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## Frontex: human rights responsibilities

### Report<sup>1</sup>

Committee on Migration, Refugees and Displaced Persons

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### Summary

The European Union Agency Frontex is tasked with co-ordinating member States' actions relating to the management and control of the European Union's external borders. While security concerns prevail, the Agency also provides an opportunity to enhance and promote respect for human rights.

Nevertheless, Frontex and European Union member States have been criticised for not carrying out their joint border surveillance operations and joint return operations in full compliance with human rights standards.

Concerns about the human rights implications of Frontex's activities have also been raised at a structural level in terms of lack of transparency, unclear responsibility and accountability, and lack of democratic scrutiny, particularly of agreements with third countries.

In response to these concerns, Frontex endorsed a Fundamental Rights Strategy and a Code of Conduct. Furthermore, a requirement to protect fundamental rights, along with the nomination of a Fundamental Rights Officer and the creation of a Consultative Forum on Fundamental Rights was included in the amended Frontex Regulation. These new fundamental rights safeguarding mechanisms now need to be effectively used. In this there will be major challenges ahead.

Further steps are necessary to enhance democratic scrutiny by the European Parliament, human rights training activities for those involved in Frontex operations should be a priority, and it is necessary to ensure public accountability by putting in place an independent monitoring system and an effective complaints mechanism. Finally, some of Frontex's current shortcomings at operational and structural level have to be addressed.

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1. Reference to committee: Doc. 12704, Reference 3809 of 7 October 2011.



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## A. Draft resolution<sup>2</sup>

1. The European Agency for the Management of Operational Co-operation at the External Borders of the member States of the European Union, known as Frontex, was created in October 2004 to assist European Union member States in managing and controlling their external borders. With a budget of about 85 million euros in 2012, Frontex has been crucial in implementing border security.
2. When Frontex was established, its role was seen primarily in terms of border control and migration management. Once it began to operate, it became clear that there were many human rights implications attached to its work and that it was ill-equipped to tackle these. This was particularly the case when intercepting irregular migrants, asylum seekers and refugees at borders or at sea, and also during return operations involving irregular migrants and rejected asylum seekers.
3. These human rights issues have brought to the forefront a number of structural issues in the way in which the Agency operates and is managed. Notable in this respect is the lack of clarity over Frontex's responsibility in co-ordinating and implementing joint land, air, sea and return operations with member States and also regarding liabilities for human rights violations or other breaches of international law resulting from the Agency's actions. In addition, there are problems of transparency regarding operations and activities and their human rights implications. There is also a lack of democratic scrutiny, for example where Frontex negotiates agreements with third countries concerning border controls, interceptions and returns.
4. The Parliamentary Assembly welcomes the fact that the European Union and Frontex have recently taken a range of measures to deal with a number of these problems. In this respect, the Agency endorsed a Fundamental Rights Strategy and a Code of Conduct. Furthermore, the EU institutions agreed to amend the Frontex Regulation so as to include the requirement to protect fundamental rights. Changes were also introduced to nominate a Fundamental Rights Officer and create a Consultative Forum on Fundamental Rights. The amended rules added obligations to provide training on fundamental rights, to respect the principle of *non-refoulement*, and to terminate or suspend joint operations or pilot projects in the event of serious or persistent breaches of fundamental rights or international protection obligations.
5. However, the Assembly remains concerned about whether these changes alone address all the human rights issues at stake and whether some of the changes are operable and effective, even if member States and Frontex do everything they can to implement them.
6. A dangerous mindset still exists which views Frontex's activities as being no more than those of member States, with responsibilities lying with individual member States and not with the Agency. While progress has been made in accepting that this is not always the case, the recourse to this argument is still too frequently made when looking at issues involving human rights responsibilities.
7. The Assembly therefore calls on Frontex and EU member States to address a range of issues at both the operational and structural level of Frontex and its activities and calls on them to:
  - 7.1. ensure that persons with international protection needs, including potential victims of trafficking, unaccompanied minors and other vulnerable persons, are identified during border and interception operations, and that these persons are provided with appropriate assistance, including access to asylum and other international protection. Furthermore, information about requests for asylum and international protection, as well as information on boats in distress, need to be given, without delay, to the competent national authorities. In order to ensure that this is done, automatic debriefing of intercepted migrants, in accessible languages, has to be standardised and relevant instructions or clear guidelines must be provided to staff and deployed officers, besides training to equip them with skills to carry out this task. This has to be integrated into each operational plan.
  - 7.2. guarantee the rights of all returnees during joint return flights or other return operations. This should include guarantees of humane and equal treatment and non-discrimination, as well as the protection of personal data. An effective and independent monitoring system at all stages of joint return operations needs to be put into place and joint return operations should only be carried out and funded for EU member States that have an effective system of forced return monitoring in place at national level. The reporting to Frontex of the monitors' findings should be obligatory.
  - 7.3. guarantee the implementation of the Frontex Code of Conduct and the future code of conduct for joint return operations and spell out consequences for non-compliance. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as well as other

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2. Draft resolution adopted unanimously by the committee on 4 April 2013.

relevant bodies of the Council of Europe should be consulted at the appropriate moment on the draft code of conduct for joint return operations, which should take the Council of Europe's Twenty guidelines on forced return fully into account;

7.4. make use of the power to suspend or terminate joint operations and pilot projects in cases of serious or persistent breaches of fundamental rights or international protection obligations. Clear risk indicators and objective early warning criteria for the suspension of operations should be developed in co-operation with the Council of Europe, the United Nations High Commissioner for Refugees (UNHCR), the European Union's Fundamental Rights Agency, human rights organisations and the Frontex Consultative Forum. The potential termination of an operation should not be left simply to the discretion of the deployed staff without their being given guidance;

7.5. apply basic standards for return monitoring to ensure it is effective. This needs to include the independence of monitors, the monitoring of all phases of the return and the reporting of the findings.

8. The Assembly also calls on Frontex to tackle a number of structural issues which have human rights implications, by:

8.1. improving transparency and public communication regarding the nature of the operations carried out on the ground and their impact on human rights;

8.2. recognising its responsibility as owner, or co-owner of the projects it co-ordinates and implements;

8.3. carrying out human rights training activities for all Frontex staff and deployed border guards in co-operation with external partners, such as the EU Fundamental Rights Agency and the UNHCR, and investing more in mainstreaming and integrating human rights standards, international protection obligations, and victim protection and identification into operational training activities at national level;

8.4. building up an effective human rights monitoring system on Frontex's operational activities, by effectively using as a starting point the two new fundamental rights safeguarding mechanisms, which are the newly appointed Fundamental Rights Officer and the Consultative Forum on Fundamental Rights. Further steps will need to be taken, however, to ensure that monitoring is systematic, transparent and independent, and that an effective reporting system is put into place. This reporting system will need to be based on human rights indicators and has to ensure that in each and every joint Frontex operation, human rights incidents are reported and that the consequences for not reporting these are defined and enforced. Furthermore, a mechanism needs to be put into place to independently assess the impact and follow-up given to the recommendations of the Consultative Forum and the activities, including training activities, carried out by external partners;

8.5. integrating into the risk analysis the likelihood of search and rescue at sea as a factor to conduct joint sea operations; integrating human rights criteria in data collection and analysis and considering the human rights situation in third countries when reporting on risk;

8.6. pre-checking that vessels provided have the equipment allowing for search and rescue at sea; introducing search and rescue in training for patrolling and making it obligatory for deployed officers to undergo such training.

