

Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)

Decision

Case OI/9/2014/MHZ - **Opened on** 20/10/2014 - **Decision on** 04/05/2015 - **Institution concerned** European Border and Coast Guard Agency (No maladministration found) |

EU migration policy includes the voluntary or forced return of irregular third-country migrants (rejected asylum seekers and persons without a valid residence permit) to their countries of origin. By their very nature, forced return operations have the potential to involve serious violations of fundamental rights. This own-initiative inquiry sought to clarify how Frontex, as a coordinator of Joint Return Operations (JROs), ensures respect for the fundamental rights and human dignity of the individuals being returned.

The Ombudsman obtained the views of Frontex and its Fundamental Rights Officer, inspected Frontex files and received contributions from members of the European Network of Ombudsmen, the European Union Agency for Fundamental Rights, the UN Refugee Agency and a number of NGOs. She found that, although much has been done, Frontex needs to enhance the transparency of its JRO work, amend its Code of Conduct in areas such as medical examinations and the use of force, and engage more with the Member States. Frontex must do all in its power to *promote independent and effective monitoring of JROs*.

The Ombudsman closes her inquiry with a series of proposals to Frontex on how it can further improve its operations in this area.

The background to the inquiry

1. EU migration policy includes the voluntary or forced return of irregular third-country migrants to their countries of origin. Individuals who have exhausted all legal avenues to legitimise their stay in an EU Member State are served with a decision issued by national authorities instructing them to return, normally to their countries of origin. Those who do not leave voluntarily are subject to forced return operations. Forced return operations may be *national*, namely operated by one Member State, or *joint*, that is coordinated, co-financed or fully financed by Frontex with



several Member States taking part (so-called Joint Return Operations or JROs). The EU Return Directive [1], the Frontex Regulation [2] and the Code of Conduct for Joint Return Operations coordinated by Frontex [3] are the relevant legal instruments.

2. By their very nature, forced return operations have the potential to involve serious violations of fundamental rights. The Ombudsman therefore decided to launch an own-initiative inquiry to clarify how Frontex, as coordinator of JROs, ensures respect for the fundamental rights and human dignity of returnees during these operations (including pre-departure; in flight; hand-over of returnees in the country of destination). While Member States carry out the vast majority of forced return operations, by January 2015 Frontex had coordinated 267 JROs by air, returning 13 633 people.

3. More specifically, in her inquiry the Ombudsman wished to establish whether there is scope for:

- Greater **clarity** as to what Frontex could and should do concretely if fundamental rights violations threatened to occur or occurred during a JRO.
- More **effective** monitoring [4] (only about half of JROs that have taken place so far have involved independent monitors physically present on board).
- More **comprehensive** monitoring: national ombudsmen, some of whom have monitoring responsibilities, were invited to share their experience.
- Greater **cooperation** among monitoring bodies (at present, there are JROs in which several national monitors each accompany "their" returnee. It is questionable whether this duplication is necessary or effective).
- More **transparent** monitoring (in relation to how the reports drafted by monitors are taken into account by Frontex).

Since opening this inquiry, the situation regarding those seeking to enter the EU has become even more desperate. Quite apart from the need to deal with the appalling tragedies of those thousands who have lost their lives in attempting to cross the Mediterranean, the arrangements for the return of individuals found not to qualify for a right to stay will come under increasing pressure. On 20 April 2015 the European Commission announced [5] a *Ten point action plan on migration* which included, at Point 8, "Establish a new return programme for rapid return of irregular migrants coordinated by Frontex from frontline Member States". Given the enhanced role proposed for Frontex, this own-initiative inquiry has taken on even more relevance and urgency.

The inquiry

4. The Ombudsman launched this inquiry by asking Frontex to answer a number of questions [6]. She then carried out an inspection of Frontex JRO files at its headquarters in Warsaw. [7]

5. As many national ombudsmen have a role to play in JROs, either as monitoring bodies or dealing with complaints, the European Ombudsman asked members of the European Network of Ombudsmen for their input. She received and published replies from the Committee on



Petitions of the German Bundestag, the Regional Ombudsman of the German Land Schleswig–Holstein, and 19 national Ombudsmen from: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Slovakia, Sweden, Slovenia and Spain. [8]

6. After receiving Frontex's comments [9] , the Ombudsman launched a targeted consultation of public institutions and civil society organisations active in protecting migrants' rights. She received and published responses from the European Union Agency for Fundamental Rights (FRA), the European Human Rights Association (EHRA), the International Commission of Jurists (ICJ), the Belgian Federal Migration Centre, the Global Detention Project, the Jesuit Refugee Service, and the United Nations High Commissioner for Refugees (Office for Europe) [10] .

7. The Ombudsman's decision takes this material into account.

Feedback from Frontex

8. The Ombudsman asked Frontex 13 detailed questions covering (i) the treatment of returnees (including on 'fit-to-travel' decisions, responsibility for returnees' welfare , standards for escorts' behaviour [11] , the handling of complaints, and compliance with the EU Charter of Fundamental Rights), (ii) monitoring of JROs (including on monitors' access to information, the exchange of best practice, so-called "representative monitoring" and monitoring of the post-return phase) and (iii) reporting on JROs (including the views of Frontex's Fundamental Rights Officer and information on reports made via the Frontex Serious Incident Reporting system).

9. In relation to fit-to-travel decisions, Frontex referred to Article 5.2 of its Code of Conduct for JROs, which provides that *"In a reasonable time prior to the JRO, the authorities of the MSs are required to provide a medical examination of a returnee (...) when he or she has a known medical condition or where medical treatment is required."* The medical doctor assigned to the JRO by the Organising Member State (OMS) is the only person with the power to review fit-to-travel decisions, it said.

