

Maastricht Centre for European Law

# Master Working

# Paper

2015/5

**Leonie Kijewski**

**Protecting Borders, People and Rights at Sea?**

**An Analysis of Frontex's Approach to Human Rights**

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Published in Maastricht, November 2015

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This paper is to be cited as MCEL Master Working Paper 2015/5

## **ACKNOWLEDGMENTS**

First and foremost, I would like to express my sincere gratitude to my supervisor Dr. Elise Muir for her continuous support, thorough feedback and for bringing me back on track numerous times. Without her, this thesis would not have been possible. I am very grateful to Thea Coventry for the incredible amount of work she put into giving me feedback, as well as to James Douglas for having helped me without the slightest hesitation. I would also like to thank Travis Farr and Ruth Mary Hackler for being so encouraging, Sietse Nuijen for his support, Mohamed Ahmed Eid Youssef for his creativity, Saravanan Somaskanthan, who offered to read my thesis countless times, and Daniela Cardoso, whose extensive knowledge about European Union law is truly impressive. A very special thanks goes out to all my fellow interns. I am particularly thankful to Rebecca van der Maas and Léa Kor, without whom these acknowledgements would not exist.

Last but not least, I would like to thank my family and friends for their support.

**Abstract**

Each year, thousands of migrants attempt to reach European Union territory by crossing the Mediterranean. Many of them do not reach their intended destinations, either because of regional border protection mechanisms or because they become shipwrecked. Frontex plays a central role in European Union border control by coordinating border control activities of Member States and has been criticised for a lack of consideration for human rights. The rights of migrants who are crossing the Mediterranean to reach European Union territory and the obligations of States conducting border surveillance stem from several sources: International maritime law, international refugee and human rights law and European fundamental rights law. This paper demonstrates that there is a lack of legal clarity in Frontex's legal human rights framework, as well as a lack of transparency and accountability. It then puts forward suggestions on how to improve these issues in order to prevent future human rights violations. In addition to proposing ways for resolving these structural issues, this paper recommends the adoptions of several specific measures to improve human right compliance.

**Key words:** Frontex, human rights, European Union borders, sea, migrants, Mediterranean

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## 1. Introduction

This year alone almost 2000 migrants drowned while attempting to reach European shores by crossing the Mediterranean.<sup>1</sup> The death toll peaked at the end of April 2015 when over 700 migrants died in one weekend.<sup>2</sup> European Union (EU) officials were accused of being “feckless, impotent and cynical in their lack of response”<sup>3</sup>, and an “insouciant, slow-to-react European Union”<sup>4</sup> was blamed for its lack of action. More specifically, the EU border agency Frontex had been criticised for a lack of consideration of human rights by pushing migrants back to their countries of origin and had been accused of being responsible for the death of numerous migrants.<sup>5</sup> Following this incident, the EU held a special summit

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<sup>1</sup> International Organisation for Migration, 21.04.2015, *Survivors of Mediterranean Tragedy Arrive in Sicily*, retrieved from <https://www.iom.int/news/survivors-mediterranean-tragedy-arrive-sicily> [last accessed 27.05.2015].

<sup>2</sup> Al Jazeera, 21.04.2015, *IOM: Mediterranean death toll could top 30,000 in 2014 – International Organisation for Migration says 1,727 migrants have died so far in 2015, up from 56 at same point in 2014*; retrieved from <http://www.aljazeera.com/news/2015/04/iom-mediterranean-death-toll-top-30000-2015-150421232012080.html> [last accessed 27.05.2015].; Reuters, *Shocked by drowned migrants, Europe restores rescue mission*, 23 April 2015; retrieved from <http://www.reuters.com/article/2015/04/23/us-europe-migrants-idUSKBN0NE1DY20150423> [last accessed 28.05.2015].

<sup>3</sup> The Guardian, 20 April 2015, *Mediterranean refugee crisis: EU reduced to impotent handwringing*, retrieved from <http://www.theguardian.com/world/2015/apr/20/mediterranean-migrant-crisis-no-european-migration-policy> [last accessed 27.05.2015].

<sup>4</sup> The Guardian, 19 April 2015, *The Observer view on the human tragedy in the Mediterranean*, retrieved from <http://www.theguardian.com/commentisfree/2015/apr/19/observer-view-human-tragedy-mediterranean> [last accessed 27.05.2015]. The term human rights is used in an international law context, whereas fundamental rights is used in the context of the European Union.

<sup>5</sup> Trevisanut, Seline (2014), *International Law and Practice: The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea*, *Leiden Journal of International Law*, 27; Trevisanut, Seline (2009), *Maritime Border Control and the Protection of Asylum-Seekers in the European Union*, *Touro International Law Review*, 12; Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, New York, Human Rights Watch, 2011; Amnesty International, 2014, *The Human Cost of Fortress Europe – Human Rights Violations Against Migrants and Refugees at Europe's Borders*; Rijpma, Jorrit J. (2014), 'The Patrolling of the European Union's External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea' In: Angela del Vecchio (ed.) *International Law at Sea*, p. 97; Platform for International Cooperation on Undocumented Migrants (PICUM), 2010, *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe*; European Policy Centre, Pascouau, Yves, Schumacher, Pascal (2014), *Policy Brief: Frontex and the respect of fundamental rights: from better protection to full responsibility*; Marin, Luisa, 2011a, '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 of Contemporary European Research*, 7(4); Marin, Luisa, 2011b, 'Is Europe Turning into a 'Technological Fortress'? Innovation and Technology for the Management of EU's External Borders: Reflections on FRONTEX and EUROSUR' in M.A. Heldeweg & E. Kica

and agreed on several measures that were to be taken.<sup>6</sup> These measures, however, will not be dealt with in this paper, as the research was finalised at the beginning of April of this year. While some of these critics seem to paint an overly harsh picture of the EU, it needs to be scrutinised whether the most effective solution for preventing deaths at sea had been put in place and whether Frontex is responsible for breaching human rights. In light of these current events, this paper seeks to assess the extent to which Frontex's legal framework provides for human rights protection and what international law safeguards exist for its operations at sea and scrutinises how these can be effectively implemented.

The agency's tasks are amongst others to coordinate border control and surveillance amongst Member States, carry out risk analyses and initiate and implement Joint Operations. This paper focuses on Frontex-coordinated operations that take place in the territorial waters<sup>7</sup> of a Member State or on the high seas. The agency has also acted in the territorial waters of Third States subject to bilateral agreements, but this is beyond the scope of this paper.<sup>8</sup> On the sea a multi-layered set of rights and obligations applies, namely international law, European Union law, the Council of Europe framework and national legislation. This paper takes a holistic approach and therefore examines Frontex's obligations from an international law perspective, without looking at national legislation that might place obligations on Frontex.

First, this paper sets out the reasons for a human-rights-based approach to Frontex. Second, it presents the human rights that have been enshrined in international and regional protection schemes. To do so, it first examines the international framework, namely international maritime-, refugee- and human rights law at sea and subsequently outlines the protections guaranteed in the EU and Council of Europe structures. Third, it sets out the status quo and examines

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(eds.), *Regulating Technological Innovation: Legal and Economic Regulation of Technological Innovation*, Palgrave MacMillan, 2011, p. 131-151; Klepp, Silja, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea', *European Journal of Migration and Law*, 12, pp. 1-21, 2010.

<sup>6</sup> For example, the EU agreed to at least triple the resources available for Frontex-coordinated missions Triton and Poseidon to ensure safety at sea and to launch initiatives to destroy vessels that are used for smuggling. Council of the European Union, Special meeting of the European Council, 23 April 2015 - statement, retrieved from <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> [last accessed 20.05.2015].

<sup>7</sup> The territorial seas extend to 12 nautical miles measured from the baselines as defined in the UNCLOS Convention. See UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982 (hereinafter United Nations Convention on the Law of the Sea), Part II, Article 3.

<sup>8</sup> The availability of information about these agreements is limited. See <http://frontex.europa.eu/partners/third-countries/>.

the existing human rights safeguards under Frontex's current legal framework. It then turns to initiatives that have been taken by Frontex itself to increase human rights compliance at the borders of the European Union. This builds the basis to point out gaps in the protection framework. Fourth, it scrutinises the effectiveness of these measures in light of search and rescue obligations, international refugee law, and international human rights law. It then puts forward suggestions on how human rights compliance could be enhanced and argues that the main structural deficiencies are due to lack of legal clarity, transparency and accountability.



## 2. A Human-Rights-Based Approach to Frontex

Frontex, officially called the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, was established in 2005 to enhance cooperation between Member States to ensure efficient border control. Its tasks are the following:

- Coordinate operational cooperation between Member States in the field of management of external borders;
- Assist Member States on training of national border guards, including the establishment of common training standards;
- Carry out risk analyses;
- Follow up on the development of research relevant for the control and surveillance of external borders;
- Assist Member States in circumstances requiring increased technical and operational assistance at external borders; and
- Provide Member States with the necessary support in organising joint return operations.<sup>9</sup>

Since the 2011 amendments, Frontex also launches and coordinates Joint Operations during which several Member States contribute to the patrolling in a designated area. The Joint Operations at sea are designed to increase efficiency in combating irregular migration by engaging in joint border control and border surveillance. Parts of these Joint Operations are interceptions, which are operations where Frontex diverts vessels from their original routes which carry migrants that are not allowed to enter EU territory. Frontex's role is to determine where Joint Operations are needed, to launch the operations and to subsequently coordinate Member States' contributions, as well as monitoring the implementation.<sup>10</sup> Since 2011, Frontex also has the capacity to buy equipment from its budget,<sup>11</sup> exchange information with Europol and Eurojust,<sup>12</sup> disembark migrants that were intercepted at sea in third countries by entering into bilateral agreements,<sup>13</sup> and since 2013 administer Eurosur.<sup>14</sup>

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<sup>9</sup> 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, Art. 2(1). (hereinafter Regulation (EC) No 2007/2004).

<sup>10</sup> See <http://frontex.europa.eu/operations/types-of-operations/sea/>; Council of the European Union, *Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 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*, 22 November 2011, OJ L. 304/1-304/7, (hereinafter Regulation (EU) No. 1168/2011), Art. 3.

<sup>11</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 7.

<sup>12</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 11(c)(3)(a).

<sup>13</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 14.

Frontex itself rejects human rights responsibilities, because its mandate does not entail any executive powers<sup>15</sup> and participating Member States retain control over the conduct on board of the vessels.<sup>16</sup> Nevertheless, Frontex should incorporate a fully-fledged human rights approach for the following reasons. First, the importance of its operational support and planning functions should not be underestimated. By launching, coordinating and planning operations at sea and gathering the information needed to implement these, Frontex exercises decisive functions and does more than just coordinating Member States' actions.<sup>17</sup> In this decision-making process, Frontex needs to ensure that human rights are upheld during the implementation of its operational plans. This is consistent with the views of the Ombudsman of the EU, who – while acknowledging that Member States are the only executive agents – rejects Frontex's argument that it only bears responsibility for acts that are committed by Frontex employees themselves. She argues that Frontex, at the very least, has to ensure that a strong human rights policy is in place and complaints can be directed to Frontex.<sup>18</sup>

Second, the European Union Charter of Fundamental Rights is binding since the Lisbon Treaty.<sup>19</sup> The Treaty on European Union reaffirms respect for fundamental rights as a founding value of the EU<sup>20</sup>, stresses the importance for the protection of human rights,<sup>21</sup> and reiterates that the EU shall promote respect for human rights in its external relations with Third Countries.<sup>22</sup> These

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<sup>14</sup> Eurosur is a European Union system that aims at increasing surveillance of border regions to combat irregular migration, see Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

<sup>15</sup> C.f. Regulation (EU) No 1168/2011, *op. cit.*, Regulation (EC) 863/2007, *op. cit.*, Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter Regulation (EU) No. 656/2014).

<sup>16</sup> Despite these claims, a number of human rights mechanisms have been created within Frontex's operational framework. These are examined in section 4.

<sup>17</sup> Marin, L., 2011a, *op. cit.*, p. 474.

<sup>18</sup> European Ombudsman, 07 November 2013, *Special Report of the European Ombudsman in own-initiative inquiry 01/5/2012/BEH-MHZ concerning Frontex*, retrieved from

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/112\\_specrefrontex\\_/112\\_specrefrontex\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/112_specrefrontex_/112_specrefrontex_en.pdf) [last accessed 21.04.2015].

<sup>19</sup> Consolidated Version of the Treaty on European Union, 2010, O.J. C 83/01, (hereinafter TEU).Art. 6(1).

<sup>20</sup> TEU, *op. cit.*, Art. 2

<sup>21</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Art. 67. (hereinafter TFEU).

<sup>22</sup> TFEU, *op. cit.*, 2008, Article 3(5).

principles are applicable to EU agencies and therefore also to Frontex. Migrants at sea are particularly vulnerable and ensuring their fundamental rights are respected thus requires special consideration.

While a fundamental rights framework for Frontex is important, one has to be cautious not to shift the blame for human rights violations exclusively on Frontex. Member States remain principal agents when conducting border surveillance and control. However, “[a]n active human-rights policy within Frontex would raise awareness not merely amongst the Agency’s staff, often recruited from national enforcement authorities, but also filter through to the national components of the network of border-guard authorities in which Frontex operates”.<sup>23</sup> Hence, it is important that Frontex develops a comprehensive human rights policy and legal framework that ensures the full respect for fundamental rights at the maritime borders of the EU.

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<sup>23</sup> Rijpma, Jorrit J, 2010, ‘Frontex: Successful Blame Shifting of the Member States?’ *Análisis Del Real Instituto Elcano (ARI)*, no. 69: 1, p. 5.

### 3. On the High Sea: International and Regional Protection Schemes

The following section lays down the rights that migrants have at sea and the obligations that states are under when conducting border control. This builds the basis for the analysis and critique on Frontex's human rights framework in section 4 and 5. This section demonstrates that at the maritime borders of the European Union, a multi-layered set of rights applies. These rights are derived from international maritime, refugee and human rights law, and regional treaty bodies that specify fundamental rights, in particular the European Convention on Human Rights (ECHR)<sup>24</sup> and the treaty body of the European Union.

#### 3.1. International Maritime Law: Search and Rescue Obligations

The search and rescue regime is regulated by the 1974 International Maritime Organisation (IMO) Convention on Safety of Life at Sea<sup>25</sup> (SOLAS Convention), the 1979 IMO Search and Rescue Convention<sup>26</sup> (SAR Convention) as well as by the United Nations Convention on the Law of the Sea<sup>27</sup> (UNCLOS Convention) and the 1989 International Convention on Salvage<sup>28</sup>. Following the adoption of the SAR Convention, each State is responsible for a Search and Rescue Region.<sup>29</sup> They have the responsibility to establish coordination centres to receive calls of distress and to appoint a commander who coordinates search and rescue operations.<sup>30</sup>

Every shipmaster “of a ship which is in a position to be able to provide assistance”<sup>31</sup> is under an obligation to rescue persons in distress at sea regardless of their nationality and the status or the circumstances in which they are

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<sup>24</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, (hereinafter European Convention on Human Rights).

<sup>25</sup> International Maritime Organization (IMO), *International Convention for the Safety of Life At Sea*, 1 November 1974, 1184 UNTS 3 (hereinafter IMO International Convention for the Safety of Life at Sea).

<sup>26</sup> International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS (hereinafter IMO International Convention on Maritime Search and Rescue).

<sup>27</sup> UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982 (hereinafter United Nations Convention on the Law of the Sea).

<sup>28</sup> International Maritime Organization (IMO), *International Convention on Salvage*, 1989.

<sup>29</sup> IMO International Convention on Maritime Search and Rescue, *op cit* 25.

<sup>30</sup> International Maritime Organization (IMO), Maritime Safety Committee, *Resolution MSC.70(69)*, adopted on 18 May 1998, Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979; Annex Art. 2.3.1.

<sup>31</sup> 1974 International Convention for the Safety of Life at Sea as amended in 2004, Chapter V (Safety of navigation), reg. 33(1) (hereinafter SOLAS Convention).

found.<sup>32</sup> It is irrelevant whether the persons in distress comply with the legal requirements to enter the territory of a State. Rescue is an “operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.<sup>33</sup> In general, the place of safety signifies the next port of call.<sup>34</sup> Further, a place of safety is defined as “a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met”.<sup>35</sup> It has also been understood as a place where the rescued is not at risk of persecution within the meaning of the 1951 Refugee Convention.<sup>36</sup> Thus, shipmasters have to deliver the rescuees to the next port of call, provided that this place can provide basic food and shelter and no risk of persecution exists. For refugees in particular, it is crucial to be able to disembark at a place of safety where they have the opportunity to apply for asylum.<sup>37</sup> This is linked to the principle of *non-refoulement*, which is explored in the following section.

The EU as such does not have any competencies with regard to the search and rescue regime under the Treaty on the Functioning of the European Union (TFEU), and therefore also Frontex does not have any SAR mandate. Its Member States have to comply with the obligations.

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<sup>32</sup> SOLAS Convention, *op. cit.*, reg. 33(1); United Nations Convention on the Law of the Sea, 1982, *op. cit.* Art. 98.

<sup>33</sup> IMO International Convention on Maritime Search and Rescue, 1978, *op cit* 25, Chapter I, para 1.3.2. This has also been supported by the European Commission which states that “obligations relating to search and rescue include the transport to a safe place”; Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007, para. 2.3.2.