9. The Assembly also calls on the European Union to ensure that Frontex and EU member States comply with their human rights obligations, by:

9.1. revising the Schengen Borders Code to take into account the fact that EU member States and Frontex have responsibilities that go beyond border surveillance, in particular in relation to *non-refoulement*, search and rescue activities and other interceptions at sea;

9.2. enhancing the European Parliament's democratic scrutiny of Frontex by:

9.2.1. ensuring that the Fundamental Rights Officer and the Consultative Forum on Fundamental Rights report directly to the European Parliament on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns;

9.2.2. requiring the European Parliament to be consulted prior to the conclusion of any agreements between Frontex and third countries, in order to ensure that human rights and refugee rights are fully respected in the third countries when activities including return, joint patrolling, search and rescue or interception operations are implemented with them.

9.3. ensuring that Frontex assumes its responsibilities with respect to human rights in joint operations;

- 9.4. strengthening the role of the Fundamental Rights Officer by:
  - 9.4.1. guaranteeing his/her independence;
  - 9.4.2. giving him/her the necessary means and resources to effectively monitor all of Frontex's activities;
  - 9.4.3. establishing a complaints mechanism for individuals who consider that their rights have been violated by Frontex.
- 9.5. strengthening the status of the Consultative Forum by guaranteeing it access to information on all Frontex activities, by integrating it into the planning, implementation and evaluation of projects/operations and by giving it the possibility to regularly observe joint operations;
- 9.6. strengthening the co-operation of Frontex with human rights expert organisations such as the Council of Europe, the UNHCR, the Office of the High Commissioner for Human Rights (OHCHR) and the Fundamental Rights Agency. This can be done by opening up joint operations to participation by these organisations and through these organisations reporting back their findings to the Agency and the hosting/participating member States in order to continuously enhance fundamental rights protection;
- 9.7. ensuring that the above matters listed in points [9.2] to [9.6] are made compulsory through a change of the Frontex regulation.

10. The Assembly furthermore calls upon the EU member States to support Frontex and to ensure that in their own participation in the Agency's activities they comply fully with all their human rights responsibilities. This they can do, *inter alia*, by:

- 10.1. ensuring that deployed officers have the required knowledge of their human rights obligations and that they have undergone human rights training to develop the respective skills that are necessary in joint operations, and that they report protection relevant issues and potential human rights violations to Frontex and the competent national authorities;
- 10.2. complying with the *Hirsi* judgment of the European Court of Human Rights when intercepting migrant boats, both in and outside EU territorial waters. In doing this, they need to ensure, *inter alia*, that those intercepted do not face collective expulsion or ill-treatment, that they have the right to an effective remedy and the possibility of claiming asylum, and that they are disembarked to a safe harbour;
- 10.3. ensuring that vessels and other equipment provided is human rights compliant (namely is equipped to carry out search and rescue at sea or other human rights or humanitarian tasks).

11. Finally, the Assembly invites the European Parliament to use its democratic control and supervisory function to oversee Frontex and its activities where these have human rights implications.

## **B. Draft recommendation<sup>3</sup>**

1. The Parliamentary Assembly refers to its Resolution ... (2013) on Frontex: human rights responsibilities.
2. It welcomes the fact that the European Union and the European Agency for the Management of Operational Co-operation at the External Borders of the member States of the European Union, known as Frontex, have recently taken a range of measures to deal with human rights concerns arising from the work of the Agency. In this respect, it notes that Frontex has endorsed a Fundamental Rights Strategy and a Code of Conduct and that the Frontex regulations have been changed to include the requirement to protect fundamental rights, especially by creating a post of Fundamental Rights Officer and by setting up a Consultative Forum on Fundamental Rights, on which the Council of Europe is represented. Both are now operational.
3. While these changes are welcome, there remain concerns about whether these changes are sufficient and whether they are operable and effective.
4. It is in this context that the Assembly calls on the Committee of Ministers to support and encourage Frontex in human rights matters, and more specifically to:
  - 4.1. ensure, via its representative on the Consultative Forum on Fundamental Rights, that the Council of Europe takes an active part in Frontex's human rights related activities, and that there is feedback and a regular exchange of views within the Council of Europe on participation in this Forum and the Council of Europe's input;
  - 4.2. ensure that the relevant Council of Europe standards, in particular those developed in the case law of the European Court of Human Rights, the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and those of the Group of Experts on Action against trafficking in Human Beings (GRETA), are duly taken into account in Frontex training curricula and operational procedures;
  - 4.3. assist Frontex in strengthening its monitoring mechanisms, including the one devised for monitoring joint return operations, through enhanced co-operation with the CPT, GRETA, the European Court of Human Rights and other relevant sectors of the Council of Europe;
  - 4.4. assist Frontex in its efforts to protect and promote human rights, ensuring that the Council of Europe uses its privileged ties with the respective national preventive mechanisms established under the OPCAT ("European National Prevention Mechanisms (NPM) Network") and with the Ombudsmen and national human rights institutions of its member States ("Peer-to-Peer Network").

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3. Draft recommendation adopted unanimously by the committee on 4 April 2013.

## C. Explanatory memorandum by Mr Cederbratt, rapporteur

### 1. Introduction

1. The European Agency for the Management of Operational Cooperation at the External Borders of the member States of the European Union, known as Frontex, was established in October 2004 by Council Regulation (EC) 2007/2004 (Frontex Regulation).<sup>4</sup> It is based in Warsaw, Poland, and became operational in May 2005. The Agency is a major tool for implementing the European Union's integrated border management system which aims to manage migration by making crossing the external EU borders safe and the subject of legal control.

2. The main tasks of Frontex are to facilitate and make more effective EU measures relating to the management of external borders, in particular the Schengen Borders Code. The Agency does this by co-ordinating EU member States' actions in order to improve efficiency, uniformity and control of persons and surveillance of the European Union's external borders.

3. We are all well aware of the challenges the European Union has to face in terms of managing migration. Frontex provides an opportunity for EU member States to better co-ordinate their border control activities, to learn from each other's experience in this respect and harmonise their practices at their external borders.

4. Admittedly, the balance between managing migration through external border control measures and human rights may in some circumstances be a delicate exercise for the authorities. The two have to go together, however, and Frontex also represents a real opportunity to enhance and promote the respect of human rights at the external borders of the European Union. This opportunity should not be missed.

## 2. Frontex: necessary but with a greater commitment to human rights

### 2.1. Structure and activities

5. Frontex is a European Union Agency with legal, administrative and financial autonomy. It is governed by a Management Board consisting of representatives of the heads of the border agencies of the 25 EU member States that are signatories of the *Schengen acquis* and two members of the European Commission.<sup>5</sup> The Agency is managed by an Executive Director who is appointed by the Management Board on the proposal of the European Commission for five years, renewable once.

