frontex?



 Unités sous la responsabilité de Frontex

 Souhait de confier la gestion de la structure à Frontex

¹ Dispositif de surveillance dans lequel figurent Fast track (enregistrement électronique des entrées et des sorties de ressortissants d'Etats tiers) et le système électronique d'autorisation de voyage (ESTA).

² tels que MARISS (images maritimes grâce à l'intégration de produits satellites) et LIMES.

³ Accord précédé d'un mémorandum de coopération signé en 2007.

⁴ Mais destinés uniquement à former les agents garde-frontières de l'UE ou présents à titre d'observateur lors de certaines opérations.

⁵ Cette institution basée à Genève s'intéresse aux réformes du secteur de la sécurité et sa bonne gouvernance.

⁶ Date connue de l'accord signé avec Frontex.



FRONTEX Agency partnerships: passing the buck?

The FRONTEX Agency is part of an overall system to manage external European Union borders. Since its establishment, it has concluded cooperation agreements with “*Europol and the international organisations competent in matters covered by Regulation No. 2007/2004*”⁶⁰. As such, the Agency collaborates with a number of other players. Various agencies and organisations find themselves partnered with FRONTEX in the fight against illegal immigration, even if this is not their main objective. Those active in the FRONTEX network are primarily from areas such as security, customs, transport, maritime affairs, research, technology, crisis management, asylum and immigration (see organisational chart).

FRONTEX also cooperates with third countries to the European Union under work agreements enabling interception and joint return operations.

The FRONTEX 2010 – 2013 work programme cites humanity as a key value and is supposedly intended to enable both border controls and access to international protection. However, the list of FRONTEX partners suggests that priority has been placed not on upholding rights, but on security and the need to crack down on illegal immigration. Furthermore, in connection with third countries, checks – and hence responsibilities – are often subcontracted.

1. Cooperation with the UN Refugee Agency and the European Union Agency for Fundamental Rights: alibis or partners?

In 2007, a liaison officer from the UN Refugee Agency (UNHCR) was appointed to work with FRONTEX to “*help ensure that border management complies with the international obligations of EU member states*”⁶¹. A work agreement was established between UNHCR and FRONTEX on 13 June 2008 via an exchange of letters. The agreement focuses on different aspects of cooperation: regular consultations, sharing information, expertise and experiences, and participation in training, especially on human rights and the rights of refugees. To this end, UNHCR helped to train the Agency’s border guards and incorporate the concept of protection into their work.

Although the main aim of the existing partnership between UNHCR and FRONTEX is to ensure border management protects human rights, the UNHCR liaison officer for FRONTEX said that “*the UNHCR has little information on joint operations, making it difficult to evaluate the impact of training*”. He also pointed out that “*all staff should be trained in fundamental human rights, not just those working on the ground*”⁶².

⁶⁰ Article 13, Regulation No. 2007/2004.

⁶¹ Working for refugees on Europe’s outer borders, interview of Michele Simone by Sybella Wikes (18 May 2010) [available online].

⁶² Michele Simone, UNHCR liaison officer, at the hearing *A new mandate for FRONTEX: beyond the security obsessions, a human rights perspective?*

Under the terms of an agreement signed with the European Union Agency for Fundamental Rights (FRA) on 26 May 2010⁶³, FRONTEX and the FRA also commit to cooperate in order “to foster a common understanding of fundamental rights in the context of border management [...] and coordinate their actions, where appropriate”. In particular, at the request of FRONTEX, the FRA provides expertise during the various phases of joint operations, especially advice on how border guards should take into account fundamental rights. The parties also undertake to develop activities for border guards, especially to train those guards in how to identify vulnerable people. Training requirements for all FRONTEX staff are to be evaluated by FRA.

Finally, lists of ‘best practices’ for the various phases of return operations are to be drawn up by the FRA. UNHCR also said it wanted to have “independent evaluations carried out by civil society organisations for all operations, not just for joint return operations”⁶⁴.

Despite the partnership agreements signed with UNHCR and the FRA, the annual reports provide no indication at all of actions taken during FRONTEX joint operations to ensure the protection of individuals. It is extremely difficult, impossible even, to evaluate the impact of the training provided by UNHCR and the FRA on actual border operations, especially those on the high seas. In terms of the plans set out by FRONTEX, staff training and efforts to share information will probably not be enough to bring operations into line with international law (e.g. the principle of non-refoulement).

Given the lack of organisations working to protect fundamental rights on the one hand and the content of the agreements on the other, it is questionable whether Member States really are concerned with protecting the rights of migrants during joint operations, as they claim to be in official discourse. Indeed, statements released by Michal Parzyszek, spokesperson for the Agency, seem rather to keep up appearances than depict reality: “FRONTEX has always had the highest commitment to the respect of human rights: this is one of the guiding principles in all our activities. Our close work with UNHCR and IOM (with whom we have cooperation agreements) demonstrates this, as does our human rights training for the officers participating in our operations”⁶⁵. The extent of UNHCR’s involvement in the Agency’s activities was explored above. For its part, the International Organisation for Migration (IOM), to which Mr Parzyszek refers, is neither part of the UN system nor governed by any international law documentation on fundamental rights. Finally, it must be reiterated that, under the agreement established between the FRA and FRONTEX, the former contributes to the Agency’s operations only at the request of the latter.

⁶³ Cooperation Agreement between FRA and FRONTEX [available online].