10. With regard to returnees' welfare, Frontex explained that each Participating Member State (PMS) is responsible for its own contingent of returnees. The OMS supports PMSs by providing (i) a medical doctor for the charter flight; (ii) sufficient food and drinks at the collecting point, on the ground and during the flight, and (iii) access to toilet facilities.

11. Frontex was silent on the Ombudsman's suggestion to publish standards for escorts' behaviour as an annex to its Code of Conduct on JROs. It explained that the list of authorised/prohibited restraints and equipment is proposed by the OMS and, after Frontex's approval, included in the Implementation Plan of the relevant JRO. PMSs have to agree to this list in advance of the JRO. No PMS is permitted to use restraints that are not authorised under its national law even if the OMS and Frontex have endorsed such measures for the given JRO.



The Code of Conduct for JROs provides that the use of coercive measures is regulated by national law and that such measures must comply with principles of proportionality, be strictly necessary and be used with due respect for the returnees' rights, dignity and physical integrity.

12. On the question of its handling of returnees' complaints, Frontex stated that *"there had been no complaint submitted so far in relation to JROs."* Frontex further referred to Articles 5(2) and 8(1) of the Code [12] , and to Article 16 which provides that any JRO participant who has reason to believe that the Code or returnees' fundamental rights have been violated is required to report it to Frontex via the appropriate channels, for example via Frontex's Serious Incident Reporting System. A report can also be made to the Frontex representative or to a monitor present on board the flight. To date, there have been three critical situations *" regarding non-compliance by returnees "*, according to Frontex: (i) in 2011, the PMS escorts' use of force against a returnee was reported by the OMS to the public prosecutor in the OMS who ultimately dropped the case; (ii) in 2012, a PMS escort was badly injured by a returnee, and (iii) in 2014, before getting on the main charter flight, *" a non-compliance took place in which no one was injured. "* Frontex and the relevant Member State reviewed these incidents, analysed them and drew lessons for the future.

13. On the issue of Frontex's financial support to Member States for the JRO being conditional upon full respect of the EU Charter of Fundamental Rights, Frontex pointed out that it ensures this through the presence of its representative on board and via the established reporting mechanism.

14. As regards monitoring JROs, Frontex stated that monitoring should be carried out on the basis of objective and transparent criteria and cover the whole JRO from the pre-departure phase until the hand-over of returnees in the country of origin. The nature of the monitoring may vary, however: in some Member States all operations are physically monitored while in others the monitoring is carried out after the event or on an *ad hoc* basis. According to Frontex, the fact that monitors were not physically present during half of the JROs *" does not mean that [these JROs] were not monitored in accordance with the national legislation of the OMS or the PMS. "* (Frontex further points out that, in 2014, a monitor was physically present in 60% of JROs.) Moreover, if the European Commission finds that a Member State has failed to comply with its obligation to provide for a forced return monitoring system under Article 8(6) of the Return Directive, this could lead to that Member State's participation in the JRO being postponed or cancelled.

15. For its part, Frontex encourages Member States actively to ensure monitoring by covering the costs of monitors present during the JRO and by means of regular meetings of the Direct Contact Points in Return Matters. It encourages Member States to deploy a monitor on board during the whole JRO and to choose one monitor for a number of Member States. On this issue of "representative monitoring", Frontex acknowledged that a monitor from one Member State monitoring on behalf of other Member States may have difficulties in monitoring escorts' behaviour because of diverging national regulations on the use of force and means of restraint. Frontex, however, expects that every monitor present shall report on all monitored situations regardless of which Member State the monitor is representing. Finally, Frontex explored the



possibility of making arrangements with one independent monitoring body to monitor certain JROs. It approached the EU's Fundamental Rights Agency (FRA), the UNHCR and the Council of Europe Committee on Prevention of Torture and initiated meetings with them. This work is ongoing.

16. With regard to monitors' access to returnees, Frontex informs all JRO participants, before the JRO starts, that monitors should have unimpeded access to all returnees and to all areas used for the JRO. Monitors take part in these briefings, as well as in debriefings. Their observations are included in debriefings and their comments are included in the Final Return Operation Report drafted by the OMS.

17. Finally on this matter, Frontex is an observer to the project of the International Centre for Migration Policy Development, which is seeking to create a European pool of independent forced return monitors and to set out guidelines and organise training. Frontex itself also provides training for monitors.

Reply of Frontex's Fundamental Rights Officer (FRO)

18. In her reply, Frontex's FRO states that, since her appointment in December 2012, she has participated in several JROs. She has full access to the calendar of JROs and decides when to be present. She has tended to prioritise (i) JROs for which there is no monitor present during the flight and (ii) so-called "Collecting JROs" [13]. When she takes part in a JRO, the FRO writes her mission report and submits it to the Frontex Return Operations Sector for information. She also discusses her findings with the officers involved and, when needed, with Frontex management.

19. The FRO says that she receives all Frontex Evaluation Reports concerning JROs, including the reports on Collecting JROs. She does not, however, receive reports from national monitors directly, although she has asked to receive them.

20. The FRO participated in the training organised by Frontex for national escort leaders who participate in JROs. She has also briefed and trained escort officers and escort leaders from third countries (Albania and Georgia) that will take part in Collecting JROs. She has suggested to Frontex to actively include National Prevention Mechanisms from third countries (such as ombudsmen) in the training of escorts participating in Collecting JROs.

