



Submission of the Immigration Law Practitioners' Association to the public consultation by the European Ombuds on Frontex and Fundamental Rights

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government and official consultative and advisory groups and works both at national and European level to contribute to the debate on immigration, asylum and nationality policy and practice.

As its contribution to this consultation ILPA would like to submit the note that follows, which has been discussed and commented upon by members.

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Frontex and Individual Guarantees: A Critique of its New Mandate. Note for the submission of the Immigration Law Practitioners' Association by Dr Violeta Moreno-Lax*

I. Introduction

The relationship of the external frontiers agency of the European Union with human rights and refugee law has been ambiguous since the agency started operations in 2005.¹ This is in spite of the formal submission of its founding instrument to the EU Charter of Fundamental Rights² and its link to the Schengen Borders Code.³ Instead of considering

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¹ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/I (*original Frontex Regulation hereinafter*).

² Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389 (*European Charter of Fundamental Rights hereinafter*).

respect for, and protection of, the EU *acquis* as a legal precondition for engagement in operational action, the agency has taken fundamental rights as a 'strategic choice'.⁴ Hitherto its functioning and operational performance have failed adequately to reflect that, as an organ of the European Union, Frontex is obliged to respect the rights and observe the principles recognised within the EU legal order,⁵ ensuring their application within its mandate.⁶ As multiple observers have denounced, these shortcomings have been most visible at sea – in the course of maritime operations. It is posited in this note that the situation may only partially change under the recast Regulation of 2011. The grandiloquent language introduced has not been adequately operationalised and is insufficient by itself to provide individual guarantees in practice.

2. The original mandate

In 2004, Frontex was assigned the mission of improving 'the integrated management of the external borders of the Member States of the Union' to ensure both 'a uniform and high level of control and surveillance' and the 'efficient implementation of common rules'.⁷ From the beginning, the exercise of its powers was subject to the fundamental principles of Union law,⁸ including the rights contained in the Charter of Fundamental Rights.⁹ The overall reference to the Charter in the Preamble of its founding Regulation rendered the right to asylum,¹⁰ the prohibition of *refoulement* and collective expulsion,¹¹ as well as the right to an effective remedy¹² relevant to Frontex's action.¹³

Regulation 863/2007,¹⁴ establishing the RABIT mechanism to counter situations of "mass influx" at the external borders and regulating the powers of guest officers, revised the original Regulation for the first time. The amendment insisted on compliance with fundamental rights, mentioning that the instrument should be implemented 'in accordance with Member States' obligations as regards international protection and *non-refoulement*', laying special emphasis on the 'obligations arising under the international law of the sea, in particular as regards search and rescue'.¹⁵

To meet the concerns following from the general disunity among the actors concerned 'over which obligations arise from EU fundamental rights and international human rights and

³ 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), OJ 2006 L 105/1.

⁴ Frontex General Report 2009, at 9, retrievable from: <http://www.frontex.europa.eu/about/governance-documents/2009>.

⁵ Art. 6(3), Treaty on European Union, OJ 2010 C 83/13 (*TEU* hereinafter). See also Art. 67(1), Treaty on the Functioning of the European Union, OJ 2010 C 83/47.

⁶ Art. 51(1) European Charter of Fundamental Rights: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers ...'.

⁷ Art. 1 and recitals 1, 2, 4 and 21 of the original Frontex Regulation.

⁸ See Arts. 2 and 6 TEU.

⁹ Recital 22 of the original Frontex Regulation.

¹⁰ Art. 18 European Charter of Fundamental Rights.

¹¹ Arts. 4 and 19 European Charter of Fundamental Rights.

¹² Art. 47 European Charter of Fundamental Rights.

¹³ Art. 51(1) European Charter of Fundamental Rights.

¹⁴ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007 L 199/30 (*RABIT Regulation* hereinafter).