⁶⁴ Michele Simone, UNCHR liaison officer, during the hearing A new mandate for FRONTEX: beyond the security obsessions, a human rights perspective?

⁶⁵ ECRE Interview with Michal Parzyszek, FRONTEX Spokesperson (April 2010) [available online].

2. Cooperation with third countries: illicit agreements and lack of accountability

Under Article 14 of Regulation No. 2007/2004, in a bid to achieve its objectives the FRONTEX Agency may “cooperate with Europol and the international organisations competent in matters covered by this Regulation in the framework of working arrangements concluded with those bodies, in accordance with the relevant provisions of the Treaty”.

Where Member States conclude bilateral agreements with third countries on matters related to Regulation No. 2007/2004, they may also include provisions on the jurisdiction of the Agency to enable FRONTEX to act.

On the face of it, the Agency cannot conclude agreements or carry out operations that might result in the violation of rules enshrined in international law. But questions remain, especially since, if the competent authorities of a third country whose support is required by the Agency indicate that they do not wish to enter into a work agreement, other ad hoc measures must be sought to determine the conditions of any operational cooperation. According to FRONTEX, this is one of the Agency’s priorities for 2010.

What is the legal framework for agreements with third countries?

FRONTEX has been cooperating with third countries for five years. On the basis of these arrangements (see map), representatives from partner countries can be invited to take part in joint operations after they have undergone the relevant training. The FRONTEX 2009 activity report said the involvement of third-country border guards (from Albania, Croatia, Russia and Serbia) in joint operations was “the most advanced form of cooperation”.

However, the conclusion of such agreements without the involvement of any European Union institution poses a number of questions about the lack of transparency surrounding them: What is the nature of the agreements? How were they concluded? What is their basis? How enforceable are they? Under Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”. What is the situation, then, for agreements established between the Agency and third countries which do not comply with the rules applicable to the conclusion of international treaties⁶⁶?

If FRONTEX’s Executive Director is to be believed, this can be explained by the fact that the Agency does not establish partnerships with third countries or governments, but rather between the border control authorities of those countries and FRONTEX⁶⁷.

⁶⁶ In particular the procedure governing the negotiation and conclusion of international agreements referred to in Article 218 TFEU which calls for the involvement of the Commission, the Council, the Parliament and, where applicable, the Court of Justice.

⁶⁷ Ikka Laitinen, questioned as part of the parliamentary inquiry led by the UK House of Lords for the report FRONTEX, the EU external borders agency, 5 March 2008.

But if those agreements are anything like the so-called technical regulations that can escape parliamentary scrutiny, judicial controls must be laid down. As a subject, the Agency may act, but several issues remain unresolved, such as who should answer for its commitments, and the enforceability of those commitments against Member States, the European Union and third countries. Moreover, who should have the power to invoke the agreements?

Compliance with legislation on human and refugee rights does not appear to be a precondition for the signing of agreements between the Agency and third countries. No mention is made of the jurisdiction of FRONTEX staff, their responsibilities or the applicable legal framework. The establishment of such agreements bypasses European and international legal provisions, which the European Parliament highlighted in its Resolution of 18 December 2008 when it called for *“the strengthening of the democratic control of Frontex by Parliament, [and for] Frontex to inform Parliament of negotiations to conclude agreements signed with third countries”*⁶⁸.

The role of the European Parliament

Under the assent procedure, the Lisbon Treaty gives the European Parliament the right to veto international agreements. However, the democratic control of the European Parliament provided for in Article 218 TFEU can be bypassed via its various instruments (technical/operational/work/cooperation agreements, etc.), since the final item of the same Article refers to cases covering *“fields to which the ordinary legislative procedure applies”*⁶⁹. As the fight against illegal immigration is one such field, work agreements established between FRONTEX and third countries are supposedly controlled by the European Parliament.

Division of responsibilities between third countries, Member States and the Agency

Article 2 of the United Nations Convention on the Law of the Sea provides that the sovereignty of a coastal State extends to its territorial sea, an area reaching up to 12 nautical miles from its coastline. Adjacent to the territorial sea, the contiguous zone can reach up to 24 nautical miles⁷⁰ (from the coastline). In the contiguous zone, the State may exercise its sovereignty only in relation to fiscal matters, customs, sanitation and immigration.

Therefore, ships intercepted by FRONTEX in territorial waters or the contiguous zone of a country fall under the jurisdiction of the coastal State. Accordingly, for third countries with whom the Agency has signed agreements, EU States and FRONTEX deem the third country in question to be the sole responsible party.

⁶⁸ European Parliament resolution of 18 December 2008 on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (Eurosur) (2008/2157(INI))

⁶⁹ i.e. the European Parliament's opinion is required.

⁷⁰ As a result, it is identical in size to the territorial sea where States have chosen to extend the latter to the maximum distance of 12 miles. In addition, the contiguous zone can stretch as far as 20 miles where the territorial sea is limited to 4 miles. Note that in the Mediterranean Sea, Syria is an exception to this rule and its contiguous zone extends 41 miles from the coastline.

That said, effective controls by a State, either in a territory or on individuals, remain a determining factor. Under international law, cooperating with third countries or international organisations does not release the States from their obligations⁷¹. ECHR case law is unambiguous in this respect⁷². If during cooperation with third countries ships are intercepted and passengers handed over to the authorities of a third country, the Member States remain bound by their international commitments. Where several States admit liability for a mistake, each State is held individually responsible for the behaviour attributable to it. The responsibility of each given State will not be diminished by virtue of the fact that one or more other States were also responsible for the same act⁷³.