21. Since her appointment in December 2012, the FRO has not received any complaints or Serious Incident Reports alleging violations of fundamental rights during a JRO. However, her participation in JROs has allowed her to identify critical issues and best practices. For instance, she is concerned by the fact that children are returned in JROs. While Frontex has to date not allowed unaccompanied minors to participate in JROs, families with children have been returned this way. She also believes that there is room for improvement as regards harmonising medical support and exchange of medical information prior to a JRO. Specifically, doctors on flights have told her that they would benefit from greater coordination prior to the JRO in order



to know the general health status of returnees.

Feedback from national ombudsmen, FRA, the UNHCR and NGOs

22. The Ombudsman asked members of the European Network of Ombudsmen for their feedback in relation to JRO monitoring. Specifically, she asked whether greater cooperation among monitoring bodies would be feasible and desirable.

23. The Ombudsman also invited feedback on Frontex's opinion, through a targeted consultation in which she asked respondents for information and views on: concrete violations of fundamental rights and complaints, Frontex's Code of Conduct for JROs and its *Best Practices for JROs*, Collecting JROs, exchange of good monitoring practices between national monitors, and transparency surrounding JROs.

24. As the individual responses have been published on the Ombudsman's website, the following contains an overview of the main suggestions put forward by respondents:

Frontex's Code of Conduct for JROs

(i) According to FRA, which made a substantial contribution to the drafting of the Code, the Code does not provide sufficiently detailed and concrete provisions on several essential issues. Two major defects are (a) the lack of clear procedures concerning the lodging and handling of individual complaints by returnees; (b) JRO monitoring (notably, that not all JROs are monitored).

(ii) Frontex should develop a set of good practice standards on the use of force that would be in line with national law in each Member State and encourage Member States to adopt them (UNCHR).

(iii) Frontex should draft a list of restraint mechanisms to which it would never agree in a JRO (ICJ).

(iv) The presence of children in JROs should be prohibited given the coercive nature of this kind of operation (Belgian Federal Migration Centre).

(v) Frontex should produce concrete guidance for Member States on the harmonised application of the Code, including how to identify the specific needs of vulnerable persons (ECHR) and when exactly the medical examination should take place.

(vi) Every returnee should undergo a medical examination subject to this person's consent (Spanish Ombudsman and EHRA). According to EHRA, the examination should take place the evening before the removal or on the day of removal. Moreover, access to medical files should



be reserved to medical staff (Spanish Ombudsman).

Monitoring

(vii) At least one monitor should be physically present at each stage of a JRO. Otherwise Frontex should not coordinate or finance a JRO (ombudsmen and respondents generally).

(viii) Frontex should establish a pool of monitors regardless of their nationality or designation and from which an individual monitor could be appointed by the Member State or Frontex to ensure independent monitoring (UNCHR and EHRA).

(ix) Monitors should be able to choose which JRO to observe (Spanish Ombudsman).

(x) Monitoring on behalf of several Member States is not feasible unless monitors have at their disposal updated information on restraint measures allowed in each Member State (to be drafted by Frontex as "country sheets") (many respondents). The Swedish Ombudsman signalled that representative monitoring would be difficult given his mandate, which is to supervise Swedish public servants in upholding Swedish law during return operations.

(xi) Monitors should operate on the basis of common standards, such as those currently being developed by the International Centre for Migration Policy Development (many ombudsmen and respondents).

(xii) Joint training, regular exchanges and study visits were some of the means suggested to improve cooperation between monitoring bodies.

(xiii) Frontex should provide training not only for escorts but for all JRO participants: medical staff, monitors and interpreters. In particular, fundamental rights training should be a pre-requisite for participation in a JRO and such training should cover the needs of vulnerable persons (EHRA).

Complaints

(xiv) Frontex should develop easy-to-read leaflets outlining returnees' rights and obligations, including the right to lodge a complaint with Frontex (EHRA and the Belgian Federal Migration Centre made detailed proposals in this regard). Frontex should pay for the complaint form and information leaflet to be translated into relevant languages. The Belgian Centre further proposed that returnees be given the contact details of those who could assist them in lodging a complaint.

(xv) Frontex should help Member States to set up complaints mechanisms for returnees and also set up its own complaints mechanism (UNHCR).



(xvi) Frontex should produce guidance as to how Member States should inform returnees about the possibility to lodge a complaint and on standards for such complaints mechanisms (EHRA).

(xvii) All JRO participants should wear a distinctive sign signalling their role (escort, monitor, doctor, interpreter,...), as well as their name or identification number. This is essential for the effective submission of complaints (Spanish Ombudsman, the Belgian Federal Migration Centre and the ICJ).

Collecting JROs

(xviii) As the EU legal framework does not explicitly provide for Collecting JROs, this practice should be suspended until it has been subject to a broad debate within the European and national parliaments and civil society. Under no circumstances should Frontex or Member States use Collecting JROs to circumvent their obligation to compensate for damage caused by human rights violations, including damage occurring during a flight operated by a third country. Individual Member States remain responsible for acts committed by third country law enforcement agents [14] (Belgian Federal Migration Centre).

Transparency

(xix) As a minimum, Frontex should publish on its website, and keep updated, the following information: the calendar of planned JROs as soon as it is confirmed; the list containing authorised restraint measures during a particular JRO; monitors' reports, including video recordings of the operation; Frontex final return operation reports; all information regarding Frontex's investigation of Member States (pursuant to Article 17 of the Code of Conduct) [15] ; Frontex's *Best Practices for JROs* [16] .

Concrete problems

(xx) Finally, respondents referred to some concrete problems of which they are aware. The Belgian Federal Migration Centre and the Polish Ombudsman pointed out that irregular migrants in detention centres are often not informed whether a JRO is planned and if they will be part of it. The Spanish Ombudsman listed a number of shortcomings from the JROs that she had monitored: (a) the aircrafts used did not have a refrigerator to keep medicines cold nor a defibrillator; (b) there was no systematic filming of JROs; (c) returnees were not informed about their right to complain; (d) there was no translator present in some JROs, even though many returnees did not speak English or Spanish; (e) in one JRO, one PMS took children to the aircraft along with adults and during the flight families with children were seated alongside other returnees.