<sup>34</sup> The Executive Committee (EXCOM) of the UNHCR, for example, stated in 1981 that “[in] accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call”; UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009, available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last visited 27.05.2015), No. 23 (XXXII), p. 31.; see also UN High Commissioner for Refugees (UNHCR), *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes)*, 18 March 2002, p. 4; O’Brien, Killian, 2011, ‘Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problems’, *Goettingen Journal of International Law*, 3 (2), p. 722.

<sup>35</sup> International Maritime Organization (IMO), *Resolution MSC.167(78)*, Guidelines on the Treatment of Persons Rescued At Sea, 20 May 2004.

<sup>36</sup> Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe, paragraphs 5.2 and 9.5; IMO *Resolution MSC 167(78)*, 2004, Guidelines for the Treatment of Persons Rescued at Sea, para 6.12 and 6.17.

<sup>37</sup> IMO Guidelines on the Treatment of Persons Rescued at Sea, *op.cit.*, 6.17 states that “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea”.

### 3.2. International Refugee Law

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) defines the principle of *non-refoulement* in Article 33(1):

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Thus, *non-refoulement* applies to refugees rather than to all migrants. The status of a refugee is merely declaratory in nature, which means that the principle of *non-refoulement* applies as soon as migrants fulfil the conditions set out in the Refugee Convention, even without having applied for asylum.<sup>38</sup> This does not establish a right to asylum as such, but rather the right to apply for asylum subject to a fair review procedure.<sup>39</sup> The extraterritorial nature of the *non-refoulement* principle is firmly established under international law.<sup>40</sup> The EU itself is not a party to the 1951 Convention, but is bound to respect its provisions through Article 78(1) TFEU.<sup>41</sup>

### 3.3. International Human Rights Law at Sea

The human rights that are at risk when migrants cross the Mediterranean include the right to life,<sup>42</sup> the right to liberty and security of the person<sup>43</sup> and the prohibition of torture and other cruel, inhuman or degrading treatment or pun-

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<sup>38</sup> The Refugee Convention defines a refugee as “owing to *well-founded fear* of being *persecuted* for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is *outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Emphasis added); UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (hereinafter 1951 Refugee Convention), Art. 1 (a) (2).

<sup>39</sup> C.f. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 14 (hereinafter Universal Declaration of Human Rights).

<sup>40</sup> UNHCR (2007), ‘*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*’, p.13, 28. ; O’Brien, *op. cit.*, pp. 727-730.

<sup>41</sup> TFEU, *op. cit.*, Art. 78(1).

<sup>42</sup> Universal Declaration of Human Rights, *op. cit.*, Art. 3 and the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (hereinafter International Covenant on Civil and Political Rights), Art. 6.

<sup>43</sup> Universal Declaration of Human Rights, *op. cit.*, Art. 9 and the International Covenant on Civil and Political Rights, *op. cit.*, Art. 9.

ishment<sup>44</sup>. These have been laid down in several treaties, as well as in the United Nations Universal Declaration of Human Rights (UDHR)<sup>45</sup>, namely the International Covenant on Civil and Political Rights (ICCPR)<sup>46</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>47</sup> and the Convention against Torture (CAT)<sup>48</sup>. Since their content has been clarified in more detail on the regional level, these provisions are analysed in the next section. This paper does not analyse the right to liberty and security of the person, as these rights, for example with regards to conditions in detention centres, have already been extensively written about.<sup>49</sup> All Member States have ratified the instruments and are thus bound to respect these during Frontex coordinated operations.

### 3.4. Regional Protection Schemes: the ECHR and the Charter of Fundamental Rights

Next to the international layer of protection, a European protection scheme applies. This consists of the European Convention on Human Rights (ECHR) and the Charter as well as a number of articles of the Treaty on the Functioning of the European Union (TFEU). This section first explores the framework of the European Union and subsequently assesses the ECHR framework.

#### *The European Union Framework*

The general principles of EU law give the most general level of fundamental rights protection. Thus, ECJ Case 26/69 states that “the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in

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<sup>44</sup> Universal Declaration of Human Rights, *op. cit.*, Art. 5, International Covenant on Civil and Political Rights, *op. cit.*, Art. 7, and in UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, (hereinafter UN Convention against Torture), Art. 2.

<sup>45</sup> Universal Declaration of Human Rights, *op. cit.*

<sup>46</sup> International Covenant on Civil and Political Rights, *op. cit.*

<sup>47</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>48</sup> UN Convention against Torture, 1984, *op. cit.*, p. 85.

<sup>49</sup> De Bondo, Daniela “Less than human’: the detention of irregular immigrants in Malta’, *Race & Class*, 2013, 55: 60-81; Hailbronner, Kay, 2007, ‘Detention of Asylum Seekers’, *European Journal of Migration and Law*, 9, pp. 159-172; O’Nions, Helen, 2008, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’, *European Journal of Migration and Law* 10, pp. 149-185.

the general principles of Community law and protected by the Court”<sup>50</sup>, thereby affirming the precedence of fundamental rights over specific provisions. Half a year later, Case 11/70 set out that the “respect for fundamental rights forms an integral part of the general principles of law protected by the Court”.<sup>51</sup> This case law is now codified in Art. 6(3) of the TEU, laying down that “Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. Since the Treaty of Lisbon, the Charter of Fundamental Rights has received binding status under Art. 6(1) TEU and has the “same legal value as the treaties”.<sup>52</sup>

According to Article 15 TFEU, all EU agencies – in consequence also Frontex – are to be directed by the principle of good governance. This includes transparency, and ensuring information about the agency’s activities is accessible to all Union citizens and residents of EU Member States’ territories.<sup>53</sup> Non-EU citizens are excluded from this; NGOs and other third parties located in the Member State therefore need to have the opportunity to scrutinise actions conducted by agencies.

Article 78 TFEU stipulates that the Union shall develop a common policy on asylum while respecting the principle of *non-refoulement*.<sup>54</sup> The *asylum aquis* as such,<sup>55</sup> however, is only applicable in the territorial waters, at the borders and

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<sup>50</sup> Case 26/69 Erich Stauder v City of Ulm [1969] ECR 419, Grounds for judgment, paragraph 7.

<sup>51</sup> Case 11-70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany, ECJ, 17 December 1970, grounds for judgment, paragraph 4.

<sup>52</sup> TEU, *op. cit.*, Art. 6(1).

<sup>53</sup> TFEU, *op. cit.*, Art. 15 (1)-(2); This has been stressed in the Joint Statement of the European Parliament, the council of the EU and the European Commission on decentralized agencies, which reads that “Agencies should provide, via their websites, information necessary to ensure transparency, including financial transparency”. Joint Statement and common approach 2012 of the European Parliament, the Council of the EU and the European Commission on decentralized agencies, para 64. Retrieved from [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf) [last accessed 28.05.2015].

<sup>54</sup> For a discussion on the principle of *non-refoulement*, see section 3.2.

<sup>55</sup> The *asylum aquis* consists of the Temporary Protection Directive (2001/55/EC), the Minimum Standards of Reception Directive (2003/9/EC), the Family Reunification Directive (2003/86/EC), the Third country national Directive (2003/109/EC), the Qualifications Directive (2004/83/EC), the Procedures Directive (2005/85/EC), the Return Directive (2008/115/EC) and the Dublin Regulation.



in transit zones of the Member State and not on the high seas.<sup>56</sup> Thus, minimum reception conditions<sup>57</sup> only apply once a migrant has entered the territory of the Union or is at a border.<sup>58</sup> This gives rise to a the absurd consequence whereby migrants, who are not in possession of valid travel documents, and who, in the hope of applying for asylum, present themselves to the authorities of the EU before attempting to cross a border are worse off than those that clandestinely cross borders and apply for asylum in a Member State. Since the Lisbon Treaty, the Court of Justice of the European Union (CJEU) can review the activities of European Union agencies.<sup>59</sup> This means that it can also review Frontex's compliance with Article 15 TFEU and 78 TFEU.

Next to the provisions of the TFEU, the Charter is applicable.<sup>60</sup> Following Article 51(1) of the Charter, Member States are only bound by the Charter when implementing European Union law. Considering the scope of the border guarding activities and the extensive European Union asylum system, national border guards, when patrolling borders, are in fact implementing European Union border policy. The acts therefore fall under the scope of the Charter.<sup>61</sup> The rights of the Charter apply to "everyone whose rights and freedoms guaranteed by the law of the Union are violated"<sup>62</sup> and thus also apply to third-country nationals. In all decisions the right to effective remedy should be respected.<sup>63</sup> This has been

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<sup>56</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter Directive 2013/32/EU), Art. 3(1).

<sup>57</sup> These minimum reception conditions ensure with regards to substantive provisions the availability of adequate information and documentation (Art. 5 and 6), freedom of movement (Art. 7), conditions for and guarantees during detention (Artt. 8-12), families (Art. 12), medical screening (Art. 13), education (Art. 14), employment and vocational training (Art. 15-16), general rules on material reception conditions and health care (Art. 17-19), conditions for reduction of the material reception conditions (Art. 20), provisions for vulnerable persons (Art. 21-25) and guarantees for appeals (Art. 26); Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32 (hereinafter Directive 2013/33/EU).

<sup>58</sup> Directive 2013/33/EU, *op. cit.*, Art. 1.

<sup>59</sup> TFEU, *op. cit.*, Article 263.

<sup>60</sup> Under Article 6(1) of the TEU, it received binding effect and thus also applies to Frontex; TEU, *op. cit.*, Art. 6(1).

<sup>61</sup> Marin, 2014, 'Protecting the EU's Borders from... Fundamental Rights? Squaring the Circle Between Frontex's Border Surveillance and Human Rights', in: Holzacker, Ronald L., Luif, Paul (eds.), 2014, *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty*, Springer: New York, p. 88. See also: *Åklagaren v. Hans Åkerberg Fransson*, Case C-617/10 of 26 February 2013. In this case, the court gave a broad interpretation on the implementation of EU law. A similar reasoning could be used to argue, *mutatis mutandis*, that Frontex Joint Operations implement EU law.

<sup>62</sup> Charter of Fundamental Rights of the European Union, 26 October 2012, C 326/02 (hereinafter Charter of Fundamental Rights), Art. 47(1).

<sup>63</sup> *Ibid.*, Art. 47(1).

affirmed for asylum seekers in Article 46 of the Asylum Procedures Directive<sup>64</sup>, according to which asylum seekers can contest the rejection of their asylum claim.<sup>65</sup>

Next to these procedural rights, a number of substantive rights are guaranteed by the Charter: Article 18 sets out a right to asylum and Article 19 prohibits collective expulsion of foreigners. For the purposes of this paper, it is not necessary to examine the asylum procedures in detail. Generally, however, the applicants for asylum have to prove that the threats are specifically and individually targeted at them and that they would be subject to serious harm in their country of origin.<sup>66</sup> However, in *Elgafaji v Staatssecretaris van Justitie* the CJEU ruled that “serious harm” as laid down in Article 15 of Directive 2004/83/EC can, in exceptional circumstances, be proven by referring to the general conditions in a country. Moreover, Article 15 of Directive 2004/83/EC (now Article 15 of Directive 2011/95/EU) has to be interpreted in a manner consistent with Article 19(2) of the Charter, which prohibits collective expulsion.<sup>67</sup> The directive in question lays down the rules for subsidiary protection, but the reasoning of the Court could, *mutatis mutandis*, also be applied to permanent asylum claims. The Directives dealing with asylum applications have to respect the rights set out in Article 18 and 19 in the Charter.<sup>68</sup> Until today, no case in front of the CJEU has

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<sup>64</sup> Directive 2013/32/EU, *op. cit.*

<sup>65</sup> *Ibid.*, Art. 46.

<sup>66</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23, now supplemented by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; see also, for example, ECtHR Case of *Vilvarajah and Others v. The United Kingdom*, 15 November 1996, Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, paragraph 111.

<sup>67</sup> Case *Mohamed M'Bodj v État belge*, C-542/13, Court of Justice of the European Union, 18 December 2014, paragraphs 38-40.

<sup>68</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Recital 15; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23, Recital 10; Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States, 6 February 2003, OJ L. 31/18-31/25, Recital 5. For case law, see for example Case *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, 2 March 2010 C-175/08; C-176/08; C-178/08 & C-179/08, Court of Justice of the European Union, paragraphs 53-54; Case *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 17 June 2010, C-31/09, Court of Justice of the European Union, para-

dealt with the applicability of Article 19 on the high seas. However, it is difficult to imagine a justification for denying the applicability of this article on the high seas, as long as EU law is implemented and the border authorities retain effective control.

Article 4 puts forward the prohibition of torture and inhuman or degrading treatment or punishment. This includes the obligation not to transfer asylum seekers to another Member State, even if the Member State would be responsible for the application, if there are systemic flaws in the asylum application system and the transfer would result in inhuman and degrading treatment.<sup>69</sup>

### *The European Convention on Human Rights*

The ECHR has been signed by all Member States of the European Union and needs to be respected whenever state authorities conduct border controls. The articles that are relevant for EU border surveillance are Article 1 (obligation to respect human rights within a MS's jurisdiction), Article 2 (right to life), Article 3 (prohibition of torture), Article 13 (right to an effective remedy) and Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens).<sup>70</sup>

*Article 1* states that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention“. According to jurisprudence of the European Court of Human Rights (ECtHR), jurisdiction can be established *de jure* and *de facto* through effective control outside the national territory of a State in exceptional circumstances.<sup>71</sup> Interceptions and border surveillance constitute a form of jurisdiction if effective

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graph 38 for Directive 2004/83/EC; for Directive 2003/9 see *Cimade and Groupe d'information et desoutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Reference for a preliminary ruling: Conseil 'État – France, Case C-179/11, 27.09.2012, paragraph 42.

<sup>69</sup> *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, Court of Justice of the European Union, 21 December 2011, paragraph 86; *Bundesrepublik Deutschland v. Kaveh Puid*, C-4/11, Court of Justice of the European Union, 14 November 2011, paragraph 30.

<sup>70</sup> European Convention on Human Rights, 1950, *op. cit.*

<sup>71</sup> ECtHR *Case of Loizidou v. Turkey preliminary objections* (1995), Application no. 15318/89, paragraphs 59-64, ECtHR *Case of Loizidou v. Turkey Judgment* (1995), Application no. 15318/89, paragraph 52, ECtHR *Issa and Others v. Turkey* (2004), Application no. 31821/96, paragraphs 68-70; ECtHR *Pad and Others v. Turkey* (2007), Application no. 60167/00, paragraph 53; ECtHR, *Xhavara et al. v. Italy and Albania*, No. 39473/98, 11.1.2001

control of the vessels and/or crew or passengers can be ascertained.<sup>72</sup> Hence, the extraterritorial application of the ECHR exists on the high seas as long as the respective State exercises effective control over the migrants. By the nature of the ECHR, Frontex is not directly bound by its provisions. Nevertheless, its actions are restrained by the Member States' obligations under the Convention.

Article 2 of the ECHR safeguards the right to life. This entails – in addition to the negative obligation not to arbitrarily deprive persons who are under a State's jurisdiction of their lives by respecting the principle of necessity<sup>73</sup> and proportionality<sup>74</sup> – a positive obligation to prevent the loss of lives of persons within their jurisdiction.<sup>75</sup> This should not, however, impose a disproportionate burden on States.<sup>76</sup> In addition to these preventive measures, States also have a duty to investigate deaths that occurred in their jurisdiction and might manifest a breach of the ECHR by the State party to the Convention.<sup>77</sup> This also applies to wide-scale events.<sup>78</sup> Hence, deaths at sea that might have constituted a breach of the ECHR must be investigated by the Member States. The extraterritorial application has been confirmed in *Al-Skeini and Others v. the United Kingdom*<sup>79</sup>, where the Court held that the UK extraterritorially breached Article 2. In this case, six Iraqi civilians were killed by UK soldiers in Iraq while the UK was the occupying power. Following these deaths, the UK refused to conduct thorough and independent investigations, because it claimed that these deaths occurred outside UK jurisdiction. The ECtHR rejected this argument and held the UK responsible for an extraterritorial breach of Article 2 ECHR.<sup>80</sup>

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<sup>72</sup> *Medvedyev and Others v. France*, 2010: in this case, French authorities intercepted a Cambodian vessel on the high seas and exercised jurisdiction by having full and exclusive control over the vessel and people. Thus, the ECHR was applicable. *Medvedyev and Others v. France*, 29 March 2010, Application no. 3394/03, European Court of Human Rights.

<sup>73</sup> *Andreou v. Turkey*, 27.10.2009, Application No. 45653/99 ECtHR; *Perisan and Others v. Turkey*, 20.05.2010 ECtHR, Application No. 12336/03; *Nachova and Others v. Bulgaria* ECtHR, 06.07.2005.

<sup>74</sup> *Wasilewska and Kulucka v. Poland*, 23.02.2010, Application No. 28975/04 and 33406/04 ECtHR; *Finogenov and Others v. Russia* 20.12.2011, Application No. 18299/03 and 27311/03, ECtHR.

<sup>75</sup> *L.C.B. v. the United Kingdom*, 9 June 1998, Application No. 14/1997/798/1001, ECtHR.

<sup>76</sup> *Osman v the United Kingdom*, 28 October 1998, Application No. 87/1997/871/1083, ECtHR, paragraph 116.

<sup>77</sup> *McCann and Others v. the United Kingdom*, 27 September 1995, Application No 18984/91, ECtHR.

<sup>78</sup> See, for example, *Sandru and Others v. Romania*, 08.12.2009, Application No 22465/03, ECtHR.

<sup>79</sup> *Al-Skeini and Others v. the United Kingdom*, 07.07.2011, Application No. 55721/07, ECtHR.

<sup>80</sup> ECtHR *Al-Skeini and Others v. the United Kingdom*, *op. cit.*, paragraph 177.

