

## Transparency and accountability in the management of European borders

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Thank you for inviting me to address you today on an issue that compels the EU to confront a highly complex challenge: how to uphold its own values, which are founded on the protection of human dignity and rights without, denying the dignity and human rights of those born outside of its borders. How does it prevent a contradiction becoming the image that it presents to the world?

The challenge of “managing” Europe’s borders has come more sharply into focus since 2015. The mass displacement of refugees - provoked by the conflict in Syria and elsewhere - has compelled the EU as a whole to review its approach to the management of the external borders of EU member states.

The proposed new Pact on Migration and Asylum, which is currently being discussed by EU governments in the Council, is the latest attempt to resolve this issue, involving, as it does, the balancing of multiple often conflicting interests and forcing the EU to confront its internal contradictions around solidarity and the balancing of rights.

In her State of the Union address last year, Commission President Von der Leyen said, “We will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must be able to rely on the solidarity of our whole European Union... Everybody has to step up here and take responsibility.”

But solidarity between member states does not necessarily imply agreement around on what precisely they should demonstrate solidarity. We generally understand it to mean a fair sharing of the challenges of migration, giving shelter to asylum seekers for example, but it must also imply a shared acceptance of an overarching approach to the matter, something that remains elusive.

In responding to this challenge, governments and public authorities face multiple dilemmas. Conflicting public expectations of, and attitudes towards, migration create differing political priorities across the member states that are difficult to reconcile with an integrated and shared EU approach.



Political parties in some member states attached the 2015 migration crisis to a populist policy agenda. The right, as they saw it, to prevent inward migration trumped the rights of those seeking safety within the EU's borders.

In that narrative, there was little if any space afforded to a contemplation of the humanitarian drivers of migration or indeed to a wider contemplation of the impact of climate change and globalisation on migration patterns, and the need therefore for a collaborative global response to the distinctly new challenges emerging in the 21<sup>st</sup> century.

I recall being very struck by a report I read some time ago about the genesis of the Syrian civil war and the Arab Spring, which began in 2011. The thesis of the report was that agricultural degradation provoked by climate change had led to many rural dwellers making their way into urban areas in Syria. The subsequent failure of the government to adequately provide for the newcomers partly contributed the uprising. I am aware that any conflict has no single cause but, in this instance, the linking of climate change with later political events was thought-provoking.

The populist arguments around migration are often challenged themselves by public support for a more humane approach to those arriving at European borders, both in terms of granting asylum, and in terms of how we receive migrants and refugees.

But this is not a fixed thing and the degree to which governments lean towards the various sentiments voiced by their citizens changes, often very quickly, with time and with events.

It may be useful to keep in mind some facts about the migration situation in Europe. For example, the share of refugees in the EU is only 0.6% compared to our total population. Also, the EU has a far lower percentage of foreign-born residents than our closest partners - such as Australia, Canada, the US, the UK or Switzerland. In 2019, nearly 9 million non-EU citizens were employed in the EU, paying taxes and helping our economies. Indeed, many are employed in the “*essential services*” to which we owe so much during the pandemic for keeping our economies and societies going.

However, it is the loss of human life in the Mediterranean, which has touched so many of us.

In 2012, a baby boy called Alan Kurdi was born in Kobane in Syria. In September 2015, the dead body of the now three year old was lifted from the sand on a beach near Bodrum in Turkey. The little boy had drowned as his family attempted to make a sea journey to Greece.

The now iconic and heart-breaking photographs did unleash an emotional and political storm humanising what for many had been impersonal and abstract. But emotional responses by their nature can fade over time, replaced by harder and more enduring political realities.

You will recall the reaction to German Chancellor Merkel's intensely human response to the Syrian refugee crisis, a reaction and a lesson observed no doubt by other EU leaders and which led to the still problematic EU-Turkey agreement concerning migrants and asylum seekers.



Five and a half years after the death of that infant boy and of thousands of others, governments and policy makers in Europe still struggle to chart a clear policy course, as they engage in a constant ethical duel between the protection of rights and the need to deter. In the grey middle ground, lie the policies surrounding the care or otherwise of those who do manage to get through.

Guaranteeing security and providing for effective and regular migration appears to be the top priority but there is no avoiding the necessity – indeed legal obligation – of attending to the humanitarian needs of refugees and migrants, and ensuring that human rights take their designated place in the process of border management.

This is an obvious dilemma for governments and legislators, but it is also reflected in the work of the public authorities responsible for implementing border management policies.

The challenge is made no less complicated by the multi-level nature of border management in Europe. While member states are responsible for their external borders, Frontex - the European Border and Coast Guard Agency - is now a central player in the management of the EU's external borders. This multi-level structure also makes it difficult to ensure accountability. When allegations of abuse or infringements emerge for example who is responsible, or who is responsible for ensuring the accountability of those responsible?