The Ombudsman's assessment



25. Article 9(1) of the Frontex Regulation provides that Frontex *"shall provide the necessary assistance and (...) ensure the coordination or the organisation of joint return operations of Member States"*. In her assessment, the Ombudsman will therefore seek to establish (i) what Frontex's assisting and coordinating roles mean in terms of the protection of returnees' human rights in JROs (including in so-called Collecting JROs); (ii) how Frontex engages with Member States and with national monitors and what more could be done in this respect; and (iii) whether Frontex's Code of Conduct for JROs, its operating procedure, and transparency practices in this area are fit for purpose.

26. Article 9(1)(a) of the Frontex Regulation specifies the need for common standardised procedures to *"assure return in a humane manner and with full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security and the rights to the protection of personal data and non-discrimination"*. Article 9(1) of the Frontex Regulation further provides that any financial support from Frontex for the purpose of JROs is conditional upon full respect for the Charter of Fundamental Rights. [17]

27. Forced returns raise two distinct human rights protection issues: (i) How should forced returns be carried out to ensure respect for human rights? What limits can be placed on the means and methods which a Member State may use in conducting forced return operations? (ii) When do human rights law and/or humanitarian considerations prohibit a forced return? The Ombudsman believes that Frontex must engage fully with the Member States on these issues. This engagement should be proactive, namely before and after a JRO, and reactive during a JRO in which a Frontex representative should be present. The Ombudsman notes with concern from her inspection of documents that there were JROs in which neither a Frontex representative nor an independent monitor was present.

Frontex engagement with Member States: reactive (during a JRO)

28. The Ombudsman appreciates how challenging forced returns are for all parties involved. In such circumstances, it is of the utmost importance that each actor is aware of the precise role that he/she is expected (and indeed legally mandated or prohibited) to play. While detailed rules cannot supplant the exercise of good judgment in stressful situations, the Ombudsman believes that Frontex should aim to provide guidance that is as clear and detailed as possible to its representatives in order to equip them with the necessary know-how and to prepare them adequately for the various scenarios they may encounter. By way of example, the Ombudsman notes the following:

- Article 9(1) of the Frontex Regulation specifies that Frontex cannot enter into the merits of a return decision. At the same time, one would expect a Frontex representative not to tolerate a situation in which an OMS/PMS presents for return a woman in advanced pregnancy, unaccompanied children or seriously sick persons, or if an OMS/PMS maintains its decision to return an individual when, at the last minute, a competent court has issued a decision that



would halt the individual's removal. [18]

- One would expect a Frontex representative to intervene if pre-departure security control of returnees was being carried out in a humiliating way. [19]

- Frontex representatives may also have a role to play when it comes to the use of force by national escorts in JROs. Since 1991, at least fifteen *national* returns appear to have resulted in the returnee's death during the return operations (in most cases due to the use of restraint), with many further instances of ill treatment reported by independent NGOs. [20] Even if PMSs agree to use only the means of restraint approved by Frontex, and even if their escorts have been trained, the non-proportionate use of restraint may still occur. Frontex representatives may need to intervene in such cases together with, or instead of, the OMS. [21]

29. Frontex currently states on its website that its representatives' tasks " *include making sure that the joint return operation is carried out in accordance with the Code of conduct for return flights created by Frontex* ". The question remains: how? The Frontex representatives' reaction could range from persuasion to the termination of the operation in accordance with Article 3(1)(a) of the Frontex Regulation. Frontex does not, however, provide a clear explanation of how its representatives could react, in practical terms, if JRO participants, in particular national escorts, violate human rights or returnees' dignity, or do not comply with the agreed means of restraint.

30. Frontex should therefore adopt and publish a document describing the actions its representatives may take during a joint return operation (JRO) in situations of human rights violations or ill-treatment before or during the flight. This could be included in its *Best practices* document or issued as a separate publication.

Frontex engagement with Member States: proactive (before and after a JRO)

31. The Ombudsman's inspection of documents revealed that Frontex has taken important steps by establishing regular exchanges through focal points and by conducting regular meetings with the Member States' competent authorities about JROs. However, more could be done. The following contains a range of proposals for further improvement, arising from the Ombudsman's inspection, the consultation exercise and her own reflections.

Complaints by returnees

32. Frontex should encourage Member States to inform returnees, in advance of a JRO, of the possibility to complain about violations of fundamental rights or human dignity that occur during the operation. The submission of complaints should be facilitated at each stage of a JRO and also in the post-return phase.

33. Aggrieved individuals should, moreover, have a choice of remedies and be able to complain to Frontex or to the Member State concerned. To ensure this, Frontex should not



delay further in **establishing a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled joint operations. The Ombudsman very much regrets the refusal of Frontex to act on her predecessor's recommendation, made in April 2013**, that it should set up a mechanism whereby it could deal directly with complaints from people claiming to have had their fundamental rights breached in the course of Frontex activities. [22] As convincingly argued by respondents to the Ombudsman's consultation, having a facility whereby incidents may be reported is not the same thing as having a proper complaints mechanism.