6. After two fact-finding missions (one to Brussels and one to the Frontex headquarters in Warsaw), I became fully aware that Frontex does not carry out its activities only on the ground. The Agency is also active in developing and applying common integrated risk analyses for the European Union's external borders. Joint operations at the external land, sea and air borders are launched based on these risk analyses. Frontex can also assist member States in organising joint return operations (JROs) for individuals staying illegally in the European Union. Furthermore, the Agency supports the training of national border guards and facilitates research and development in the area of border security.

7. The Frontex budget has seen constant growth. In Frontex's first year, the budget was 6.2 million euros; in 2006 it reached 19.2 million euros. For 2012, the projected budget amounted to 84.96 million euros. This growth indicates that border security is one of the top priorities for EU member States.

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4. The Frontex Regulation has been amended twice: in 2007 and most recently in 2011 by Regulation (EC) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2011, L 304, 22 November 2011, p. 1). References to the "Frontex Regulation" refer to the consolidated text following the 2011 amendments.

5. The four Schengen Associated Countries – Iceland, Lichtenstein, Norway and Switzerland – also participate in Frontex's Management Board meetings. Each of them sends one representative to the Management Board but has limited voting rights. In addition, representatives from the United Kingdom and Ireland, which are not Schengen countries, are invited to participate.

## 2.2. Frontex and human rights

8. Frontex is a young Agency that has been criticised for not carrying out its co-ordinated operations in full respect of European human rights obligations. According to international organisations and non-governmental organisations (NGOs), concerns about the human rights implications of Frontex's activities appear both at a structural and operational level.<sup>6</sup> In this report, I will address the main concerns and how Frontex is facing them.

9. Indeed, there have been some serious shortcomings, based *inter alia* on a lack of transparency, a lack of clarity in terms of responsibility and liability, and a lack of democratic scrutiny, particularly of agreements with third countries. This has prompted a welcome reaction both by Frontex and by the EU institutions. In March 2011, the Agency endorsed a Fundamental Rights Strategy and a Code of Conduct and, in June 2011, the Council, the European Parliament and the European Commission came to a political agreement on proposals to ensure the full respect of fundamental rights during Frontex's activities and to reinforce its legal framework (see section 5 below).

## 3. Human rights concerns at operational level

10. Operational activities of EU member States co-ordinated by Frontex concern joint operations or pilot projects. They are divided into four sectors: land, air and sea operations, and one sector responsible for providing assistance to member States in organising joint return operations (JROs). This part of the report looks at sea operations co-ordinated by the Agency and joint return operations, where human rights concerns are most obvious.

11. Joint operations, whether by land, air or sea or as JROs, are performed under the authority of the host State. Other member States and Schengen Associated Countries participate by deploying their equipment and staff. While the latter remain under the authority of the sending State and have to respect both the laws of the sending and the host State, the role of Frontex in preparing and implementing joint operations is nevertheless substantial.

### 3.1. Sea operations co-ordinated by Frontex

12. Sea operations deal essentially with border surveillance at sea. Almost two thirds of the total budget spent in joint operations in 2011 concerned sea operations and between 2006 and 2012, Frontex co-ordinated a total of 48 of these. I was informed that joint maritime border surveillance operations co-ordinated by the Agency often turn out to become so-called search and rescue operations (SAR operations). The Committee on Civil Liberties, Justice and Home of the European Parliament (LIBE) has requested Frontex to improve its search and rescue operations and has put almost 10 million euros of Frontex's 2013 budget aside until practical steps are taken, and has requested Frontex to report back on this. Frontex's Executive Director addressed the LIBE Committee on 11 October 2012 on this issue and stressed that search and rescue activities are likely to happen during sea operations, therefore they are considered a "starting point" rather than an exception for planning Frontex activities at sea.<sup>7</sup>

13. Every year thousands of migrants and asylum seekers attempt to reach the European Union by sea in terrible conditions. The recent report of the Parliamentary Assembly on "Lives lost in the Mediterranean Sea: who is responsible?" gives a tragic account of such attempts (Doc. 12895). According to the International Maritime Organization (IMO), around 90% of interceptions involving unsafe boats in recent years occurred during joint sea operations co-ordinated by Frontex and were conducted by vessels participating in these operations.<sup>8</sup>

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6. Amnesty International and the European Council on Refugees and Exiles, 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; Migreurop, Frontex Agency: Which guarantees for Human Rights?; Jesuit Refugee Service Europe, Safe and Secure: How do refugees experience Europe's Borders?, December 2011; Human Rights Watch, Simon Troller, On the Borders of Legality, 8 February 2011; United Nations High Commissioner for Refugees (UNHCR), UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM(2010)61 final.

7. [www.europarl.europa.eu/ep-live/en/committees/video?event=20121011-0900-COMMITTEE-LIBE&category=COMMITTEE&format=wmv](http://www.europarl.europa.eu/ep-live/en/committees/video?event=20121011-0900-COMMITTEE-LIBE&category=COMMITTEE&format=wmv).

8. International Maritime Organization, Unsafe practices associated with the trafficking or transport of migrants by sea, First and Second biannual reports, 2 November 2009, 18 February 2010, 7 January 2011 and 16 December 2011.

14. Although Frontex has no mandate to conduct SAR operations, the Agency, through its deployed assets or staff, in practice facilitates these activities and saves lives at sea while intercepting migrants, asylum seekers and refugees, and the people who smuggle them. Nevertheless, the Agency's ability to assist member States in conducting SAR operations (as foreseen in Article 2.1.*da*) largely depends on whether the latter are willing to provide staff and equipment.

15. I would like to give a concrete example of this sort of sea border control. Operation *Hermes*, co-ordinated by Frontex, took place from 20 February 2011 to 31 March 2012 with a budget of 12 158 959 euros. This joint operation, requested by the host member State Italy, aimed to implement co-ordinated sea border surveillance. The member States participating in this operation<sup>9</sup> deployed naval and aerial equipment – although these means remained limited – in order to assist Italy in controlling irregular migration flows from Tunisia towards the south of Italy, mainly Lampedusa and Sardinia.

16. The main focus of operation *Hermes* was, however, to undertake a risk analysis on the possible migratory scenarios linked to the Arab Spring in North Africa and thereby increasing Italy's reactivity. Therefore, member States also provided screening and debriefing experts to gather information for analysing migrants' nationalities and routes upon arrival, and detecting and preventing possible criminal activities.

#### – Issues of concern

17. The conduct of these sea operations poses a range of problems. While member States are obliged to respect human rights when carrying out maritime border surveillance activities within their own territorial waters, the question is more complex on the high seas and in the territorial waters of a third country.