Is there a risk of responsibilities being 'subcontracted'?

Legal frameworks and shared responsibility aside, once the work agreements in question are negotiated, third countries are supposed to play a 'greater part' in preventing illegal immigration⁷⁴. As we saw in Part I, this endangers the right to leave one's own country, the right to seek asylum and the principle of non-refoulement. The conclusion of immigration agreements with third countries seen to violate human and refugee rights, or with States that have not ratified the Geneva Convention of 1951 relating to the Status of Refugees, goes to prove the unacceptable way in which States are treating migrants, at their borders or within their territory, especially in detention centres⁷⁵.

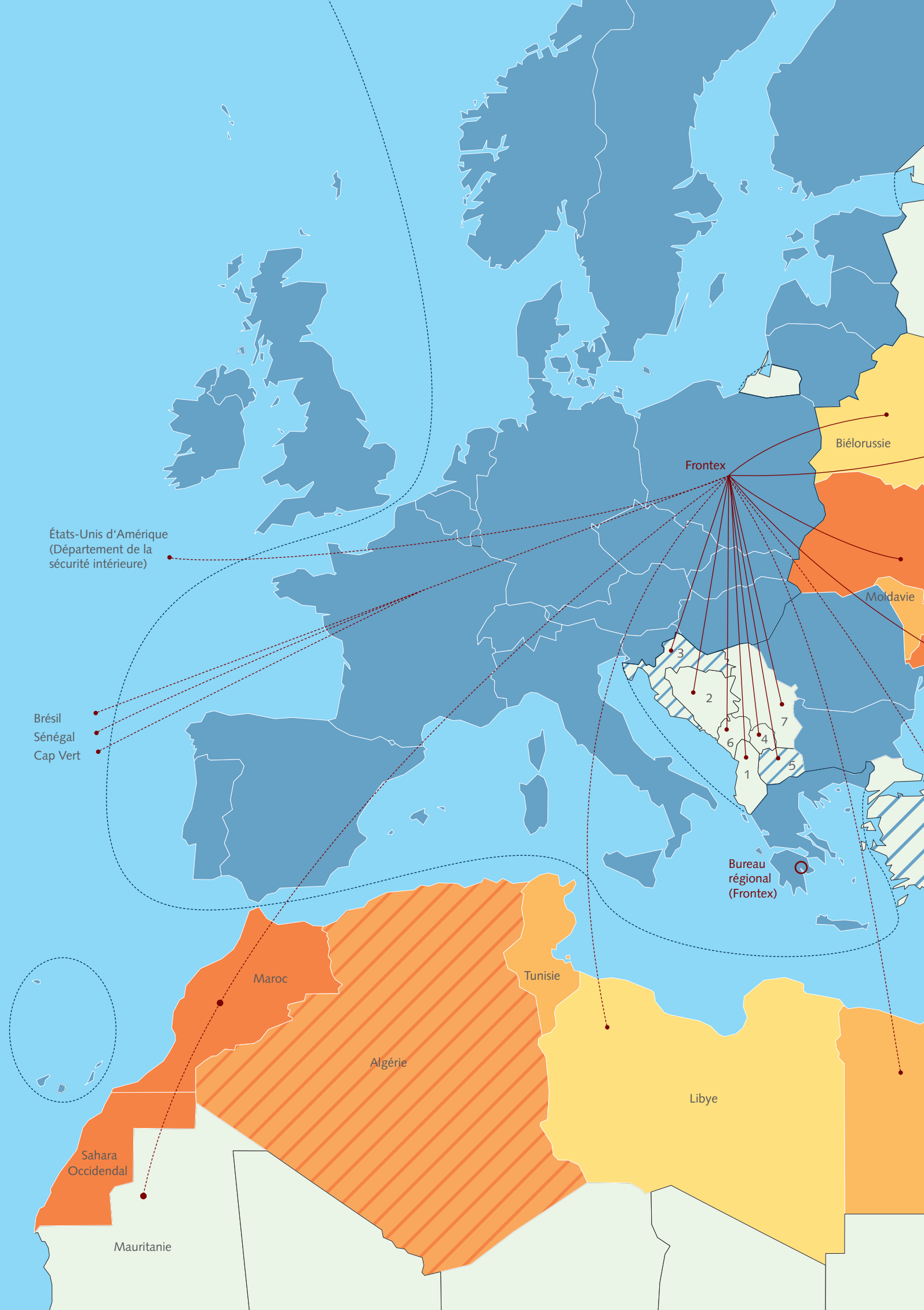
⁷¹ Goodwin-Gill G.S. (2007), *The Extraterritorial Processing of Claims to Asylum or Protection : The Legal Responsibilities of States and International Organisations*, U.T.S. Law Review, pp.26-40.

⁷² European Court of Human Rights, *BOSPHORUS V. IRELAND*, No. 45036/98, 30 June 2005, para. 154; European Court of Human Rights, *SAADI V. UK*, No. 37201/06, 28 February 2008, para. 126.

⁷³ Special Rapporteur J. Crawford, *Commentary to the Draft Articles on State Responsibility*, International Law Commission, Annual Report (2001), Chap. IV, pt 314 [available online].

⁷⁴ House of Lords *FRONTEX Report*, [available online], para. 149.

⁷⁵ *Ibid.*, para. 150.