34. Respondents to the Ombudsman's consultation provided excellent ideas to facilitate the submission of complaints. For example, **Frontex should consider producing a complaint form for returnees, as well as an information sheet about the complaints procedure, drafted in cooperation with the Member States. Frontex should co-finance translations of these documents into the most frequently used languages.**

35. Strictly speaking, the responsibility of those involved in a JRO finishes when the hand-over has taken place. Neither Frontex nor the Member State involved has a specific obligation to check on the welfare and treatment of those who have been returned to their countries of origin. The Ombudsman has not been able to find any evidence of regular follow up in terms of what happens to returnees after the hand-over, even though such follow up could arguably make a difference. [23] Returnees should therefore be informed of which agency or service may be able to assist them in the return country with making a complaint. **This information should therefore include contact details of agencies or individuals who might assist returnees to submit a complaint when they are back in the country of return, for example NGOs, *pro bono* lawyers, and third country ombudsmen.**

Possible withdrawal of financing

36. Frontex should make it clear to the Member States that reducing or withdrawing co-financing in the event of human rights violations is a sanction for **past** experience, applied on the basis of a risk assessment. In this respect, the Ombudsman endorses the view of respondents to her targeted consultation that Frontex's statement in its opinion that “ *a possible decision to review or reduce the co-financing could be taken in case of violation of fundamental rights provisions, based on evidence* ”, does not fully reflect its role as a *responsible* coordinator. It should be enough for such a decision that fundamental rights violations are **at risk** of occurring. [24]

Coercive actions and means of restraint

37. The limits to escorts' coercive actions are regulated before each JRO in the corresponding Implementation Plan approved by Frontex [25]. However, as part of its proactive coordination, as suggested by respondents to the targeted consultation, **Frontex should consider (i) supporting projects aimed at documenting the means of restraint allowed for return**



operations in each Member State or launching such a project itself, (ii) listing the means of restraint to which it would never agree in a JRO, and (iii) making these documents public . The Ombudsman points out that the Committee for the Prevention of Torture of the Council of Europe recently stated that " *the time is now ripe for more in-depth discussions among Frontex State Parties on the subject of promoting more precise common rules on the use of means of restraint* ". [26]

Aircrafts, boarding and disembarking

38. The situation of children in JROs is of particular concern to Frontex's FRO. **Frontex should therefore consider establishing a requirement in the JRO Implementation Plan, and scrutinising compliance with it, that families with pregnant women and families with children are enabled to board the aircraft separately and are seated separately from other returnees.** [27]

39. The Ombudsman has further noted a number of practical suggestions made by respondents to the consultation. The Spanish Ombudsman, for instance, suggested that Frontex should require from the OMS that there is a refrigerator and defibrillator on each flight. Frontex should also require the OMS to check with its national headquarters, just before disembarking from the airplane in the country of return, whether, during the flight, a competent court has issued a decision that would halt the operation for any returnee concerned [28] .

Monitoring

40. Many respondents consider that the physical presence of monitors during each return flight is paramount. The Ombudsman agrees that this is a markedly better solution than that offered by monitoring afterwards on the basis of documentation. **Frontex should therefore consider requiring, in the pre-JRO procedure, that the compulsory physical presence of monitors in the JRO is dealt with in the relevant documents (namely, in the offer of a return flight, the Conditions attached to the acknowledgement of the offer and in the Implementation Plan).** Frontex could also consider making the plan for upcoming JROs public, at least one week in advance, and making it clear on its website that it may pay for monitors' presence in the JRO .

41. With regard to so-called "representative monitoring" under Article 14(5) of the Code, the Ombudsman notes some respondents' scepticism as to how a monitor from one Member State could monitor the behaviour of escorts from another Member State, given that they act according to their national rules. The Ombudsman, however, sees potential in such monitoring, provided that monitors are properly briefed on the means of restraint agreed in the Implementation Plan. Frontex could, moreover, prepare and publish country sheets on the allowed use of means of restraint in each Member State. Training for monitors in this area would also be helpful [29] as would recording the JRO .



42. The question remains as to what Frontex should do if there are no OMS/PMS monitors available for a JRO. During the inspection of documents, the Ombudsman came across, on several occasions, a recommendation in Frontex's Evaluation Reports that Frontex and OMSs should avail of a pool of monitors from NGOs or other fundamental rights bodies. The Ombudsman is moreover aware of the EU project on forced return monitoring, which includes work on establishing a pool of monitors, that is currently being conducted by the International Centre for Migration Policy Development. The Ombudsman considers that such a pool could be a helpful solution to increase the physical presence of monitors in JROs.

43. This may, however, be problematic from the point of view of monitors' independence. More specifically, monitors' independence may be jeopardised in circumstances where they are "assigned" to a specific return flight by the **state** institution in charge rather than volunteering for specific operations on their own initiative. One solution to this issue would be for Frontex itself to select JRO monitors from such a pool.

44. More generally, further reflection is required in relation to what independent and efficient monitoring entails. [30] Article 9(1)(b) of the Frontex Regulation provides that the monitoring of JROs should be carried out on the basis of objective and transparent criteria, and cover the whole JRO from the pre-departure phase until the handover of returnees in the country of return. It does not, however, list the criteria. Frontex's Code of Conduct, for its part, merely states that monitoring is an obligation of Member States as set out in Article 8(6) of the Return Directive. It is thus difficult to see how Frontex can make use of Article 13(2) of the Code of Conduct which provides that: "*MSs taking part in a JRO are required to ensure that they have in place **an effective** forced return monitoring system. Failing to meet this condition could ultimately lead to postponement or cancellation of the participation of the respective MS.*"

45. Frontex's argument, that a decision on postponement/cancellation should be based on a Commission decision of non-compliance with Article 8(6) of the Return Directive, is flawed. If Frontex intended here to refer to the Commission's possible actions under Article 258 TFEU [31], the Ombudsman points out that, in the context of infringement proceedings, the Commission does not take a 'decision' to the effect that a Member State has infringed EU law. Rather, it launches the procedure and, if necessary, submits the case to the Court of Justice for decision. Moreover, the Commission's standard approach is that such proceedings should not normally be launched in relation to isolated events, but only if there is an established practice in a Member State.