This means that Member States as part of a Joint Operation have to comply with Article 2 of the ECHR, even when acting outside territorial waters. However, as the preventive measures of Article 2 only extend to the jurisdiction of a State, this obligation is of less relevance for the purposes of operations coordinated by Frontex, since migrants are only under the jurisdiction of a State when it has effective control over them. Thus, if an unseaworthy vessel is found on the high seas and no authorities exercise effective control over it, the ECHR does not apply. In this case, only Search and Rescue obligations apply.

Article 3 upholds the prohibition of torture and inhuman or other cruel and degrading treatment does not permit any derogation.<sup>81</sup> The link between extradition and ill-treatment has first been established in *Soering v. the United Kingdom*<sup>82</sup>, where the Court held that extradition to another country, in this case the United States, could pose a real risk of ill-treatment and therefore constitute a breach of Article 3 of the ECHR.

This also applies to push-backs at the sea. Most recently, the Court held in *Hirsi Jamaa and Others v. Italy* that Article 3 had been violated extraterritorially, since Italian border guards exercised *de jure* and *de facto* control over the migrants when intercepting the boat outside Italy's territorial waters. The push-back to Libya posed a real risk of ill-treatment, because only insufficient protection schemes were in place in Libya. The Italian authorities knew or should have known this and therefore should have refrained from conducting the push-back operation.<sup>83</sup> Although the applicants in *Hirsi* had not sought asylum (yet), they could rely on the Article 3 ECHR, since there was a real risk that they might be exposed to torture, degrading or inhuman treatment or punishment in the receiving country.<sup>84</sup> The judgment was directed towards Italy and the Court did not examine Frontex's role as such. However, it indirectly also carries implications for the work of Frontex, since the judgment sets limits to possible actions conducted by Member States during a Joint Operation.

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<sup>81</sup> Lavrysen, Laurens, 2014, "The scope of rights and the scope of obligations", in: Brems, Eva & Gerards, Janneke (eds), 2014, *The Role of the European Court of Human Rights in determining the Scope of Human Rights*, Cambridge, p. 172; Smet, Stijn, 2014, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR – Truly a question of scope only?' in: Brems, Eva & Gerards, Janneke (eds.), 2014, *The Role of the European Court of Human Rights in determining the Scope of Human Rights*, Cambridge, pp. 273-293.

<sup>82</sup> ECtHR *Soering v. the United Kingdom*, 07 July 1989, Application No. 14038/88.

<sup>83</sup> ECtHR *Hirsi Jamaa and Others v. Italy*, 23.02.2012, Application No. 27765/09, paragraph 131.

<sup>84</sup> Chlebny, J. (2013), *Standards of the provisional protection against expulsion*. Speech delivered on the occasion of the publication of the Handbook on European law relating to asylum, borders, and immigration, p. 4.

*Article 13* (right to an effective remedy) has most often been invoked in conjunction with Article 3.<sup>85</sup> In *M.S.S. v. Belgium and Greece*<sup>86</sup>, the Afghan applicant had lodged an application for asylum in the EU in Belgium, after having passed through Greece. Following the Dublin rules, Belgium sent the applicant back to Greece. The Court held that both Greece and Belgium violated Article 3 of the ECHR: Greece for breaching the prohibition of degrading treatment itself and Belgium for sending the applicant back to a country where he would face a risk of ill-treatment. Moreover, the Court determined a breach by Belgium of Article 13 in conjunction with Article 3, since no effective remedy was available for the applicant.<sup>87</sup>

This has implications not only for intra-EU transfers of asylum seekers. The Court ruled that an effective asylum procedure must be available in practice and not only on paper.<sup>88</sup> Hence, if the overall situation in a State, in this case Greece, makes it clear that no effective asylum system is in place in practice, even if it exists in law, a State could be held responsible for a breach of Article 13 in combination with Article 3.<sup>89</sup> This has been confirmed by *Hirsi*.<sup>90</sup> The migrants who were pushed back to Libya did not have the option to have the decision effectively reviewed before the removal took place. The Court stated that under Article 13, any complaint made by a person has to be examined with “independent and rigorous scrutiny”.<sup>91</sup> Moreover, the Court deducted the risk of ill-treatment in Libya from the overall situation in that country and not from individual circumstances.<sup>92</sup> Moreover, the Court relied on information provided by non-State actors,<sup>93</sup> which eases the burden of proof for the applicants.<sup>94</sup>

*Article 4 of Protocol No. 4* lays down the prohibition of collective expulsion: each decision to expel or extradite has to be taken according to the individual circumstances of the person. In *Hirsi*, the Court found that this article also

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<sup>85</sup> See, for example, *Sharifi and Others v. Italy and Greece*, 21.01.2015, Application No. 16643/09; *M.S.S. v. Belgium and Greece*, 21.01.2011, Application No. 30696/09, and *Hirsi Jamaa and Others v. Italy*, *op. cit.*.

<sup>86</sup> *M.S.S. v. Belgium and Greece* (2011), *op. cit.*

<sup>87</sup> *M.S.S. v. Belgium and Greece* (2011), *op. cit.*, paragraph 321.

<sup>88</sup> *M.S.S. v. Belgium and Greece* (2011), *op. cit.*, paragraphs 290-293.

<sup>89</sup> *M.S.S. v. Belgium and Greece* (2011), *op. cit.*, paragraph 300.

<sup>90</sup> *Hirsi Jamaa and Others v. Italy* (2012), *op. cit.*, paragraph 207.

<sup>91</sup> *Hirsi Jamaa and Others v. Italy* (2012), *op. cit.*, paragraph 198.

<sup>92</sup> *Hirsi Jamaa and Others v. Italy* (2012), *op. cit.*, paragraph 131.

<sup>93</sup> *Hirsi Jamaa and Others v. Italy* (2012), *op. cit.*, paragraphs 123 and 203.

<sup>94</sup> Moreno-Lax, Violeta, 2012, ‘*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?’ *Human Right Law Review*, 12:3, p. 583; Dembour, Marie-Bénédicte (2012), *Interception-at-sea: Illegal as currently practiced – Hirsi and Others v. Italy*. *Strasbourg Observers*, retrieved from <http://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/> [last accessed 15.05.2015].

applies outside a State's territory if it exercises jurisdiction over the persons in question.<sup>95</sup> This means that in principle expulsion is a territorial concept, but in exceptional circumstances expulsion can also take place extraterritorially. Thus, the applicants fell under the jurisdiction of Italy within the meaning of Article 1 and could therefore rely on the ECHR. The Court also determined that there had been an infringement of Article 13 in conjunction with Article 4 of Protocol No. 4, as no effective remedy was available against the decision.

It needs to be borne in mind that reviewing European actions will only be possible once the European Union accedes to the ECHR,<sup>96</sup> the timing of which is unclear, since the draft accession agreement was rejected in late 2014.<sup>97</sup> Hence, obligations do not directly apply to Frontex but only to the border guards of the Member State during operations that the agency coordinates. Indirectly, this has an influence on Frontex's actions, as the risk of infringement needs to be kept to a minimum. Moreover, following Article 6(3) TEU, the ECHR is part of the general principles of European Union law; ECtHR jurisprudence can and should be taken into account by the ECJ for interpretation of the general principles of EU law.

This section has shown the obligations of Member States under the ECHR, which is applicable in the jurisdiction of a State and whenever a State exercises effective control over a territory or persons. Throughout border surveillance, Member States need to respect the right to life and take positive measures to prevent deaths, prevent breaches of the prohibition of torture and other inhuman or degrading treatment, respect the prohibition of collective expulsion and ensure that effective remedies are available.

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<sup>95</sup> In *Conka v. Belgium*, 05.05.2002, Application No. 51564/99, the Court found an infringement of Article 4 of Protocol No. 4 for the first time. In *Hirsi, op. cit.*, the Court applied this article also extraterritorially. The Court determined that jurisdiction was exercised from the moment when Italian authorities were boarding a migrants' vessel on the high seas until the handing over of these migrants to Libyan authorities, since this constituted continuous and exclusive *de jure* and *de facto* control.

<sup>96</sup> European Convention on Human Rights, 1950, *op. cit.*

<sup>97</sup> Court of Justice of the European Union, 18 December 2014, Opinion 2/13 of the Court, retrieved from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=60924> [last accessed 15.05.2015].

## 4. Frontex's Approach to Human Rights

This section explores the existing safeguards within Frontex's legislative framework and presents initiatives that have been taken to enhance respect for human rights during Frontex operations. The following analysis demonstrates that since Frontex's inauguration, an increasing number of human rights have been incorporated in the legislative framework and a range of initiatives has been taken. The legislative framework includes the Frontex regulation, and, specifically drafted for operations at sea, Regulation 656/2014. The initiatives include the Fundamental Rights Strategy, the Code of Conduct, the establishment of the Consultative Forum on Fundamental Rights and the Fundamental Rights Officer as well as the Common Core Curriculum and European Border Guard Training.

### 4.1. Human Rights Protection within Frontex

The following analysis outlines which human rights safeguard exist in Frontex's framework under the *status quo*. Frontex's activities at sea are regulated by Regulation 2007/2004<sup>98</sup> and Regulation 656/2014 that is applicable to Joint Operations at sea. Regulation 2007/2004 demarcates Frontex's mandate and defines its operational standards. Regulation 656/2014 standardises Frontex's mandate for Joint Operations at sea and therefore supplements the existing framework by detailing the applicable rules for the maritime part of Frontex's actions.

#### 4.1.2. The Frontex Regulation as amended in 2011

Frontex's mandate is based on Article 16 (2) of the Schengen Borders Code,<sup>99</sup> which regulates border surveillance and control of the Schengen Area Member States. The first Frontex Regulation that regulates the agency's mandate was adopted in 2004 and makes only limited references to human rights. Recital 22 of this Regulation 2007/2004 states that the regulation "respects the fundamen-

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<sup>98</sup> Council Regulation (EC) No 2007/2004, *op. cit.*

<sup>99</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code); Article 16 (2) of the Schengen Borders Code: "operational cooperation between Member States in the field of management of external borders shall be coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States". Notably, the Schengen Borders Code was adopted after the adoption of the Frontex Regulation. Due to the scope of this paper, this will not be further elaborated on.



tal rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union”. As regards transparency, the regulation sets out that Frontex needs to respect Regulation 1049/2001.<sup>100</sup> Moreover, it needs to be ensured that “the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work”.<sup>101</sup> The first Frontex regulation provides for no binding SAR obligations or fundamental rights safeguards.

In 2011, Regulation 1168/2011<sup>102</sup> reformed Frontex’s legal framework by amending Regulation 2007/2004 and incorporating a number of fundamental rights safeguards. Recital 1 reaffirms fundamental rights, solidarity and responsibility as basic principles for the development of European Union migration policy. It amends Article 1(1)(2) by stipulating that Frontex has to act:

[I]n full compliance with the relevant Union law, including . . . the Charter of Fundamental Rights; the relevant international law, including . . . the Geneva Convention; obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation.<sup>103</sup>

Furthermore, Article 2 now postulates that “[i]n accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle”.

New Article 2a required the development of a Code of Conduct applicable to operations that are coordinated by Frontex (see section 4.2). Article 5(1) of the Recast Regulation now requires that personnel participating in European Border Guard Teams<sup>104</sup> receive training, including fundamental rights and access to international protection, prior to their partaking in operations.<sup>105</sup> The same article provides that Frontex shall “establish and further develop common

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<sup>100</sup> Regulation (EC) No 2007/2004, *op. cit.*, Art. 28(1).

<sup>101</sup> Regulation (EC) No 2007/2004, *op. cit.*, Art. 28(2).

<sup>102</sup> Regulation (EU) No 1168/2011, *op. cit.*.

<sup>103</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 1(1), Regulation 1168/2011 Art. 1(1)(2) Recast Regulation. For an analysis of the Consultative Forum, see section 4.2.3.

<sup>104</sup> The European Border Guard Teams were established in the 2011 Frontex Regulation and are to be deployed during joint operations and rapid border interventions.

<sup>105</sup> Frontex Regulation, as amended in 2011, Art. 5(1).

core curricula for the training of border guards and provide training . . . including with regard to fundamental rights, access to international protection and relevant maritime law”.<sup>106</sup> Further fundamental rights mechanisms are introduced in Article 26a, which provides for the establishment of a Fundamental Rights Strategy, a Consultative Forum, as well as for the designation of a Fundamental Rights Officer.<sup>107</sup> These mechanisms will be examined in section 4.2.

To monitor the compliance of Frontex with fundamental rights, the European Parliament and the Council may ask the Executive Director of Frontex to report on the Fundamental Rights Strategy.<sup>108</sup> Moreover, Frontex’s own evaluation shall include the extent to which the Charter has been complied with.<sup>109</sup>

#### 4.1.3. The 656/2014 Regulation

Regulation 656/2014<sup>110</sup> was adopted in May 2014 as the successor of Council decision 2010/252/EU and sets operational standards for border surveillance operations at sea that are coordinated by Frontex.<sup>111</sup> The regulation is divided into three parts: (1) general provisions including scope and definition; (2) general rules about safety at sea and protection of fundamental rights and specific rules regulating detection, interception, search and rescue situations, disembarkation; and (3) reporting obligations. It includes a number of safeguards concerning the SAR regime at sea, rights of refugees and fundamental rights. Article 4 provides for general respect for fundamental and refugee rights applicable to maritime operations under the auspices of Frontex and safeguards the respect for the principle of *non-refoulement* during joint operations.<sup>112</sup>

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<sup>106</sup> Frontex Regulation, as amended in 2011, Art. 5(1).

<sup>107</sup> These mechanisms are based on initiatives taken by Frontex itself.

<sup>108</sup> Frontex Regulation, as amended in 2011, Art.25(2).

<sup>109</sup> Frontex Regulation, as amended in 2011, Art. 33 (2).

<sup>110</sup> Regulation (EU) No. 656/2014 , *op. cit.*

<sup>111</sup> Decision 2010/252/EU was annulled by the CJEU with its judgment of 5 September 2012 following the initiative of the European Parliament. The Council decision was not in conformity with legislative procedures, since it was adopted based on comitology procedure whereas it should have been adopted based on the ordinary co-decision procedure, as it goes beyond specifying rules within the scope of implementing powers; Case-355/10, 5 September 2012 CJEU. The Parliament was in principle in favour of the provisions adopted in the decision, but nevertheless insisted on the right legal procedure to press for amendments; Rijpma, Jorrit J. (2014), ‘The Patrolling of the European Union’s External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea’ In: Angela del Vecchio (ed.) *International Law at Sea*, p. 97.

<sup>112</sup> It sets out that no disembarkation should take place where a person would be at risk of “death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or

The principle of *non-refoulement* is also relevant for the planning of sea operations: The “assessment of the general situation in a third country shall be based on information derived from a broad range of sources, which may include other Member States, Union bodies, offices and agencies, and relevant international organisations”.<sup>113</sup> This should build the basis for considering whether it is possible to disembark intercepted or rescued persons in a third country. Further, “[p]articipating units shall, in the performance of their duties, fully respect human dignity”.<sup>114</sup>

As regards SAR obligations, Article 5(1) lays down that the participating units have to verify, when detecting a vessel that is suspected of attempting to avoid border checks or smuggle persons, whether there is an imminent risk to the lives of the persons on board”.<sup>115</sup> Moreover, Article 9 reaffirms that Member States have to respect their SAR obligations during Frontex-coordinated joint operations.<sup>116</sup> The article further defines the phase of uncertainty, alert and distress.<sup>117</sup> If a vessel is found in one of these situations SAR obligations apply.<sup>118</sup> During interception operations in territorial waters, contiguous zones and on the high seas, the principles of proportionality and necessity have to be respected.<sup>119</sup>

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political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement”. Regulation (EU) No. 656/2014, *op. cit.*, Art. 4(1).

<sup>113</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 4(2).

<sup>114</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 4(6).

<sup>115</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 5(1).

<sup>116</sup> Article 9(1) reads: “Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”.

<sup>117</sup> A phase of uncertainty exists “when a person has been reported as missing or a vessel is overdue; or when a person or a vessel has failed to make an expected position or safety report”. A phase of alert exists when “following a phase of uncertainty, attempts to establish contact with a person or a vessel have failed and inquiries addressed to other appropriate sources have been unsuccessful; or when information has been received indicating that the operating efficiency of a vessel is impaired, but not to the extent that a distress situation is likely”. A phase of distress is at stake “when positive information is received that a person or a vessel is in danger and in need of immediate assistance; or when, following a phase of alert, further unsuccessful attempts to establish contact with a person or a vessel and more widespread unsuccessful inquiries point to the probability that a distress situation exists; or when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely”. Regulation (EU) No. 656/2014, *op. cit.*, Art. 9 (2) (c)-(e).

<sup>118</sup> Regulation No. 656/2014, *op. cit.* Art. 9(2)(c), (d) and (e).

<sup>119</sup> Regulation No. 656/2014, *op. cit.* Art. 6(3), Art.7(3)

A report has to be submitted every year to the European Parliament, the Council and the European Commission<sup>120</sup> with “detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place”.<sup>121</sup> Finally, participating units have to be trained with respect to fundamental rights, search and rescue obligations and refugee law.<sup>122</sup>

## 4.2. Other Human-Rights Strategies

Five initiatives have been taken to enhance human rights compliance, namely the Frontex Fundamental Rights Strategy (2011), the Code of Conduct (2011), the Consultative Forum (2012) and the appointment of a Fundamental Rights Officer (2012) and training of the border guards. This section shows that these initiatives are an important step towards an improved human rights record at the maritime borders of the EU.