18. Sea operations co-ordinated by Frontex most often take place in the contiguous zones and on the high seas. Council Decision 2010/252/EU sought to extend the territorial scope of the Schengen Borders Code and allows maritime border surveillance activities in these areas. This surveillance had to be in accordance with fundamental rights.<sup>10</sup> However, in its judgment of 5 September 2012, the Court of Justice of the European Union (CJEU) annulled the decision on formal grounds, expressing at the same time concerns about possible human rights implications of such operations.<sup>11</sup>

19. The European Court of Human Rights ("the Court"), in its judgment in the case of *Hirsi Jamaa and Others v. Italy*, clarified the scope of member States' responsibilities regarding border management operations outside their own territorial waters, when it had to deal with the issue of interceptions on the high seas. The Court found that whenever a State exercised authority over an individual outside its territory, it was required to guarantee the human rights obligations under the European Convention on Human Rights (ETS No. 5, "the Convention") to that individual, in order to avoid a lack of protection.<sup>12</sup> These included both the prohibition to return an individual to a country where he or she would face a real risk of being subjected to ill-treatment, and the right to an effective remedy before the removal measure is enforced.<sup>13</sup> On the problem of collective expulsion, the Court held that the prohibition of collective expulsion also applies to their extra-territorial actions, even if it involves the removal of aliens to a third country carried out outside their territorial waters.

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9. The participating member States were Austria, Belgium, France, Germany, Greece, Hungary, the Netherlands, Poland, Portugal, Romania, Switzerland and Spain

10. Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2010 L 111, p. 20), paragraphs 1.1 and 2.5 of Part I to its Annex.

11. Court of Justice of the European Union, *European Parliament v. Council of the European Union*, Case C-355/10, 5 September 2012, paragraphs 51 and 77. The CJEU found that the decision exceeded the limits of the Council's implementing powers, by introducing new elements of the surveillance of the member States' external sea borders which normally required the involvement of the European Parliament as co-legislator. The CJEU also held that the conferral of enforcement powers on border guards might interfere with the fundamental rights of the persons concerned. The CJEU, however, maintained the effects of the contested decision until the entry into force of new rules intended to replace the contested decision annulled by the judgment. The European Commission has planned to present a legislative proposal in early 2013 to replace the Frontex sea border operations rule that was annulled by the CJEU.

12. *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, judgment of 23 February 2012, paragraphs 74-75 and 181-182. The facts of the *Hirsi* case, however, did not take place in the context of a Frontex co-ordinated operation.

13. *Ibid.*, paragraphs 114-115, 198 and 205. The Court found that there had been two violations of Article 3 of the Convention because the applicants had been exposed to the risk of ill-treatment in Libya and of arbitrary return to their countries of origin, and a violation of Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No. 4 to the Convention.

20. Frontex's involvement in interception operations and treatment of individuals who may need international protection thus has human rights implications. A major problem in this context is the need to ensure that, in any interception during sea operations co-ordinated by Frontex, the persons intercepted have access to international protection in line with the principle of *non-refoulement*. member States have to ensure disembarkation of those intercepted at sea at a place where they are not only physically safe but where their rights are respected. These include the right to an individual and fair assessment of any asylum claim.

21. Indeed, no Frontex report refers to the presence of asylum seekers or vulnerable individuals such as unaccompanied minors during sea operations. 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 as it does not collect such data and does not receive such information from member States.<sup>14</sup> This should be changed and the Agency should be required to present a list of individuals who were intercepted and in need of international protection during its operations.

22. Nevertheless, Frontex officers who interview migrants after disembarkation may receive requests for asylum or asylum-related information. However, there is no obligation to pass this information on to the competent national authorities and the Frontex operational plans do not provide guidance in this respect to the deployed officers and neither are the latter equipped with the required skills. In addition, Human Rights Watch reported that Frontex activities may also result in the migrants' exposure to detention conditions that amount to inhuman or degrading treatment. The EU Fundamental Rights Agency's (FRA) report stated that the risk of informal push backs of third country nationals to Turkey decreased with the deployment of Frontex operations in Greece.<sup>15</sup>

23. Obligations as regards international protection and the respect of the principle of *non-refoulement* can only be ensured if operating procedures reflect these obligations in practical, clear guidelines to border personnel (at land, sea and air borders). As co-ordinator of joint operations, Frontex needs to ensure that border guards possess specific and practical knowledge and are equipped with skills to be able to identify those in need of international protection, to respond effectively to any request for asylum, and that relevant protection information is provided to the national authorities. Therefore, the debriefings of migrants should be standardised and deployed officers should receive prior training on human rights standards and international protection obligations, with the assistance of FRA, the United Nations High Commissioner for Refugees (UNHCR) and other relevant organisations.

24. Importantly, joint border surveillance operations which are executed in the territorial waters of a third country and involve the interception of migrant boats may entail significant human rights challenges. According to Migreurop, those operations co-ordinated by Frontex may particularly be an obstacle to the right to leave one's country.<sup>16</sup> In the context of joint operation Hera, for instance, Frontex boats with third-country officers on-board were patrolling in the territorial waters of Mauritania and Senegal and intercepted migrant boats in order to prevent their departure towards the Canary Islands. Almost 6 000 people were thus returned to African shores in 2008 alone.

25. In its [Resolution 1821 \(2011\)](#) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants, the Assembly called on member States to guarantee to all intercepted persons humane treatment and systematic respect for their rights, including when *de jure* or *de facto* jurisdiction is exercised in intercepting migrant boats in the territorial waters of another State on the basis of bilateral agreements.

26. Another serious issue is that of non-assistance to persons in danger. The most recent alleged case concerns a Frontex airplane which reportedly crossed a migrant boat in distress in October 2012 without assisting or initiating a SAR operation. At least 56 people died in this incident.<sup>17</sup> If these allegations were to be true, such a situation is unacceptable. Frontex has to ensure that its staff or deployed officers inform without delay the competent authorities and that the necessary follow-up steps to initiate a SAR operation are taken.

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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.

15. Fundamental Rights Agency, Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner, March 2011; Human Rights Watch, The EU's dirty hands: Frontex Involvement in the ill-treatment of migrants detainees in Greece, September 2011, pp. 46-52. See also: European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011, paragraphs 367-368.

16. Migreurop, "Frontex Agency: Which guarantees for human rights?", p. 13.

17. See Federación Andalucía Acoge, Nueva tragedia ante la inacción de Frontex, 26 October 2012, [www.acoge.org/index.php/es/8-nuestras-noticias/217-nueva](http://www.acoge.org/index.php/es/8-nuestras-noticias/217-nueva), and El País, Otra zódiac similar a la hundida retrasó el rescate de los naufragos de Motril, 28 October 2012, [http://politica.elpais.com/politica/2012/10/27/actualidad/1351370892\\_526066.html](http://politica.elpais.com/politica/2012/10/27/actualidad/1351370892_526066.html).

### 3.2. Joint return operations co-ordinated by Frontex

27. Joint return operations (JROs) co-ordinated by Frontex concern third-country nationals who receive a return decision from a respective court or an administrative body forcing them to return to their country of origin. Some refuse to comply and are returned by force. I will not go into detail about this practice as Ms Virolainen has been appointed as rapporteur on “Effective and fair returns of irregular migrants and failed asylum seekers” (Doc. 12771) and she will deal with the issue extensively. However, I would like to point out that the Agency can assist EU member States in organising such JROs with the participation of national border guards.