46. The Ombudsman considers that in order to apply Article 13(2) of the Code of Conduct Frontex should build up its own expertise. Member States' awareness that Frontex is ready to apply sanctions under Article 13(2) of the Code on the basis of its own fact-finding could, in fact, have a preventive role and ultimately promote national monitoring. Frontex could also seek relevant information from national ombudsmen and similar bodies.

JRO procedure and transparency standards



47. The Ombudsman's inspection of Frontex files enabled her to understand the procedure followed by Frontex when coordinating and organising JROs [32] , and to conclude that it is consistently applied to all JROs: standard forms are prepared and updated if necessary (for instance, evaluation sheets for observers in Collecting JROs), Frontex documents comprehensively drafted, the files properly recorded and JROs documented.

48. The Ombudsman notes, however, that there is not much public information concerning JROs. The right to an effective remedy for returnees can become illusory if monitors, returnees and social workers and/or legal representatives assisting returnees in the event of human rights violations cannot get access to the relevant legal and factual information. Moreover, Frontex's transparency policy should reflect the fact that this is an area of significant public interest.

49. As things stand, only the first page of the Frontex Evaluation Report, containing information on the budget, number of participants, from which country they are returned and whether a monitor was present, is published on Frontex's website. As the Ombudsman is aware from her inspection, the full document contains, for instance, recommendations made by Frontex and monitors' observations, where such observations are made.

50. Frontex should therefore publish on its website: Frontex's JRO Evaluation Reports, including monitors' observations and Frontex recommendations; the section of the JRO Implementation Plan, which refers to the agreed use of means of restraint; Frontex's *Best Practices for JROs* . In the JRO Implementation Plan or Conditions Frontex should require monitors' reports to be forwarded to Frontex. These reports should, in turn, be published on Frontex's website.

Collecting flights

51. The Ombudsman is concerned about the introduction of Collecting JROs, the existence of which she became aware of during her inspection of documents. During that inspection, Frontex explained under which conditions a third country's cooperation may be accepted in such JROs. [33] The Ombudsman agrees that prior training of third country escorts (with the valuable participation of the FRO) is useful, and that the presence of a Frontex representative, OMS escorts and an EU observer on board the flight is essential to prevent or otherwise react to human rights violations or ill-treatment.

52. However, Frontex also argued that Collecting JROs will concern only those third countries which are parties to the European Convention on Human Rights (ECHR). In the Ombudsman's view, the fact that a third country has signed up to the ECHR does not in itself constitute an adequate guarantee that human rights (specifically the right to life and the prohibition of inhuman and degrading treatment and torture) will be respected in practice in the context of return flights. [34] Moreover, third country enforcement officials are not obliged to apply Frontex's Code of Conduct. [35] Finally, the aircraft used in Collecting JROs fly under the third country flag. The jurisdiction/liability issue is therefore open.



53. Against this background, the Ombudsman believes that **Frontex should ensure that fundamental rights are respected in Collecting JROs (in compliance with its own human rights obligations as a responsible coordinator of Collecting JROs.)** Frontex should also publicly explain the legal framework of so-called Collecting JROs, including the working arrangements with third countries concluded in accordance with Article 14(2) of the Frontex Regulation [36] .

Code of conduct for JROs

54. The Ombudsman takes the view that all participants in a JRO have a legal obligation to follow Frontex's Code of Conduct for JROs. This obligation flows from acceptance, through the Member States' voluntary participation in the JRO, of the Executive Director's Decision on the Code [37] , which is annexed to each JRO Implementation Plan. Article 4 of the Code includes fundamental rights obligations established by national, international and EU law.

55. The Code provides for a standard approach with common principles and procedures to be observed by all participants in JROs coordinated by Frontex. Even if the standards of human rights protection may be higher in some Member States (as argued by the Spanish Ombudsman), the Code addresses the need for a uniform approach. In any event, at least as regards the means of restraint, the Code provides that PMSs are not permitted to use coercive measures disallowed under their national law even if those measures are accepted by the OMS and Frontex for a specific JRO (Article 6(5) of the Code).

56. In the proposals below, the Ombudsman identifies a number of desirable changes to Articles 5-11 and 17 of the Code, based on the responses to her consultation.

The Ombudsman's proposals for improvement

57. The Ombudsman proposes that Frontex should:

A) Adopt and publish a document describing the actions its representatives may take during a joint return operation (JRO) in situations of human rights violations or ill-treatment before or during the flight. This could be included in its *Best practices on JROs* or issued as a separate publication.

B) Produce a complaint form for returnees, as well as an information sheet about the complaints procedure, drafted in cooperation with the Member States; co-finance translations of these documents into the most frequently used languages. The information should include contact details of agencies or individuals who might assist returnees to submit a complaint when they



are back in the country of return, for example NGOs, *pro bono* lawyers, and third country ombudsmen.

C) Support projects aimed at documenting the means of restraint allowed for return operations in each Member State or launch such a project itself; list those restraint means to which it would never agree in a JRO, and make these documents public.

D) Establish a requirement in the JRO Implementation Plan, and scrutinise compliance with it, that families with pregnant women and families with children are enabled to board the aircraft separately and are seated separately from other returnees.

E) Require, in the pre-JRO procedure, that the compulsory physical presence of monitors in the JRO is dealt with in the relevant documents (namely, in the offer of a return flight, the Conditions attached to the acknowledgement of the offer and in the Implementation Plan). Frontex could also make the plan for upcoming JROs public, at least one week in advance, and make it clear on its website that it pays for monitors' presence in the JRO; Frontex could, finally, prepare and publish country sheets on the allowed use of means of restraint in each Member State and provide training for monitors in this respect.

