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## Frontex and the respect of fundamental rights: from better protection to full responsibility

*Yves Pascouau and Pascal Schumacher*

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The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was created to improve border management cooperation between Member States. Seen from its inception as a security-oriented body, tools and rules have been gradually developed to enhance the human rights dimension and protection regarding Frontex activities. However, this step has not been accompanied with the explicit recognition of Frontex's legal responsibility regarding violations of human rights occurring during joint operations it coordinates.

Frontex argues it has only a coordination role and therefore legal responsibility falls within the remit of Member States involved in joint operations. In a context where voices call for a change in this regard, this paper identifies several ways of engaging Frontex's legal responsibility. As this requires the development of a full body of rules protecting human rights, such a change would create political tensions regarding the aspect of exercising sovereign powers.

### BACKGROUND

The work of border guards is at the heart of national sovereignty and has long been the preserve of national governments, thus making it impermeable and impenetrable. With the 'Europeanisation' of border management which started with Schengen cooperation, national sovereignty over border management has decreased. Conditions for entering the EU including the controls border guards have to perform are now embedded in EU law (the Schengen Borders Code). In addition, the operational side of the policy i.e. the practical implementation of EU rules by national border guards, is subject to an ever growing coordination process led by Frontex.

The rapid Europeanisation of border management over the last 25 years has increased the focus on this policy area. Civil society, media, as well as independent stakeholders have put pressure on the EU and its Member States, and in particular Frontex, and forced them to develop border management activities in conformity with human rights requirements. Pressure also came from the European Parliament (EP) which has made fundamental rights its 'war horse' regarding Frontex's mandate. The EP has in particular been a key player in the creation of the Frontex Fundamental Rights Officer (FRO), the Consultative Forum on Fundamental Rights (CF) and the extension of Frontex's duties regarding interceptions and rescue in the framework of operations at sea.

Paradoxically, Frontex's action has turned from pure border management, generally considered as a threat to fundamental rights, into a broader mandate including the promotion of human rights. The security-oriented approach is balanced with a human-rights-based approach.

On 27 June 2013, the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) of the EP held a session where the FRO and representatives of the CF attended. While this session highlighted the Agency's contribution to fundamental rights, it also underlined that in practice fundamental rights are still insufficiently respected.

Furthermore, in February 2013 the European Ombudsman intervened at the same forum in favour of the principle of the Agency's responsibility. Against Frontex's arguments to deny its responsibility, the Ombudsman underlined that responsibility cannot be divided artificially and the Agency should at least grant effective access to an individual complaint mechanism.

Although the risk of violating fundamental rights may be inherent to the nature of border control, border management is evolving in the right direction while remaining under wide, watchful and critical attention, especially from civil society and media. Frontex has a lot to gain by assuming the role of promoting and strengthening the respect for human rights. But, can Frontex perform better in this field and can its legal responsibility be recognised?

## STATE OF PLAY – ENHANCING HUMAN RIGHTS OBLIGATIONS AND MONITORING MECHANISMS

The rights guaranteed by international, European and state jurisdictions have gradually developed to the extent that they should be fully respected in theory. This development also applies to Frontex, which is compelled to respect all fundamental rights in its actions, especially those enshrined in the Charter of Fundamental Rights of the EU. In particular, the right to life; the respect for human dignity; the ban on torture and humiliating and degrading acts; the right to *non-refoulement*; access to asylum procedures; and the prohibition of collective expulsions.

In this view, and alongside Frontex's operational mandate consisting of helping border authorities from different EU Member States to work together, Frontex was instructed, under the EP insistence, to draw up, further develop and implement a Fundamental Rights Strategy. In addition, duties to respect human rights have been enhanced in the latest regulation adopted regarding operations at sea. The establishment of effective monitoring mechanisms was therefore indispensable to legitimatise the Agency's activities.

### **The guarantee of rights: constant improvements via formal and informal mechanisms**

Proclaiming rights is one thing; making sure that these rights are guaranteed by Frontex through its action, is another thing. In this view, several *ex-ante* and *ex-post* mechanisms have been established.

The Frontex operational framework in regards to fundamental rights is based upon a strategy (adopted in March 2011), an implementation action plan (adopted in September 2011), the 2013 annual work programme of the Consultative Forum (CF) and the Code of Conduct for all persons participating in Frontex activities. These documents reaffirm respect for fundamental rights as an essential part of integrated border management. They set ambitious challenges in the field of operations, capacity building, external relations and professional conduct.

Alongside these actions, the FRO and the CF play a central role. The CF, in place since September 2012, is composed of 15 organisations specialised in different aspects of Human Rights and sharing expertise on migration issues. The CF shall be consulted on the further development and implementation of the Fundamental Rights Strategy, the Code of Conduct and common core curricula. The FRO provides preventive and corrective measures based on field visits conducted on its own initiative and assessments of the input provided in the reporting system regarding joint operations.