28. Frontex can co-ordinate returns by air when several third-country nationals from several EU member States are put on a flight. According to information provided by Frontex to FRA, in 2011 2 059 people were returned by force in 42 JROs. I was informed that the Agency is in the process of developing a specific code of conduct for return operations, as laid down in the amended Frontex Regulation. Once adopted, this should be applied and implemented without delay.

#### – Issues of concern

29. These JROs have raised many concerns among Human Rights organisations. Ill-treatment has been alleged during return flights co-ordinated by Frontex,<sup>18</sup> and concerns have been raised that certain JROs might have amounted to collective expulsions.<sup>19</sup> Where these interventions target specific national groups, they have to be handled sensitively as they raise potential questions of racial discrimination in the Agency’s operation. In addition, the Agency’s policy on not assessing the reasons for the return decision might contradict the principle of *non-refoulement*.

30. To date, there is no generalised and independent monitoring of JROs by outside agents in place, although member States have the legal obligation to provide a monitoring system in line with the EU Return Directive<sup>20</sup> to ensure that the EU Charter on Fundamental Rights is respected. According to FRA, only four countries currently monitor Frontex co-ordinated JROs.<sup>21</sup> A study requested by the European Commission revealed that at least 13 member States do not have an effective monitoring system in place.<sup>22</sup>

31. Therefore, the Agency should only carry out JROs from those member States that have established an effective monitoring mechanism. The monitoring institutions and deployed officers should also report to Frontex. Conversely, only those member States that have an effective system of forced return monitoring in place should be able to benefit from Frontex co-ordinated JROs and related funding.

32. In addition, there are many open questions about responsibilities in the context of grouped return flights involving several countries alongside Frontex. Frontex should therefore develop safeguards and procedures to carry out JROs in full compliance with human rights standards, including by training escort leaders, applying good practice solutions and developing criteria for potential termination of an operation. It is also crucial to establish a complaints mechanism for returnees and include their accounts in reporting.

33. Another concern is the right to the protection of personal data, included in Article 8 of the European Convention of Human Rights. Indeed, personal data is collected when organising JROs for foreign nationals deported by air from EU territory, including sensitive data relating to health and offences or criminal convictions of the persons concerned. The European Data Protection Supervisor (EDPS) gave an opinion on this practice in 2010 and noted that Frontex has so far not foreseen specific procedures to grant the returnees rights in terms of data protection and to inform them about their personal data before the processing activity takes place.<sup>23</sup> In this matter, transparency should be better respected. The organising member State also

18. Migreurop, Frontex Agency: Which guarantees for Human Rights?, p. 18.

19. Migreurop et al., 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.

20. See Article 8(6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive).

21. Fundamental Rights Agency, Fundamental rights: challenges and achievements in 2011 (annual report), 2012, p. 51. These countries are Austria, Denmark, Luxemburg and the Netherlands.

22. Matrix Insight, Comparative Study on Best Practices in the Field of Forced Return Monitoring, study requested and published by the European Commission, 10 November 2011.

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

transmits returnees' names to the authorities of third countries to check their right of entry. However, no safeguards are in place for the returnees' security, whereas some might risk being arrested and detained upon return.

#### **4. Human rights concerns of a structural nature**

##### **4.1. Lack of transparency**

34. Many NGOs underline the lack of transparency regarding the nature of the operations carried out on the ground and their impact on human rights as a real threat for the respect of fundamental rights. A study by the European Parliament on the implementation of the EU Charter of Fundamental Rights points out that Frontex's "coercive policy linked with a culture of secrecy and lack of transparency exacerbates the vulnerable status of the individuals" who try to cross the European frontiers in order to get a better life in Europe.<sup>24</sup> This study clearly talks about a "profound knowledge gap" regarding the nature of the operations, their impact on the ground and their compatibility with the EU legal framework.

35. This lack of transparency leads to a lack of democratic and public accountability. Therefore, improvements in terms of transparency and communication are needed, particularly on the side of member States, and the Agency needs to comply fully with its obligations in this respect under the Frontex Regulation (Article 28).

36. It is therefore important that the European Parliament exercises its power of control over Frontex and calls on member States to work with the Agency to ensure that fundamental rights are protected.

37. In addition, independent monitoring and public reporting on findings is of the utmost importance to ensure public accountability and credibility. Until now there has not been an independent monitoring mechanism in place to assist Frontex in assessing the human rights impact of these operations. The Agency has, however, appointed a Fundamental Rights Officer who started her work in December 2012. Her main tasks are to put in place a monitoring system and to report on every possible infringement of fundamental rights to the Frontex Management Board and the Consultative Forum. The recommendations of the recently established Consultative Forum on Fundamental Rights will also contribute to increasing the transparency of Frontex's activities.

38. When it comes to transparency, not only procedures must change but mentalities must evolve. Having myself been a police officer for 25 years, I am well placed to know that there is a risk of sub-cultures of secrecy developing in law-enforcement institutions.

##### **4.2. Lack of clarity in terms of responsibility and liability**

39. While the staff and equipment deployed to joint operations and pilot projects remain under the authority of the sending State and the host State, the role of Frontex in preparing and implementing these joint operations and pilot projects is nevertheless substantial, as demonstrated above. However, the legal framework is unclear about the Agency's responsibility and accountability.

40. Given that the amended Frontex Regulation (Article 3.1) allows the Agency to "initiate and carry out joint operations and pilot projects", one may therefore consider that Frontex could be held responsible, at least in part, for the way these activities are carried out in practice, when initiated by Frontex.<sup>25</sup> The same text provides, however, that "the responsibility for the control and surveillance of external borders lies with the member States" (Article 1.2).

41. While the Frontex Regulation also attributes civil and criminal liability to member States regarding the deployment of guest officers to a host member State (Articles 10.b and 10.c), there is no clear rule relating to Frontex's liability when damage occurs due to the Agency's action. Human Rights Watch underlines the failure of the Regulation to create a mechanism to hold the Agency accountable for human rights violations.<sup>26</sup>

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24. European Parliament, Study on Implementation of EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies, 2011, p. 8.

25. On the question of Frontex's responsibility regarding SAR operations, see Statewatch, Criticism of Frontex's operations at sea mounts, Analysis No. 200, November 2012, pp. 4-5.

26. Simon Troller, On the Borders of Legality, 8 February 2011.

42. It is thus necessary to establish a complaints mechanism for persons affected by Frontex's activities. During my fact-finding mission, Frontex expressed its reservations regarding the inclusion of such a complaints mechanism. Frontex regularly claims to "only" co-ordinate member States' and Schengen Associated Countries' activities, and therefore not be in charge or responsible. According to this reasoning, activities that can affect a person's rights can only be performed by the authorities of member States hosting or participating in the operation.

43. I have doubts about this restrictive interpretation, which, in my view, is a shortcut and would not stand up under a Court's assessment. For instance, the Agency's co-ordination duties involve preparing and implementing joint operations and pilot projects and thus have an impact on the way these activities are carried out. Frontex needs to recognise its responsibility as owner of the projects it co-ordinates and finances.