Border management is also inherently linked to fundamental rights concerns, especially where individuals are denied entry to or the right to remain on a state's territory. This can manifest itself through actions such as forced returns to the country of departure, detention or other restraint measures. Such issues can arise whether national authorities control their borders alone or do so with the assistance of Frontex.

The challenges are immense but cannot be ignored, particularly when it comes to fundamental rights protection. The obligations on public authorities cannot be chosen a la carte. They are there not as a decoration on the face of Frontex or on any other body involved, but rather as a concrete expression of the will of the EU Treaties when it comes to the EU's foundational values. It is therefore essential that the relevant authorities can be held to account for their actions. Ensuring a high level of transparency about their work and about possible redress mechanisms is crucial to this end.

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As European Ombudsman, I have dealt with concerns about the activities of national border operations that receive EU funds, specifically concerning how the Commission monitors alleged fundamental rights violations in activities that are funded from the EU budget.

I have no mandate, of course, over national authorities. As such, I approach these concerns about border management primarily through the prism of my work on Frontex.

Since Frontex's creation in 2004, my Office has received a number of complaints about



Frontex's work, including in recent months. These include concerns about its joint operations, its role in forced returns and more general fundamental rights concerns. I have also received complaints concerning public access to documents and the transparency of Frontex's work, and have also carried out several inquiries on my own initiative into Frontex.

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The first own initiative inquiry concluded in 2013, and concerned the difficulties faced by the potential victims of fundamental rights violations in seeking redress, both in terms of identifying who was responsible for the alleged violations and how to access formal redress procedures.

I recommended that Frontex establish a 'complaints mechanism' for individuals who consider they have been victims of fundamental rights violations that occurred during Frontex operations. I further recommended that Frontex's 'Fundamental Rights Officer' should be responsible for this complaints mechanism to ensure a formalised system of accountability for Frontex operations.

The European Parliament overwhelmingly backed my findings and, with the Council, turned my recommendation into a legal obligation in the 2016 Frontex Regulation, which replaced the 2011 Regulation. The complaints mechanism was formally created in October 2016.

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In 2014, I launched another own initiative inquiry into how Frontex, in its role coordinating the forced returns of irregular migrants in 'Joint Return Operations', ensures respect for the fundamental rights and human dignity of the irregular migrants being returned to their countries of origin.

I made a series of proposals to Frontex for improvements, and emphasised that it must do all in its power to promote independent and effective monitoring of returns. I suggested that Frontex enhance the transparency of its work, amend its Code of Conduct in areas such as medical examinations, provide human rights training, and engage more with national authorities.

When the major refugee crisis unfolded in 2015, resulting from the conflict in Syria and elsewhere, Frontex had not yet implemented all of my recommendations. Whether this was due to timing or a lack of will is not clear.

The crisis did however trigger the adoption of a new law in 2016 through which Frontex became the European Border and Coast Guard Agency. In this revised structure, national border guard authorities are brought together within a single organisational framework, along with Frontex staff, and are subject to increased direction and supervision at EU level. However, the dilemma of how to ensure accountability for multi-layered operations involving Frontex and national staff was not satisfactorily resolved.

The changes introduced by the most recent regulation on Frontex in 2019 could, however,



theoretically improve the situation.

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The 2019 regulation further strengthened the powers of Frontex, making it a real operational arm of the EU in the area of border management, with a vastly increased budget and staff.

By 2027, Frontex should have at its disposal a standing corps of 10,000 border guards, with 7,000 from national authorities and 3,000 statutory Frontex staff.

The regulation however also strengthened the mandate of the Fundamental Rights Officer and created 'fundamental rights monitors', who will be managed by the Fundamental Rights Officer. It also further developed the complaints mechanism, notably by explicitly allowing individuals to bring a complaint against not only the actions but also "the failure to act" on the part of staff involved in a joint operation. This may considerably increase the possibilities for individuals to hold to account those involved in fundamental rights violations.

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In November 2020, one year after the 2019 regulation entered into force, I launched a new own initiative inquiry, based on concerns that Frontex had (i) delayed the recruitment of fundamental rights monitors, (ii) not updated the rules on the complaints mechanism and (iii) failed to guarantee the independence of the Fundamental Rights Officer. More generally, the inquiry is set against the backdrop of concerns that, while creating the complaints mechanism was a big step towards ensuring individuals have a formal avenue for holding Frontex to account, the mechanism may not be functioning effectively.

My inquiry is at an advanced stage. It is already clear that the Fundamental Rights Officer and her small but very dedicated staff have worked hard to develop the role and pushed to be able to carry out their work in an independent manner. So far, her work has mainly concerned incidents with national bodies; she has not yet received complaints against Frontex staff members, only concerning the actions of national authorities. Only when and if the Fundamental Rights Officer deals with complaints concerning Frontex staff members will it be possible adequately to judge how effectively and independently the Fundamental Rights Officer can operate and how effective the complaints mechanism can be.

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In February, I launched a separate own initiative inquiry concerning the transparency and accountability of Frontex's work, notably in the context of safeguarding fundamental rights.