F) Require in the JRO Implementation Plan (or Conditions) that monitors' reports are forwarded to Frontex; publish on its website: Frontex's JRO Evaluation Reports, including monitors' observations and Frontex recommendations; the section of the JRO Implementation Plan, which refers to the agreed use of means of restraint; Frontex *Best Practices for JROs* ; monitors' reports.

G) Ensure that fundamental rights are respected in so-called Collecting JROs; in particular, explain publicly (i) the legal framework for Collecting JROs, including the working arrangements with third countries concluded in accordance with Article 14(2) of the Frontex Regulation, and (ii) how Frontex complies with its own human rights obligations in fulfilling its role as coordinator of Collecting JROs.

H) Revise the Code of Conduct, as follows:

- Article 5 (*Cooperation with returnees*) should be amended as follows. Paragraph 1 provides



that the objective of such cooperation is to avoid, or limit to the minimum extent necessary, 'the use of force'. However, this concept is not explained in the Code and there is no requirement of a previous agreement on the use of force similar to the one provided for in point 6.4 Frontex should explain which use of force may be considered.

- Article 5(2) of the Code provides that Member States **are expected** to give sufficient and clear information to returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation. This should be a clear **requirement**. Moreover, there is no reason to limit such a complaint to allegations of "ill-treatment". Full implementation of the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR) requires that the Code should extend to **all violations of rights under the Charter occurring during the JRO**. The Code should also state that **guidelines on the complaints mechanisms** of Member States and of Frontex will be provided to each returnee together with a **complaint form**.

- Article 6(2) (*Use of coercive measures*) should include a requirement that **the use of coercive measures should take appropriate account of the individual circumstances of each person such as their vulnerable condition** (children if present in the JRO with their families, persons with physical or mental disabilities, HIV positive persons).

- Article 7 (*Fitness to travel and medical examination*) should be modified to avoid situations where returnees are examined weeks or days before the flight and possibly become sick before boarding with the JRO doctor being unaware of this development. Paragraph 2 should (i) provide that **all** returnees be examined shortly before the flight and (ii) mention when exactly this medical examination will take place (**the day before or on the very same day** instead of the existing "in reasonable time"). Paragraph 4 should provide that " **only medical staff has access to medical information of returnees** ", in order to avoid any abuses. The current version ("the processing of medical information must be carried out in line with applicable and relevant personal data protection") serves little practical purpose in the circumstances of a return operation.

- Article 8(3) (*Escorts*) should be amended to read that escorts should undergo **training on human rights with a focus on people with disabilities, women and children [see above]**. The current Article 15, which mandates human rights training for all "participants" is not sufficiently clear.

- Article 9 (*Identification*) should specify that all JRO staff be **individually identifiable by name or identification number** (for example, on a badge). This should facilitate the submission of complaints by returnees and help ensure proper accountability.

- Article 10(1) (*Recording*) should include a disclaimer to the effect that **monitors do not need permission** from the Organising Member State (OMS), Participating Member States (PMSs), Frontex or the company operating the means of transport **to photograph, film or carry out any other form of recording during a JRO**.

- Article 11 (*Medical staff and interpreters*) should provide that **the JRO medical doctor be provided with full medical information of all returnees**.

- Article 17(3) (*Information procedure and Right to be informed*) should be drafted in mandatory terms as follows: " *The Frontex Executive Director shall request information from the Member States on the conduct and results of their investigation into the violation of fundamental rights.* " Without a binding follow-up mechanism, Frontex cannot assess whether the right to an effective remedy and reparation is ensured for returnees in a JRO.



Emily O'Reilly

Strasbourg, 04/05/2015

[1] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ 2008 L 348, p. 98.

[2] Regulation (EU) No 1168/2011 of the European Parliament and 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, OJ 2011 L 304, p. 1.

[3] The Code of Conduct for JROs was adopted on 7 October 2013 by the Decision of Frontex Executive Director.

[4] Independent observers who are present during the entire removal process play an important role in preventing cases of ill-treatment and ensuring respect for returnees' fundamental rights. Article 8(6) of the Return Directive stipulates that Member States shall provide for an effective forced return monitoring system.

[5] http://europa.eu/rapid/press-release_IP-15-4813_en.htm [Link]

[6] Available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58135/html.bookmark> [Link]

[7] The report on this inspection, which was sent to Frontex, is available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59005/html.bookmark> [Link]

[8] Available at:

<http://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/58134/html.bookmark> [Link]

[9] Available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59007/html.bookmark> [Link]

[10] Members of the Frontex Consultative Forum who replied stated that their contributions do not represent the Consultative Forum's view but their own.



[11] "The term "escort(s)" refers to the security personnel, including persons employed by a private contractor, responsible for accompanying the returnees, in particular during their transportation from the Member State". (Code of Conduct for JRO coordinated by Frontex)

[12] Article 5(2): *"The competent authorities of the MSs are expected to give sufficient and clear information to the returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation."* Article 8(1): *"(...) the MSs have the overall responsibility in accordance with the general principles of state responsibility (...) for investigating and sanctioning actions of escorts acting under their instructions (...) irrespective of whether the escorts are State employees or employed by a private contractor."*

[13] In these JROs, the third country to which migrants are being returned provides the airplane, escorts and medical staff for the operation. The handing over of migrants by national authorities/escorts takes place in an airport in the EU. Frontex provides training to third country escorts. These JROs started in 2014, as a pilot project.

[14] ECtHR (GC), *El-Masri v. the former Yugoslav Republic of Macedonia*, 13 December 2012, par. 206.