44. For Frontex, persons who consider their rights have been violated should use both national and EU mechanisms to file complaints.<sup>27</sup> Pursuant to the provisions of the Frontex Code of Conduct, all participants in Frontex activities who have reason to believe that a violation of the Code, including violations of fundamental rights, has occurred or is about to occur, should report the matter to Frontex via the appropriate channels.<sup>28</sup> However, this reporting is not obligatory and the Agency does not have the right to investigate cases and can only transfer a matter of concern to the respective national authorities.

45. Regarding complaints mechanisms at EU level, since the adoption of the Lisbon Treaty, the "CJEU is fully competent to revise the legality or provide interpretation to guide the acts of the EU Agencies (Articles 263, 265 and 267 TFEU)".<sup>29</sup> Frontex is thus accountable for certain kinds of behaviour before the Court, including actions for failure to act and preliminary rulings concerning the validity of acts. However, compensation for damage that occurs during operations due to the Agency's action is not addressed. In addition, the Lisbon Treaty does not extend the jurisdiction of the CJEU to cover the responsibility of agencies.

46. However, Article 19 of the Frontex Regulation provides that Frontex should assume its non-contractual responsibility before the CJEU for all disputes concerning damage caused by the Agency's departments or their staff in the performance of their duties. In such circumstances, the CJEU has jurisdiction over disputes concerning damages.

47. While currently there are only limited means to file complaints against Frontex or the European Union on a European level, this might change in the future. The main consequence of a future EU accession to the European Convention on Human Rights would be the possibility for an individual to lodge a complaint to the European Court of Human Rights against the European Union. It would therefore be up to the Strasbourg Court to define a potential EU responsibility linked to an operation co-ordinated by Frontex.

48. The problem is to know who should answer for actions on a case-by-case basis, and where are the limits of the Agency's accountability. What about cases involving other people whose responsibility is not covered by the provisions in the Frontex Regulation? At what point should responsibility be shared by the host country, the participating country and Frontex? Today, all these questions remain unanswered.

49. This lack of clarity regarding responsibility and liability is not acceptable. In case of alleged problems, it leaves the door wide open to a "blame game" between the European Union (its Agency) and its member States, and vice versa. Not only does it dent Frontex's credibility, but it also contradicts the basic principles of rule of law.

### **4.3. Lack of democratic scrutiny of agreements with third countries**

50. The amended Frontex Regulation gives the Agency a legal personality and allows it to enter into co-operation with the authorities of third countries or international organisations. I was told in Warsaw that Frontex's main interest in concluding agreements with third countries lies with accession or pre-accession countries, as well as with countries of transit and of origin. So far, Frontex has concluded working arrangements with 17 countries.<sup>30</sup> Negotiations are ongoing with eight other third countries.<sup>31</sup>

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27. Frontex, Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, p. 2. This and all contributions from interested parties can be found at: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11758/html.bookmark>.

28. Frontex, Code of Conduct for all persons participating in Frontex activities, adopted by the Decision of the Executive Director on 21 March 2011: [www.frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf).

29. Frontex Fundamental Rights Strategy, paragraph 7.

51. Co-operation is supposed to be practical and operational. The amended Frontex Regulation allows the Agency to launch and finance technical assistance projects in third countries regarding matters covered by the Frontex Regulation. These include capacity-building activities in third countries and consist in giving money and materials, but also in providing training. Such agreements can contain provisions on returns. There is generally a certain lack of clarity on the scope of such agreements, as they are not in the public domain.

52. These working arrangements with third countries may have human rights consequences and could even lead to human rights violations. Co-operation with certain countries raises serious concerns about the way migrants will be treated when returned to these countries or when intercepted based on intelligence provided by the partner country. Given the treatment reserved to migrants, refugees and asylum seekers in Libya and the fact that the country has not ratified the 1951 Geneva Convention relating to the Status of Refugees, returns to that country, for instance, risk not being in compliance with obligations under the European Convention on Human Rights.

53. It is also my understanding that, although the European Parliament has a right to see such agreements and is kept informed of all relations between Frontex and third parties, thus far none have been submitted. In view of the human rights implications of these documents, it may be appropriate for the European Parliament to be requested to give its prior consent to these.

## **5. The European Union's answer to these concerns: inclusion of a greater human rights perspective**

54. There have been two main reactions by Frontex and by the EU institutions to these concerns. The first was to endorse a Fundamental Rights Strategy on 31 March 2011 and the second to include the protection of fundamental rights in the legal framework by amending the Frontex Regulation on 25 October 2011<sup>32</sup> to ensure that Frontex fully complies with its fundamental rights obligations during all its activities. In addition, the Agency also endorsed a Code of Conduct for all participants in its activities on 21 March 2011. The latter contains provisions on the respect of fundamental rights and international protection.

55. Despite these important changes, which show that Frontex has undergone profound changes over the past years, the main challenge is to fully implement these human rights provisions in practice and in the context of all Frontex activities.

56. As a follow-up, the European Ombudsman launched, on 6 March 2012, an own-initiative inquiry into how Frontex implements its fundamental rights obligations in relation to this Fundamental Rights Strategy. According to what the European Ombudsman told me at our meeting on 26 June 2012, this initiative is not the result of any specific suspicion of wrongdoing. I would like to thank Frontex for having shared with me a copy of its opinion to the European Ombudsman, prior to its publication, as it gives a detailed insight into the Agency's position on fundamental rights.<sup>33</sup>

### **5.1. The need for implementation of the Fundamental Rights Strategy**

57. According to Article 26.a of the Frontex Regulation, "the Agency shall draw up and further develop and implement its Fundamental Rights Strategy" and "put in place an effective mechanism to monitor the respect for fundamental rights in all [its] activities".

58. Frontex's Fundamental Rights Strategy was elaborated following a consultative process which involved representatives of member States, the European Commission, Frontex, and international organisations – such as FRA, the UNHCR and the International Organization for Migration (IOM).

59. The strategy provides that "[r]espect for fundamental rights is an essential part of integrated border management" (Article 1). The document sets out the objectives and measures to be taken in order to achieve human rights compliance. It also underlines the need for its proper implementation.

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30. These countries are Albania, Armenia, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, Croatia, Georgia, the Republic of Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United States.

31. These countries are Azerbaijan, Brazil, Egypt, Libya, Morocco, Mauritania, Senegal and Tunisia.

32. Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex Regulation) (OJ 2011, L 304, 22 November 2011, p. 1) entered into force on 12 December 2011.

33. Frontex's opinion on the European Ombudsman's own-initiative inquiry, op. cit.

60. However, it does not clarify the circumstances under which Frontex is accountable. According to Article 13 of the Strategy, the Agency does not assume any responsibility in this area, as “member States remain primarily responsible” for the implementation of the relevant legal obligations and therefore also “for the respect of fundamental rights during these activities” (Article 13). This, however, does “not relieve Frontex of its responsibilities as the co-ordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all activities”.

61. The implementation of this Strategy should be possible in part through the Fundamental Rights Action Plan drafted by the same actors and adopted by the Frontex Management Board on 29 September 2011.<sup>34</sup> The Action Plan presents, in 20 points, how Frontex can implement this Strategy regarding operational activities (risk analysis, joint operations and joint return operations), capacity building (training, research and development) and horizontal activities (such as external relations, communication and dissemination). I was told that an annual progress report on the implementation of this Strategy would be presented to the Frontex Management Board and made public.