### 4.2.1. The Fundamental Rights Strategy

The Fundamental Rights Strategy (FRS) was endorsed by Frontex’s management board<sup>123</sup> on 31 March 2011 to enhance respect for fundamental rights during border surveillance activities and included into the regulatory framework in October of the same year.<sup>124</sup> It is a non-binding instrument that provides for fundamental rights guidance and sets out operational standards for Frontex-coordinated missions. Paragraph 1 states that “[r]espect for fundamental rights is an essential part of integrated border management and, more broadly, of EU Migration and Security Policies. The implementation of this Fundamental Rights Strategy shall strengthen the commitment of Frontex and the entire EU border-guard community to respect and promote the fundamental rights in their activi-

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<sup>120</sup> Regulation No. 656/2014, *op. cit.* Art. 13(1).

<sup>121</sup> Regulation No. 656/2014, *op. cit.* Art. 13(2)

<sup>122</sup> Regulation No. 656/2014, *op. cit.* Art. 4(8).

<sup>123</sup> The Management Board is composed of representatives of the border authorities of the 26 EU Member States that have signed the Schengen *aquis*, as well as two EU Commission members. The UK and Ireland, and representatives of the states that take part in the Schengen *aquis* (Iceland, Liechtenstein, Norway and Switzerland) are invited to participate in Management Board meetings. See <http://frontex.europa.eu/about-frontex/organisation/management-board/> [last accessed 20.05.2015].

<sup>124</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 26a.

ties”. The FRS confirms Frontex’s fundamental rights obligations that are laid down in international and European Union law.<sup>125</sup>

Further, while “Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations (JOs) and therefore also for the respect of fundamental rights during these activities”<sup>126</sup>, Frontex still bears responsibility for its actions and remains “fully accountable for all actions and decisions under its mandate”.<sup>127</sup>

Moreover, “[the] Operational Plan<sup>128</sup> and other similar agreed rules shall provide guidance on how to address identified fundamental rights challenges with a view to preventing breaches or other negative effects. Corrective measures should be taken in case of breach or serious risk of breach of fundamental rights”.<sup>129</sup> According to the FRS, an effective reporting system will be put in place within Frontex that also involves external stakeholders next to national border-guard services.<sup>130</sup> In these lines, the “Operational Plan shall set out the modalities for reporting, including how and to who report”.<sup>131</sup> In case of an alleged fundamental rights violation, this “will be followed up by Frontex by communicating and clarifying the situation in cooperation with the competent national authorities”.<sup>132</sup> Concerning transparency, the FRS states that Frontex should provide higher transparency of EU and national border management activities.<sup>133</sup> The implementation of the Fundamental Rights Strategy is monitored by the Consultative Forum, which publishes information on the progress made on a yearly basis.<sup>134</sup>

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<sup>125</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Frontex Fundamental Rights Strategy*, 31 March 2011, (hereinafter *Frontex Fundamental Rights Strategy*), paragraph 4.

<sup>126</sup> *Frontex Fundamental Rights Strategy*, *op. cit.*, paragraph 13.

<sup>127</sup> *Ibid.*

<sup>128</sup> An Operational Plan sets out the rationale for a Frontex-led Joint Operation, defines its objectives, scope and time frame for the activities and regulates the cooperation and coordination with third countries as well as the reporting mechanisms.

<sup>129</sup> *Frontex Fundamental Rights Strategy*, *op. cit.*, paragraph 15

<sup>130</sup> *Frontex Fundamental Rights Strategy*, *op. cit.*, paragraph 17

<sup>131</sup> *Ibid.*

<sup>132</sup> *Frontex Fundamental Rights Strategy*, *op. cit.*, paragraph 19

<sup>133</sup> *Frontex Fundamental Rights Strategy*, *op. cit.*, paragraph 40

<sup>134</sup> The first report published was the annual report 2013. No further report has been published up to this date.

#### 4.2.2. The Code of Conduct for all Persons Participating in Frontex Activities

The Code of Conduct is another soft-law instrument and was adopted on 31 March 2011 by Frontex's Executive Director. It was included in the 2011 amendments to the Frontex regulation in Article 2(a)<sup>135</sup> and applies to all persons participating in Frontex activities, namely "Frontex staff, officers of border guard services of a Member State and other staff performing any actions in a Frontex activity".<sup>136</sup> Article 3(1) confirms that "[p]articipants in Frontex activities serve the public interest and shall comply with international law, European Union law, the national law of both home and host Member States and the present Code of Conduct". Participants shall also promote compliance with the relevant instruments of fundamental rights protection as well as the principle of *non-refoulement* and the assistance of persons in need of international protection.<sup>137</sup> Human dignity and fundamental rights shall be promoted on a non-discriminatory basis.<sup>138</sup>

If a violation of the Code of Conduct has occurred, participants<sup>139</sup> "are obliged to report the matter to Frontex *via* the appropriate channels"<sup>140</sup>, and "the Executive Director will take adequate measures which may include the immediate removal of the Frontex staff member from the activity".<sup>141</sup> The Consultative Forum on Fundamental Rights has reported on the implementation of the Code of Conduct for Joint Return Operations.

#### 4.2.3. The Consultative Forum on Fundamental Rights

The Consultative Forum on Fundamental Rights (the Consultative Forum) was set up in October 2012 by a Drafting Committee that included representatives of the Frontex Management Board, the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA) and the United Nations High Commis-

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<sup>135</sup> Regulation (EU) No 1168/2011, *op. cit.*, Art. 2(a).

<sup>136</sup> Frontex Code of Conduct for all Persons Participating in Frontex Activities, adopted by Decision of the Executive Director No 24/2011, 21 March 2011, (hereinafter Code of Conduct), Art. 1(2), received from [http://frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf) [last accessed 30.05.2015].

<sup>137</sup> Code of Conduct, *op. cit.*, Art 4(b), Art. 5.

<sup>138</sup> Code of Conduct, *op. cit.*, Art. 4 (a).

<sup>139</sup> A participant is defined as "any person participating in a Frontex activity", Art. 2(a), which includes "Frontex staff, officers of border guard services of a Member State and other staff performing any action in a Frontex activity"; Code of Conduct, *op. cit.*, Art. 1(2).

<sup>140</sup> Code of Conduct, *op. cit.*, Art. 22.

<sup>141</sup> Code of Conduct, *op. cit.*, Art. 23.

sioner for Refugees (UNHCR) based on Article 26a (2) of the new Frontex regulation. Final decisions about the composition and mandate of the Consultative Forum were taken by Frontex's Management Board.<sup>142</sup> The role of the Consultative Forum is to provide Frontex with expertise and strategic advice about the implementation and respect of fundamental rights.<sup>143</sup> Nine out of the fifteen members are representatives of civil society that hold a mandate of three years,<sup>144</sup> while the other six are representatives of European agencies and international organisations.<sup>145</sup> These representatives meet up to three times a year, which is financed by Frontex itself.<sup>146</sup> Additionally, they meet in working groups<sup>147</sup> and occasionally conduct field visits.<sup>148</sup> Their work is of a recommendatory nature; proposals do not have binding effect on the management board of Frontex. Information about the work of the Consultative Forum is available in its annual reports. The Consultative Forum has published one report so far, namely the annual report for 2013.

#### 4.2.4. The Fundamental Rights Officer

The amended Frontex Regulation provides for the nomination of a Fundamental Rights Officer by Frontex's Management Board in Article 26a(3):

A Fundamental Rights Officer shall be designated by the Management Board and shall have the necessary qualifications and experience in the field of fundamental rights. He/she shall be independent in the performance of his/her duties as a Fundamental Rights Officer and shall report directly to

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<sup>142</sup> See <http://frontex.europa.eu/partners/consultative-forum/general-information/>.

<sup>143</sup> Working Methods of the Consultative Forum, p. 10, retrieved from [http://frontex.europa.eu/assets/Partners/Consultative\\_Forum\\_files/Working\\_Methods.pdf](http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Working_Methods.pdf) [last accessed 29.05.2015].

<sup>144</sup> These are currently: Amnesty International, Caritas Europa, Churches Commission on Migrants in Europe, International Catholic Migration Commission, European Council on Refugees and Exiles (ECRE), International Commission of Jurists, Jesuit Refugee Service, Platform for International Cooperation on Undocumented Migrants (PICUM) and Red Cross.; see Consultative Forum Annual Report for 2013, p. 5.

<sup>145</sup> These are: the Fundamental Rights Agency (FRA), the UN High Commissioner for Refugees (UNHCR) and the European Asylum Support Office (EASO); Council of Europe, International Organisation for Migration (IOM) and the Organisation for security and cooperation in Europe (OSCE).

<sup>146</sup> Frontex Consultative Forum on Fundamental Rights, Annual Report for 2013 (hereinafter Consultative Forum Annual Report for 2013), p. 10.

<sup>147</sup> Currently, four working groups have been set up: The Working Group on Border Joint Operations, the Working Group on Return Operations, the Working Group on Risk Analysis, and the Working Group on Training. See Consultative Forum Annual Report for 2013, p. 10.

<sup>148</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 15; In 2013, the CF conducted a field visit to the Joint Operation Poseidon to assess the implementation of the principle of *non-refoulement* and the identification and protection of vulnerable groups.

the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanisms for monitoring fundamental rights.

In December 2012, the new Fundamental Rights Officer, Inmaculada Arnáez Fernández took up her work. Her mandate includes making observations on joint operations, identifying possible preventive and corrective measures concerning fundamental rights issues and setting up and maintaining a score of fundamental rights incident that might have occurred and monitoring the implementation of the Fundamental Rights Strategy.<sup>149</sup> She has access to internal Frontex documents, can take part in Frontex meetings and receives incident reports and individual complaints.<sup>150</sup> Neither is there an annual report mechanism by the FRO at this point, nor are there any report on her work.

#### **4.2.5. The Common Core Curriculum and European Border Guard Training**

The Common Core Curriculum (CCC) sets training standards that are mandatory for national border guard training.<sup>151</sup> The CCC has a part dealing with general studies for border guard standards, general law enforcement and practical skills. The remaining part is divided on modules on sea, air and land borders, each of which covers specific legislation and practice.<sup>152</sup> Fundamental rights are covered in the general part as one of nine subchapters in the part on general studies.<sup>153</sup> Next to this common core curriculum, Frontex provides training for European Board Guard Teams. This training prepares border guards for their operational deployment at European Union borders. It gives border guards basic knowledge about Frontex's structure, its legal framework, the Code of Conduct and about EU institutions in general, as well as about fundamental rights and access to international protection.<sup>154</sup> At the end of each training session for the European Border Guard Teams, each border guard has to take a test. According to the

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<sup>149</sup> Frontex Annexes, Annex 6, p. 2. Retrieved from [http://frontex.europa.eu/assets/Images\\_News/Annexes.pdf](http://frontex.europa.eu/assets/Images_News/Annexes.pdf) [last accessed on 20/04/2015].

<sup>150</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 14.

<sup>151</sup> See [www.frontex.europa.eu/](http://www.frontex.europa.eu/).

<sup>152</sup> Frontex Common Core Curriculum - EU Border Guard Basic Training, 2007 (hereinafter Frontex Common Core Curriculum).

<sup>153</sup> Frontex Common Core Curriculum, 2007, *op. cit.*.

<sup>154</sup> See <http://frontex.europa.eu/training/principles/>.



Frontex Programme of Work, a draft budget of 4.4 M € out of a total budget of around 82.1 M € has been allocated for the training.<sup>155</sup>

This section has shown the initiatives and legal safeguards that were taken to ensure the respect for fundamental rights at the borders of the European Union during Frontex operations. The next section will scrutinise the effectiveness of these measures in light of search and rescue obligations, international refugee law, and international human rights law.

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<sup>155</sup> Frontex Programme of Work for 2015, p. 8.

## 5. A proposal for increased Human Rights Protection

This section scrutinises each of the protection regimes (Search and Rescue Obligations, International Refugee Law, International Human Rights Law and the European Protection Scheme) and puts forward suggestions within each scheme on how to improve respect for fundamental rights. Since its inauguration, Frontex has moved from a limited number of human rights safeguards to an extensive framework consisting of legislative instruments adopted by the European Union and initiatives taken by Frontex itself. A large number of references to general principle of European Union law, SAR obligations and respect for the principle of *non-refoulement* have been incorporated in Frontex's legal framework. Regulation 656/2014 represents the most recent step towards a more comprehensive human rights framework. This thesis then progresses to examine the value of Frontex's initiatives.

### 5.1. The effectiveness of legal fundamental rights safeguards

This section scrutinises the effectiveness of the fundamental rights safeguards existing within Frontex's legal framework through the lens of Search and Rescue Obligations, International Refugee Law, International Human Rights Law and regional obligations under EU law and the ECtHR. The following analysis reveals that despite the initiatives taken, several structural problems remain to be solved, revolving mainly around the issues of legal clarity, transparency, and accountability.

#### 5.1.1 Search and Rescue Obligations at Sea

Regulation 656/2014 sets out the framework of SAR obligations for Frontex operations. It does not provide for any SAR obligations as such, and only sets out that the unit has to inform the Rescue Coordination Centre that is in charge for the region while fulfilling the duty of care.<sup>156</sup> Efficacy of SAR operations could be enhanced if cooperation among Member States was increased at the EU level, which might increase the number of rescued persons. According to Article 9 of Regulation 656/2014, information about situations of uncertainty, alert or distress on board of a vessel and report this information to the Rescue Coordination Centre and the International Coordination Centre (see section 3.1). The

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<sup>156</sup> Regulation (EU) No. 656/2014, *op. cit.* Art. 9.

concept of imminent threat to life as such is problematic. Although the duty of the Frontex Joint Operation is more focused on informing the coordination centres and remaining at their disposal than immediately initiating rescue operations, making a distinction between a phase of alert or distress might lead to an unnecessary risk for the migrants at sea. Delaying until a certain and imminent risk to life exists might lead to fatalities at sea, since rescue operations can be lengthy and depend on external circumstances – such as the weather – that cannot always be foreseen. Frontex and its participating units should therefore read “imminent risk” in the broadest meaning possible to inform the rescue centres and prepare for rescue operations as soon as feasible. As Marin highlights, the unseaworthiness of many vessels that cross the Mediterranean, taken together with a lack of a clear SAR framework for Frontex, result in numerous deaths.<sup>157</sup> It is therefore crucial to develop a common legal framework to clearly define SAR responsibilities of each Member State and the agency as such.

Moreover, the shipmasters’ SAR obligations also include delivering rescued persons to a place of safety (see section 3). For example, the annex Operational Plan of the Joint Operation Hermes<sup>158</sup> sets out, that, to ensure the survival of all rescued persons, “each participating unit shall include at least one person with basic first aid training. Furthermore, upon disembarkation, Italy shall, prior to any other action, render the basic human needs of the apprehended and rescued persons such as food, shelter and medical assistance”.<sup>159</sup> One person trained in basic first aid is barely sufficient for the possible needs of shipwrecked persons.<sup>160</sup> To meet SAR obligations and prevent numerous deaths, a good first aid system is mandatory. This should be enshrined in the regulatory framework. Regulation 656/2014 gives priority for disembarkation in

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<sup>157</sup> Marin, 2014, *op. cit.*, p. 77.

<sup>158</sup> Joint Operation Hermes became active in the Mediterranean and serves to control irregular migration flows to EU Member States through the sea. It is coordinated by Frontex with around 20 participating Member States. Italy is the host Member State of this operation and therefore the principal responsible actor. Frontex is responsible for the coordination of the Joint Operation and the drafting of the Operational Plans. Information accessible at [www.frontex.europa.eu/operations/archive-of-operations](http://www.frontex.europa.eu/operations/archive-of-operations) [last accessed 25.05.2015].

<sup>159</sup> Joint Operation Hermes, Operational Plan 2014, Annex 3, p. 23.

<sup>160</sup> Albeit not in the responsibility of Frontex, the fatality of this calculation was shown on the 9<sup>th</sup> of February 2015. On this day, the Italian border authorities rescued around eighty persons from a shipwrecked vessel, while seven died already before the Italian border guards arrived. Around twenty persons died on board of the Italian border authorities. This shows, although Frontex was not involved, how inadequately the boat and team was equipped to save such a number of people. See <http://www.tagesschau.de/ausland/fluechtlinge-lampedusa-103.html> [last accessed 26.05.2015]. and <http://www.tagesschau.de/ausland/fluechtlinge-lampedusa-101.html> [last accessed 26.05.2015].

third countries, and only if this is not possible, disembarkation shall take place in EU territory.<sup>161</sup> This might be in conflict with the principle of *non-refoulement*, which is examined in the next subsection.<sup>162</sup>

To improve the efficiency of SAR obligations, several measures should be taken. First, concerning the imminence of the threat to life, the participating units have to interpret the word in its broadest meaning possible and prepare SAR operations as soon as they receive information that a vessel might find itself in distress. Second, a number of deaths could be prevented by increasing the minimum number of border guards that have to be trained in basic first aid, depending on the region where the Joint Operation takes place. Further, the presence of one medical practitioner per vessel might prevent deaths on board of Joint Operation vessels. Third, the lack of a clear legal framework of SAR responsibilities during Frontex Joint Operations should be addressed by introducing a new paragraph in Regulation 646/2014, regulating the divide of responsibilities of Member States during SAR operations.<sup>163</sup> For example it could be clarified who is responsible for taking record of asylum claims made during a SAR operation and to which authority this is to be directed. Fourth, the EU should provide funding for SAR activities in the Mediterranean. The Italian *Mare Nostrum* operation, which was abolished because of high costs, provides an example of how greater EU funding could have substantially prevented deaths at sea. The Frontex operation Triton, which partially replaced this mission, currently only has approximately one third of the *Mare Nostrum* budget and does not have a search and rescue mandate. After the incident at the end of April, the

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<sup>161</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 10 (1)(b). Note, however, that operational plans might specifically provide for disembarkation in the host member State, as it is for example the case in the Joint Operation Hermes, which sets out that the “participating units are authorized by Italy to disembark in its territory the persons intercepted and apprehended in its territorial sea as well as in the operational area beyond its territorial sea”. Joint Operation Hermes, Operational Plan 2014, Annex 3, p. 23.

