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Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

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1 INTRODUCTION

As Chapter II has shown, the powers of Frontex range from initiating, organising and coordinating joint border surveillance operations and pilot projects, as well as return operations upon request of a member state or on its own initiative, to monitoring the capacity and readiness of the member states to face migratory pressures and possible crisis at their borders effectively, and imposing measures when deemed necessary with or without the consent of the host member state. The agency also has an essential role in research and risk analysis, as well as the management of EUROSUR and the centralised returns platform.

These activities are inherently sensitive to human rights violations. When these sensitivities materialise into real violations, the need arises to protect the rights of the individual. Tensions between Frontex operations and human rights and relevant criticisms have been repeatedly expressed by civil society¹ and academia since early on.² This chapter aims to showcase the societal problem that this study aims to address, in particular, to illuminate the sensitivity of the agency's work and examine the specific nature of these sensitivities by identifying the rights that may be at stake during Frontex operations. It is not the purpose of this study, nor is it deemed feasible at the level of academic research, to prove the occurrence of breaches of human rights law. However, Frontex documents, such as Annual Reports and reports of governmental and non-governmental organisations are studied, to provide illustrations and indications of such potential breaches.

First, the border operations are examined that are conducted at the sea, land, and air borders as well as the parallel issue of cooperation with the national authorities of the member states with respect to the apprehended migrants. Next, I describe the hazards for fundamental rights that arise during joint return operations. Taking a step back, I further examine the situation as it manifests itself before the realisation of the operations on the ground, concerning the information activities of the agency, its cooperation with third states, and its risk analyses.

1 Amnesty International 2007; Amnesty International 2008, p. 276; Refugee Council and ECRE 2007.

2 Carrera 2008; Baldaccini 2010.

2 JOINT BORDER SURVEILLANCE OPERATIONS

It is the area of on-the-ground-operational activities that presents the most obvious relationship with fundamental rights. In joint border surveillance operations, the rights that are at particularly high stake, as they have been reported by NGOs and international organisations such as UNHCR, the EU Fundamental Rights Agency (FRA), or the Parliamentary Assembly of the Council of Europe (PACE), are protection against refoulement and collective expulsions, the right to claim asylum, protection against inhuman and degrading treatment, the right to leave a country, protection of personal data; and protection from discrimination.³

The primary objective of Frontex is to safeguard the security of the common borders, and it is precisely its success in meeting its goals that raises human rights concerns. Its approach towards Iraqis already since 2007 is indicative. In particular, 18.4% of all asylum applications in Europe in the period January – September 2007 were lodged by Iraqis,⁴ which, to the largest extent, were afforded international protection. While Frontex acknowledges this, its primary concern appears to be that 80-90% of the Iraqis applying for asylum in Sweden⁵ could have been intercepted before reaching the territory.⁶

2.1 Sea borders

This is especially the case with respect to interceptions at sea, where border guards participating in Frontex operations may not only stop vessels trying to enter EU territory irregularly, but also conduct the ship or persons on board to a third country, or otherwise hand over the ship or persons on board to the authorities of a third country.⁷

The agency counts in its successes that its operations have led to a considerable decrease in the number of irregular entries in Europe. For instance, Frontex reported a decrease in irregular migration flows of 80% in 2011,⁸ a year of massive migration flows triggered by the Arab Spring. That year, 59,592 migrants were refused entry at the land borders, 49,393 at the

3 See Chapter II for elaboration on the legal framework; Statewatch and Migreurop 2012, p. 1.

4 UNHCR 2007b.

5 Iraqis were awarded international protection at 90% in Sweden. Sperl 2007; UNHCR 2007a.

6 Frontex 2007c, p. 1.

7 Council Decision 252/2010 was annulled with *European Parliament v. Council*, but it remains in force until a new text is adopted. The European Commission presented in 2013 a new Proposal for a Regulation establishing rules for the surveillance of the external sea borders, 2013/0106 (COD) of 12.4.2013; FRA 2013a, p. 11.

8 Frontex 2011d, p. 49.

air borders, and 9,000 at the sea external borders of Europe.⁹ A further 50% decrease is reported for 2012.¹⁰

Although several other head-count figures are provided in Frontex reports with respect to the people apprehended or detained, or to the falsified travel documents detected, there is no information available on the specific characteristics of the third-country nationals involved, the destination of those that are diverted, or a follow up of their situation.

Refugees and economic migrants tend to travel in mixed flows, and those eligible for international protection cannot be easily identified.¹¹ The European Commission has acknowledged that border guards are frequently confronted with situations involving persons in need of international protection.¹²

However, neither the Commission in its evaluation report nor the agency in its annual reports refers to the procedures to which these migrants are subjected, such as lodging an asylum application or an appeal against the refusal of entry or the fate of those diverted.¹³ According to Amnesty International and the European Council on Refugees and Exiles (ECRE), Frontex does not know whether any asylum claims were made during interception operations.¹⁴

Since information on whether those diverted back had protection concerns is lacking, a legitimate argument exists suggesting that, among those diverted back, there are refugees, victims of trafficking, unaccompanied minors or other vulnerable groups.¹⁵ Without reaching the territory of an EU state, these persons were deprived of the opportunity to seek international protection. The possibility of assessing asylum claims onboard

9 Frontex 2012a.

10 Frontex 2013a.

11 Vandvik 2008, p. 31; Betts 2006, pp.: 656-659; Kneebone, McDowell and Morrell 2006, pp.: 492-493.

12 European Commission, Report on the evaluation and future development of the FRONTEX agency, COM (2008) 67 final, Brussels, 13 February 2008, p.5.

13 Meijers Committee, 'Views Standing Committee on the evaluation and future development of the FRONTEX agency (COM(2008) 67 final)', addressed to the European Parliament, 4 April 2008. S. Sirtori and P. Coelho, *Defending Refugees' Access to Protection in Europe* (ECRE paper), Brussels: European Council on Refugees and Exiles December 2007, p. 12, https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf.

14 Amnesty International and ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 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), September 2010, <https://www.refworld.org/docid/4ca337ca2.html>.

15 One case of an EU national being on board a migrant vessel has been reported. N. Pisa, 'German mum grabs nine-year-old daughter and flees husband with immigrants to Italy', *Daily Mail Online* 8 March 2011, <https://www.dailymail.co.uk/news/article-1364173/German-mum-grabs-year-old-daughter-flees-husband-immigrants-Italy.html>.

has been evaluated as inadequate.¹⁶ Even when potential refugees are not returned to the country from where they are fleeing, they may be sent back to the place of departure that is usually countries, such as Libya and Senegal that do not have a system providing protection to those who seek asylum.¹⁷

Not only operations designed to prevent irregular access, but also search and rescue operations, where the priority is to bring the shipwrecked to a place of safety, must be measured against the prohibition of refoulement.¹⁸ This means that when migrant ships are forced to sail to a port of safety in a third country, without having identified those in need of international protection, there are legitimate reasons to believe that the rescue operation could result in grave human rights violations.¹⁹

The protection of the procedural rights of those eligible for international protection can only be guaranteed through procedural rights that are only practicable when the applicant is within the state's territory.²⁰ It is only there that a substantive examination of the individual application; the right to information and legal representation; the right to contact the UNHCR; and an effective legal remedy with suspensive effect can be materialised. This also seems to be the rationale behind the Asylum Procedures Directive,²¹ which generally provides for the right of applicants to stay until their applications are examined.²²

The UN High Commissioner for Refugees has repeatedly stated that those persons in need of international protection should be enabled access to the EU, while he has compared Europe to the Wild West, where human life no longer has value.²³ This view that access to the territory is essential

16 ECtHR 23 February 2012, App. No. 27765/09, (*Hirsi Jamaa and Others v. Italy*); FRA 2013a, pp. 12, 68, 69.

17 L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', *Journal for Contemporary European Research* 2011, vol. 7(4), p. 482; The situation in third countries concerning violations other than those relating to international protection are examined below under the section 5; FRA 2013a, p. 49.