Frontex

Biélorussie

Moldavie

États-Unis d'Amérique
(Département de la
sécurité intérieure)

Brésil
Sénégal
Cap Vert

Bureau
régional
(Frontex)

Maroc

Tunisie

Algérie

Libye


Sahara
Occidental

Mauritanie

La dimension externe de l'agence européenne de gestion des frontières de l'Union


 État de l'UE et associé à l'UE

 Candidats à l'entrée dans l'UE


 Espace Schengen

Politique européenne de voisinage (PEV)/ situation en octobre 2010

 État de l'UE et associé à l'UE


 Plan d'action adopté, accompagné d'un « statut avancé » ou d'un accord renforcé

 Plan d'action en cours de négociation

 Lien formel, sans accord spécifique

Frontex

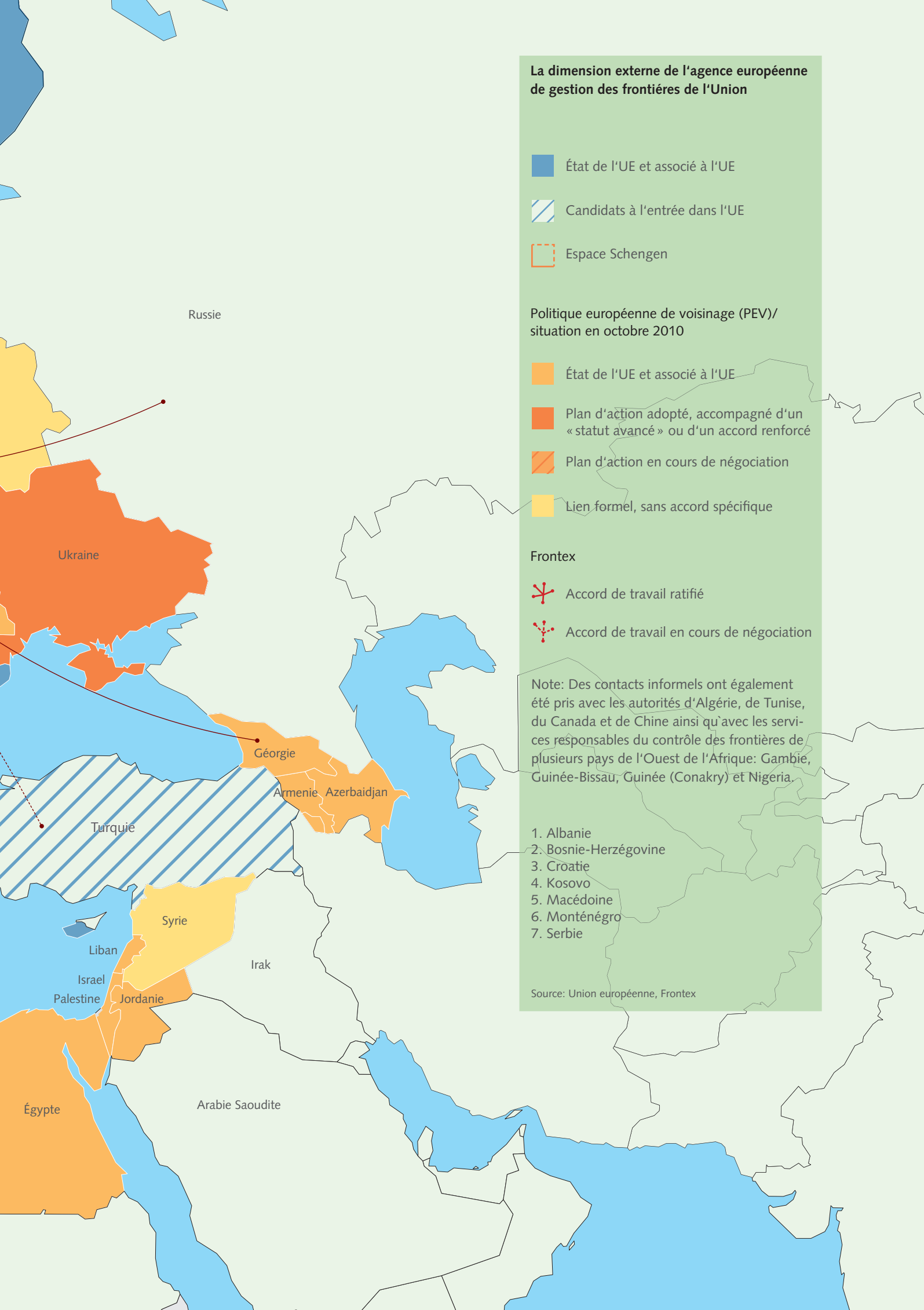
 Accord de travail ratifié

 Accord de travail en cours de négociation

Note: Des contacts informels ont également été pris avec les autorités d'Algérie, de Tunisie, du Canada et de Chine ainsi qu'avec les services responsables du contrôle des frontières de plusieurs pays de l'Ouest de l'Afrique: Gambie, Guinée-Bissau, Guinée (Conakry) et Nigeria.

1. Albanie
2. Bosnie-Herzégovine
3. Croatie
4. Kosovo
5. Macédoine
6. Monténégro
7. Serbie

Source: Union européenne, Frontex



PART III: IMPACT ON FUNDAMENTAL RIGHTS OF THE PLANNED AMENDMENT OF REGULATION 2007/2004

The Stockholm Programme adopted on 10-11 December 2009 requested the Commission to clarify the mandate and enhance the role of FRONTEX, taking account of the evaluation of the Agency and the role and responsibilities of the Member States in the area of border control. The proposed amendment of Regulation 2007/2004 presented by the Commission in February 2010 is the result of recommendations made by the Agency's Management Board and in-depth discussions at the Council and Parliament in which, according to the Commission, civil society and academia had the opportunity to express their views.