<sup>162</sup> In the case of Hermes, for example, the Operational Plan reads that “if it is not possible to arrange for the participating unit to be released of its obligation to render assistance as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorized to disembark the rescued persons in Italy”.; Joint Operation Hermes, Operational Plan 2013 Annex 3, p. 23.

<sup>163</sup> It is regrettable that the European Union does not have any power to legislate Search and Rescue obligations to give Frontex a fully-fledged SAR mandate. If there was a single body responsible for the coordination of Search and Rescue operations within the EU, crucial time could be saved and a larger number of people be saved.

EU agreed on a special summit to at least triple the funding for Triton. If this funding is used to search and rescue, this is a welcome development.<sup>164</sup>

### 5.1.2. International Refugee Law at Sea

Regulation 656/2014 clarifies the definition of *non-refoulement* and its implications for Frontex sea patrol operations,<sup>165</sup> after its practical meaning stayed vague in the Schengen Borders Code and Frontex Regulation 1168/2011. It now also includes chain refoulement.<sup>166</sup> The clarification is a welcome development, since this decreases the margin of discretion for border guards, gives them clearer guidelines and increases legal certainty.

*Non-refoulement* is also reaffirmed in operational plans, for example in the plan for the Joint Operation Hermes. The intercepted persons need to have an opportunity “to express any reason for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement” after having been informed about the intended destination.<sup>167</sup> Here, the practical implementation is crucial. It is inadequate to merely expect objections by the intercepted persons as soon as the intended destination has been announced. Instead, people must be informed about the meaning of the principle of *non-refoulement* and about the possibility to apply for asylum – in any case if they find themselves in the territorial waters of a Member State. This should be guaranteed by introducing a paragraph into Regulation 656/2014, stating that every rescued or intercepted person has to be informed, in a language that this person understands, about the possibility to apply for asylum. If this takes place in the

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<sup>164</sup> Special meeting of the European Council, 23 April 2015, statement, retrieved from <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> [last accessed 20.05.2015].

<sup>165</sup> See section 4.1.3; Regulation (EU) No 656/2014, *op. cit.*: Art. 4 states that “No person shall, in contravention of the principle of non-refoulement, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement.

<sup>166</sup> Chain refoulement has been recognized as being prohibited by the European Court of Human Rights in *T.I. v. the United Kingdom*. Here, the Court stated that “the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”. *T.I. v. the United Kingdom*, 7 March 2000, Application No. 43844/98.

<sup>167</sup> Joint Operation Hermes Plan, p. 22; based on Regulation No. 656/2014, *op. cit.*, Art. 4(3).

territorial waters of a Member State, the persons must have the possibility to claim asylum in the respective Member State. Outside the territorial waters of the EU, the asylum reception conditions directive does not apply. As a minimum standard, however, migrants have to be disembarked to a country with a functioning and effective asylum system.

Regulation 656/2014 provides for sufficient safeguards regarding the principle of *non-refoulement* in relation to inhuman or degrading treatment. However, it needs to be given broader interpretation than merely not pushing someone back to where his or her life would be threatened: As implied in Article 33 of the Refugee Convention, governments are under an obligation to “provide access to official proceedings in order to verify refugee status”.<sup>168</sup> This means that effectively, States are compelled to allow for “temporary admission for the purpose of verifying the need for protection and the status of the person concerned”.<sup>169</sup> Hence, intercepted or rescued persons can only be disembarked in a country where an effective asylum system is in place. Frontex needs to thoroughly scrutinise the situation in potential countries of disembarkation before drafting the Operational Plan and ensure that they provide a place of safety for rescued and intercepted persons and continuously update information about these third countries; the intercepted persons must have the opportunity to apply for asylum subject to a fair procedure and effective remedy. In case of doubt, rescued and intercepted persons should be disembarked in EU countries to have the opportunity to claim asylum in EU member states.<sup>170</sup> This should be included in an amended Frontex Regulation.

Moreover, the obligation to deliver rescued persons to the next port of call<sup>171</sup> has to be respected also during Joint Operations: the participating Member States should not take longer routes back to the country of departure to disembark the rescued persons. It is difficult to scrutinise whether this is taken place in practice, since Frontex does not publish this information. The information about these procedures has to be accessible to the public.

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<sup>168</sup> Fischer-Lescano, Lühr & Tohidipur, 2009, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 21 *International Journal of Refugee Law* 2, p. 284.

<sup>169</sup> *Ibid.*, p. 283.

<sup>170</sup> Goodwin-Gill takes the obligation one step further by stating that “in the absence of effective and verifiable procedures and protection in countries of proposed return, the responsibility to ensure protection remains that of the EU agency or Member State”. Thus, the responsibility shifts from preventing a likely breach of the principle of *non-refoulement* to the obligation to verify whether an effective asylum procedure is in place in the country of disembarkation. Goodwin-Gill, 2011, *op. cit.*, p. 456.

<sup>171</sup> See section 3.1.

On a more general basis, it needs to be questioned whether the principle of *non-refoulement* can be fully respected when decisions are taken by border guards on board of a vessel. The information given by the persons applying for asylum can hardly be verified, there might be an inadequate translation, and asylum seekers are confronted with difficulties of proving their claims. The right to effective remedy as enshrined in Article 47(1) of the Charter and Article 46 of the Asylum Procedure Directive, as well as in Article 13 of the ECHR is also at risk of violation when decisions are taken at sea. While an effective remedy against such a decision does not necessarily require the presence in the Member State, it is difficult to imagine how an effective remedy could be guaranteed once a person has been intercepted or saved by a participating unit and sent back to the country of departure. In the country of departure the person in question might not be familiar with the language spoken and have no access to judicial support.<sup>172</sup>

Since Frontex does not have any executive powers and Member States remain in control of the acts on board of the vessel, responsibilities need to be clarified so that in the case of human rights violations, the blame is not shifted from one party to another. To avoid gaps of responsibility, it needs to be clarified which state is responsible for which acts during interception operations, for example for the examination of an asylum application.<sup>173</sup> With an average of approximately ten States<sup>174</sup> participating in Joint Operations, regulating asylum application obligations during Frontex operations could provide a clearer framework of international protection.<sup>175</sup>

In general, the principle of *non-refoulement* needs to be prioritised to build the basis of Joint Operations.<sup>176</sup> This means that before taking any actions, it has to be ensured that every person who might wish to apply for asylum is only

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<sup>172</sup> Migrants who attempt to reach the European Union territory by boat often have crossed several countries before reaching the port of departure. This implies that they might not be familiar with the language spoken in the country of departure. Source: The case *Hirsi* has shown how difficult it can be to stay in contact with legal representatives once being expelled.

<sup>173</sup> Commission of the European Communities, Communication from the Commission to the Council, *Reinforcing the management of the European Union's Southern Maritime Borders* COM(2006) 733 final, Brussels, 30.11.2006, p. 11

<sup>174</sup> This average has been increasing over the past years. Information is accessible on [www.frontex.europa.eu](http://www.frontex.europa.eu), see also appendix.

<sup>175</sup> The fatality of a situation where responsibilities are not clearly set out has been shown in the so-called left-to-die-boat incident of March/April 2011, where 63 people drowned while the NATO, Frontex and EU Member States were aware of the risk that the vessel might sink; Strik, Tineke, Rapporteur for Committee on Migration, Refugees and Displaced Persons (09 June 2014), *The "left-to-die-boat": actions and reactions*. Report to the Parliamentary Assembly.

<sup>176</sup> Strik, 2014, *op. cit.*, p. 12

disembarked at a place where this would be possible and subject to a fair procedure. In practice, this means that more often than not, rescued and intercepted persons have to be disembarked in EU territory to ensure that a fair asylum procedure is in place.

Thus, international refugee law requires some amendments and clarifications to Frontex's framework. First, it has to be enshrined in the 656/2014 Regulation and the Operational Plans that border guards have to inform migrants about the possibility to claim asylum, before waiting for objections to the intended place of disembarkation. Second, Frontex has to collect human rights information before drafting Operational Plans about potential countries of disembarkation and continuously update these. Frontex has to establish whether an effective and fair asylum procedure is in place. An amendment of Regulation 656/2014 could make this mandatory. Third, if a SAR operation takes place on the high seas, the rescued persons should always be disembarked in an EU Member State if this is the next port of call. If the next port of call is a third state, the staff members on the Joint Operation vessels have to check the updated information provided for by Frontex about the human rights situation in this country. If it is unclear whether an effective asylum system is in place, the persons should be disembarked in EU territory. Fourth, if people are intercepted or rescued in territorial waters of the EU, they should always be disembarked in the respective Member State, since it remains doubtful that it is possible that the principle of *non-refoulement* can be respected on board of a vessel. Fifth, if several Member States are hosting a Joint Operation, it needs to be clarified who is responsible for asylum claims.

### 5.1.3. International Human Rights Law at Sea: Legal Certainty, Transparency and Accountability

Frontex's legal framework includes a number of international human rights law guarantees: Respect for human dignity,<sup>177</sup> non-discrimination<sup>178</sup> and the principle of proportionality<sup>179</sup> are safeguarded in every document building the framework

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<sup>177</sup> Frontex Regulation, as amended in 2011, Art. 3(b)(4); Regulation (EU) 656/2014, *op. cit.*, Art. 4(6).

<sup>178</sup> Frontex Regulation, as amended in 2011, Art. 3(b)(4); Regulation (EU) 656/2014, *op. cit.*, Recitals 10 and 19.

<sup>179</sup> Frontex Regulation, as amended in 2011, Art. 3(b)(4); Regulation (EU) 656/2014, *op. cit.*, Art. 6(3). The principle of proportionality has been confirmed as applying to border control in *Medvedyev v France*: the end of controlling the border, even if legitimate, does



for Frontex's actions. After the limited scope of human rights in the first Frontex regulation, the 2011 amendment has significantly improved the human rights framework by incorporating the respect for fundamental rights in a number of articles.<sup>180</sup> While no specific human rights are enumerated, fundamental rights and "relevant Union law"<sup>181</sup> clearly include the right to life, the right to liberty and security of persons, the prohibition of torture and other inhuman or degrading treatment, and the prohibition of collective expulsion (see section 3). These rights need to be respected during Frontex operations.

However, the practical meaning of these rights is left unclear in the regulatory framework. Since border guards who act under the auspices of Frontex in Joint Operations are not experts in European Union or international law (and cannot be expected to be so), it is important to give as clear practical guidelines as possible. When drafting a new operational plan, Frontex therefore should be required to include sufficient human rights safeguards in this document to ensure the full compliance by border guards with international and European Union obligations. Effective trainings of border guards could further enhance protection of human rights, as examined below.

The principle of legal certainty needs to be ensured.<sup>182</sup> This means that Joint Operations have to be framed by a clear legal structure that does not produce an unnecessarily broad scope of interpretation. Interceptions at high seas do not fall under a clear legal framework and their legality remains questionable.<sup>183</sup> In the words of Klepp, the current "legal gap gives room for operational practices at sea that do not conform to the European refugee law".<sup>184</sup> Article 7 of Regulation 656/2014 presents a step towards the clarification of the legal framework of interception missions. On the international waters, participating units have to receive the authorisation of the flag State of a vessel that is suspected of carrying irregular migrants before seizing the vessel and apprehending the persons on board.<sup>185</sup> If a stateless vessel is found, and its nationality cannot be determined, the host Member State shall take "further appropriate measures

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not justify the use of whatever means available; *Medvedyev v France*, 2010, *op. cit.*, paragraph 81.

<sup>180</sup> Frontex Regulation, as amended in 2011, Art. 1(2), Art. 2(a), Art. 3(1)(a), Art. 3(b)(4), Art. 5(a), Art. 10(2), Art. 14(1), Art. 14(3) and Art. 14(4). See also section 4.

<sup>181</sup> Frontex Regulation, as amended in 2011, Art. 1(2).

<sup>182</sup> Goodwin-Gill, 2011, *op. cit.*, p. 456

<sup>183</sup> For a discussion about the legality of interceptions on the high seas see Goodwin-Gill, 2011, p. 456. The right to visit flagless ships which exists under international law does not imply the right to divert the ships' routes. See also Marin, L., 2011a, *op. cit.*, p. 482. An analysis of this issue would exceed the scope of this paper.

<sup>184</sup> Klepp, 2010, *op. cit.*, p. 19.

<sup>185</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 7(1) and 7(2) (a).

as laid down in paragraph 1 and 2 in accordance with national and international law".<sup>186</sup> It is not further specified what these appropriate measures are. Since the attempt to trespass the Member States' borders often takes place on stateless vessels,<sup>187</sup> it is crucial to specify the range of actions that may be taken. Detailed rules on interception mechanisms should be included in the regulatory framework, since *ad-hoc* rules for interceptions cannot be analysed until the end of an operation and therefore jeopardize human rights compliance. Clearly, a more detailed legal framework has to be in conformity with obligations under international maritime, human rights and refugee law.

It is difficult to scrutinise human rights provisions that are included in operational plans, since these are kept secret for the duration of an operation.<sup>188</sup> Again, the 2014 operational plan for the Frontex-coordinated Joint Operation Hermes serves as an example. The document has been redacted and is not fully accessible to the public.<sup>189</sup> In those parts that are accessible, no reference is made to specific human rights except the principle of *non-refoulement*.<sup>190</sup> However, it is stated that Guest Officers have to act in accordance with relevant international law.<sup>191</sup>

The secrecy of the Operational Plans shows the connection between transparency and human rights. Without access to documents, it cannot adequately be scrutinized whether sufficient human rights safeguards are in place.<sup>192</sup> Joint Operation Plans are made accessible only on individual requests from EU nationals under Regulation 1049/2001 and are not available for ongoing Joint Operations. The parts that have been redacted and are not available even on an individual basis include – but are not limited to – the operational areas, the procedure during interceptions (in the territorial waters, in the contiguous zone and on the high seas), the greater part of the Search and Rescue situations and the internal incident reporting system. These are the parts that are

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<sup>186</sup> Regulation (EU) No. 656/2014, *op. cit.*, Art. 7(11).

<sup>187</sup> Den Heijer, Maarten, 2011, *Europe and Extraterritorial Asylum*, Institute of Immigration Law, Leiden University.

<sup>188</sup> Marin, L., 2014, *op. cit.*, p. 92-93.

<sup>189</sup> See section 5.1.4.

<sup>190</sup> Joint Operation Hermes Operational Plan & Annexes, 2014.

<sup>191</sup> This includes, according to the Operational Plan, the United Nations Convention on the Law of the Seas, the International Convention on Maritime Search and Rescue, International Convention for the Safety of Life at Sea, the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, the 1951 Geneva Convention on the Status of Refugees, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Union Charter.

<sup>192</sup> Klepp, S., 2010, *op. cit.*, p. 16.

particularly important for scholars and human rights activists to scrutinise the respect for human rights during Frontex operations.

The agency only has a limited duty to publicise its documents: The basis for publication of the relevant documents with regard to Frontex, Regulation No. 1049/2001<sup>193</sup> only applies to citizens or residents of the European Union.<sup>194</sup> There should be a system within which also directly affected non-residents have a right to access all relevant information. This would require an amendment of the Frontex regulation. A duty to publish all information – with the exception of information that, if published, would pose a threat to public security or safety or that would hamper the effectiveness of the operation – should be enshrined in the regulatory framework. More detailed guidelines are needed for the implementation of this obligation and redaction should be kept to a strict minimum.<sup>195</sup>

Transparency also includes the collection of more comprehensive statistics about intercepted and rescued people. Statistics that are important to evaluate human rights compliance include data on whether persons sought to lodge an application for asylum, reasons for the migration and where specifically they have been disembarked. This data is not currently collected by Frontex.<sup>196</sup> In practice, there is a lack of precision and transparency about Frontex actions as such, since these are often taken on an ad-hoc basis without subsequent publication.<sup>197</sup> For example, the lack of collection of data is linked to summary expulsions: If no data is collected on the number of asylum applications that have been made and no record is kept about where those asylum seekers have been disembarked, it cannot be verified whether the prohibition of collective expulsion has been respected.<sup>198</sup> This means that there is a serious risk that collective

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<sup>193</sup> Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.; referred to in Frontex Regulation 2007/2004 *op. cit.*, Art. 28.; see section 4.1.2.

<sup>194</sup> Regulation (EC) No. 1049/2001, *op. cit.*, Art. 2.

<sup>195</sup> It remains questionable whether it poses a threat to public security or hampers the effectiveness of an operation if the section on interpreters is redacted, for example, as it is the case in the Hermes operational plan.

<sup>196</sup> Goodwin-Gill, 2011, *op. cit.*, p. 451.

<sup>197</sup> Carrera, 2012, The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice, *CEPS Paper in Liberty and Security in Europe* 49, p. 5.