18 Article 4 Frontex Sea Operations Regulation.

19 R. Weinzierl and U. Lisson, 'Border Management and Human Rights: A study of EU Law and the Law of the Sea', *German Institute for Human Rights*, 2007, p. 16, <http://www.state-watch.org/news/2008/feb/eu-study-border-management.pdf>; The rules on disembarkation of apprehended migrants are not clear. House of Lords, 'Frontex: the EU External Borders Agency. Report with Evidence', HL Paper 60, London, 5 March 2008, p. 37, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>.

20 For instance, the right to be given reasons for the refusal of entry, the right to appeal a negative decision, and the right to remain in the territory pending the appeal.

21 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status.

22 Weinzierl and Lisson 2007, p. 14.

23 UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, Geneva: United Nations High Commissioner for Refugees September 2007, pp.: 8,9, <https://www.refworld.org/pdfid/46e159f82.pdf>.

for access to protection, among others, by PACE,²⁴ the ECtHR,²⁵ and the LIBE Committee.²⁶ Indeed, the graveness and irreversible nature of the harms that may result from these diversions is such that there is no room for derogations from the procedural guarantees at the border under any circumstances.²⁷

The UNHCR has warned of the risk of refoulement for those returned to Turkey, already in 2009,²⁸ while several other reports have appeared corroborating this concern since the entry into force of the EU-Turkey deal.²⁹ Thus, such push backs could potentially constitute refoulement and violate the prohibition of collective expulsion, the right to seek asylum, and the right to an effective remedy protected in the EU Charter, the ECHR, the Geneva Convention on the Status of Refugees and Exiles (Refugee Convention),³⁰ and other instruments of international law covering the principle of non-refoulement, as well as customary law.³¹

Further reinforcement of these concerns is derived from the statistics on Mediterranean arrivals. In particular, 58% of all arrivals by boat to Malta in 2009 were recognised as being in need of international protection.³² Furthermore, around 70% of all asylum applications in Italy for 2008 were presented by persons arriving by boat, while eligibility for international protection was recognised in almost 50% of these cases.³³

24 PACE 2012, p. 10.

25 Hirsi Jamaa and Others v. Italy, prohibition of collective expulsion, pp. 7-75.

26 EP Civil Liberties (2011), supra n. 15, p. 53.

27 Weinzierl and Lisson 2007, pp. 54, 55; Hirsi Jamaa and Others v. Italy.

28 UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09)*, Geneva: United Nations High Commissioner for Refugees January 2009, <https://www.refworld.org/pdfid/4afd25c32.pdf>.

29 M. Gkliati, 'The Application of the EU-Turkey Deal: A Critical Analysis of the Decisions of the Greek Appeals Committees', *European Journal of Legal Studies* 2017, vol. 10(1).

30 LIBE 2011, p. 58; Meijers Commissie 2013, par. I; Rijpma 2010, p. 4.

31 Mungianu 2016.

32 Malta Annual Reports of Government Departments 2009, Valletta: Office of the Prime Minister Malta July 2010. <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Annual%20Government%20Reports/Documents/Annual%20Report%20of%20Government%20Departments%20-%202009.pdf>.

33 UNHCR, *Refugee protection and international migration: a review of UNHCR's operational role in southern Italy* – Prepublication edition, September 2009, p. 4, www.unhcr.org/4ac35c600.html. See also information from the Italian Ministry of the Interior: www.interno.it/mininterno/export/sites/default/it/temi/asilo/sottotema009.html.

Such concerns are shared by the ECJ³⁴ and PACE,³⁵ while push backs have been extensively documented by NGOs, since the early years of operation for the agency.³⁶ The Executive Director of Frontex categorically stated then that such operations ‘cannot take place’,³⁷ but the annual reports of the agency suggest the opposite, for instance, for Hera I³⁸ and Hera III operation³⁹. In the context of Hera III operation of 2011, the European Commissioner, Cecilia Malmström, had to make clear that the push-back of migrants encountered at sea is not permitted.⁴⁰ The prohibition of the surrender of irregular migrants to the authorities of a country, where they would face a serious risk of death penalty, torture or other inhuman or degrading treatment or further refoulement is included in the EC Proposal for a Regulation establishing rules for Frontex joint operations at sea.⁴¹

Allegations of violations occurring during joint operations have been repeatedly made over the years.

The most prominent documentation of such push backs was undoubtedly the *Hirsi* case, where the ECtHR held that the principle of non-refoulement was violated by systematic practice of push backs from Italy to Libya

34 “[P]rovisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required”. *European Parliament v. Council*.

35 PACE, Council of Europe, Resolution 1637 (2008) ‘Europe’s boat people: mixed migration flows by sea into southern Europe’ and PACE 2012, pp. 1, 2.

36 Migreurop, *Frontex Agency: Which Guarantees for Human Rights?*, March 2011, pp. 11-13, <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>; Pro Asyl, *Borderline-europe*, and Menschenrechte ohne Grenzen, J. Gleitze, *Die Folgen der Abschottung auf See – das Mittelmeer*, in T. Pflüger (in cooperation with Informationsstelle Militarisierung), *Was ist Frontex?*, Januar 2008, pp. 34-35, <http://www.imi-online.de/download/Frontex-Broschuere.pdf>; Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, *The Truth Might Be Bitter, but It Must Be Told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, Frankfurt am Main and Athens, October 2007, https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Report_Refugees_in_Greece_The_truth_may_be_bitter_but_it_must_be_told_Oct_2007.pdf.

37 Frontex’s Executive Director, Ilka Laitinen, speaking before the LIBE Committee on the measures taken by the agency in preparation for search and rescue operations, 11 October 2012, video of the session available at <http://www.europarl.europa.eu/eplive/en/committees/video?event=20121011-0900-COMMITTEE-LIBE>.

38 Frontex, *HERA 2008 and NAUTILUS 2008 Statistics*, Warsaw, 13 February 2009, <https://frontex.europa.eu/media-centre/news-release/hera-2008-and-nautilus-2008-statistics-op7kLN>.

39 Frontex, ‘Hera III operation’, Press Release 13 April 2007, <https://frontex.europa.eu/media-centre/news/news-release/hera-iii-operation-It9SH3>.

40 N. Frenzen, *Frontex Operation Hermes to Begin on Sunday*, 20 Feb.–Push-Back Practice Prohibited, Migrants at Sea, 19 February 2011, <https://migrantsatsea.org/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-%E2%80%93push-back-practice-prohibited/>.

41 Frontex Sea Operations Regulation Proposal. This proposal is presented in replacement of Council Decision 2010/252/EU, which was annulled by the ECJ.

on the basis of their bilateral agreement. These push-back practices also continued in the context of a Frontex operation, for instance in the case of 200 Eritrean and Somali nationals who were summarily returned to Libya in the case that reached the Court. In *Hirsi*, the ECtHR found a violation of Article 3 (direct and indirect refoulement) due to the risk of ill-treatment in Libya and the possibility of their repatriation to Somalia and Eritrea, Article 4 of Protocol 4 (collective expulsion), and Article 13 in conjunction with Article 3 and Article 4 of Protocol 4 (effective legal protection).⁴²

Prior to the ECtHR judgment, Frontex had already been accused of facilitating the Italian practice of push backs to Libya during Nautilus operation of 2009.⁴³ The agency had then admitted that it was helping the Italian coastguard in this policy, but refused to take up responsibility ‘for decisions taken by Italy’.⁴⁴

Similar allegations were expressed for operation HERA operations. Hera I operation (2006), the first large-scale operations of the newly established then agency was a joint sea operation combined with a return operation, the main purpose of which was to gather information about the migrants’ routes. Upon request of Spain, Frontex officers supported the Spanish authorities in identifying irregular migrants, and the agency coordinated returns. The operation was evaluated as successful.⁴⁵ During the operation, 6,076 migrants were sent back.⁴⁶

The follow-up operation HERA II (2008), hosted by Spain, focused on interceptions of irregular migrants in Senegal and Mauritania’s territorial waters and their readmission to these countries in the context of bilateral agreements with Spain.⁴⁷ During this operation, 5,969 persons were diverted back to the closest shore (Senegal or Mauritania).⁴⁸ The fate of those apprehended was never revealed, particularly concerning the protection of their

42 *Hirsi Jamaa and Others v Italy*.