Does the Commission's proposal for a Regulation, which stresses the need to reinforce the Agency's operational capacity in terms of equipment and manpower, **address the concerns expressed in this study regarding respect for fundamental rights?** Whereas the preamble to Regulation 2007/2004 simply made a general reference to the EU Charter of Fundamental Rights, the new version, which is more detailed, might suggest that it does do so. It contains the following statement:

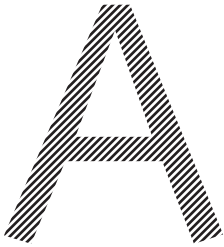
This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data, right to asylum, non-refoulement, non discrimination, the rights of the child and right to an effective remedy. This Regulation should be applied by the Member States in accordance with these rights and principles. (Recital 4).

However, **an examination of the proposed provisions shows that many grey areas still remain**, not least because the principle enshrined in Regulation 2007/2004 that *"the responsibility for the control and surveillance of external borders lies with the Member States"* remains unchanged. This exempting of FRONTEX from all responsibility for the operations that it coordinates is all the more worrying because **the proposed amendment of the Regulation aims to increase the Agency's powers in many areas**. Under the Commission's proposal, the Agency *"shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States"*, *"draw up an operational plan"* for these operations, and *"may itself initiate joint operations and pilot projects"* and *"terminate"* them. It may also decide to *"constitute a pool of border guards called Frontex Joint Support Teams"*, and shall *"ensure the operational implementation of all the organisational aspects"*.

The importance of the role conferred upon FRONTEX, as a European agency with legal personality, is increasingly at odds with its unaccountability for the operations that it co-manages.

Far from clarifying the legal framework in which the Agency operates, the respective powers attributed to the Member States and FRONTEX in the amended Regulation actually make it more opaque: whereas the Agency would have almost complete autonomy in deciding whether to embark upon or suspend joint border control operations, the officers taking part in those operations would remain *"subject to the disciplinary measures of their home Member State"* (Article 3c(4)). This set-up seems designed to enhance the lack of accountability already identified in the Agency's current functioning (cf. Part II) and to give FRONTEX total control over operations while shifting responsibility for any problems onto national officials and the Member States.

Furthermore, under the terms of the Commission proposal, the Agency *"shall evaluate the results of the joint operations and pilot projects and transmit the detailed evaluation reports within 60 days following the end of the activity to the Management Board"*. Thus, not only would FRONTEX acquire almost full management control of border control operations and pilot projects, without assuming responsibility for them, but it would also have a monopoly on evaluation and follow-up. It can therefore be argued that the Commission proposal introduces a self-assessment mechanism that makes FRONTEX accountable for its actions to itself alone, with a complete absence of transparency.



Risky 'facilitation' of cooperation with third countries

The proposed amendment to the Regulation gives FRONTEX – which is already allowed to enter into “*working arrangements*” with third countries – new instruments of cooperation. The main ones are:

- the possibility – subject to receiving a favourable opinion from the Commission – of sending “*liaison officers*” to third countries constituting “*a country of origin or transit regarding illegal migration*” (Article 14(2)). Their task is “*the establishment and maintaining of contacts with the competent authorities of the third country to which they are assigned to [sic] with a view to contribute to the prevention of and fight against illegal immigration and the return of illegal migrants*” (Article 14(3));
- the possibility of launching and financing technical assistance projects in third countries (Article 14(4)) in order to “*establish a solid cooperation model with relevant third countries*” (Recital 23);
- the inclusion, in bilateral agreements concluded between Member States and third countries, of provisions concerning the role and competencies of FRONTEX (Article 15(5)).

Finally, the proposal adds an obligation for FRONTEX to obtain a favourable opinion from the Commission before concluding “*working arrangements*” with third countries (Article 14(7)).

NB: It should be noted that the proposal for a Regulation preserves the fictitious notion of the distinction between “*operational cooperation with third countries*” and “*cooperation with competent authorities of third countries*”. It is this distinction that allows the Director of FRONTEX to maintain that the working arrangements concluded by the Agency with third countries are not subject to the rules applying to international treaties because they are concluded with the competent authorities of those countries and not with their government (cf. Part II, B.2).

Although Article 14 on cooperation with third countries is dotted with references to respect for human rights and to fundamental rights, there is reason to consider these reservations to be highly inadequate given the objectives pursued and the weakness of the effective guarantees.

1. Objectives pursued

As regards liaison officers, the main aim of sending them to countries of transit or departure is to combat illegal immigration. One of their missions is to hold back 'at source' those migrants who are not deemed suitable to go through legal migration channels, either by gathering and analysing intelligence for the purpose of risk assessments, or through direct intervention with departing migrants.

This objective is hard to reconcile with a respect for the fundamental rights described in Part I of this study. **Intervening upstream to stop the departure of an individual in order to prevent illegal immigration constitutes a violation of the right of every person to leave any country**, including his or her own country, this right being enshrined in various binding international texts. **Intervening to interrupt the journey of a migrant entitled to claim international protection is also a breach of the right to asylum and the principle of non-refoulement.**

As regards the establishment of close cooperation with third countries through technical assistance, whether or not in the framework of bilateral agreements concluded with third countries, this is part of a move to **outsource migration controls**, something that **is often incompatible with respect for migrants' rights**. By delegating responsibility for these controls to officials of countries that are not bound by the same fundamental rights obligations as the Member States – the proposed amendment to the Regulation merely refers to *"third countries in which border management practices respect minimum human rights standards"* (Article 14(2)) –, **the proposed system poses risks of serial 'outsourced' violations of rights**: not only the aforementioned right to freedom of movement and right of asylum, but also risks of inhuman and degrading treatment, particularly in mass apprehension, deportation and detention operations.