62. Despite the good intentions contained in the Fundamental Rights Strategy, most provisions have not yet been put into practice. For instance, the Strategy foresees fundamental rights training for all Frontex staff – a project jointly prepared by FRA, the UNHCR and Frontex. Although the concept, the training content and the trainers have been ready for over a year, the implementation has not yet started. In order to ensure an efficient democratic scrutiny, a monitoring process should be set up to control the implementation of the Frontex Fundamental Rights Strategy, to measure its impact and to potentially provide further recommendations for change indicators. This mechanism should be external, transparent and independent.

## **5.2. Human rights provisions included in the amended Frontex Regulation**

63. In line with the amended Frontex Regulation, the Frontex Consultative Forum on Fundamental Rights was established in October 2012 to assist and advise the Executive Director and the Management Board on how the Agency should structurally improve the promotion and respect of fundamental rights in all Frontex activities.<sup>35</sup>

64. It brings together key European institutions, experts and civil society organisations, including the Council of Europe, the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (OSCE/ODIHR), the UNHCR, FRA, the European Asylum Support Office (EASO), the IOM and nine civil society organisations.<sup>36</sup> In September 2012, the Frontex Management Board adopted working methods for the Consultative Forum. In January 2013, the Consultative Forum adopted its work programme for 2013.

65. While the Consultative Forum has been tasked with preparing a publicly available annual report of its activities, it remains to be seen whether the report can have an impact. The Consultative Forum will not have a monitoring role, only an advisory function – allowing it to make recommendations and provide opinions. Therefore, an impact assessment on whether the recommendations of the Consultative Forum have been taken into account should be considered in 2014-2015.

66. On 27 September 2012, the Frontex Management Board designated Ms Inmaculada Arnáez Fernández as Frontex’s first Fundamental Rights Officer with the task of monitoring the respect of fundamental rights and reporting on a regular basis to the Management Board, the Consultative Forum and the Executive Director.

67. The Fundamental Rights Officer has access to all information concerning respect of fundamental rights in relation to all activities of Frontex. It is, however, unclear in the Regulation as to what exactly her competences are and whether she will be able to receive complaints from individuals and if this information will be made public.

68. Importantly, the Fundamental Rights Officer is supposed to be an independent staff member. I would like to underline several weaknesses of this process. The objective of independence cannot be reached if the person is an ordinary staff member and, therefore, has to report to his or her line manager (Frontex’s

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34. *Ibid.*, p. 1.

35. *Ibid.*, p. 4.

36. These are the European Council for Refugees and Exiles (ECRE), the Red Cross EU Office, Amnesty International’s European Institutions Office, the International Catholic Migration Commission (ICMC), Caritas Europa, the International Commission of Jurists (ICJ), the Jesuit Refugee Service (JRS), the Churches’ Commission for Migrants in Europe (CCME) and the Platform for International Cooperation on Undocumented Migrants (PICUM).

Executive Director) and if he or she does not have a team with which to monitor the Agency's activities. Indeed, an individual (and an assistant) alone will not be able to do this complex task effectively. According to Article 26.a.3 of the Regulation, the Fundamental Rights Officer reports to Frontex's Management Board and to the Consultative Forum. In addition, he or she should also be encouraged to report directly to the European Parliament on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns. Furthermore, the terms of reference requiring the incumbent to commit him or herself "to act independently in Frontex's interest" appears to be contradictory: if the Fundamental Rights Officer is supposed to act independently, it might not always be in Frontex's direct interest.

69. Another provision included in the amended Frontex Regulation (Article 2, paragraph 1.a) envisages that Frontex's risk analyses and joint operations co-ordinated by the Agency have to take into account the particular situation of persons seeking international protection in line with the principle of *non-refoulement*, and the particular circumstances of vulnerable individuals or groups in need of protection or special care (separated and unaccompanied children, women, victims of trafficking and persons with medical needs). Frontex assured me that this would be done.

70. Moreover, Frontex should seek advice from its external partners on the relevant instructions or guidelines for deployed officers taking part in the Agency's activities. These instructions should be integrated into each operational plan in order to identify people in need of international protection, including potential victims of trafficking. Frontex should also respect the principles of non-discrimination and effective data protection.

71. In addition, the amended Frontex rules require the Agency to put in place an effective reporting system to ensure that any incidents or suspected violations of fundamental rights are immediately reported by participating officers or Frontex staff members, and can thus be acted upon. It is interesting to note that the Agency already has a standard reporting system for each operation and a standard operating procedure to ensure respect of fundamental rights in joint operations and pilot projects (Decision by the Executive Director of 19 July 2012).

72. Indeed, operational plans adopted by Frontex for joint operations, pilot projects and rapid interventions stipulate standard operating procedures for Serious Incident Reporting. This mechanism provides for the relevant steps that should be taken in case of serious or persistent violations of fundamental rights or international protection obligations that occur in the course of activities co-ordinated by the Agency. It consists of an online reporting form that is sent via national validation directly to the Frontex incident centre.

73. Overall, it seems that the procedure is not sufficiently applied, given the low number of reports that have been recorded so far. I was also informed about cases where deployed officers reported incidents to their authorities, but not to Frontex. In addition, there is no encouragement or incentive to report such incidents or provide an individual evaluation of operations from a human rights point of view, and there are no consequences if human rights violations are not reported. Therefore, a new transparent and public reporting system should be put in place.

74. In theory, the Executive Director should – based on these reports and as a last resort – suspend or terminate joint operations or pilot projects, if he or she considers that violations of fundamental rights or of international protection obligations have occurred.<sup>37</sup> He can also reduce the financing for an operation. To date, this procedure has not been activated. In the reply to the European Ombudsman, Frontex States that no criteria have been developed as "violations of human rights cannot be predicted before they actually happen". Here again, a clear mechanism with criteria or risk assessment indicators should be established to guide deployed officers on the ground.

75. Frontex will face a dilemma in using the Serious Incident Reporting mechanism. In certain countries it is common knowledge that human rights are not always respected at the borders. How will Frontex react to a serious incident report? According to Frontex, the Agency has no power to improve the situation, which is in the competence of the national sovereign powers of the member States. Frontex therefore risks becoming a tacit witness of human rights violations, as it may only inform the relevant authorities accordingly, formulate recommendations and give advice. This dilemma is reflected in the Agency's reply to the European

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37. Frontex's opinion on the European Ombudsman's own-initiative inquiry, *op. cit.*, p. 9. Frontex might suspend or terminate joint operations and pilot projects for the following reasons: firstly, if the conditions guaranteeing the respect of fundamental rights are not met; secondly, in case of persisting violations of fundamental rights or international protection; and thirdly for violations of international protection obligations.

Ombudsman: “Due to the complexity of the operations which largely involve member States and are linked to significant political and operational issues, it shall not be always appropriate to suspend or terminate the operation.”