<sup>198</sup> In the view of Goodwin-Gill, 2011, the lack of data is even an indication that summary expulsions are taking place: “the failure of both states and Frontex to make distinction where international law requires distinctions to be made, or to record and retain data relating to passengers’ nationality, reasons for departure and possible protection needs, simply strengthens the reasonableness of the inferences to be drawn from the facts - that interceptions at sea are resulting in the summary return of individuals in need of protection, in breach of international obligations”. Goodwin-Gill, 2011, *op. cit.*, p. 455.

expulsions may take place.<sup>199</sup> Thus, data needs to be collected to be able to scrutinise respect for the prohibition of collective expulsion. As Marin explains “[t]he little official information offered by Frontex does not meet the standards of accountability and transparency with which the agency should comply”.<sup>200</sup> Greater transparency would also lead to a decrease in conflicting information that is available about Joint Operations.<sup>201</sup> This would make it easier to draw conclusions about Frontex’s human rights compliance in practice.

Applicants before the ECtHR could profit from this data collection, since this could ease the burden of proof in some regards. For instance, it is rather difficult to prove the imminence of a threat to life on the high seas where the number of external witnesses is small and situations are under little supervision.<sup>202</sup> A partial solution to this issue might be to accept third party documents as indication of a situation. ECtHR jurisprudence represents a step into this direction, as can be seen in *Hirsi Jamaa and Others v. Italy*, where evidence from NGOs and other third parties was accepted to assess the general situation in a third country.<sup>203</sup> Moreover, in case of non-transparency with regards to the treatment of intercepted or rescued persons, the burden of proof should shift, *inter alia*, to Frontex or the responsible Member State.<sup>204</sup> In *M.S.S. v. Belgium*, the ECtHR stated that “the applicants should not be expected to bear the entire burden of proof”.<sup>205</sup>

Next to the issue of transparency, Frontex is in need of effective accountability mechanisms. Despite improvements, some major issues remain.<sup>206</sup> First, there is still a democratic deficit regarding Frontex’s operations.<sup>207</sup> With regard to sea operations, Regulation 656/2014 sets out that Frontex has to re-

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<sup>199</sup> Goodwin-Gill, 2011, *op. cit.*, p. 455.

<sup>200</sup> Marin, 2011b, *op. cit.*, p. 139

<sup>201</sup> For example, the scholar Klepp conducted interviews with participants in Frontex operations. In these interviews, she found contradictory information about the operations. Klepp, 2010, *op. cit.*; See also Marin, 2011a, *op. cit.*, *Border*, p. 478.

<sup>202</sup> Klepp, 2010, *op. cit.*, p. 17.

<sup>203</sup> *Hirsi Jamaa and Others v. Italy* (2012), *op. cit.*, paragraphs 43-44 and 149-151.

<sup>204</sup> Analogy could be drawn to sex equality legislation and non-discrimination. Here, the burden of proof shifts at least partially to the defendant in an alleged case of discrimination if he or she has been non-transparent with regard to the treatment of the employees and the plaintiff can show facts that indicate discrimination; Handbook on European non-discrimination law, 2010, pp. 123-126 [last accessed 09/03/2015] [http://www.echr.coe.int/Documents/Handbook\\_non\\_discr\\_law\\_ENG\\_01.pdf](http://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG_01.pdf) .

<sup>205</sup> *M.S.S. v Belgium and Greece*, 2011, *op. cit.*, paragraph 352.

<sup>206</sup> Since the Lisbon Treaty, EU institutions can ask the CJEU to review the legality of the acts of Frontex under Article 263 TFEU. This has improved Frontex’s accountability; for more information, see Marin, 2014, *op. cit.*.

<sup>207</sup> C.f section 4.2. The most powerful actor within Frontex is the non-elected Management Board. Moreover, reports about the activities of Frontex are not fully accessible to the public.

port annually to the European Parliament, the Council and the Commission “on the practical application of this Regulation”.<sup>208</sup> This has to include “detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place”.<sup>209</sup> While this represents an improvement to previous reporting systems, it remains questionable that this mechanism will account for sufficient democratic scrutiny. These reports should be made accessible to the public. Second, the main actors during Frontex operations are not democratically elected and often take *ad-hoc* choices based on informal practices and non-accessible operational plans without being subject to public scrutiny and democratic control.<sup>210</sup> The acts of these non-elected staff members therefore need to be subject to democratic scrutiny to ensure accountability of the main actors.

Besides this democratic deficit, the lack of legal accountability for actions taken on board of a Joint Operation vessel gives rise to concern. As Mikael Cederbratt states in his report for the Council of Europe Committee on Migration, Refugees and Displaced Persons, “the legal framework is unclear about the Agency’s responsibility and accountability”.<sup>211</sup> Frontex’s power has shifted from merely coordinating functions to a mandate that includes initiation, supervision and evaluation functions.<sup>212</sup> This increase in power needs to be followed by an increase in accountability mechanisms, which has yet to take place. As noted by Marin, “there is a gap between Frontex’s role and function, considering the remit and scope of its interventions, which is way more complex than neutral cooperation, and the actor(s) bearing the final responsibility for those activities”.<sup>213</sup> Thus, the next step would be to also legally recognise Frontex’s responsibility.<sup>214</sup>

To increase accountability, an effective reporting system is needed. The reporting system about incidents that might have constituted human rights viola-

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<sup>208</sup> Regulation (EU) No. 656/2014, *op. cit.*, Article 13(1).

<sup>209</sup> Regulation (EU) No. 656/2014, *op. cit.*, Article 13(2).

<sup>210</sup> Klepp 2010, *op. cit.*, p. 18.

<sup>211</sup> Cederbratt, M., 2013, Frontex: human rights responsibilities, Council of Europe Committee on Migration, Refugees and Displaced Persons, paragraph 39.

<sup>212</sup> Marin, 2011a, p. 474; Pascouau, Y, Schumacher, P, 2014, *op. cit.*, p. 4; Jesuit Refugee Service Europe, 27 June 2013, *The Frontex Consultative Forum on Fundamental Rights*, p. 2; retrieved from

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/discussion\\_paper\\_frontex\\_discussion\\_paper\\_frontex\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/discussion_paper_frontex_discussion_paper_frontex_en.pdf) [last accessed 26.05.2015]. For example, the 2011 amendments gave Frontex the power to initiate, coordinate and monitor Joint Operations, which previously was not possible (see introduction).

<sup>213</sup> Marin, 2011a, *op. cit.*, p. 474

<sup>214</sup> Pascouau, Y, Schumacher, P., 2014, *op. cit.*, p. 3, retrieved from [http://www.epc.eu/documents/uploads/pub\\_4512\\_frontex\\_and\\_the\\_respect\\_of\\_fundamental\\_rights.pdf](http://www.epc.eu/documents/uploads/pub_4512_frontex_and_the_respect_of_fundamental_rights.pdf) [last accessed 20/04/2015].

tions is set out in the operational plan. Doubts arise whether this reporting system is effective to deal with human rights violations. The reporting system for previous Frontex Joint Operations has been blanked out of the operational plans that were made accessible. Thus, it is not possible to scrutinise the reporting system of past operations, let alone current operations. The Fundamental Rights Strategy states that “Frontex will put in place an effective reporting system to ensure that any incidents or serious risks regarding fundamental rights are immediately reported”.<sup>215</sup> This needs to be put in practice now and the effectiveness of such a reporting system needs to be ensured.

The lack of a clear individual complaint mechanism procedure is also a point to be criticised. By the nature of a Joint Operation where several Member States participate it might be difficult for a third party to identify the Member State that was responsible for an individual act. Hence, an overarching independent complaints mechanism should be introduced that makes it possible for affected persons to directly address Frontex for alleged human rights violations, which in turn either investigates the individual complaints itself or directs it to the responsible Member State. Frontex could use its coordinating powers and information that it has access to in order to collect individual complaints and direct them, if it is not responsible itself for the alleged human rights violations, to the individual Member States that were participating in the Joint Operation and might bear responsibility for the acts.<sup>216</sup> Having limited executive powers does not prevent Frontex from receiving complaints and directing these to the alleged perpetrators.<sup>217</sup> This would increase accountability and have a positive impact on the guarantee of human rights.<sup>218</sup>

A clear independent mechanism that investigates reports of human rights abuses and a new individual complaints mechanism therefore need to be established to give practical effect to existing human rights safeguards.<sup>219</sup> Frontex should use its position as a coordinating agency with access to all relevant information to promote the respect for human rights. After having examined the effectiveness of human rights safeguards within Frontex’s legal framework, I now turn to the initiatives taken to enhance human rights compliance.

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<sup>215</sup> Frontex Fundamental Rights Strategy, *op. cit.*, para 17.

<sup>216</sup> European Ombudsman, 2013 “*Special Report of the European Ombudsman in own-initiative inquiry 01/5/2012/BEH-MHZ concerning Frontex*”(hereinafter European Ombudsman Special Report), paragraphs 37-40.

<sup>217</sup> European Ombudsman Special Report, 2013, para 48

<sup>218</sup> Pascouau, Y, Schumacher, P., 2014, *op. cit.*, p. 1.

<sup>219</sup> Amnesty International, 2014, *op. cit.*, p. 16.

Nevertheless, accountability by Frontex does not mean that Member States should or could be relieved of their responsibility and accountability. Only an adequate system of accountability where responsibility is not shifted according to changing political interests of States or the agency can ensure that human rights violations are addressed. This means that each actor has to bear responsibility for his own acts; if several actors are involved, joint responsibility should arise.<sup>220</sup> Consequently, both transparency and accountability are required to give practical meaning to the improvements that were made in law to ensure human rights compliance and provide sufficient remedy in case of human rights violations.<sup>221</sup>

In general, human rights compliance can be enhanced by taking a few measures. First, the legal framework for interception measures needs to be clarified in Regulation 656/2014 to ensure legal certainty. Second, transparency has to be improved.<sup>222</sup> To this end, the duty to publish information should be extended. This includes publishing Operational Plans on Frontex's website and keeping the redacted parts to a strict minimum. This could be introduced in a paragraph in the Frontex Regulation. Another paragraph should be introduced stating that Third Country nationals directly affected by Frontex's decisions have the right to access all relevant information, in order to account for the gap in Regulation 1049/2001 that only grants EU citizens access to information. Moreover, Frontex should be obliged by an amended Frontex regulation to collect more detailed statistics and make them publically available. Third, accountability needs to be improved. For one, democratic accountability should be increased by implementing an effective reporting mechanism to the democratic institutions of the EU. For another, an independent monitoring mechanism is necessary.<sup>223</sup> This could be implemented by requiring the presence of a person from an independent body, such as the UNHCR, on board of a Joint Operation vessel. Further, an individual complaints mechanism is indispensable to address human rights violations.<sup>224</sup>

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<sup>220</sup> Goodwin-Gill, 2011, *op. cit.*, p. 447. For a discussion of joint responsibility, see Nolkaemper, Andre, Jacobs, Doc, 2013, 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law* 34 (2), pp. 359-438.

<sup>221</sup> Slominski, 2013, *op. cit.*, p. 49

<sup>222</sup> Council of Europe Parliamentary Assembly, 2013, *Frontex: human rights responsibilities*, Resolution 1932 (2013), 8.1.

<sup>223</sup> Council of Europe Parliamentary Assembly, 2013, *Frontex: human rights responsibilities*, Resolution 1932 (2013), 8.4.

<sup>224</sup> Council of Europe Parliamentary Assembly, 2013, *Frontex: human rights responsibilities*, Resolution 1932(2013), 9.5.

## 5.2. Frontex's initiatives

In addition to this legal framework, an evaluation of the initiatives taken by Frontex is essential. The *Code of Conduct* is applicable to all persons participating in Frontex operations serves to enhance compliance with human rights standards. Nevertheless, its impact is limited due to a lack of precision with regard to several issues. First, it fails to establish how complaints can be made in practice and how these will be processed.<sup>225</sup> Second, no monitoring mechanism with persons from an independent body on board of a Joint Operation vessel is in place. To give effect to human rights and increase both accountability and access to an effective remedy, it is important that an independent monitoring mechanism exists and that there is a follow-up concerning every report that has been submitted.

The establishment of the *Consultative Forum* is a positive development. As the annual report 2013 shows, the Consultative Forum has been consulted by the Management and Executive Board on a regular basis.<sup>226</sup> Nevertheless, a few shortcomings have to be pointed out. First of all, the impact of its work entirely depends on the will of the Management Board and Executive Director, since the Consultative Forum has purely advisory and no deciding or voting powers. Thus, the recommendations by the Consultative Forum have had diverse impact, from being included into Frontex's working plan<sup>227</sup> to being rejected in its entirety<sup>228</sup>.

Second, the budget only finances three meetings a year and if Consultative Forum members participate in Frontex activities; not every type of work is covered, e.g., analyses, drafting of reports, exchange and engagement with other stakeholders.<sup>229</sup> But to provide informed and qualitative recommendations, a substantially larger amount of time and resources needs to be dedicated to draft

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<sup>225</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 22.

<sup>226</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 21; For example, Frontex submitted the draft Programme of Work 2014 to the Consultative Forum that gave recommendations on how to improve it with regards to fundamental rights. Some of the recommendations were included in the final Working Programme

<sup>227</sup> By way of example, the Consultative Forum recommended to refrain from value judgments and remove these from the Programme of Work 2014. This has partially been followed. Consultative Forum Annual Report for 2013, *op. cit.*, p. 20.

<sup>228</sup> For example, the Consultative Forum recommended that Frontex should "consider consulting civil society organizations and other stakeholders working in that environment" when developing "effective protection measures for vulnerable persons". This recommendation has been rejected; Consultative Forum Annual Report for 2013, p. 20.

<sup>229</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 48. The budget for 2015 for the Consultative Forum has been allocated at 66 0000 €, see Frontex Programme of Work, *op. cit.*, p. 111.



recommendations so as to enhance the impact of the Consultative Forum.<sup>230</sup> Third, the Consultative Forum has only restricted access to internal Frontex documents.<sup>231</sup> Access should be granted to all relevant materials to give the Consultative Forum opportunity to provide qualitative strategic advice.

The creation of a post for a *Fundamental Rights Officer* is also a welcome development. Her wide-ranging mandate has a positive impact on the implementation of and compliance with fundamental rights.<sup>232</sup> However, a single person with one assistant and limited financial resources<sup>233</sup> is unable to systematically assess fundamental rights compliance.<sup>234</sup> Therefore, Frontex should establish a team to assist the Fundamental Rights Officer. Moreover, the FRO's powers are limited to recommendations and should be strengthened.<sup>235</sup> For example, consulting her could be made compulsory whenever a new operational plan is drawn up. It also remains doubtful whether the FRO can act independently when being designated by the Management Board and subsequently having to report to them about her work and not receiving independent funding.<sup>236</sup> Additionally, she has to "act independently in Frontex's interest"<sup>237</sup>, which might be a point of conflict: if acting independently, the Fundamental Rights Officer might not always act in Frontex's interest if, for example, criticizing fundamental rights policies. That the FRO is employed on a temporary basis<sup>238</sup> might aggravate this problem, since she is dependent on the Management Board for the renewal of her contract.

The *European border guard training* also has room for improvement. First, not every participant in Frontex's border guarding activities receives training. The priority so far lies on giving training to officers.<sup>239</sup> While this is certainly important, it is crucial that all border guards participating in Frontex activities also receive at least basic training prior to their deployment. Second, the time

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<sup>230</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 48.

<sup>231</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 12.

<sup>232</sup> Cederbratt, M., 2013, *op. cit.*, p. 14.

<sup>233</sup> The budget for the Fundamental Rights Officer for 2015 has been allocated 40 000€. See Frontex Programme of Work for 2015.

<sup>234</sup> Cederbratt, 2013, *op. cit.*, p. 14.

<sup>235</sup> Pascouau, Y, Schumacher, P., 2014, *op. cit.*, p. 2.

<sup>236</sup> Cederbratt, M., 2013, *op. cit.*, pp. 5 and 14.

<sup>237</sup> Frontex Annexes, Annex 6, p. 3, retrieved from [http://frontex.europa.eu/assets/Images\\_News/Annexes.pdf](http://frontex.europa.eu/assets/Images_News/Annexes.pdf) [last accessed 20/04/2015].

<sup>238</sup> Frontex Annexes, Annex 6, p. 4 retrieved from [http://frontex.europa.eu/assets/Images\\_News/Annexes.pdf](http://frontex.europa.eu/assets/Images_News/Annexes.pdf) [last accessed 20/04/2015].

<sup>239</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 39.

gap between the training and the actual deployment can be significant.<sup>240</sup> This should be restricted to a reasonable amount of time and regular training to refresh the knowledge should be made mandatory. Third, under current practice, border guards are also deployed if having failed the final test at the end of the training; passing this test made mandatory.<sup>241</sup>

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<sup>240</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 38; The actual amount of time that elapses between the training and the actual deployment of an officer is not available.

<sup>241</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 40.

## 6. Conclusion

This paper has shown that Frontex's approach to human rights requires improvement. Despite the fact that Frontex's legal framework has developed from marginal consideration for human rights to a structure that aims at complying with international and European human rights standards, some systemic deficiencies must be highlighted. First, the lack of clarity in the legal framework leaves disproportionate room for interpretation and therefore leaves the fulfilment of human rights obligations to national border guards who are not (and cannot be expected to be) experts in international and regional human rights law and EU law in general. Second, the lack of transparency for Frontex's activities manifests itself in the lack of a clear reporting mechanism and the unavailability of data and statistics to the public. Third, the lack of accountability leaves human rights violations unaddressed. In sum, fundamental rights should not build only one part of Frontex's mandate as an additional criterion, but should be the very basis of all its activities and therefore receive priority over border guarding.<sup>242</sup>

More specifically, the *Search and Rescue obligations* also apply to Frontex Joint Operations. As shown by recent tragedies, however, their fulfilment is unsatisfactory. To improve efficiency, Regulation 656/2014 should be amended. A new paragraph should be introduced clearly setting out the responsibilities of the participating Member States during SAR operations: For example, who is responsible for taking record of asylum claims made during a SAR operation and to which authority is this directed. Moreover, Regulation 656/2014 should make it mandatory that the minimum number of border guards who have to be trained in basic first aid is increased and that at least one medical practitioner is present on board of a Joint Operation vessel. What is more, the EU should increase funding for SAR activities.