43 Human Rights Watch, *Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers*, New York: Human Rights Watch September 2009, p. 37, https://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf; The Italian practice of forcibly returning immigrant vessels to the country of departure was condemned by the ECtHR in *Hirsi Jamaa and Others v Italy*.

44 Interview of Gil Arias-Fernández, deputy director of Frontex, at European Voice, A.C. Martin, *Gil Arias-Fernández: ‘the immigration problem in Calais is not so bad’*, 24 November 2014, <https://www.euractiv.com/section/justice-home-affairs/interview/gil-arias-fernandez-the-immigration-problem-in-calais-is-not-so-bad/>.

45 Frontex, *HERA II Operation to be Prolonged*, Warsaw, 13 October 2006, <https://frontex.europa.eu/media-centre/news-release/hera-ii-operation-to-be-prolonged-iWMEF9>.

46 Frontex Annual Report 2006 *Coordination of intelligence driven operational cooperation at EU level to strengthen security at external borders*, Warsaw, 5 December 2007, p. 12, <https://www.europarl.europa.eu/document/activities/cont/200801/20080111ATT18445/20080111ATT18445EN.pdf>.

47 Jeandesboz 2008, p. 14.

48 Frontex 2009.

human rights by the Spanish, Senegalese and Mauritanian authorities.⁴⁹ Concerns have been expressed regarding the risk of undermining the principle of non-refoulement.⁵⁰ Similarly, as already mentioned, in such circumstances, the right to an effective remedy is at risk.⁵¹ The ECtHR has ruled that the obligation to provide the right to an effective remedy is not suspended in the high seas. Individuals should still be provided with the opportunity to challenge the administrative decisions regarding the denial of entry or the refusal of their asylum request.⁵² Denying them the possibility to exercise their right to appeal but not providing sufficient information, access to a lawyer or access to courts in EU territory would constitute a violation of the right.

HERMES 2011 aiming to detect and prevent unauthorised border crossings to the Pelagic Islands, Sicily and the Italian mainland. The agency celebrates the success of the operation: ‘Since the deployment of the RABIT operation, the numbers of irregular crossings have dropped by approximately 75%’.⁵³ At the same time, according to the agency, the vast majority of migrants were Tunisian,⁵⁴ while 20% of all apprehended individuals had ‘indicated an intention to apply for international protection’.⁵⁵ Thus, Frontex was in knowledge of the fact that among the 75% of irregular crossings that

49 Socialist Group, Spain, Committee on Migration, Refugee and Population, T. Arcadio Díaz, Rapporteur, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, p. 15.

50 V. Moreno Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’, *European Journal of Migration and Law* 2008, vol. 10(3); Neal 2008; P. Nyers, ‘Forms of irregular citizenship’, in Vicki Squire (ed.), *The Contested Politics of Mobility. Borderzones and Irregularity*, London: Routledge 2011; H. Oosterom-Staples, ‘Effective Rights for Third-Country Nationals’, in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU’s Area of Freedom, Security and Justice*, Oxford: Hart Publishing 2009; M. Pace, ‘Norm shifting from EMP to ENP: the EU as a norm entrepreneur in the south?’, *Cambridge Review of International Affairs* 2007, vol. 20(4); E. Papastavridis, ‘Fortress Europe’ and FRONTEX: Within or Without International Law?, *Nordic Journal of International Law* 2010, vol. 79(1); Perkowski 2012, p.p.: 21-24.

51 M. Hernández-Carretero, *Reconciling Border Control with the Human Aspects of Unauthorized Migration* (PRIO Policy Brief Paper), Oslo: International Peace Research Institute, Oslo 2009, <https://www.prio.org/utility/DownloadFile.ashx?id=198&dtype=publicationfile>.

52 CJEU 19 February 2004, C-327/02, ECLI:EU:C:2004:110 (*Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie*); *Hirsi Jamaa and Others v. Italy.*, par. 201-207.

53 Frontex, *Frontex and the RABIT operation at the Greek-Turkish border*, Warsaw, 2 March 2011, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_130.

54 The Democracy Spring or Arab Spring began in Tunisia in December 2010.

55 Frontex, Press Release, *Update to Joint Operation Hermes 2011*, 11 March 2011, <http://frontex.europa.eu/news/update-to-joint-operation-hermes-2011-7DIILz>.

were averted, were also asylum seekers. Nevertheless, the operation was also extended to cover Sardinia.⁵⁶

Most recently, between 2018 and 2020, academic research and civil society reporting have been implicating Frontex team members in systematic push backs conducted by the Greek authorities.⁵⁷ In October 2020 a consortium of international news outlets published evidence that implicates Frontex in six push-backs by the Greek authorities between April and August 2020.⁵⁸ The Frontex Executive Director, Fabrice Leggeri, has denied the existence of evidence of Frontex officers in the push backs.⁵⁹ As a result, the issue of the complicity of Frontex in human rights violations occupied a central role in the public debate in the last months of 2020.⁶⁰

Naturally, additional risks may result for the life and the physical integrity of the people on board from conducting unseaworthy boats to high seas.⁶¹ With more than 33,000 migrants having lost their lives at sea trying to reach European shores between 2000 and 2017, the IOM declared the Mediterranean ‘by far the world’s deadliest border’.⁶²

56 Frontex, Press Release, Hermes Operation Extended, 23 March 2011, <http://frontex.europa.eu/news/hermes-operation-extended-OWmwti>; FRA 2013a, pp.: 29, 30.

57 L. Karamanidou and B. Kasperek, *Consequences and Responses Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency*, in Working Papers Global Migration, 2020, p. 64; Border Violence Monitoring Network, *Special report: Covid-19 and border violence along the Balkan route*, 2020, <http://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the-Balkan-route/>; Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported*, 2020 <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>.

58 G. Christides, E. Freudenthal, S. Luedke and M. Popp 2020, *EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign*, in Spiegel, 2020, <https://www.spiegel.de/consent-a?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Finternational%2Feuropa%2Ffeu-border-agency-frontex-implicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7>.

59 ECRE, *Greece: Frontex Denies Involvement in Push-backs, Expert Council Critique of NGO Registration Rules*, 27 November 2020, <https://www.ecre.org/greece-frontex-denies-involvement-in-pushbacks-expert-council-critique-of-ngo-registration-rules/>.

60 M. Gkliati, *The next phase of the European Border and Coast Guard: Responsibility for returns and push-backs in Hungary and Greece*, in A. Ott, L. Tsourdi and Z. Vankova (eds), ‘Migration and EU Borders: Foundations, Policy Change, and Administrative Governance’, European Papers, 2021 (forthcoming).

61 Rijpma 2010, p. 4; “State parties [to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air] should prioritise the preservation of life and safety upon detection of a vessel used to smuggle migrants”, United Nations, Working Group on the Smuggling of Migrants 2012, Report on the meeting of the Working group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012, CTOC/COP/WG.7/2012/6, http://www.unodc.org/documents/treaties/organized_crime/2012_CTOC_COP_WG7/CTOC_COP_WG7_2012_6/CTOC_COP_WG7_2012_6_E.pdf.