Experience shows that these fears are far from theoretical: the bilateral agreements between Italy and Libya and between Spain and Mauritania have been and continue to be the framework for regular and unpunished violations of migrants' fundamental rights (cf. Part I).

2. Weak guarantees

In the face of these risks, the guarantees offered by the amended Regulation are extremely weak. Admittedly, the proposal's provisions relating to third countries frequently mention fundamental rights, unlike the original Regulation. **However, this reference to fundamental rights will be essentially meaningless if there are no means, either upstream or downstream, of verifying that these rights are being respected.**

- *Downstream*, they are virtually non-existent. We have seen that FRONTEX alone is authorised to evaluate the operations that it coordinates and hence any rights violations that they may give rise to – but that it does not consider itself responsible for them. Any victim of such violations would have no other option but to pursue remedies against the perpetrator in a court in the third country. In the best case scenario, the perpetrator might be an official from a Member State, but he might equally be from the third country in which the operation took place. Essentially, the victim would have no chance of being heard.
- *Upstream*, the amended Regulation stipulates that, in future, authorisation from the European Commission will be required for FRONTEX to cooperate with the authorities of third countries in matters that concern it.

This new requirement raises two questions. Firstly, what about agreements that have already been concluded (cf. list in Part II)? **Secondly, does an opinion from the Commission guarantee that migrants' rights will be respected?** On the latter point, there is room for serious doubts, as the case of Libya makes clear. Despite the repeatedly expressed reservations of international organisations and NGOs about the treatment of migrants and refugees by the Libyan authorities, and despite the regular interventions of the European Parliament, the Commission has cooperated closely with the Libyan authorities for a num-

ber of years on issues of migration flow management. Moreover, on 4 October 2010 it concluded an agreement – presented in the form of a ‘joint communiqué’ between the EU and Libya – on cooperation and dialogue in the areas of borders, mobility, migration and asylum.

This formalisation of cooperation in these areas is particularly worrying. Libya has not signed the United Nations Convention relating to the Status of Refugees and its head of state is known to exploit the issue of migration to suit his own interests. A few weeks before this agreement was concluded, Muammar Gaddafi said that he was asking “*the EU to provide at least 5 billion euro a year*”, explaining that Libya “*is a gateway for illegal immigration*” and that immigration must be stopped at Libya’s borders otherwise “Europe could one day become part of Africa – it could become black, because millions [of Africans] want to come here”. **The signing of the joint communiqué between the EU and Libya is therefore set against a backdrop of blackmail** which augurs badly for the Commission’s ability to assess calmly and far-sightedly the suitability of FRONTEX entering into arrangements with particular third countries.

B

What framework for joint return operations?

Called on by Regulation 2007/2004 to provide “*the necessary assistance for organising joint return operations of Member States*”, FRONTEX has become increasingly involved in this activity by coordinating joint flights (‘FRONTEX charter flights’). However, this assistance is not a priori part of border control activities, and unlike the other provisions of the Commission’s proposed amendment to the Regulation, those relating to the joint return operations do not substantially strengthen the Agency’s powers. The proposed new Article 9 simply enshrines the Agency’s current de facto role in the coordination and organisation of these operations, and stipulates that it may decide to finance or co-finance them (Article 9(1)).

1. Code of Conduct and independent monitoring of joint flights

The main changes made to the procedure for return operations tend, at first glance, to introduce a better framework and greater transparency, most notably owing to the obligations imposed by Directive 2008/115 (the ‘Return’ directive), which stipulates that the monitoring of joint return operations “*should be carried out independently and should cover the whole joint return operation from the pre-departure phase until the hand-over of the returnees in the country of return*” (Article 9(2)). The proposal states on several occasions that activities linked to the removal of foreign nationals must be carried out in conformity with the EU Charter of Fundamental Rights (Recital 21). It requires FRONTEX to develop a “*Code of Conduct for the return of illegally present third-country nationals by air which shall apply during all joint return operations coordinated by the Agency, describing common standardized procedures which should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination*” (Article 9(2)).

It also states that “*observations of the monitor, which shall cover the compliance with the Code of Conduct [...] shall be made available to the Commission*”, and the “*reports of the monitor shall be included in an annual reporting mechanism*” (Article 9(3)).

2. Highly dangerous operations

Although these proposed improvements to operation follow-up and monitoring have the advantage of introducing transparency into a system that is conducive to irregularities and the dilution of responsibilities (cf. Parts I and II), they leave open a whole series of questions relating to their effectiveness and scope.

- **What effective procedures will there be to ascertain in a timely fashion that the Code of Conduct is being adhered to?**

The existence of a Code of Conduct, combined with training of the officials required to take part in joint return operations, is a good preventive measure, and monitoring how operations were conducted after the event is also a welcome development for the future. However, given the circumstances in which forced returns take place (use of restraint and sometimes of force), these pre and post measures do not address the need for immediate recourse to an independent authority in case of problems during a return operation – problems that witness accounts indicate are far from hypothetical. What possibilities are there for a person who suffers ill-treatment during a return operation to enforce his rights not to be treated in a manner contrary to the requirements of the Code of Conduct? Once he has been handed over to the authorities in the country of return, what actual possibilities does this victim have to bring a case before a court of law in order to obtain redress?