To foster compliance with *international refugee law* and live up to obligations towards persons in need of international protection, Art. 4(3) of Regulation 656/2014 should be amended to include a sentence that border guards have to inform intercepted or rescued migrants about the possibility to claim asylum before disembarking them. Next, it should be made obligatory that rescued persons have to always be disembarked to an EU Member State, if this is the next port of call. Furthermore, if migrants are rescued in the territorial waters of a Member State, they must always be disembarked in the respective Member State and under no circumstances be disembarked in third countries, since ad-

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<sup>242</sup> Goodwin-Gill, 2011, *op. cit.*, p. 455.

hoc decisions taken on board of a vessel might infringe the principle of *non-refoulement*.

With regard to *human rights*, both the Frontex Regulation and Regulation 656/2014 should be amended. The Frontex regulation should introduce an article on effective remedies and how to ensure an effective remedy for decisions taken during Joint Operations or other Frontex-led operations to clearly divide responsibilities between Member States. To scrutinize Frontex's activities and denunciate human rights violations, the duty to publish all relevant information must be enshrined in Frontex's legal framework. Further, a clear and effective individual complaints procedure has to be set up. Regulation 656/2014 should set out that Frontex must collect detailed information on the human rights record of a third country that is a potential country of disembarkation and include this information in the Operational Plan of each operation. This must include whether a fair and effective asylum system exists and must be continuously updated. A means to enhance human rights compliance would be to establish an independent monitoring mechanism by, for example, having one person from an independent organization such as the UNHCR on each Joint Operation vessel, which would prevent human rights violations and at the same time contribute to greater transparency. Further, fundamental rights training should be made mandatory and passing the final test obligatory. Risk analyses conducted by Frontex have to include sufficient regard for fundamental rights issues that might arise during joint operations.<sup>243</sup>

If these measures are taken, there would be a likely decrease in the number of human rights violations during Frontex-coordinated operations. The initiatives taken by Frontex and the legislator point towards the right direction; however, both the Consultative Forum and the Fundamental Rights Officer lack resources and power. Frontex should not only coordinate and monitor border control, but also human rights compliance. On a broader note, the root causes can only be addressed if the EU opens safe and legal ways for refugees to come to Europe. This requires a review of the burden-sharing system amongst Member States to ensure that countries at external borders can also live up to their asylum obligations.<sup>244</sup> If this is ensured, fewer refugees would resort to put their lives at risk in order to reach European shores by crossing the Mediterranean.

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<sup>243</sup> Consultative Forum Annual Report for 2013, *op. cit.*, p. 31

<sup>244</sup> Marin, 2014, *op. cit.*, p. 98; PICUM, 2010, *op. cit.*, p. 63



## Bibliography

### Primary Sources

#### *European Union Law*

Council of the European Union, Special meeting of the European Council, 23 April 2015 - statement, retrieved from <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> [last accessed 20.05.2015].

Court of Justice of the European Union, 18 December 2014, *Opinion 2/13 of the Court*, retrieved from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIn dex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=60924> [last accessed 15.05.2015].

European Parliament, Council of the EU and European Commission; *Joint Statement and common approach 2012 of the European Parliament, the Council of the EU and the European Commission on decentralized agencies*. Retrieved from [http://europa.eu/agencies/documents/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf)

European Ombudsman, 07 November 2013, *Special Report of the European Ombudsman in own-initiative inquiry 01/5/2012/BEH-MHZ concerning Frontex*, retrieved from [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/112\\_sp ecrepfrontex /112\\_specrepfrontex\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/112_sp ecrepfrontex /112_specrepfrontex_en.pdf) [last accessed 21.04.2015]

European Ombudsman, 2013 “*Special Report of the European Ombudsman in own-initiative inquiry 01/5/2012/BEH-MHZ concerning Frontex*”(hereinafter European Ombudsman Special Report)

Frontex, *Annex 6*, Retrieved from [http://frontex.europa.eu/assets/Images\\_News/Annexes.pdf](http://frontex.europa.eu/assets/Images_News/Annexes.pdf) [last accessed on 20/04/2015].

Frontex Code of Conduct for all Persons Participating in Frontex Activities, adopted by Decision of the Executive Director No 24/2011, 21 March 2011, retrieved from : [http://frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf) [last accessed 30.05.2015]

Frontex Consultative Forum on Fundamental Rights, Annual Report for 2013, 28 July 2014

Frontex Programme of Work for 2015, 18 December 2014, retrieved from [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Work\\_programme/2015/PoW\\_2015\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2015/PoW_2015_EN.pdf) [last accessed 31.05.2015].

Frontex Joint Operation Hermes, Operational Plan 2014, 23 September 2014

Frontex Joint Operation Hermes, Operational Plan 2014, 23 September 2014, Annex 3.

Frontex Working Methods of the Consultative Forum, retrieved from [http://frontex.europa.eu/assets/Partners/Consultative\\_Forum\\_files/Working\\_Methods.pdf](http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Working_Methods.pdf) [last accessed 29.05.2015].

#### *EU Directives*

Directive 2003/9/EC, 27 January 2003 [2003] OJ L. 31/18

Directive 2004/83/EC, 29 April 2004, [2004] OJ L 304/12

Directive 2011/95/EU, 13 December 2011, [2011] OJ L 337/9

Directive 2013/32/EU, 26 June 2013 [2013],

Directive 2013/33/EU, 26 June 2013, [2013] OJ L. 180/96 -105/32

#### *EU Regulations*

Regulation (EC) No. 1049/2001, 30 May 2001, [2001] OJ L. 145/43

Regulation (EC) 343/2003, 18 February 2003, [2003]

Regulation (EC) 2007/2004, 26 October 2004 [2004] OJ L 349/1

Regulation (EC) No 562/2006, 15 March 2006, [2006] OJ

Regulation (EU) 1168/2011, 22 November 2011 [2011] OJ L. 304/1

Regulation (EU) No 1052/2013, 22 October 2013, [2013] OJ L 295/11

Regulation (EU) No. 656/2014, 15 May 2014 [2014] OJ L 189/93

#### *International Instruments*

Council of Europe Parliamentary Assembly, 2013, Resolution 1932 (2013)

Council of Europe Parliamentary Assembly, 2011, Resolution 1821

International Maritime Organization (IMO), Maritime Safety Committee, *Resolution MSC.70(69)*, adopted on 18 May 1998, Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979; Annex Art. 2.3.1.

International Maritime Organization (IMO), *Resolution MSC.167(78)*, Guidelines on the Treatment of Persons Rescued At Sea, 20 May 2004.

UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009, available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last visited 27.05.2015), No. 23 (XXXII)

UN High Commissioner for Refugees (UNHCR), '*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*', 2007

#### *Jurisdiction*

## *European Union*

Case 26/69 *Erich Stauder v City of Ulm* [1969] ECR 419

Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main Germany*, [1970]

Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, [2013]

Case C-542/13 *Mohamed M'Bodj v État belge*, Court of Justice of the European Union, [2014]

Case C-175/08; C-176/08; C-178/08 & C-179/08 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, [2010] Court of Justice of the European Union

Case C-31/09 *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, [2010]

Case C-179/11 *Cimade and Groupe d'information et desoutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Reference for a preliminary ruling: Conseil 'État – France, [2012]

Case C-411/10 and C-493/10, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2011]

Case C-4/11 *Bundesrepublik Deutschland v. Kaveh Puid*, Court of Justice of the European Union, [2013]

## *Council of Europe*

*Al-Skeini and Others v. the United Kingdom*, 07.07.2011, Application No. 55721/07

*Andreou v. Turkey*, 27.10.2009, Application No. 45653/99

*Conka v. Belgium*, 05.05.2002, Application No. 51564/99

*Finogenov and Others v. Russia* 20.12.2011, Application No. 18299/03 and 27311/03

*Hirsi Jamaa and Others v. Italy*, 23.02.2012, Application No. 27765/09

*Issa and Others v. Turkey* (2004), Application no. 31821/96

*L.C.B. v. the United Kingdom*, 9 June 1998, Application No. 14/1997/798/1001

*Loizidou v. Turkey* (preliminary objections) (1995), Application no. 15318/89

*Loizidou v. Turkey* (Judgment) (1995), Application no. 15318/89

*McCann and Others v. the United Kingdom*, 27 September 1995, Application No 18984/91.

*Medvedyev and Others v. France*, 29 March 2010, Application no. 3394/03, European Court of Human Rights



M.S.S. v. Belgium and Greece, 21.01.2011, Application No. 30696/09  
Nachova and Others v. Bulgaria, 06.07.2005. Application No 43577/98 and 43579/98  
Osman v the United Kingdom, 28 October 1998, Application No. 87/1997/871/1083  
Pad and Others v. Turkey (2007), Application no. 60167/00  
Perisan and Others v. Turkey, 20.05.2010, Application No. 12336/03  
Sandru and Others v. Romania, 08.12.2009, Application No 22465/03  
Sharifi and Others v. Italy and Greece, 21.01.2015, Application No. 16643/09  
Soering v. the United Kingdom , 07 July 1989, Application No. 14038/88  
T.I. v. the United Kingdom, 7 March 2000, Application No. 43844/98  
Vilvarajah and Others v. The United Kingdom, 15 November 1996, Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87  
Wasilewska and Kulucka v. Poland, 23.02.2010, Application No. 28975/04 and 33406/04  
Khavara et al. v. Italy and Albania, 11.01.2001, Application No. 39473/98  
.

## Secondary Sources

### **Carrera 2012**

Carrera, Sergio; Centre for European Policy Studies, *The Court of Justice of the European Union as a Fundamental Rights Tribunal Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*. Brussels, Belgium: Centre for European Policy Studies, 2012. <http://www.ceps.eu/book/court-justice-european-union-fundamental-rights-tribunal-challenges-effective-delivery-fundamen>.

### **Chlebny 2013**

Chlebny, J. , *Standards of the provisional protection against expulsion*. Speech delivered on the occasion of the publication of the Handbook on European law relating to asylum, borders, and immigration, 2013

### **FRA 2014**

European Union Agency for Fundamental Rights (FRA); "Fundamental Rights: Key Legal and Policy Developments in 2013," 2014.

### **Goodwin-Gill 2011**

Goodwin-Gill, Guy S; "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement." *International Journal of Refugee Law* 23, no. 3, 2011, 443–57

### **Klepp 2010**

Klepp, Silja. "Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea" *Eur. J. Migration & L.* 12, 2010, 1

**Marin 2011a**

Marin, Luisa; 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 of Contemporary European Research* 7, no. 4, 2011, 468–87

**Marin 2011b**

Marin, Luisa; 'Is Europe Turning into a 'Technological Fortress'? Innovation and Technology for the Management of EU's External Borders: Reflections on FRONTEX and EUROSUR' in M.A. Heldeweg & E. Kica (eds.), *Regulating Technological Innovation: Legal and Economic Regulation of Technological Innovation*, Palgrave MacMillan, 2011, p. 131-15

**Marin 2014**

Marin, Luisa; Protecting the EU's Border From.. Fundamental Rights?" In *Freedom, Security and Justice in the European Union - Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty*, 75–100. New York: Springer Science and Business Media, 2014

**O'Brien 2011**

O'Brien, Killian S. "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem." *Goettingen J. Int'l L.* 3, 2011, 715

**Pascouau & Schumacher 2014**

Pascouau, Yves, Pascal Schumacher; "Frontex and the Respect of Fundamental Rights: From Better Protection to Full Responsibility." *Policy*, 2014. [https://www.epc.eu/documents/uploads/pub\\_4512\\_frontext\\_and\\_the\\_respect\\_of\\_fundamental\\_rights.pdf](https://www.epc.eu/documents/uploads/pub_4512_frontext_and_the_respect_of_fundamental_rights.pdf)

**PICUM 2010**

Platform for International Cooperation on Undocumented Migrants (PICUM); "PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe," 2010

**Rijpma 2010**

Rijpma, Jorrit J; "Frontex: Successful Blame Shifting of the Member States?" *Análisis Del Real Instituto Elcano (ARI)*, no. 69 (2010): 1

**Rijpma 2014**

Rijpma, Jorrit J; "The Patrolling of the European Union's External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea." In *International Law at Sea*, edited by Angela del Vecchio, 2014

**Slominski 2013**

Slominski, Peter; "The Power of Legal Norms in the EU's External Border Control." *International Migration* 51, no. 6, 2013, 41–53

**Strik 2012**

Strik, Tineke; "Lives Lost in the Mediterranean Sea: Who Is Responsible?" Council of Europe Committee on Migration, Refugees and Displaced Persons, April 5, 2012

**Strik 2014**

Strik, Tineke, "The 'Left-to-Die-Boat': Actions and Reactions." Council of Europe Committee on Migration, Refugees and Displaced Persons, June 9, 2014

#### **Trevisanut 2009**

Trevisanut, Seline; "Maritime Border Control and the Protection of Asylum-Seekers in the European Union." *Touro International Law Review* 1, (2009, 157–61

#### **Trevisanut 2014**

Trevisanut, Seline; "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea." *Leiden Journal of International Law* 27, no. 03, 2014, 661–75

#### **IOM 21-05-2015**

International Organisation for Migration (IOM), 21.04.2015, *Survivors of Mediterranean Tragedy Arrive in Sicily*, retrieved from <https://www.iom.int/news/survivors-mediterranean-tragedy-arrive-sicily> [last accessed 27.05.2015]

#### **Al Jazeera 21-04-2015**

Al Jazeera, 21.04.2015, *IOM: Mediterranean death toll could top 30,000 in 2014 – International Organisation for Migration says 1,727 migrants have died so far in 2015, up from 56 at same point in 2014*; retrieved from <http://www.aljazeera.com/news/2015/04/iom-mediterranean-death-toll-top-30000-2015-150421232012080.html> [last accessed 27.05.2015]

#### **Reuters 23-04-2015**

Reuters, *Shocked by drowned migrants, Europe restores rescue mission*, 23 April 2015; retrieved from <http://www.reuters.com/article/2015/04/23/us-europe-migrants-idUSKBN0NE1DY20150423> [last accessed 28.05.2015]

#### **The Guardian 20-04-2015**

The Guardian, 20 April 2015, *Mediterranean refugee crisis: EU reduced to impotent handwringing*, retrieved from <http://www.theguardian.com/world/2015/apr/20/mediterranean-migrant-crisis-no-european-migration-policy> [last accessed 27.05.2015]

#### **The Guardian 19-04-2015**

The Guardian, 19 April 2015, *The Observer view on the human tragedy in the Mediterranean*, retrieved from <http://www.theguardian.com/commentisfree/2015/apr/19/observer-view-human-tragedy-mediterranean> [last accessed 27.05.2015]. The term human rights is used in an international law context, whereas fundamental rights is used in the context of the European Union

#### **Human Rights Watch 2011**

Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, New York, Human Rights Watch, 2011

#### **Amnesty International 2014**

Amnesty International, *The Human Cost of Fortress Europe – Human Rights Violations Against Migrants and Refugees at Europe's Borders*, 2014

#### **UNHCR 2002**

UN High Commissioner for Refugees (UNHCR), *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes)*, 18 March 2002

**De Bondo 2013**

De Bondo, Daniela ‘Less than human’: the detention of irregular immigrants in Malta’, *Race & Class*, 2013, 55: 60-81

**Hailbronner 2007**

Hailbronner, Kay, ‘Detention of Asylum Seekers’, *European Journal of Migration and Law*, 9, 2007, pp. 159-172

**O’Nions 2008**

O’Nions, Helen, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’, *European Journal of Migration and Law* 10, 2008, pp. 149-185

**Lavrysen 2014**

Lavrysen, Laurens, 2014, ‘The scope of rights and the scope of obligations’, in: Brems, Eva & Gerards, Janneke (eds), 2014, *The Role of the European Court of Human Rights in determining the Scope of Human Rights*, Cambridge

**Smet 2014**

Smet, Stijn, 2014, ‘The ‘absolute’ prohibition of torture and inhuman or degrading treatment in Article 3 ECHR – Truly a question of scope only?’ in: Brems, Eva & Gerards, Janneke (eds.), 2014, *The Role of the European Court of Human Rights in determining the Scope of Human Rights*, Cambridge, pp. 273-293

**Moreno-Lax 2012**

Moreno-Lax, Violeta, ‘Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?’ *Human Right Law Review*, 2012, 12:3

**Dembourg 2012**

Dembourg, Marie-Bénédicte, Interception-at-sea: Illegal as currently practiced – Hirsi and Others v. Italy. *Strasbourg Observers*, 2012, retrieved from <http://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/> [last accessed 15.05.2015]

**Fischer-Lescano, Löhr, Tohidipur 2009**

Fischer-Lescano, Löhr & Tohidipur; ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 2009, 21 *International Journal of Refugee Law* 2

**Den Heijer 2011**

Den Heijer, Maarten, , *Europe and Extraterritorial Asylum*, Institute of Immigration Law, Leiden University, 2011