¹⁵ Recitals 16 to 18 of the RABIT Regulation.

refugee law, and how these obligations relate to the law of the sea',¹⁶ a Council Decision codifying a minimum common understanding of the régime applicable to interdiction, search and rescue, and disembarkation in relation to Frontex-led operations was adopted in 2010.¹⁷

The main objective of the instrument is to establish 'additional rules for the surveillance of the sea borders by border guards operating under the coordination of [Frontex]', supplementing the Schengen Borders Code.¹⁸ Nonetheless, since in the course of a surveillance operation a situation may occur where it becomes necessary to render assistance to persons in distress, to provide for better coordination between the Member States participating in joint patrols, guidelines on search, rescue, and disembarkation have been included as well.¹⁹ Both sets of norms 'shall form part of the operational plan drawn up for each operation coordinated by the agency'.²⁰ Their implementation is submitted to the observance of the Schengen Borders Code, EU fundamental rights, and the prohibition of *refoulement*.²¹ In particular, it is compulsory that

*'...no person ... 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.'*²²

Therefore,

*'the persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement.'*²³

Throughout the operation, '[t]he special needs of ... persons in need of international protection ... shall be considered'.²⁴

In spite of the straightforwardness of these rules, human rights have not been systematically integrated in the *modus operandi* of the agency.²⁵ Although official evaluations recognise that 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea',²⁶ several thousands have been prevented from leaving or returned to unsafe countries since 2006.²⁷

3. Life after Regulation 1168/2011

¹⁶ Reinforcing the management of the southern maritime borders of the European Union, COM(2006) 733 final, 11 Nov. 2006, paragraph 35.

¹⁷ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2010 L 111/20 (*Maritime Guidelines Decision* hereinafter). The Decision has now been annulled by the Court of Justice of the European Union, Case C-355/10, *Parliament v Council*, 5 Sept. 2012, but its effects are maintained until new rules are adopted to replace it.

¹⁸ Recital 11 of the *Maritime Guidelines Decision*.

¹⁹ Recitals 7 to 9 of the *Maritime Guidelines Decision*.

²⁰ Art. 1 of the *Maritime Guidelines Decision*.

²¹ Recitals 3 and 10 and paras. 1.1 and 1.2, Part I, Annex, *Maritime Guidelines Decision*.

²² Para. 1.2, Part I, Annex, *Maritime Guidelines Decision*.

²³ *Ibid.*

²⁴ Para. 1.3, Part I, Annex, *Maritime Guidelines Decision*.

²⁵ For a detailed list of reports and articles by civil society organisations and researchers on the human rights repercussions of Frontex's action refer to: http://www.statewatch.org/observatories_files/frontex_observatory/analysis.html.

²⁶ Report on the evaluation and future development of the Frontex Agency, COM(2008) 67 final, 13 Feb. 2008, at 5.

²⁷ See, for instance, Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009, available at: <http://www.frontex.europa.eu/news/hera-2008-and-nautilus-2008-statistics-5KsnAL> and Frontex General Report 2009, at 43.

Partly as a response to alarming reports by civil society organisations and others to clarify the legal framework of the agency the 2011 changes specify Frontex's duty to observe international and European Union law, including the 1951 Refugee Convention,²⁸ the European Charter of Fundamental Rights, and obligations regarding access to international protection and the principle of *non-refoulement*.²⁹ The implementation of the Regulation ought also to consider Member States' commitments under the law of the sea, especially as regards search and rescue.³⁰ In particular, in the context of joint maritime operations 'no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*'. Paraphrasing the Maritime Guidelines Decision, the reform requires that the special needs of vulnerable persons, including those of persons in need of international protection, be 'addressed' in accordance with the relevant standards.³¹

As a result of the amendments, Frontex must adopt a Fundamental Rights Strategy, introducing an 'effective' monitoring mechanism to ensure 'respect for fundamental rights in all the activities of the agency'.³² A Code of Conduct applicable to all operations coordinated by Frontex must also be drawn up,³³ specifying the 'procedures intended to guarantee ... respect for fundamental rights with particular focus on ... vulnerable persons [including] persons seeking international protection'.³⁴