[15] For example, the Spanish and Danish Ombudsman's monitoring reports are published on their websites.

[16] According to FRA, this publication needs to be updated in light of developments since 2011 when it was last reviewed.

[17] While the EU, through Frontex, does not bear primary responsibility for human rights violations in a JRO, it may be argued that it has ancillary responsibility in the event of a human rights violation committed by staff of the OMS/PMS by action or omission. See, in particular, the ICJ contribution to the Ombudsman's targeted consultation. The ICJ referred to the judgment of the European Court of Human Rights, according to which the State in question was complicit in gross human rights violations, *"because its agents actively facilitated the treatment and failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring"* (*El-Masri v the former Yugoslav Republic of Macedonia*, ECtHR, GC, application no 39630/09, Judgment of 13 December 2011, para 211). The ICJ also referred to Article 14 of the UN Draft Articles on the Responsibility of International Organisations: *"An international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act by the State or the latter organisation is internationally responsible for doing so if: (i) the former organisation does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."*

http://legal.un.org/ilc/documentation/english/A_66_10.pdf [Link]

[18] See in this respect the Spanish Ombudsman's contribution and the "Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment



from 16 to 18 October 2013”, issued in Strasbourg on 15 February 2015, page 8, available at: <http://www.cpt.coe.int/documents/nld/2015-14-inf-eng.pdf> [Link]

[19] See in this respect the contribution of the Belgian Federal Migration Centre.

[20] Data referred to by the Global Detention Project in its response to the Ombudsman's targeted consultation.

[21] This is without prejudice to the tasks of the OMS which is ultimately responsible in the event of a major incident on board, in accordance with Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States of third-country nationals who are subjects of individual removal orders (OJ 2004 L 261, p. 28), point 3.1 of Annex "Common Guidelines on Security Provisions for Joint Removals by Air".

[22] The Ombudsman submitted a Special Report on this issue to the European Parliament in case OI/5/2012/BEH-MHZ. The Report may be found at: <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark> [Link]
For this reason, the Ombudsman does not repeat the same recommendation here.

[23] The Belgian Federal Migration Centre pointed out, as an example of what may happen in the post-return phase, that in the case of a Belgian return to Kinshasa in 2013, 38 persons appear to have been arrested and detained by the local authorities after their arrival at the airport of destination. They were under arrest for several hours without the possibility to eat or drink. In January 2015 the Irish Times reported on a return operation from Ireland where a Somali national was returned to Tanzania but, on arrival at Kilimanjaro International Airport, was refused admission; subsequently, he was flown to Dar Es Salaam where it is reported he was beaten and tortured by police and died some days later of his injuries. See <http://www.irishtimes.com/news/social-affairs/deported-from-ireland-attacked-and-left-to-die-1.2053069>

[24] See, in particular, the response of the ICJ.

[25] Article 6 of the Code of Conduct provides that " *The OMS and Frontex decide on a list of authorised restraints in advance of the JRO* ".

[26] "Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 16 to 18 October 2013", issued in Strasbourg on 15 February 2015, available at: <http://www.cpt.coe.int/documents/nld/2015-14-inf-eng.pdf> [Link]

[27] The ECtHR has held that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178 par.55, judgement of 12 October 2006.

[28] See the above mentioned Report.



[29] The Ombudsman notes in this respect that the International Centre for Migration Policy Development provides training for monitors for which Frontex provides trainers.

[30] The Belgian Federal Migration Centre listed the minimal conditions required for effective and independent monitoring. For instance, a monitor must be able, in law and practice, to collect information from persons who allege that they have been victim of an incident even during the post return phase; monitor reports must cover all phases of the JRO and must be available to the persons concerned and to the public; monitors must be able to freely film the entire operation, bring all kinds of incidents to the attention of the public (including posting information and video or audio recordings online) and be able to report or file a complaint to all administrative and judicial authorities of all Member States.

[31] Article 258 TFEU:

" If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. "

[32] This procedure includes administrative steps which take place before and after the JRO. Before the JRO, the OMS submits an offer to Frontex by letter to organise the JRO. Frontex acknowledges the offer in a reply to which it attaches "Conditions for the JRO". The "Conditions" are drafted on the basis of a template and refer to financial aspects, requirements and logistics, among others. Subsequently, in cooperation with the OMS, Frontex drafts an "Implementation Plan" (also based on a template), which will constitute an annex to the Specific Financing Decision concerning the JRO. Frontex then adopts Specific Financing Decisions and sends them to the OMS and each PMS in advance of the JRO. After the JRO ends, the escort leaders from the OMS and PMSs fill out debriefing forms. Within 14 days of the end of the JRO, the OMS provides Frontex with a standardised Final Return Operation Report. Finally, Frontex drafts its own Final Evaluation Report (the FRO puts her initials on it to show her approval). As a last step, Frontex makes the final payment after having received the Final Financial Statements from the OMS and PMSs. In addition to this individual handling of JROs, Frontex organises, four times a year, planning and evaluation meetings of national focal points concerning the JROs which have taken place in the meantime.

[33] See the Report on the inspection of documents, available at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59005/html.bookmark> [Link]

[34] http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf [Link]

[35] Article 1 of the Code: *"This Code sets out common principles and main procedures to be observed in the joint return operations of Member States coordinated by Frontex (...)."*



(emphasis added)

[36] *"The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation within the framework of working arrangements concluded with those authorities, in accordance with the relevant provisions of the TFEU. Those working arrangements shall be purely related to the management of operational cooperation."*

[37] Point 2 of the Executive Director Decision Number 2013/67 introducing the Code: *"The Code is applicable to all participants taking part in joint return operations coordinated by Frontex and must be respected by them."*