**ECHR 2010**

European Court of Human Rights, *Handbook on European non-discrimination law*, 2010, pp. 123-126 [last accessed 09/03/2015]  
[http://www.echr.coe.int/Documents/Handbook\\_non\\_discrimination\\_ENG\\_01.pdf](http://www.echr.coe.int/Documents/Handbook_non_discrimination_ENG_01.pdf)

**Jesuit Refugee Service Europe 2013**

Jesuit Refugee Service Europe, *The Frontex Consultative Forum on Fundamental Rights*, 27 June 2013

**Nolkaemer & Jacobs 2013**

Nollkaemer, Andre, Jacobs, Doc; 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law* 34 (2), 2013, pp. 359-438

## Appendix: Frontex Operations at Sea<sup>245</sup>

Name	Year	Aim	Host Country	Participating countries	Number Participating Countries
<b>EPN Aenas</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from Turkey, Albania and Egypt towards south east coasts of Italy, especially Puglia and Calabria.	Italy	Austria, Denmark, Finland, France, Germany, Greece, Iceland, Luxemburg, Malta, Norway, Portugal, Romania, Spain, United Kingdom/Albania	14
<b>Aenas</b>	2012	Combating illegal migration from the Ionian Sea towards Italy (Apulia, Calabria) from Turkey, Egypt.	Italy	Denmark, Finland, France, Germany, Greece, Iceland, Luxembourg, Poland, Portugal, Romania, Slovakia, Spain, Sweden	13
<b>Aenas</b>	2011	see above	Italy	Denmark, Finland, France, Germany, Greece, Iceland, Luxembourg, Portugal, Romania, Slovakia, Spain, Sweden	12
<b>Agios</b>	2006	To carry out exhaustive border controls on ferry passengers traveling to Spain	Spain	France, Germany, Italy, the Netherlands, Portugal	5

<sup>245</sup> Information retrieved from <http://frontex.europa.eu/operations/archive-of-operations/?year=&type=Sea&host=> (last accessed 31.05.2015).

		from North Africa disembarking in the ports of Tarifa, Algeciras, Almeria and Alicante.			
<b>EPN Minerva</b>	2013	Implementing activities at border crossing points on the southern coast of Spain in order to control illegal migration flows and other cross-border crime originating from Morocco.	Spain	Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Italy, Latvia, The Netherlands, Norway, Poland, Portugal, Romania, Sweden, Switzerland/Moldova, Ukraine	18
<b>Focal Points</b>	2011	Located at migration "hot spots", Focal Points were established as platforms for professional assistance, experience exchange and training.	Cyprus, Lithuania, Romania	Estonia, Germany, Latvia, the Netherlands, Poland	5
<b>Focal Points</b>	2012	Located at migration "hot spots", Focal Points were established as platforms for professional assistance, experience exchange and training.	Bulgaria, Lithuania, Portugal, Romania, Spain	Belgium, Estonia, Latvia, Norway	4
<b>Focal</b>	2013	Implementing	Bulga-	Belgium, Bulgaria,	15

<b>Points Sea</b>		activities to control irregular migration flows and other cross-border crime at specific border crossing points or selected border areas, not covered by joint operations, or complementing regular joint operations.	ria, Lithuania, Portugal, Romania, Slovenia, Spain	Denmark, Estonia, Finland, France, Latvia, The Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden	
<b>Gate of Africa</b>	2006	To search stowaways on board, people hidden in vehicles and detect networks involved on traffic of human beings traveling to Spain from North Africa disembarking in the ports of Tarifa, Algeciras, Almeria and Alicante. Carry out exhaustive border controls on ferries arriving Spain to the designated ports.	Spain	Germany, Italy, Portugal, Sweden, United Kingdom	5
<b>Hera</b>	2012	Improving cooperation with Senegalese and Mauritanian authorities in order to combat illegal	Spain	Iceland, Luxembourg	2



		immigration from North Africa to the Canary Islands.			
<b>Hera</b>	2010	Reducing the number of non identified irregular migrants arriving to the Canary Islands, predominantly from African nations.	Spain	-	-
<b>Hera</b>	2009	Reducing the number of non identified irregular migrants arriving to the Canary Islands, predominantly from African nations.	Spain	Denmark, France, Germany, Italy, Luxembourg, Portugal	6
<b>Hera</b>	2008	To carry out an exhaustive aeromarine surveillance in the waters close to Mauritania and Senegal in order to reinforce the early detection of immigrants by sea. To involve more closely the SAR Canary Islands Area Coordinator in the Joint Operation for those aspects concerning the information gathering, identification of the mi-	Spain	France, Germany, Italy, Luxembourg, Portugal	5

		grant traffickers and any other relevant aspects that regard the objectives of this Joint Operation. To identify facilitators that transport migrants from Africa to Europe. To detect as early as possible any new trends being used by trafficking organizations.			
<b>Hera</b>	2007	Coordinate operational cooperation between Member States in the field of the management of the EU external borders by organising joint patrols. The Member States provided assets to tackle the of illegal migration flows across the EU maritime borders from Senegal and Mauritania, disembarking in Canary Islands. The operation involved air and naval surveillance on the waters close to Mauritania and Senegal in order to rein-	Spain	France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Sweden, United Kingdom	8

		force the early detection of immigrants at the sea.			
<b>Hera I</b>	2006	Reducing the number of non identified irregular migrants arriving to Canary Islands and establishment of their nationality. Perform additional assistance to Spain by the deployment of a team of experts with thorough knowledge of Western Africa in order to be able to identify the immigrants' nationality and countries of origin in order to repatriate them. Detect the different means and ways of entrance used by the criminal networks trafficking with human beings.	Spain	France, Germany, Italy, the Netherlands, Norway, Portugal, United Kingdom	7
<b>Hera II</b>	2006	Perform surveillance of the Atlantic maritime borders of the European Union, with the prime objective of preventing the loss of immigrants'	Spain	Finland, Italy, Portugal	3

		lives at sea and assisting Spain in dealing with the migration situation in the area of Canary Islands and to fight against organized crime on illegal migration.			
<b>Hera III</b>	2007	Coordinate operational cooperation between Member States in the field of management of external borders through organisation of joint patrols of the assets provided by the Member States in the predefined areas in order to combat illegal migration across the external maritime borders of the EU from West African countries disembarking in Canary Islands.	Spain	France, Germany, Italy, Luxembourg, Portugal	5
<b>EPN Hermes</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from Tunisia, Algeria and Libya to-	Italy	Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Spain, Swe-	23

		wards Lampedusa, Sardinia and Sicily.		den, Switzerland, The Netherlands, United Kingdom/Georgia, Moldova, Ukraine	
<b>Hermes</b>	2012	Combating illegal migration flows from Tunisia, Libya, and Algeria towards the Italian islands of Lampedusa, Sardinia and Sicily.	Italy	Austria, Finland, France, Iceland, Lithuania, Poland, Portugal, Romania, Spain, Switzerland, United Kingdom	11
<b>Hermes</b>	2011	To implement coordinated sea border activities to control illegal migration flows from Tunisia towards south of Italy (mainly Lampedusa and Sardinia).	Italy	Austria, Belgium, France, Germany, Greece, Hungary, the Netherlands, Poland, Portugal, Romania, Switzerland, Spain	12
<b>Hermes</b>	2010	To increase the capacity of border control measures on persons illegally trying to enter the Schengen area via boats from Algeria.	Italy	France, Latvia, Luxembourg, Slovakia, Spain	5
<b>Hermes</b>	2009	To increase the capacity of border control measures on persons illegally trying to enter the Schengen area via boats from Algeria, Tunisia and Libya.	Italy	Denmark, France, Italy, Norway, Portugal, Slovakia, Spain,	7

<b>Hermes</b>	2007	Coordinate operational cooperation between Member States in the field of management of external borders through organising joint patrols with the means provided by member States in the predefined areas in order to tackle illegal immigration across the external maritime borders towards the EU from North African countries disembarking in Italy and Spain	Italy, Spain	France, Germany, Greece, Portugal, Romania, United Kingdom	6
<b>EPN Indalo</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from North African and Sub-Saharan countries towards the Southern Spanish coast.	Spain	Belgium, France, Finland, Iceland, Italy, Luxembourg, Portugal, Romania, Slovakia, United Kingdom	10
<b>Indalo</b>	2012	Combating illegal immigration from North Africa and Sub-Sahara, resulting from a cyclical seasonal	Spain	Belgium, France, Iceland, Italy, Luxembourg, Malta, Portugal, Slovakia	8

		increase as well as protracted crisis in Mali.			
<b>Indalo</b>	2011	Combating and monitoring illegal migration flows along the Mediterranean coast from North Africa and Sub-Saharan nations.	Spain	Belgium, Finland, France, Germany, Iceland, Italy, Luxembourg, Netherlands, Portugal, Slovakia	10
<b>Indalo</b>	2010	Combating and monitoring illegal migration flows along the Mediterranean coast from North Africa and Sub-Saharan nations.	Spain	Belgium, France, Iceland, Italy, Luxembourg, the Netherlands, Portugal, Slovakia	8
<b>Indalo</b>	2009	Combating and monitoring illegal migration flows along the Mediterranean coast from North Africa and Sub-Saharan nations.	Spain	Belgium, France, Germany, Italy, Portugal	5
<b>Indalo</b>	2007	Measure the illegal immigration towards the Mediterranean Sea, the Spanish coast of Levante and more generally to control the maritime external borders of the European Union Member States on the Mediterranean Sea. Tackle	Spain	France, Germany, Italy, Malta, Portugal, Romania	6

		illegal immigration maritime flows, in particular migration those organised by criminal networks.			
<b>EPN Hera</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from West African countries towards the Canary Islands.	Spain	Luxembourg	1
<b>Minerva</b>	2012	To strengthen border control during the summer season (increased traffic) at the southern coast of Spain.	Spain	Austria, Albania, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Georgia, Greece, Italy, Lithuania, Montenegro, the Netherlands, Norway, Portugal, Romania, Slovakia, Sweden, Slovenia, Switzerland, Ukraine	23
<b>Minerva</b>	2011	see above	Spain	Austria, Belgium, Bulgaria, Estonia, Finland, France, Georgia, Italy, Lithuania, Montenegro, the Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Switzerland, Ukraine	18



<b>Minerva</b>	2010	Increasing the capacity of border checks for people trying to illegally enter the Schengen area via ferry connections with Morocco.	Spain	Austria, Belgium, France, Italy, Lithuania, the Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Spain	12
<b>Minerva</b>	2009	Increasing the capacity of border checks for people trying to illegally enter the Schengen area via ferry connections with Morocco.	Spain	Austria, Belgium, France, Germany, Malta, the Netherlands, Norway, Portugal	8
<b>Minerva</b>	2008	To carry out border checks according to the Schengen Borders Code; To carry out identify checks in the port of Ceuta; To carry out tracking of human beings hidden in any transportation means; To identify facilitators of immigration from Africa towards European Union; To carry out exhaustive border control in the ports of Algeciras, Almeria and Tarifa; To detect innovative ap-	Spain	Austria, Belgium, France, Germany, Italy, Portugal, Romania, Slovenia	8

		proaches of trafficking organisations as early as possible; To enhance cooperation with Europol and Interpol			
<b>Minerva</b>	2007	Strengthen the control over the EU external borders by means of combating illegal migration flows from the African Coast towards the South of Spain. Specifically, it involved border control in the seaports of Algeciras and Almeria, identity checks in the Seaport of Ceuta as well as the control of the coastal waters in the area of Almeria, with bigger affluence of nationals coming from Algeria and Morocco.	Spain	Austria, Belgium, France, Germany, Italy, the Netherlands, Poland, Portugal, Romania, United Kingdom	10
<b>Mobile Operational Units</b>	2012	Combating and preventing cross border crime by supporting national authorities in the identification of human	Greece	Netherlands, Portugal, Sweden, United Kingdom	4

		traffickers and victims.			
<b>Nautilus</b>	2009	Increasing the capacity for border surveillance of people trying to illegally enter the Schengen area via boats from Libya.	Malta	Belgium, Finland, France, Germany, Italy, Luxembourg, Portugal, Romania	8
<b>Nautilus</b>	2008	To coordinate risk analyses based on operational cooperation between Member States in the field of management of external borders through organising a synchronisation of surface and air patrolling efforts enabling the detection and interception of targets and identification of facilitators organising illegal immigration via sea, by using Members States' assets and interrogation experts.	Italy, Malta	Belgium, France, Germany, Greece, Luxembourg, Portugal, Romania, Spain, United Kingdom	9
<b>Nautilus</b>	2007	Perform surveillance of the southern maritime borders of the European	Italy, Malta	France, Germany, Greece, Spain	4

		Union, with the prime objective of combating Illegal Immigration flows to Malta and Lampedusa.			
<b>Nautilus</b>	2006	Perform surveillance of the southern maritime borders of the European Union, with the prime objective of combating Illegal Immigration flows to Malta and Lampedusa.	Italy, Malta	France, Germany, Greece	3
<b>Poseidon</b>	2011	Combating illegal migration flows from Turkey and North Africa towards Greece.	Greece	Austria, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Sweden, United Kingdom	20
<b>Poseidon</b>	2010	To enhance border control efficiency along the Greek-Turkish sea border in order to combat cross-border crime and illegal immigration.	Greece	Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden,	25

				United Kingdom	
<b>Poseidon</b>	2009	To prevent unauthorized border crossings, counter cross-border criminality and to take measures against persons who have crossed the border illegally. This was accomplished by carrying out enhanced border surveillance and checks.	Greece	Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Sweden, Slovenia, United Kingdom	20
<b>Poseidon</b>	2008	To coordinate the operational cooperation between Member States, based on risk analyses, in the field of management of external borders, by organising an intelligent and flexible synchronisation of aerial, land and sea borders control and surveillance efforts.	Bulgaria, Greece	Denmark, Finland, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Spain, Sweden, United Kingdom	15
<b>Poseidon</b>	2007	This operation was implemented at the main border crossing points between Greece and Turkey (land and sea borders), Greece	Bulgaria, Greece, Italy	Austria, Cyprus, France, Germany, Latvia, Malta, the Netherlands, Portugal, Romania, Spain, Sweden United Kingdom	12

		and Albania (land border), Bulgaria and Turkey (land border) and at the seaports of Greece and Italy. It was carried out to tackle the problem of illegal immigration via the EU South-eastern Sea/Land Borders. General objective was to coordinate operational cooperation between Member States in the field of management of the EU external borders through organizing joint patrols of the assets and personnel provided by the Member States in the predefined areas as well as border checks at the border crossing points on persons and vehicles.			
<b>Poseidon Sea</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from the Turkish coast and Egypt towards Greece and Italy as well	Greece	Austria, Belgium, Germany, Denmark, Spain, France, Iceland, Italy, Luxembourg, Latvia, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovenia. Sweden, Uni-	20

		as contributing to the control of secondary migration movements from Greece towards the European Union.		ted Kingdom/Albania	
<b>Poseidon Sea</b>	2012	The operational activities are planned in order to constantly monitor the areas and to maintain situational awareness in the region by identifying threats and risks affecting the EU's external borders and being in a position to adopt a flexible operational response to new developments with the aim of controlling irregular migratory flows mainly from the Western Turkish coast and Egypt towards Greece and Italy, aiming at the early detection of vessels as well as contributing to control secondary immigration flow.	Greece	Austria, Germany, Denmark, Spain, France, Greece, Hungary, Iceland, Italy, Lithuania, Latvia, Luxemburg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, United Kingdom/Croatia, Georgia, Ukraine	23
<b>Zeus</b>	2009	To investigate the	Germa-	Austria, Belgium,	15

		<p>specific phenomenon of abuse of transit visa and seafarer's identity documents/seaman's book by carrying out border checks on seamen crossing the external border, according to the Schengen Borders Code (SBC) To increase the information gathering in order to improve risk assessment Increase of the awareness level and knowledge of border guards on the phenomenon of "false seamen" and "bogus shipping companies" To carry out a thorough scrutiny of transit visas applications, seamen books, supporting documents and to check arrivals/departures to/from ports and airports To enhance the cooperation with the Baltic Sea Region Border Control Cooperation</p>	ny	<p>Bulgaria, Denmark, Estonia, Finland, Italy, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Spain, United Kingdom</p>	
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		(BSRBCC) structure; To involve Russian border authorities in the activities of Joint Operation			
<b>Zeus</b>	2007	Management of operational cooperation among participating MS'enabling exchange of information and increasing number of pre-checks of the applications for seamen in transit.	Germany	Belgium, Finland, Greece, Italy, Latvia, the Netherlands, Poland, Portugal, Romania, Spain, Sweden, United Kingdom	12
				<b>Average Participation</b>	10,4081633
<b>Name</b>	<b>Year</b>	<b>Aim</b>	<b>Host Country</b>	<b>Participating countries</b>	<b>Number</b>
<b>EPN Aenas</b>	2013	Implementing activities to control irregular migration flows and other cross-border crime from Turkey, Albania and Egypt towards south east coasts of Italy, especially Puglia and Calabria.	Italy	Austria, Denmark, Finland, France, Germany, Greece, Iceland, Luxemburg, Malta, Norway, Portugal, Romania, Spain, United Kingdom/Albania	15
<b>Aenas</b>	2012	Combating illegal migration from the Ionian Sea	Italy	Denmark, Finland, France, Germany, Greece, Iceland, Italy,	14

		towards Italy (Apulia, Calabria) from Turkey, Egypt.		Luxembourg, Poland, Portugal, Romania, Slovakia, Spain, Sweden	
<b>Aenas</b>	2011	see above	Italy	Denmark, Finland, France, Germany, Greece, Iceland, Luxembourg, Portu- gal, Romania, Slo- vakia, Spain, Sweden	12