A Consultative Forum, comprising representatives of the European Asylum Support Office, the Fundamental Rights Agency, and UNHCR shall be established to assist in this regard, the exact composition and working methods of which are to be decided by the agency's Management Board on a proposal by its Executive Director.³⁵ The Forum is to advise Frontex's authorities with regard to the execution and further development of the Fundamental Rights Strategy, the Code of Conduct, and related matters.³⁶ In addition to the Consultative Forum, a Fundamental Rights Officer is to be appointed to contribute to the effective monitoring of fundamental rights. S/He will report directly to the Management Board and the Consultative Forum, but is expected to perform his/her tasks independently.³⁷ Both the Fundamental Rights Officer and the Consultative Forum will be given access 'to all information concerning respect for fundamental rights, in relation to all the activities of the agency'.³⁸ Finally, an external evaluation will be carried out every five years, assessing 'the way the Charter of Fundamental Rights was complied with in the application of [the] Regulation'.³⁹

²⁸ Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (CSR hereinafter).

²⁹ Art. 1(2), 2nd indent, 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, OJ 2011 L 304/1 (*Frontex Recast Regulation* hereinafter). See also recitals 1, 9, and 29.

³⁰ Recital 30 of the Frontex Recast Regulation.

³¹ Art. 2(1a) of the Frontex Regulation, as introduced by the 2011 changes.

³² Art. 26a(1) of the Frontex Regulation, as introduced by the 2011 changes. The Fundamental Rights Strategy was adopted by the Management Board on 31 Mar. 2011 and is available at: http://frontex.europa.eu/assets/Attachments_News/fx_fund_rights_strategy_endorsed_by_mb_31.03.2011.pdf.

³³ The Code of Conduct for All Persons Participating in Frontex Activities (*Code of Conduct* hereinafter) was adopted on 1 Jan. 2011 and is available at:

http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf.

³⁴ Art. 2a of the Frontex Regulation, as inserted by the 2011 reform.

³⁵ Art. 26a(2) of the Frontex Regulation, as introduced by the 2011 reform.

³⁶ Art. 26a(2), 2nd indent, Frontex Regulation, as inserted by the 2011 reform.

³⁷ Art. 26a(3) of the Frontex Regulation, as introduced by the 2011 reform.

³⁸ Art. 26a(4) of the Frontex Regulation, as introduced by the 2011 reform.

³⁹ Art. 33(2b) of the Frontex Regulation, as inserted by the 2011 reform.

Through these changes, the oversight of Frontex's general submission to human rights' standards is expected to be reinforced. One of the purposes of the revision was precisely '*...to strengthen ... [the] operational capabilities [of the agency] while ensuring that all measures taken ... fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement*'.⁴⁰

However, it remains open to question whether the amended Regulation provides the necessary tools for compliance with individual guarantees in each particular case. Most of these obligations have not been operationalised in the operative part of the revised instrument, but in the Code of Conduct and the Strategy on Fundamental Rights, the legal nature of which remains uncertain.⁴¹

The main objective of the Code is to '*promote professional values based on ... the respect of fundamental rights*'.⁴² Yet, the document fails to make clear that human rights obligations *must* be met – the Code uses the words 'promote compliance with' instead.⁴³ In particular, in relation to international protection, Article 5(a) establishes that

*'...participants in Frontex activities shall **promote** ... that persons seeking international protection are recognised, receive adequate assistance, are informed in an appropriate way about their rights and relevant procedures, and are referred to national authorities responsible for receiving their asylum requests*'. [emphasis added]

Contrary to what new Article 2a of the recast Regulation foresees, the specific procedures intended to guarantee this in practice have not been laid down by the Code.

The Fundamental Rights Strategy is that which details the implementation of these principles to a certain degree, considering a number of human rights concerns throughout the cycle of the joint operation. As a result, risk analyses preceding the launch of a common intervention '*shall specifically take into consideration the particular situation of persons seeking international protection*'.⁴⁴ However, Article 4 of the amended Regulation is silent on this point.