Although many Member States were reluctant at the beginning, they agreed that the FRO and the CF shall obtain access to all information regarding the Agency's activities concerning respect for fundamental rights.

In addition, Frontex has developed several internal reporting mechanisms in case of fundamental rights' infringements. Firstly, a requirement in the Frontex Code of Conduct obliges participants of joint operations, such as Frontex staff and national guest officers, to report to the Agency any incidents that may eventually cause a violation of a fundamental right.

Secondly, a reporting system of internal incidents is performed via the Frontex Situation Centre. It monitors all incidents occurring in joint operations and if necessary alerts the Frontex coordinating officers. The Frontex Executive Director shall suspend or terminate, in whole or in part, joint operations if they consider that violations of fundamental rights or international protection obligations in the course of joint operation are of a serious nature or are likely to persist.

Thirdly, new provisions on the respect for fundamental rights were added to the standard operating procedure in joint operations and pilot projects. Frontex now has to seriously consider reports of possible violations in Frontex coordinated activities provided by any external sources (NGOs, Media reports, etc.) by all possible ways.

Despite this rather attractive portrait of the *ex-ante* system, there are still some deficiencies. The power of the two internal bodies (FRO and CF) are limited to recommendations, therefore, one can hope that upcoming evaluations encourage the legislator to strengthen their role.

Finally, the new regulation establishing rules for the surveillance of the external sea borders in the framework of Frontex operations indicates that such operations should be conducted in accordance with an operational plan defined by Frontex. The regulation underlines that such an operational plan should include references to Union and international law regarding interception, rescue at sea and disembarkation. While these plans should respect human rights, the ECJ has mentioned that they produce binding legal effects for Member States implementing them in the framework of operations coordinated by Frontex. In the end, the new regulation creates a chain of obligations *vis-à-vis* human rights on Frontex where it defines the operational plan, and on the Member States, when implementing the plan.

## **The influence of European Court of Human Rights (ECtHR) jurisprudence over Frontex's action (the *Hirsi* case law)**

In a recent landmark case the ECtHR strongly advocated the necessity to respect fundamental rights when intercepting migrants at sea and recalled the imperative extraterritorial effect of the guaranteed rights. The *Hirsi* case, from 23 February 2012, is about boats carrying refugees within the maritime area of search and rescue under the jurisdiction of Malta, and intercepted by Italian military ships. The Italian authorities boarded the refugees and returned them immediately to Tripoli where they were delivered to the Libyan authorities. Persons intercepted and taken on board by state vessels on the high seas, outside territorial waters or sea areas of the coastal state, are within the jurisdiction of the flag state of that vessel. Hence, states are bound by the *non-refoulement* obligation and should avoid immediate return following interception to the country of origin and establish the obligation of state protection.

The Court underlined that as long as a state exercises its effective control over an individual, its authority and consequently its jurisdiction on an individual, through its agents operating outside the territory, it has the obligation to recognise rights and freedoms defined under the European Convention of Human Right (ECHR). Even in international waters, participating Member States are under an ECHR obligation to secure everyone the rights and freedoms defined in the Convention.

Italy had in this specific case, the obligation not to return persons in a country where they would run a real risk of being subject to ill-treatment or other similar situations prohibited by the Convention. The ECtHR has though conferred an extraterritorial scope to the guaranteed rights.

This reasoning should be and has been extended to Frontex operations at sea. Indeed, it has framed the adoption of new Frontex rules regarding operations at sea which guarantee more legal certainty about the respect of fundamental rights and particularly the principle of *non-refoulement* during Frontex sea operations. This new legal framework in conjunction with the recent pragmatic mechanisms of the FRO and the CF present a major step towards better and effective respect of human rights in the European surveillance of external maritime borders. However a further step would be to recognise the legal responsibility of Frontex.

## **PROSPECTS – WAYS OF ENGAGING FRONTEX RESPONSIBILITY**

While Frontex has proven to be a vector to improve human rights protection in joint operations, a further evolution would be to define its responsibility where human rights violations are reported in joint operations. Despite Frontex's position rejecting such a responsibility, it is no longer clear whether this position can be maintained, as the paper demonstrates.

### **The binding effect of operational plans**

Frontex Joint Operations are based on operational plans drawn up by the Frontex Executive Director. These operational plans detail the organisational aspects of joint operations such as the objective of the operation, its duration, the geographical area covered, the composition of the teams, command and control provisions, the equipment involved, etc. Regarding sea operations, operational plans shall include specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation takes place, including references to international and Union law regarding interception, rescue at sea and disembarkation.