62 International Organisation for Migration, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe. A Review of the Evidence*, Geneva: 2017, p. 13, https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

The EBCG Regulation makes search and rescue that takes place in the context of border controls explicitly part of Integrated Border Management (IBM) (Article 3(1)(b)). Nevertheless, Frontex does not collect data on migrant mortality.⁶³ This is left to the national authorities, which show differences in registration deaths and keeping official statistics as comprehensive academic research has shown.⁶⁴

Discussing the lack of recording Aas and Gundhus mention: ‘While the right to life has been extensively debated in relation to the duty of assistance to boats in distress, and the adequacy of timing of Frontex search and rescue operations, far less attention has been paid to how the right is institutionally anchored in the agency’s performance measures and its mechanisms of knowledge production.’⁶⁵ The act of counting has been noted as substantially political, as an acknowledgement of death in contrast with the invisibility of casualties.⁶⁶

Regarding the search and rescue obligations of the agency as such, allegations have even been voiced with respect to non-assistance to persons in danger.⁶⁷ A 2013 PACE report refers to an incident, where 56 people died after a Frontex aeroplane reportedly crossed their boat while in distress without providing any assistance.⁶⁸

Finally, complaints of ill-treatment during maritime operations are not rare. Human Rights Watch has voiced allegations that Frontex personnel had refused intercepted persons access to drinking water. The Commission, questioned by Members of the European Parliament,⁶⁹ responded that neither it nor the agency could verify the allegations due to lack of

63 Aas and Gundhus 2015, p.p.: 9, 10.

64 T. Last and T. Spijkerboer, ‘Tracking Deaths in the Mediterranean’, in: T. Brian and F. Laczkó (eds.), *Fatal Journeys. Tracking Lives Lost during Migration*, Geneva: International Organization for Migration 2014, p. 85.

65 Aas and Gundhus 2015, p. 9.

66 See for instance: P. Andreas and K. M. Greenhill, ‘Introduction: The Politics of Numbers’, in: P. Andreas and K. M. Greenhill (eds.), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca: Cornell University Press 2010; N. Rose, *Powers of Freedom. Reframing Political Thought*, Cambridge: Cambridge University Press 1999; S. Sandberg, ‘What can “Lies” Tell Us about Life? Notes towards a Framework of Narrative Criminology’, *Journal of Criminal Justice Education* 2010, vol. 21(4); L. Weber and S. Pickering, *Globalization and Borders: Death at the Global Frontier*, London: Palgrave Macmillan 2011.

67 Like any state or private vessel, Frontex vessels are under the obligation to render assistance to persons in distress at sea. Montego Bay Convention on the Law of the Sea of 1982, the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and the Search and Rescue Convention (SAR Convention) of 1979.

68 PACE 2012, p. 11.

69 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.

evidence.⁷⁰ An incident, during which the Greek coast guard opened fire and injured at least four Syrian passengers was reported in 2014. The Greek courts found the conduct to be in accordance with the law. The victims were subsequently given asylum in Germany and Sweden.⁷¹ Journalistic research into several Frontex serious incident reports revealed ‘a broader Greek and European tactic of using weapons to stop boats driven by suspected smugglers – and injuring or killing refugees in the process’⁷²

2.2 Land borders

The situation is developing in a parallel way at the land borders. The first RABIT operation at the Greek-Turkish borders succeeded in diminishing irregular crossings by 44% within one month. In fact, the Executive Director of Frontex at the time, Ilkka Laitinen, stated that this operation ‘will be remembered as a milestone in the history of Frontex’.⁷³ The majority of those detected trying to cross the border irregularly come from Afghanistan, Iran, Palestine, and Somalia, primarily refugee-producing countries. Nevertheless, the Rapid Intervention Team was composed of specialists on false documents, clandestine entry, first and second-line border checks and stolen vehicles, rather than asylum experts.⁷⁴

A lower but not negligible risk to life and physical integrity also exists in land operations. Indicatively, a 16-year old boy from Syria trying to cross the Greek-Turkish border in Evros died, and two more were injured in pursuit by Greek border guards and Frontex officials in 2011.⁷⁵

70 Parliamentary questions, Answer given by Mr Barrot on behalf of the Commission, 18 December 2009, E-5353/2009.

71 Z. Campbell, ‘Shoot First. Coast Guard Fired at Migrant Boats, European Border Agency Documents Show’, *The Intercept* 22 August 2016, <https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/>.

72 Campbell 2016a.

73 Frontex, *RABIT Operation 2010 Evaluation Report*, Warsaw, August 2011, <https://www.yumpu.com/en/document/read/34681466/rabit-operation-2010-evaluation-report-frontex-europa>.

74 S. Carrera and E. Guild, ‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System (CEPS Paper), Brussels: Centre for European Policy Studies November 2010, https://www.researchgate.net/publication/48665031_Joint_Operation_RABIT_2010_-_FRONTEX_Assistance_to_Greece's_Border_with_Turkey_Revealing_the_Deficiencies_of_Europe's_Dublin_Asylum_System_CEPS_Liberty_and_Security_in_Europe_November_2010/link/5950b5ce45851543383c3a0e/download.

75 Statewatch, Statewatch News Online, ‘Greece-Turkey: 16-year-old sans-papiers killed in FRONTEX-aided police pursuit’, December 2011.

Several allegations of severe beatings and refoulement to Turkey were registered at Frontex' serious incidents reports', with regard to operation Poseidon Land at the Bulgarian-Turkish borders between December 2012 and January 2014.⁷⁶

The most prominent allegations concerning violations during Frontex land surveillance operations are expressed with regard to the Hungarian-Serbian border. Already since 2016 the Frontex Consultative Forum and the Fundamental Rights Officer (FRO) had repeatedly suggested that the agency withdrew from return operations in Hungary because of the systematic nature of violations of human rights and asylum law.⁷⁷

2.3 Air borders

Concerns that Frontex does not take seriously into account potential protection issues have also been expressed concerning operations conducted at airports.⁷⁸

Indicatively, according to Frontex data, already in 2006, 3,166 third-country nationals were refused entry during joint operation Amazon, conducted at airports in Spain, Portugal, France, the United Kingdom, Italy, the Netherlands, and Germany.⁷⁹

2.4 Frontex as a humanitarian agent

One of the highlighted facts concerning the efficiency and contributions of EU agencies in improving the life of EU citizens in a study commissioned by the EU Agencies Network reads: 'The European Border and Coastguard Agency has contributed to the rescue of more than 250,000 people at sea and has processed 20 million visa applications.'⁸⁰

76 A. Fotiadis, 'E.U. Border Agency Still Unaccountable on Refugees' Rights', *The New Humanitarian* 18 November 2016, <https://deeply.thenewhumanitarian.org/refugees/community/2016/11/18/e-u-border-agency-still-unaccountable-on-refugees-rights>; Z. Campbell, 'Over the Line. Bulgaria Welcomes Refugees With Attack Dogs and Beatings', *The Intercept* 3 November 2016, <https://theintercept.com/2016/11/03/bulgaria-welcomes-refugees-with-attack-dogs-and-beatings/>.

77 Frontex, *Frontex Observations, Situation at the Hungarian-Serbian Border*, 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming-14832; Frontex Consultative Forum on Fundamental Rights, *Recommendation by the Consultative forum to the Executive Director and Management board of the European Border and coast guard Agency*, 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming-14832. Further on this topic see Gkliati 2021b.

78 Sirtori and Coelho 2007, p. 12.

79 FRONTEX 2006b, p. 11.

80 Deloitte, *How do EU agencies and other bodies contribute to the Europe 2020 Strategy and to the Juncker Commission Agenda?*, London, November 2016, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/TEMP/Deloitte%20Study_EU%20agencies%20contribution.pdf?_cldee=bWFyaWFuYWdrbEB5YWdvby5ncg%3d%3d&recipientid=contact-253f7aa82caae111b7e500155d043f10-df2137815e99433886cc66cd9bea4dfb3&desid=5cff7273-90bb-e611-80ce-00155d040a3bandurlid=2.