- **How binding is the Code of Conduct? What sanctions are there for violations of the Code?**

The proposal for a Regulation requires the Agency to “develop” a Code of Conduct, which “shall apply” to all operations, “describing” the procedures aimed at ensuring respect for rights. These terms do not make the Code of Conduct binding in any formal way, and the mechanism does not indicate what type of sanctions would apply to those breaking the Code – assuming that they could be identified (cf. above). In addition to these questions, there is the fundamental problem of the ambiguity of how tasks are shared out between FRONTEX and Member States, or their officials (cf. A.). The combination of all these uncertainties considerably weakens the scope of the new measure.

- **What kind of relations exist with third countries of return during joint return operations?**

One of the keys to the ‘success’ of a joint return operation is the collaboration of authorities in the country of return. In this connection, the proposal for a Regulation states that the “Agency shall cooperate with competent authorities of the relevant third countries [and] identify best practices on the acquisition of travel documents and the return of illegally present third-country nationals” (Article 9(5)). How does this cooperation fit in with the requirements of the Code of Conduct for return operations? More generally, here again we encounter the above-mentioned risks (B.) regarding cooperation with countries whose legal framework on human rights does not provide the necessary guarantees. The problem is made all the more acute by the fact that joint return operations are by their very nature highly dangerous⁷⁶.

- **Based on what information will the independent monitor draw up his report?**

What means will there be to enable the monitor of return operations, who is competent at all stages of the process, to carry out his task? Will he have staff posted to the places of detention where foreign nationals are often held before being deported? On board the aircraft? At the destination airports? What about after the deportees have been handed over to the authorities in the country of

⁷⁶ The Institute of Race Relations (IRR) identified 38 cases of deaths of migrants and asylum-seekers between January 2009 and June 2010 in the European Union, Switzerland and Norway. Cf. IRR (2010) Accelerated removals: a study of the human cost of EU deportation policies, 2009-2010, 29 p. [available online]

return? What possibilities will there be for people who have experienced or witnessed ill-treatment to contact the monitor? Without specific answers to all of these questions, the independent monitoring provided for by the proposed Regulation risks being little more than a formality.

- **What will be the scope of the monitor's reports, how will they be made public and what action will be taken in response to them?**

According to the proposal for a Regulation, the observations of the monitor in relation to fundamental rights will be made available to the Commission and form part of the Final Return Operation Report. Do these communications guarantee transparency regarding possible human rights violations of which the monitor becomes aware? Will the monitor's annual reports be made public? How will the Commission handle the monitor's observations? What mechanisms are proposed to identify and/or prosecute the perpetrators of human rights violations uncovered by the monitor?

Paradoxically, therefore, the part of the proposed Regulation relating to joint deportation flights, which appears at first glance to take most account of respect for human rights, is actually the one that creates the most uncertainty. Vigilance is therefore required, all the more so because the stakes – as we saw in Part I – are high.



Fundamental rights: a big gap between text and reality

At first glance, the proposal for a Regulation, unlike Regulation 2007/2004, appears to be rooted in respect for fundamental rights, which is one of the criteria for evaluating the options in the impact assessment carried out by the Commission. It echoes the note sent by FRONTEX to the European Parliament on 8 October 2010, which states in its introduction that respect for fundamental rights is “*unconditional*” for the Agency and is “fully integrated into its activities”.

However, a detailed examination of the proposal undermines this first impression:

In addition to the reaffirmation of principles contained in the preamble and Article 1, the proposal refers explicitly to respect for fundamental rights in the provisions relating to cooperation on returns (Article 9), cooperation with third countries (Article 14) and the activity of the FRONTEX Joint Support Teams (Article 3b(4)). It stipulates that border guards, other personnel of the Member States and the Agency's staff “*shall, prior to their participation in operational activities organised by the Agency, have received training [...] including [on] fundamental rights and access to international protection*” (Article 2(1a)), as shall instructors of the national border guards of Member States (Article 4(7)). Finally, the preamble reiterates that one of the partners with which FRONTEX cooperates is the Fundamental Rights Agency. However, these two points are not new, since they are based on working arrangements already concluded by FRONTEX with UNHCR and the Fundamental Rights Agency.

As regards joint return operations and relations with third countries, we have already shown how guarantees could be sidestepped or weakened and highlighted all the questions that remain unanswered regarding the effective enforcement of rights (cf. B. and C.).

Aside from this, it can be noted, firstly, that nothing is said on this subject in the section dealing with the new competencies awarded to FRONTEX in the co-management of joint operations, that there is virtually no reference to the right of asylum, and more generally, that the proposal for a Regulation highlights a lack of transparency which hampers effective respect for fundamental rights.