The obligation to include specific information regarding EU and internal law in the operation plan has been reiterated in the new regulation regarding Frontex operations at sea. In legal terms this has a major impact on Frontex's responsibility. While the operational plan is the 'matrix' border guards have to implement during joint operations, it must be fully compatible with human rights. It is a duty for the Frontex Executive Director to make sure that operational plans ensure the full respect of human rights. If this is not the case, it should be established that an operational plan which violates fundamental rights leads to engage Frontex's responsibility. This could happen during a trial where a victim claims a violation of their human rights deriving from the implementation of the plan.

### **EU Joint operations fall within the scope of the Charter of Fundamental Rights**

In addition to the first argumentation, it should be underlined that Frontex joint operations fall within the scope of the Charter of Fundamental Rights. The latter can therefore be invoked before a national court or eventually even before the court of Luxembourg.

This derives from the European Court of Justice (ECJ) jurisprudence. On the one hand, the Court has affirmed the Union's jurisdiction for monitoring external maritime border rules. It has more precisely underlined that in such operations the fundamental rights of the persons concerned may be interfered to such an extent that the involvement of the EU legislator is required. This entails the application of the Charter of Fundamental Rights.

On the other hand, according to Article 51, the Charter applies within the scope of EU law implementation. The Court added "applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter" (ECJ Åklagaren/Hans Åkerberg Fransson). This applies to Frontex joint operations.

Finally, some would argue that Frontex operations are carried out by the police or other law-enforcement services of Member States and that this leads to the exclusion of the jurisdiction of the ECJ regarding police and public security operation (as organised by Article 276 TFEU). However, such operations pursue primarily an immigration objective and should not be considered as missions which purposefully side with maintenance of law and order and the safeguarding of internal security. Otherwise the legal basis for adopting the Frontex regulation should be different, namely Art. 87.3 requiring the special legislative procedure, and not Art. 77 as is the case.

All in all, it seems inconceivable to exclude the Union competence as the European legislator has devoted an organisational role to the Agency and has provided safeguards in terms of fundamental rights.

### **The engagement of EU's non-contractual responsibility**

Another possibility would be to establish the *imputability* of the EU/Frontex responsibility for an alleged violation. In a case of an alleged violation, the primary interest of a victim is not to seek for an *ex-post* annulment of a border-guard decision, but to receive compensation. In such a scenario, Frontex's legal responsibility could be engaged. The purpose of *lucre*, often criticised in the Union, would this time become a lever for the protection of fundamental rights. The victim could aim for a full jurisdiction litigation, as provided for by Articles 268 and 340, paragraph 2 TFEU on non-contractual responsibility of the EU.

In this case, the European judge will have to determine whether the act in question is actually taken by Frontex and whether it is attributable to the Union action. During such an assessment, the judge will undoubtedly examine the role of Frontex in joint operations. As the Agency's role is not limited to pure coordination between resources provided by Member States, but concerns participation in the decision-making, Frontex would have difficulties in arguing against its responsibility. The difficulty will lie at the evidence since accountability requires the plaintiff to demonstrate a causal link between the Agency's act and the damage caused.

Denying any responsibility would become even more difficult to maintain as Frontex's financial and material resources are significant even if decreasing today. If alleged violations occur within a deployment of European Border Guards Teams (EBGT) and with Frontex's own resources, the presumption of responsibility will be significantly strengthened.

### **EU's accession to the ECHR and impact on Frontex responsibility**

At present, the EU is not signatory of the ECHR, therefore only the responsibility of the contracting states may be engaged before the ECtHR. It will be different with the forthcoming accession of the EU to the ECHR. This accession will raise further questions, and challenge the Union's competence and responsibility for Frontex operations. It opens the door for actions to engage either the Union's legal responsibility as such, or the Union legal responsibility in conjunction with a Member State. Such a scenario would nevertheless require defining how the exhaustion of the 'European' remedies is completed for an individual.

In conclusion, Frontex has proven to be a tool that improves the respect of fundamental rights in joint operations. The evolution is certainly positive, but not yet complete. Standards have now been elaborated, but need further development as well as effective implementation. In addition, legal responsibility and enhanced transparency regarding access to documents such as operational plans are remaining steps to be completed.

Meanwhile, it is possible that these issues will be resolved when national or European courts will be seized. Completing the regime of responsibility is a crucial issue which puts the Union reputation at stake, as it will be judged on the respect of its own constitutional values.

***Yves Pascouau is Director of Migration and Mobility Policies and Head of European Migration and Diversity programme at the European Policy Centre (EPC) and Pascal Schumacher is JHA Counsellor at the Permanent Representation of Luxembourg to the EU. This text expresses their personal views.***

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium  
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: [info@epc.eu](mailto:info@epc.eu) ■ Twitter: [@epc\\_eu](https://twitter.com/epc_eu) ■ Website: [www.epc.eu](http://www.epc.eu)



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