In particular, operations Triton and Poseidon were awarded a significant ‘search and rescue’ character after several incidents of mass drowning in the Mediterranean.⁸¹ Similarly, the life-saving character of EUROSUR has been its main promotion point.⁸² Frontex itself claims humanitarian motives for its operations. For instance, the agency promotes its success in intercepting and diverting ‘3,887 illegal immigrants’ in 2006 in the context of HERA II Operation and notes that ‘This means that these people were stopped from setting off for a dangerous journey that might have cost their lives’.⁸³

This fits in the general tendency of ‘humanitarisation’ of language concerning EU migration control policies.⁸⁴

In an interesting study of Aas and Gunthus, discussing humanitarian thinking and the human rights discourse among the officers on the ground, but also in the self-presentation of Frontex, the authors note that the motto ‘*humanity, open communication, professionalism, trustworthiness, teamwork*’ features on the business cards of the agency’s staff.⁸⁵ Furthermore, interviews show, that participating officers see their presence as alleviating the migrants’ suffering and enhancing the quality of human rights at the borders. Often, they express compassion and the intention to help those vulnerable, viewing that not just as their individual character qualities, but as their official role.⁸⁶ An earlier study had also concluded that participating officers have a strong belief in the morality of their actions. The interviewees found that ‘anti-terrorism/radicalisation policies and interceptions of migrants are in line with the ethical values they are mandated to respect in the implementation of such practices’.⁸⁷

It has been recognised that humanitarian and human rights discourse can be instrumentalised to conceal the goals of securitisation and border control. Perkowski gives the example of the RABIT operation in Greece between November 2010 and March 2011, where she notes an increasing use of human rights terminology in the press releases, although the purpose was to address ‘urgent and exceptional pressure’ at the borders.⁸⁸ It becomes apparent that the agency is adopting a language of humanitarian assistance.

81 European Commission 2014; Council of the European Union 2015.

82 Chapter II, section 2.2.5.

83 Hera Statistics, available online at <http://www.frontex.eu.int/gfx/frontex/files/hera-statistics.pdf>.

84 S. Klepp, ‘Italy and its Libyan Cooperation Program: Pioneer of the European Union’s Refugee Policy?’, *Blog Middle East Institute* 1 August 2010, <https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy#edn35>.

85 Aas and Gundhus 2015, p. 4.

86 Aas and Gundhus 2015, p.p.: 5,6.

87 I. Ioannides and M. Tondini, *Ethical Security in Europe? Empirical Findings on Value Shifts and Dilemmas across European Internal External Security Policies* (Policy Recommendation Report INEX Work Package 3), Oslo: International Peace Research Institute 30 September 2010, p. 100.

88 Perkowski 2012, p. 26.

According to Aas and Gundhus it ‘seems to have appropriated the language of as a standard item of its self-presentation’.⁸⁹

What is essential however, is to see these declarations materialising in effective protection of human rights, also by the means of accountability mechanisms that can ensure the adherence with human rights and the rule of law.⁹⁰ Furthermore, since the beginning, fundamental rights were a basic aspect of the training Frontex provides.⁹¹ Next to that, the agency is expected to contribute to the uniform application of EU fundamental rights in all its operations, including facilitating the exchange of good practices among member states.⁹² In practice, Frontex presence may have a disciplinary effect as the case was at the Bulgarian – Turkish borders, where the guest officers integrated surveillance systems that had an anti-corruption effect.

2.5 The apprehended migrants in a member state

When apprehended migrants are not turned back at the border or diverted to third states directly, they are surrendered to the national authorities of a member state, where they are usually detained pending their removal. This is another area where the responsibility of Frontex for human rights violations may occur.

Characteristically, in the period between November 2010 and March 2011, during the first RABIT operation in Greece, nearly 12,000 migrants that tried to enter the country from the land border with Turkey were arrested and detained in Greece. The grave detention conditions in Greek police stations and detention centres as well as ill-treatment incidents by the police have been extensively documented and held by the ECtHR to amount to torture in several cases.⁹³ Frontex has nevertheless provided Greece with staff and material support facilitating the arrest and detention of the undocumented migrants.⁹⁴ Moreover, a high-ranking Frontex

⁸⁹ Aas and Gundhus 2015, p. 14.

⁹⁰ On translating human rights principles into practice, see P. Neyroud and A. Beckley, *Policing, Ethics and Human Rights*, New York: Routledge 2001.

⁹¹ European Union Agency for Fundamental Rights, *Fundamental rights-based police training. A manual for police trainers*, Luxembourg, 3 December 2013, https://fra.europa.eu/sites/default/files/fra-2013-fundamental-rights-based-police-training_en_0.pdf.

⁹² Article 5(4) EBCG Regulation.

⁹³ e.g., ECtHR 11 June 2009, App. No. 53541/07, (*S.D. v. Greece*); ECtHR 26 November 2009, App. No. 8256/07, (*Tabesh v. Greece*); ECtHR 7 June 2011, App. No. 2237/08, (*R.U. v. Greece*); ECtHR 21 June 2011, App. No. 33225/08, (*Efremidzi v. Greece*); ECtHR 17 July 2012, App. No. 74279/10, (*Lica v. Greece*); ECtHR 21 June 2018, Judgment, App. No. 66702/13, (*S.Z. v. Greece*); ECtHR 28 February 2019, Judgment, App. No 19951/16, (*H.A. and others v. Greece*).

⁹⁴ Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, p. 1, https://www.hrw.org/sites/default/files/reports/greece-0911webwcover_0.pdf; Migreurop 2011, p. 11.

official stated that Frontex personnel are not allowed to enter the cells and thus, 'have not witnessed what is going on there'.⁹⁵ Following a Human Rights Watch report in 2011,⁹⁶ assessing the involvement of Frontex in the ill-treatment of migrants detained in Greece, the agency issued a response according to which 'the Agency has been extremely concerned with the conditions at the detention centres' but 'at the practical level abandoning emergency support operations, such as RABIT 2011, is neither responsible, nor does it do anything to help the situation of irregular migrants on the ground'.⁹⁷

Related to this is also allegations of Joint Operation Hera targeting vulnerable groups of migrants to detract information, resulting from the leak of 2012 debriefing guidelines.⁹⁸

3 RETURN OPERATIONS

The number of joint return operations coordinated by Frontex is gradually growing, as is the number of returned migrants.⁹⁹ This is expected to scale up even further in the near future given the enhanced powers of Frontex with respect to return, and the significant boost in the allocation of funding. In particular, EUR 66.5 million have been allocated to joint return operations in 2016 and 2017, increased from EUR 9.5 million in 2015.¹⁰⁰ The growth continued in the next years, but it is only with the new 2019 EBCG Regulation that the budgetary allowance permits the agency to reach its potential in returns. In particular, approximately EUR 250 million per year on average is added to the agency's budget for 2021-2027 to facilitate its return activities.¹⁰¹

Illustratively, over 53,000 people have been returned in flights where Frontex was involved in the period 2007-2018. This is still only a small fraction (7%) compared to the total number of persons returned by member

95 Migreurop 2011, p. 11.

96 Human Rights Watch 2011.

97 Frontex, Frontex's Reaction to HRW report, 'The EU's dirty hands', 20 September 2011, http://migrantsatsea.files.wordpress.com/2011/09/frontex_-_news-frontexs-reaction-to-hrw-report-2011-20-sept.pdf.

98 'Statewatch, Press release: EU border agency targeted "isolated or mistreated" individuals for questioning, London: Statewatch 16 February 2017, <https://www.statewatch.org/news/2017/february/press-release-eu-border-agency-targeted-isolated-or-mistreated-individuals-for-questioning/>.

99 On a more focused look into the Frontex return operations see Jones, Kilpatrick and Gkliati 2020.

100 Statewatch, *Rapid introduction of new Frontex powers: EU and Member States prefer to shut the door and return refugees than relocate them*, London: Statewatch 27 January 2017.