1. Shortcomings in the management of joint operations

- *Discontinuation*: it is stated that FRONTEX may “*terminate*” joint operations “*if the conditions to conduct these initiatives are no longer fulfilled*” (Article 3(1)). No details are given regarding the nature of the conditions to be considered, and in any case this provision does not indicate whether FRONTEX could decide to discontinue an operation if its progress is threatening fundamental rights.
- *Evaluation*: we have seen that the Agency “*shall evaluate the results of the joint operations and pilot projects*” (Article 3(4)) and must transmit these results to the Management Board. However, there are no details of the information taken into account in these results, and in particular whether, in addition to material aspects, an assessment of the operation in terms of

respect for fundamental rights will be carried out. The explanation that these evaluations are intended to enhance *“the quality, coherence and efficiency of future operations and projects”* sheds no light on this question. In particular, one might ask whether the requirement of Article 3b(4) that *“[m]embers of the Frontex Joint Support Teams shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights”* is subject to evaluation and, if so, what method of evaluation is used.

- Interventions at sea: the operational plan drawn up by FRONTEX for the joint operations that it co-manages must mention *“regarding sea operations, specific requirements regarding the applicable jurisdiction and maritime law provisions”* (Article 3a(ii)). Although sea operations are a very fertile breeding ground for violations of the rights of intercepted persons, in particular because of the vulnerability of the individuals concerned and the uncertainty regarding accountability, there is no mention of specific requirements regarding respect for fundamental rights.

2. Almost no reference to the right of asylum

Given the high probability, during border surveillance operations involving the deployment of maritime patrols and the outsourcing or subcontracting of controls, of confrontation between FRONTEX personnel and persons requiring international protection, it is surprising that there is no reference in the proposed Regulation to the Geneva Convention on Refugees and that the principle of non-refoulement is not mentioned in the preamble.

For a long time, FRONTEX'S response to criticism that it failed to respect the right of asylum was that its mandate did not include competence in this area. This response is no longer possible since the Agency now says that fundamental rights are central to its activities. Nonetheless, it should be noted that the proposal for a Regulation does not make any improvement in this area, aside from statements of principle. In particular, we would like to see an affirmation that the principle of non-refoulement applies to all operations coordinated by FRONTEX at borders, and a reminder of the obligation to comply with the rules laid down in directives adopted by the EU, most notably concerning the reception of asylum seekers and the procedures applying to them, especially during maritime interceptions.

3. Lack of transparency

The best guarantee that fundamental rights will be respected in procedures involving representatives of public authority is the transparency of those procedures. This principle is particularly relevant to FRONTEX operations given the potential for incidents to occur (especially during joint return operations) and the fact that these operations target vulnerable individuals. Experience from the Agency's first years of existence does not belie the need for such transparency.

However, it can be seen that the proposed Regulation largely preserves the lack of transparency and the culture of secrecy surrounding FRONTEX operations. Admittedly, a general analysis of joint operation evaluations is included in the Agency's annual report, which is sent to the EU institutions and also made public. However, as has already been pointed out, these evaluations are derived largely from FRONTEX

itself (cf. A.2). The provisions relating to monitoring of joint return operations require the monitor's observations to be made available to the Commission and included in the final report on the operation concerned. However, they do not specify whether that report is made public, or at the very least made available to the other EU institutions.

Finally, it should also be noted that neither the procedures for implementing joint operations (drawing-up of an operational plan, organisational aspects such as reporting of incidents and specific requirements for sea operations) nor the relationship between FRONTEX and the Member States with which it cooperates, nor organisational plans for joint return operations are the subject of information provided to the European Parliament.

Conclusion and recommendations

It is not enough to decree that fundamental rights must be respected: it is also necessary to provide the legal means and democratic safeguards needed to achieve this. The proposal for a Regulation amending the Regulation establishing the FRONTEX Agency does neither of these things. Over the five years in which the Agency has been operating, many questions have been asked about the compatibility of its functioning with respect for the rights of individuals. The Commission's proposed Regulation only addresses a very few of these questions, and raises many more. Until the Agency's objectives are fundamentally reviewed and seen in the context of the threats the Agency poses to respect for rights, it is questionable whether FRONTEX itself is compatible with human rights.

In the meantime, a number of measures should be introduced into the amended Regulation to bring the rules governing the functioning of FRONTEX more closely into line with standards on fundamental rights:

- There should be a clear division of responsibilities between Member States and FRONTEX in line with the Agency's expanded role, ensuring that FRONTEX has full legal responsibility for acts committed during the operations that it coordinates, wherever they take place.
- It should be explicitly stated that all operations coordinated by FRONTEX must comply with EU directives on asylum, in particular Directive 2003/9 (on reception) and Directive 2005/85 (on procedures), as well as the principle of non-refoulement, including during interventions at sea wherever they take place, and during interventions involving officials acting under the authority of FRONTEX and liaison officers deployed by the Agency.
- It should be explicitly stated that operations coordinated by and/or involving officers placed under the authority of FRONTEX outside EU territory must be consistent with respect for the right to leave any country, including one's own (Article 12.2 ICCPR).
- Independent monitoring mechanisms should be implemented during operations coordinated by FRONTEX (joint operations, joint return operations, deployment of liaison officers), and the conclusions and follow-up of monitoring operations should be communicated regularly to the European Parliament and made public.
- For monitoring of joint return operations, enough personnel should be made available to ensure that monitoring can take place at every stage, including inside the places of detention where deportees are held, onboard aircraft, and when deportees are handed over to the authorities of the country of return.
- The Code of Conduct for return operations should be made binding.
- Decisions taken by FRONTEX in relation to joint operations and pilot projects that it coordinates should be made available to the European Parliament.
- There should be mandatory consultation of the European Parliament whenever negotiations are opened between FRONTEX and a third country or the authorities of that country, and any agreement reached by FRONTEX during the negotiations should be submitted to the Parliament before being concluded.

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