Frontex's expanded operational role now involves the organisation and coordination of joint operations in which member states receive assistance on the ground. Frontex is also now directly involved in organising returns, but a patchwork of actors is often involved.



Despite this expanded role, only very generic information is publicly available on Frontex's activities. When trying to assess a particular situation or incident, it is therefore not always entirely clear what exactly Frontex's role and contribution were. This makes it particularly difficult for the public to hold Frontex to account.

My inquiry aims to identify the gaps that continue to prevent proper accountability for Frontex's work. This implies providing proper transparency about all Frontex operations, something that is currently lacking.

Under the 2019 Regulation, Frontex's own staff will be able to exercise executive powers on the ground. This represents a major shift from the original mandate of Frontex as an agency that was created to support and coordinate the activities of national authorities.

Frontex staff members can, for example, verify the identity and nationality of migrants, authorise or refuse entry, stamp travel documents, issue or refuse visas at the border, patrol the border, and register fingerprints. There is a clear risk of potential fundamental rights violations in relation to these procedures.

I am seeking to determine what specific guidance or instructions Frontex provides to its own migration support teams on how to ensure the protection of fundamental rights. I also want to know more about how Frontex uses or intends to use its power to suspend or terminate operations if fundamental rights violations that are of a serious nature or likely to persist occur or could occur.

My inquiry also revisits the issue of forced returns. I am concerned, as are many national ombudsmen, some of whom have a formal role in monitoring returns in their jurisdictions, that incorporating return monitoring into the legal framework of Frontex could undermine the independence of such monitoring.

By providing greater transparency and proactively publishing operational documents showing who is involved in what aspects of joint operations and who should therefore be held accountable in cases of alleged violations of fundamental rights, Frontex would enable potential complainants better to choose the proper means of redress. The fact that EU border management is a shared responsibility of Frontex and of the national authorities should not mean that the individual responsibility of the different actors is blurred.

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As I alluded to at the outset, there is an inherent tension between the logic of the legitimate need to control borders and the legal and moral necessity to ensure a rights-based approach to migration policy. I witness this directly through my work on Frontex.

The main aim of Frontex is to ensure safe and well-functioning external borders. However, Frontex must act in compliance with fundamental rights in all its operations and ensure that all those participating in its operations - and not just its own staff - uphold fundamental rights. It



must also be possible for victims of fundamental rights violations to hold Frontex to account for its actions.

To be successful in its expanded mandate, Frontex must do all it can to achieve this balance. Compliance with fundamental rights should not be seen as an obstacle to the management of the EU's external borders.

I know you all understand these issues deeply, and are working very hard to make sure EU migration policy lives up to our values. I thank you for your work.

I also believe that, in addition, between my work and that of my colleagues from the **European Network of Ombudsmen**, we will make progress in ensuring that Frontex and national authorities do more to guarantee respect for fundamental rights in their border management operations. And that those involved in alleged fundamental rights violations can be held accountable for their actions.

However, the overarching challenge for the EU is how to incorporate its migration and asylum policies into its broader geopolitical role. The issue of migration is not niche, detached from all others, capable of resolution through equally niche regulations. Rather it is the human expression, the human outcome of the totality of those other issues, from climate policy, to international relations, to future enlargement, to the economy, to defence and a myriad other areas of EU and global policy making and engagement.

Some or all of those will continue to play a part in whether, in the future, a poor or threatened family decides one day to leave everything that it knows and plunge itself and its hopes into the Mediterranean Sea or against a barbed wire border crossing.

The shape of the new Pact on Migration and Asylum may be vital in determining much of this.

As Ombudsman, I do not have a policy role. Rather my job is to align the imperatives of the EU Treaties with the concrete actions of the administration. Through complaints and investigations, I can see where Treaty values are diluted or set aside, and make recommendations as to how that may be remedied.

I am not naïve. The job of governing, at EU level or national level, is very often ethically challenging. As former Commission President Jean Claude Juncker once observed when he was previously Prime Minister of Luxembourg, “ *We know what the right thing to do is. The problem is, will we be re-elected once we do it?* ”

But, if this past year has taught us anything, it is the profound necessity of solidarity and of collaboration when it comes to solving problems that go way beyond our internal and external borders. We are fortunate enough not to be seeking asylum in a strange country, but that does not mean that we can distance ourselves from the challenges faced by those who are.

A pandemic that we never imagined could happen to us, happened to us. Climate catastrophes



encroach more and more on the territories we imagined would be safe. Authoritarian regimes are no longer foreign to us, but find a mirroring in regimes much closer to home.

Only by finding solutions to these and other global problems will we be capable of dealing appropriately and comprehensively with the challenges of migration and asylum and saving not just the lives of others but our own. In the meantime we can start by ensuring that the EU administration leads by good practice and by good example. Global leadership takes many forms.

Your conference today will provide many valuable insights to this end, and I wish you a very fruitful discussion.

Thank you.