101 Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May 2019, p. 6.

states in these years.¹⁰² The stated goal for 2021-2027 is to facilitate the return of 50,000 returnees per year.¹⁰³

Concerns have been expressed regarding the risk of collective expulsions.¹⁰⁴ Moreover, the risk of violation of the principle of non-refoulement exists, especially given the serious discrepancies in the asylum determination systems of different EU member states.¹⁰⁵ For instance, in Greece, recognition rates were found to be extremely low in 2010, especially in the first instance, where they came down to 0.04%.¹⁰⁶ This was one of the reasons that led the ECtHR to the judgment of *MSS v Belgium and Greece*, which essentially banned Dublin returns to Greece, since asylum seekers would be in danger of being refouled.¹⁰⁷ The result of such unfair asylum procedures may be that refugees were sent back, to places where they were at risk of being tortured or persecuted, in the context of a Frontex coordinated joint operation.¹⁰⁸

In an incident of October 2016 that caught the public eye, 10 Syrians were returned to Turkey in a Frontex coordinated flight from the Greek island, Kos, after the entry into force of the EU-Turkey deal.¹⁰⁹ The passengers were reportedly never given the opportunity to apply for asylum and were not informed of the destination of their trip (they believed they were flying to Athens). This incident attracted the interest of the UNHCR, and

102 Jones, Kilpatrick and Gkliati 2020, p. 37.

103 Council of the European Union 2019, p. 6.

104 Migreurop, Chachipe a.s.b.l., Rom e.V., Köln, Flüchtlingsrat Niedersachsen, Project Roma Center, Göttingen, European Network against Racism (ENAR), *New Group Deportation Flight Coordinated by FRONTEX as means of Collective Expulsion towards Serbia: Rights violation and the impunity of member states*, 20 April 2012.

105 PACE 2012, p. 11.

106 Amnesty International, 'Greece: Systematic detention of irregular immigrants and asylum seekers under minimal condition' (in Greek), 2010, available at www.amnesty.org.gr/; It needs to be noted that after the establishment of the transitional appeal committees with Presidential Decree 114/2010, recognition rates on second instance have risen and are near the European average. M. Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece', *Inter-American and European Human Rights Journal* 2011, vol. 4(1), p. 102; In 2011 recognition rates were between 1,65 and 2,05% in the first instance and 28,2 and 40,62% in the second instance. Council of Europe, Commissioner for Human Rights, Nils Muižnieks, report following country visit to Greece from 28 January to 1 February 2013, 16 April 2013.

107 ECtHR [GC] 21 January 2011, App. No. 30696/09, (*M.S.S. v. Belgium v. Greece*), para. 301.

108 Such concerns have been expressed, for instance, also with respect to Hungary (Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited. An update of the Hungarian Helsinki Committee's 2011 report based on a field mission to Serbia* (2-4 April 2012), Budapest, June 2012, <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>) and Germany (Migreurop e.a. 2012).

109 P. Kingsley, 'Syrian refugees: we were tricked into returning to Turkey', *The Guardian* 1 November 2016, <https://www.theguardian.com/world/2016/nov/01/syrian-refugees-tricked-into-returning-to-turkey-greece-eu>; Fotiadis, 2016.

Amnesty International denounced it as refoulement.¹¹⁰ On another occasion, the ECtHR granting the applicant interim measures stopped a Frontex coordinated deportation of an Iranian activist from Greece to Turkey.¹¹¹

Furthermore, an element of force and coercion is inherent in these operations, since most of the returns are non-voluntary, and it is to be expected that some individuals will actively resist.¹¹² Thus, the right to physical integrity may be at risk.¹¹³ Several NGOs have reported the use of disproportionate force and degrading and inhuman treatment upon return.¹¹⁴ According to Migreurop, during the return flights, ‘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’.¹¹⁵

Migreurop has pointed out the lack of transparency regarding the rules and protocols applied during joint return operations that would guarantee the physical integrity of those returned.¹¹⁶ Since then, the agency has developed a Code of Conduct for Joint Return Operations, which sets out common principles and main procedures to be observed by everyone participating in joint return operations.¹¹⁷

PACE, had called on Frontex in 2013 to put in place an effective and independent monitoring system at all stages of joint return operations, which operations should only be carried out for EU member states that have an effective system of forced return monitoring in place at the national level.¹¹⁸ Furthermore, after he participated in a return operation in 2017, the Greek Ombudsman expressed concerns regarding the lack of appropriate

110 Amnesty International, *A Blueprint for Despair. Human Rights Impact of the EU-Turkey deal*, London: Amnesty International 14 February 2017, <https://www.amnesty.nl/content/uploads/2017/02/EU-Turkey-Deal-Briefing.pdf?x87333>.

111 D. Angelidis, ‘Message from the ECtHR, against deportations’, *EF SYN*, 2017, https://www.efsyn.gr/ellada/dikaionomata/108778_minyma-edda-kata-ton-apelaseon; The Press Project, Λέσβος: Απελαύνουν άρον άρον πρόσφυγες – Παρέμβαση ΕΔΑΔ, 30 April 2017, <https://www.thepressproject.gr/article/110765/Lesbos-Apelaunoun-aron-aron-prosfuges---Parembasi-EDAD>.

112 LIBE 2011, p. 61; PACE 2012, p. 11.

113 Several deaths have even been reported during expulsions organised by member states. Migreurop 2011, p. 17.

114 Statewatch and Migreurop 2012, p. 10.

115 Migreurop 2011, p. 15; Two descriptive complaints by expelled foreigners have been posted on the website Mille Babords, www.millebabords.org/spip.php?article13938.

116 Migreurop 2011, p. 17.

117 Frontex, Code of Conduct for Joint Return Operations Coordinated by Frontex, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.

118 PACE Resolution 1932, ‘Frontex: human rights responsibilities’, 2013, Mr Mikael Cederbratt rapporteur, (Doc. 13161).

safeguards,¹¹⁹ while the CPT also noted that ‘the current arrangements cannot be considered as an independent external monitoring mechanism’.¹²⁰

4 INTELLIGENCE ACTIVITIES

When the information policies of the EU are seen under the light of combating terrorism and crime, then the gathering of a large amount of data is deemed essential for the purposes of border surveillance.¹²¹ Frontex plays a critical role in this respect. Its work has a strong intelligence dimension.

In particular, Frontex is tasked with monitoring the migratory flows towards and within the EU and identifying possible routes and entry points. For this purpose, it has established a Common Integrated Risk Analysis Model, which collects and analyses statistical and operational data provided by member states and other agencies, but also media and other sources, produced by the agency’s own work, or through EUROSUR. On the basis of this information, the agency prepares a general risk analysis and tailored analyses for separate operations, based on which joint surveillance and return operations are conducted (Article 29).¹²²

The agency did not have the competence to process personal data until the 2011 amendment.¹²³ However, the agency has long before that amendment been processing personal data in the context of joint return operations,¹²⁴ allegedly without adopting any measures for the application of Regulation 45/2001 on data protection.¹²⁵

119 Greek Ombudsman, *Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues*, Athens: The Greek Ombudsman. Independent Authority April 2017, p.p.: 37, 38, https://www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017_en.pdf.

120 European Committee for the Prevention of Torture, Germany: Visit 2018 (return flight), Inf (2019) 14, Section: 12/18, 03/12/2018, section 60, <https://hudoc.cpt.coe.int/eng#%7B%22sort%22:%5B%22CPTDocumentDate%20Descending,CPTDocumentID%20Ascending,CPTSectionNumber%20Ascending%22%5D,%22tabview%22:%5B%22document%22%5D,%22CPTSectionID%22:%5B%22p-deu-20180813-en-12%22%5D%7D>.

121 A. Fischer-Lescano and T. Tohidipur, *Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX*, 2007, vol. 67(4), https://www.zaoerv.de/67_2007/67_2007_4_b_1219_1276.pdf, p.p.: 1260, 1261.

122 Frontex, Operational Analysis, <http://www.frontex.europa.eu/intelligence/operational-analysis>.

123 Article 11(b) and (c) Frontex Regulation.

124 European Data Protection Supervisor (EDPS), *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)”*, Case 2009-0281, Brussels, 26 April 2010(c).

125 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institution and bodies and on the free movement of such data; Statewatch and Migreurop 2012, p.p.: 11, 12.

Moreover, Frontex operates EUROSUR, which has unique capabilities to collect and process vast information and share this data with multiple actors. It is also responsible for developing a Common Information-Sharing Environment, including the interoperability of systems, particularly by developing, maintaining, and coordinating the EUROSUR framework (Article 10).