76. Finally, Frontex is also required to establish an effective monitoring system on the impact of Frontex’s operational activities on human rights, which is particularly needed for JROs. However, monitoring is only going to be credible and useful if it is independent. To monitor effectively, one has to know who is responsible and have access to information on the operations, including by choosing which operations to monitor. In addition, reporting on the findings of monitoring activities should be public. It all starts and ends with transparency.

77. The institution of the Fundamental Rights Officer, the setting up of the Consultative Forum, as well as the current design of the Serious Incident Reporting, are all steps in the right direction. However, contrary to what I was told by Frontex, they cannot be considered sufficient to constitute an effective monitoring system as foreseen in the Frontex Regulation (Article 26.a). The lack of independence and of means, and the extremely vague mandate of the Fundamental Rights Officer, and the purely advisory capacity of the Consultative Forum are shortcomings in systematically monitoring fundamental rights compliance of all Frontex activities and in its potential for organisational change of processes and procedures. The effectiveness of both mechanisms remains to be seen in practice.

### **5.3. Co-operation agreements with external partners**

78. To ensure the identification of vulnerable people by border guards, co-operation agreements were signed with UNHCR on 13 June 2008, with FRA on 26 May 2010, and with EASO on 26 September 2012. Frontex also co-operates with the International Organization for Migration (IOM). Another working arrangement is under negotiation with the Joint Research Centre.

79. The working agreement signed with UNHCR consists of providing regular consultation, exchange of information and input into the training of border officials on international human rights and refugee law. UNHCR has posted a liaison officer in Warsaw in order to work closely with the Agency and has been able to participate in two joint operations in an effort to help identify vulnerable children. This is considered a breakthrough in co-operation. Hopefully, Frontex will increasingly accept the presence during its joint operations of external partners in an advisory but also in an observer capacity.

80. The co-operation arrangement with FRA focuses on the comprehensive integration of fundamental rights into key areas of Frontex’s mandate such as training, joint operations, data collection and a tailored training programme on fundamental rights for Frontex staff.

81. The recently signed agreement with EASO provides for co-operation on operational response and capacity building, including training and research, and exchanging information. The two Agencies will in particular step up co-operation in the field of reception and care of migrants, as well as the identification process of those requiring international protection. In addition, they will improve their co-ordination with regard to the assistance provided to countries experiencing difficulties (setting up expert teams, risk analysis and providing statistics).

82. Despite these promising steps, some obstacles remain. There is no evaluation of the impact of advice and recommendations, or of training activities and a formal mechanism to assess the impact of the co-operation would be helpful.

### **5.4. Frontex – a greater potential for training national border guards?**

83. According to the Frontex regulations, Frontex officers and border guards deployed in joint operations should all be trained in human rights matters. While many efforts have been made to develop training courses and tools, human rights training activities for Frontex staff members are still not implemented. The pre-deployment briefing that deployed officers receive is not sufficient to equip them with the necessary human rights skills when confronted with serious incidents during operations. More efforts are therefore needed to mainstream and integrate human rights, international protection, victim protection and identification into operational training and training sessions.

84. I believe that Frontex officers have knowledge to share with national staff. It is a good start that Frontex officers are to be trained, but it is far too little. Every member of staff and the border guards deployed by the member States (not only those on the ground) should benefit from training activities on the protection of human rights and international protection obligations in co-operation with external partners, including notably FRA and the UNHCR.

85. Nevertheless, Frontex officers are not numerous, and often there is only one Frontex officer present on the ground. More training sessions therefore need to be organised on the ground for national staff, who need to be made more aware of their human rights obligations. The Agency's work on establishing a core curriculum is a step in the right direction, as are the training sessions and the training of trainers already organised in co-operation with the UNHCR. However, there is still a long way to go in this respect. Therefore, evaluation reports on the outcome of the training delivered by international organisations such as the UNHCR and FRA should be drawn up and made public.

86. When I visited the Greek border with a delegation from the Swedish Parliament in 2011, I had the opportunity to speak to both local border guards and the Frontex officer on the spot. It became clear to me that the only one person with a knowledge of human rights was the Frontex officer. I am sure that local staff could improve their human rights knowledge. I was told in Warsaw that Frontex's good influence on the practice in Greece is starting to become visible. However, I was also told that progress is slower than expected.

## **6. Conclusion: How to make Frontex a more effective tool for the protection of human rights?**

87. I stated at the beginning of this report that Frontex has an important role to play to better co-ordinate EU member States' activities in the field of external border control. Frontex operations can also serve as an opportunity to harmonise practices on the European Union's external borders and to familiarise the national border guards with their human rights obligations.

88. I have sincere respect and am grateful for the commitment of Frontex staff members in ensuring the protection and surveillance of our borders. They are currently under great pressure and they are making efforts to respect fundamental rights on the ground. I am aware of these efforts. Frontex feels uneasy about the attention given to its activities and their compliance with human rights by a growing number of actors, including the European Ombudsman and the Council of Europe.

89. Frontex has to face the difficulty of having two masters: the European Union and its member States. In Brussels, the latter might be very keen on respecting human rights. However, back in their capitals and at the borders, they may see the priority more in terms of migration management. Furthermore, member States never like being monitored. Frontex is in an uneasy situation and I can sympathise with this.

90. The situation on the ground is not easy either, as the member States have quite different laws and procedures. More harmonisation is needed. Communication between Frontex co-ordination officers and those of the host countries can be difficult. This may be because of language (English being the common language) or it may be cultural.

91. It is unfortunately not sufficient to elaborate a Fundamental Rights Strategy and to include in the Frontex rules the overall obligation that fundamental rights must be respected. It is necessary to provide the legal means and democratic safeguards to achieve these goals. This report tries to give some recommendations to help the Agency improve the respect and protection of human rights at European borders.

92. These recommendations seek to address human rights concerns at operational level, notably in respect of joint return and border surveillance operations. While border guards deployed to these operations remain under the authority of the sending State and have to respect both the laws of the sending and the host country, the role of Frontex in preparing and implementing a joint operation is nevertheless substantial. Human rights can easily come to the forefront during interception operations, in particular where there are persons who may need international protection.

93. The recommendations also aim to address human rights concerns of a structural nature, including the lack of transparency of the Agency's activities, the lack of clarity regarding its responsibility and liability, and the lack of democratic scrutiny of some of its activities, particularly agreements negotiated with third countries. Frontex and the European Union have taken a number of important steps to tackle some of the human rights criticisms made, but what is now needed is implementation, in particular of the provisions contained in the amended Frontex Regulation and in the Fundamental Rights Strategy.

94. Furthermore, there is a need to enhance democratic scrutiny by the European Parliament and to ensure public accountability and credibility of the Agency, by putting in place an independent monitoring system and an effective complaints mechanism. It is also necessary to address the current shortcomings at operational and structural level.

95. Finally, I would like to recall that, although managing migration through external border control measures remains one of Europe's key challenges today, the need to respect and protect human rights in all Frontex activities is not an option – it is an obligation. Frontex's commitment in this respect will be all the more important, as the Agency will in the future be in charge of managing and implementing the European border surveillance system, called "Eurosur", which should become effective in October 2013.