Such activities may infringe upon the right to privacy and data protection. The principles underpinning data protection are that personal data must be processed fairly and lawfully. They may be collected for explicitly specified legitimate purposes, while they may not be further processed in a way incompatible with those purposes.¹²⁶

Article 86 EBCG Regulation stipulates that Regulation (EC) No 45/2001¹²⁷ should be applied when processing personal data, and it expressly prohibits the onward transfer of personal data from member states to third countries or any other third parties. The purposes for which data may be processed are laid out in Article 87 EBCG Regulation. Articles 88 to 92 cover the type of data and the circumstances under which these may be processed.

More specific limitations and guarantees had already been introduced with the 2011 amendment with respect to the processing of personal data by Frontex, such as the introduction of a Data Protection Officer for the agency¹²⁸ and the monitoring of the activities of the agency by the European Data Protection Supervisor (EDPS).¹²⁹ However, these guarantees are not deemed adequate by the EDPS in the context of the agency's growing tasks and responsibilities.¹³⁰ He also expresses concerns about the lack of clarity regarding the scope of processing personal data, which could lead to legal uncertainty and a significant risk of non-compliance with data protection rules.¹³¹

Thus, notwithstanding these guarantees, there is still a great risk that personal data could be ill-protected in an area that is particularly delicate with respect to the stigmatisation of the migrants¹³² or when operational decisions are taken, for instance, on the basis of data that identify ethnicity.¹³³

126 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, p. 31); Data Protection Regulation, p. 1; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

127 Data Protection Regulation.

128 Art 11(a) Frontex Regulation.

129 Preamble par. 25 and Article 13 of Frontex Regulation.

130 EDPS 2010, p. 3,4

131 EDPS 2010, p. 4.

132 ECtHR 4 December 2008, Nos. 30562/04 30566/04, (*Marper v. the United Kingdom*).

133 LIBE 2011, p. 62-64; The human rights risks of surveillance technology and databases are described extensively in E. Brouwer, *Digital Borders and Real Rights. Effective Remedies for Third-Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers 2008, Chapters 6 and 7.

Moreover, the European Parliament has held regarding EUROSUR that the ‘necessary guarantee in terms of privacy and purposive collection, which lie at the heart of EU values regarding the operation of databases and information systems’ are lacking.¹³⁴

As far as the redress mechanisms are concerned, the secrecy over Frontex operations and risk analyses does not allow the individual to challenge the unlawful acts of the agency by making use of his rights under Article 8(2) of the Charter and Article 12 of Regulation 45/2001.¹³⁵

The rights of individuals are even more at risk because of the advanced security technologies deployed in the field of data surveillance and employed in the frame of EUROSUR. These cover not only radar and satellite images, but also identification technologies that increasingly make use of biometric data.¹³⁶ Large amounts of these personal data are stored in databanks, such as the second-generation Schengen Information System (SIS II),¹³⁷ the Visa Information System (VIS) and the DNA database under the Prüm Treaty as well as the Smart Borders Package.

5 COOPERATION WITH THIRD STATES

Building cooperation with neighbouring countries and with countries of origin and transit is an integral part of the EU’s IBM and has contributed significantly to the success of Frontex. Its extent becomes apparent in the operational plans and the working arrangements it concludes with third states. Frontex has concluded working arrangements with 18 countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, the Former Yugoslav Republic of Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, and the United States.¹³⁸

The agency is in regular contact since 2010 with the African countries that form part of the Africa-Frontex Intelligence Community (AFIC),¹³⁹ in the context of which it launched in 2017 a capacity-building project for

134 Jeandesbo 2008, p. 14.

135 LIBE 2011, p. 64; EDPS 2010.

136 Wolff 2010, p. 264, referring to D. Bigo, ‘From foreigners to “abnormal aliens”: how the faces of the enemy have changed following September the 11th’, in: E. Guild and J. van Selm (eds.), *From Foreigners to Abnormal Aliens: How the Faces of the Enemy Have Changed Following September the 11th*, London: Routledge 2005, p. 73.

137 SIS II became operational on 9 April 2013.

138 Frontex website, <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>.

139 Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Democratic Republic of Congo, Ivory Coast, Egypt, Eritrea, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan and Togo.

Africa aiming to strengthen the capacity of AFIC countries to work on joint intelligence analysis of crime.¹⁴⁰ Other capacity-building cooperation projects include the Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey (IPA II) and the Eastern Partnership Integrated Border Management Capacity Building Project. It is also involved in cooperation based on agreements concluded between a third country and an EU member state.¹⁴¹ Technically such agreements, in the form of Memoranda of Understanding or Technical Protocols are concluded between Frontex and the border control authority of the third country.¹⁴²

The cooperation could be on the level of information exchange, training, research, development, or joint patrols. In particular, the collaboration may take the form of donations of border management technologies and assets, deployment of liaison officers to third countries, and financial means so that states develop their border security systems.¹⁴³

The aim is that the third countries are assisted so that they are able to successfully stop the departure of immigrant vessels aiming to reach Europe, intercept migrant vessels or readmit third-country nationals and return them to their respective countries of origin.

Cooperation with third states is clearly illustrated in the example of Joint Operation Hera, where Frontex co-financed an aeroplane based in Senegal for the surveillance of the national waters of Senegal. The purpose was to detect immigrant boats leaving the country with a destination to Europe so that either Spanish or Senegalese vessels could return them to their port of departure.¹⁴⁴

These pre-border preventive actions are in obvious tension with the right of a person to leave a country, which is protected in Article 2 of the Fourth Protocol to the ECHR and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR).¹⁴⁵

Furthermore, responsibility may result from violations committed against the individuals by the authorities of the third state. The cooperating countries are usually not subject to human rights commitments or have worrying human rights records. Many of these countries operate under different legal standards as they are not bound by the ECHR¹⁴⁶ or EU law.

140 Frontex launches capacity building project for Africa during AFIC meeting', Warsaw, 29 September 2017, <http://frontex.europa.eu/news/frontex-launches-capacity-building-project-for-africa-during-afic-meeting-nqXaPW>.

141 For instance, operation HERA was based on bilateral agreements that Spain had concluded with Mauritania and Senegal.

142 Papastavridis 2010, p.p.: 89, 90.

143 Frontex website, <http://www.frontex.europa.eu/partners/third-countries>.

144 Baldaccini 2010, p. 251.

145 FRA 2013a, p. 46; Migreurop 2011, p. 13.

146 With the exception of Turkey.

Moreover, Libya is not bound by the 1951 Refugee Convention, while Turkey still retains a geographic reservation to the Convention, which means that it accepts only asylum claims coming from Europe.¹⁴⁷

Serious human rights violations have been documented time and again by international organisations and NGOs, while the ECtHR and the UNHCR have warned that it is not safe to send certain persons back to these countries. Libya is one of the most characteristic examples, being reported of arbitrarily detaining people for long periods, inhumane detention conditions, beatings, rape, and other forms of ill-treatment towards irregular migrants.¹⁴⁸ Amnesty International has been reporting the abuse of ‘tens of thousands’ of migrants at the hand of Libyan authorities and non-state actors, such as tribes and armed groups. It has highlighted the complicity of EU member states in such violations.¹⁴⁹ The report expressly indicates that the EU has also been assisting Libya through Frontex.¹⁵⁰

Besides, observers repeatedly report ill-treatment of migrants in Nigeria,¹⁵¹ while similar criticism is being expressed concerning Mauritania.¹⁵² Indicatively, the Nouadhibou detention centre in Mauritania has been renamed Guantanamo by migrants.¹⁵³ Finally, most North African states and Turkey have criminalised irregular exit imposing fines and imprisonment to those trying to leave the country without the necessary documents or outside the designated border crossing points.¹⁵⁴

Frontex does not provide information as to the fortune of the apprehended migrants and does not consider itself responsible for the treatment of individuals after they are surrendered to the authorities of the third state.¹⁵⁵ Moreover, there is no mechanism or policy that would allow monitoring whether third states use the donated assets and equipment in accordance with human rights law.¹⁵⁶

147 Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, *Management of mixed migration and asylum challenges beyond the European Union's eastern border*, 8 April 2013, <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19549&Language=EN&>; The most expected new asylum law in Turkey has not managed to remedy the inconsistency of the geographic restriction.

148 Human Rights Watch, *Libya: Nightmarish Detention for Migrants, Asylum Seekers*, 21 January 2019, <https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers>.

149 Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees and Migrants*, London: Amnesty International 7 December 2017, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

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151 The World Organisation Against Torture, The International Federation for Human Rights and FrontLine, *Nigeria: Defending Human Rights: Not Everywhere Not Every Right. International Fact-Finding Mission Report*, Geneva, Paris and Dublin, April 2010, https://www.omct.org/files/2010/05/20688/nigeria_mission_report.pdf.

152 Migreurop 2011, p. 14.

153 Migreurop 2011, p. 14.

154 FRA 2013a, p.p.: 42, 43.

155 Migreurop 2011, p. 11; Human Rights Watch 2009, p. 98.

156 FRA 2013a, p. 11.

Various sources have expressed repetitive criticism on the cooperation of Frontex with third countries and called for safeguards on the choice of countries.¹⁵⁷ According to the Frontex Regulation, liaison officers ‘shall only be deployed to third countries in which border management practices respect minimum human rights standards’. However, such guarantees do not wholly reassure the experts.¹⁵⁸ As it has been pointed out, no information is provided on the criteria or the mechanisms of evaluation, thus constituting the guarantees unenforceable and in fact meaningless. Furthermore, there is no supervisory authority that would monitor the upholding of human rights standards in the cooperation agreements.¹⁵⁹

The broadest opening of Frontex towards third countries was made with the EBCG Regulation 2016. Third states of return may provide the means of transport and the return escorts in collecting return operations, while border surveillance activities may be carried out in the territory of a third state, under its command. Specific actions, such as the deployment of European Border Control teams with executive powers, require establishing a status agreement between the EU and the third state, which will cover the details of the operation.¹⁶⁰

This first third-state border surveillance operations have been launched in Albania and Montenegro.¹⁶¹ Studying issues of responsibility and accountability in the context of joint operations conducted in third countries raises new questions regarding, for instance, the extraterritorial jurisdiction of the CJEU or special agreements excluding Frontex personnel from criminal and civil liability in third countries participating in EU operations. These issues deserve separate attention, and are, thus, excluded from the scope of this study.

157 V. Moreno-Lax, *Frontex as a Global Actor: External Relations with Third Countries and International Organizations*, in M. Dony (ed.), *The External Dimension of the Area of Freedom, Security and Justice*, Universite Libre de Bruxelles Press, 2012; Meijers Committee 2013, par. II; House of Lords 2008, p. 47; FRA 2013a, p.p.: 10, 11, 16; PACE 2013a, p.p.: 4, 5, 14; FRA holds that the EU should reinforce its efforts to strengthen the protection space in the transit countries, which should involve effective asylum systems, prevention of abuse, access to justice etc.

158 ECRE 2013, Rijpma and Cremona 2007, p. 23.

159 Statewatch and Migreurop 2012, p.p.: 12, 13.

160 Article 73(3)(4) EBCG Regulation. Such a model agreement has been drawn by the Commission, establishing a framework for the cooperation of the agency with third states. European Commission Communication, Model status agreement as referred to in Article 76 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (COM(2016) 747 final).

161 Frontex news release, *Frontex launches first operation in Western Balkans*, 11 May 2019, <https://frontex.europa.eu/media-centre/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM>; Frontex news release, *Frontex launches second operation outside EU*, 15 July 2020, <https://frontex.europa.eu/media-centre/news-release/frontex-launches-second-operation-outside-eu-1UZt3Q>.

6 RISK ANALYSIS

The risk analysis as such may constitute discrimination if it is targeting individuals of specific nationalities. Decisions on joint operations but also the preparation of the member states' activities at their borders depend on the risk analysis conducted by the agency to identify the different irregular immigration flows and the trends developing in the trafficking and human smuggling networks.¹⁶²

According to the Code of Conduct of Frontex, 'all discriminatory behaviours as defined in Article 2 towards the public or other participants in Frontex activities are forbidden.'¹⁶³

However, several risk analyses have identified specific groups of irregular migrants as proportionately large in number, which led to the organisation of ethnicity focused operations. Such examples are operation Silence targeting Somali migrants, Operation Hydra targeting individuals of Chinese origin,¹⁶⁴ and Operation Niris, which targeted Chinese and Indian individuals.¹⁶⁵ As an illustration, out of the 579 travellers only 15 individuals of the aforementioned nationalities were refused entry. Such concerns about racial discrimination have been expressed not only by NGOs,¹⁶⁶ but also by the LIBE Committee¹⁶⁷ and PACE.¹⁶⁸

Moreover, certain unverified statements resulting from the risk analysis could result in serious harm for the persons involved as they could act as incentives for member states to impose discriminatory measures upon certain groups.¹⁶⁹ For instance, Frontex stated in the 2012 Western Balkans Annual Risk Analysis Report that 'claiming asylum in the EU is part of Roma overall seasonal strategy for their livelihood.'¹⁷⁰ The agency does not recognise profiling as discriminatory.¹⁷¹ However, such concerns have been voiced by the European Parliament which holds that in general terms descriptive and predictive profiling are 'legitimate investigative tools when they are based on specific, reliable and timely information (...) and when the actions taken on the basis of such profiles meet the legal tests of neces-

162 Frontex, Reply to the LIBE Committee regarding Frontex fundamental rights strategy, 30 May 2012, p. 4, http://www.statewatch.org/observatories_files/frontex_observatory/Frontex%20June%202012-EP%20LIBE%20Committee%20Questions.pdf. Further on the risk analysis as a form of power see, S. Horii, *The effect of Frontex's risk analysis on the European border controls*, European Politics and Society, 17(2), 2016, 242-258.

163 Article 12 of the Code of Conduct for all persons participating in Frontex activities.

164 Frontex, *General Report 2007*, Warsaw, 2008, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2007/frontex_general_report_2007_final.pdf, p. 32.

165 Frontex 2007b, p.p.: 29-30.

166 Migreurop 2011, p. 21.

167 LIBE 2011, p. 62-64.

168 PACE 2013a, p. 11.

169 Statewatch and Migreurop 2012, p.p.: 7, 8.

170 Frontex, *Western Balkans Annual Risk Analysis Report*, 2012 p. 29.

171 Frontex 2012d, p. 4.

sity and proportionality'. However, the European Parliament stresses that 'in the absence of adequate legal restrictions and safeguards as regards the use of data on ethnicity, race, religion, nationality and political affiliation, there is a considerable risk that profiling may lead to discriminatory practices.'¹⁷²

Frontex may also be involved in assisting member states to enforce discriminatory policies. For instance, Frontex is being accused of legitimising the German policy of 'systemic expulsion against the Roma community.'¹⁷³ According to Migreurop, Germany carried out one or two return flights every month in 2012 to Serbia and Kosovo, coordinated and financed by Frontex. In 2011, 21 such operations were organised by Frontex, while among the deportees was a significant number of asylum seekers whose claims had been refused in accelerated procedures.¹⁷⁴

7 CONCLUSIONS

In this chapter, I have explored the societal problem that generates the interest of this study, namely the human rights sensitivities that are inherent in the agency's work. I have showcased several instances where human rights violations may occur, while at the same time providing reported indications of such violations. This information provides the framework for examining the possible responsibility of the agency for such violations, in case the discussed sensitivities materialise.

The dynamic growth analysis, shown in the previous chapter, combined with the presentation of the human rights sensitivities here serve to suggest that such growth also needs to be reflected in accountability frameworks.

This chapter aimed to show where the need for protection arises in Frontex coordinated operations. This knowledge, combined with our understanding of the concept and the legal framework on responsibility, examined in the following chapters, will lead us to examine the institutional responses to possible human rights violations.

172 European Parliament, *Profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control*, P6_TA(2009)0314, 24 April 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:184E:0119:0126:EN:PDF>.

173 Migreurop 2011.

174 Migreurop 2011.