The ensuing operational plan must include a series of elements pursuant to Article 3a of the revised Regulation, among which nothing is said about refugees, despite the specific requirement in the Maritime Guidelines Decision to provide for adequate disembarkation arrangements in line with *non-refoulement* obligations.⁴⁵ It is paragraph 15 of the Fundamental Rights Strategy that determines in very general terms that operational plans should be elaborated '*in strict conformity with the relevant international standards*'. How exactly

'...the persons intercepted or rescued [will] be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement'

has not been further expounded.⁴⁶ Related safeguards and procedural guarantees are also left undefined. With regard to the development of '*methods for better identifying people seeking international protection*', the Strategy simply establishes that this '*could*' possibly be the object of specific collaboration with external partners from which Frontex could seek expert advice.⁴⁷

⁴⁰ Recital 9 of the Frontex Recast Regulation. See also revised Art. 1(2), 2nd indent, Frontex Regulation.

⁴¹ While the Code of Conduct states in its Preamble that the document '*is binding*', the Strategy does not include any such specification. However, the fact that it is a political – if not a '*strategic*' – paper seems to point to its non-binding character.

⁴² Art. 1(1) of the Code of Conduct (emphasis added).

⁴³ Art. 4(b) of the Code of Conduct.

⁴⁴ Para. 14 of the Fundamental Rights Strategy.

⁴⁵ Para. 1.2, Part I, and para. 2.2, Part II, Annex, Maritime Guidelines Decision.

⁴⁶ Para. 1.2, Part I, Annex, Maritime Guidelines Decision.

⁴⁷ Para. 22 Fundamental Rights Strategy. According to para. 21, possible external partners include UNHCR, EASO, FRA and the International Organisation for Migration.

The integration of human rights has also been marginal in relation to incident reporting and evaluation. Whereas recital 16 of the 2011 recast Regulation establishes that an incident reporting mechanism should be used to transmit information to the relevant authorities regarding 'credible allegations of breaches of ... fundamental rights' during joint operations, this has not been incorporated into the wording of Article 3a of the instrument. The provision reappears in paragraph 17 of the Fundamental Rights Strategy, without however specifying the concrete modalities for reporting. These have been deferred to the operational plan of each individual mission. The only concrete obligation upon participants in Frontex's activities, 'who have reason to believe' that a violation of the Code of Conduct has occurred or is about to be committed, is to report the matter to the agency through the appropriate channels.⁴⁸ However, the value of 'self-monitoring' by participating officers or Frontex's own personnel, in terms of impartiality and objectivity, should be considered very limited and may simply lead to the perpetuation of current malpractices.

In relation to evaluations, it is unclear how the observations of the Fundamental Rights Officer will feed into the review of each mission and whether any contributions by external observers will be taken into account. Revised Article 3(3) of the Regulation seems to differentiate the two processes, so that the assessment of the final results is undertaken by the Risk Analysis Unit and transmitted to the Management Board 'together with' the (separate) comments of the Fundamental Rights Officer, without both exercises being materially integrated. Most importantly, Article 3(3) fails to elucidate whether international human rights and refugee law are to be considered benchmarks against which to assess 'the quality, coherence and effectiveness' of the performance. That new Article 33 requires an external evaluation to be carried out every five years, including 'a specific analysis on the way the Charter of Fundamental Rights was complied with', leads to the conclusion that the assessment of operational outcomes is independent from the appraisal of their human rights implications.

Which follow-up measures should be adopted on account of human rights evaluations is also not articulated. The Strategy does not clarify this point. Building upon Article 3(1a) of the revised Regulation, it only establishes that some (indeterminate) 'corrective measures should be taken in case of breach or serious risk of breach of fundamental rights' and that 'as last resort' the agency 'might' decide to terminate the joint operation concerned, if the conditions guaranteeing the respect for fundamental rights – whichever these may be and however these were identified in the first place – are no longer fulfilled.⁴⁹ According to the text of new Article 3(1a), this seems to be a prerogative of the Executive Director, who may discretionarily resolve to suspend or cancel the activity 'if he considers' that the violations in question 'are of a serious nature or are likely to persist'. The standards and the procedure according to which s/he should assess the gravity of such events have not been specified. In case of a breach, the Fundamental Rights Strategy gives to all participants the *possibility* 'to request the host Member State, Frontex, or other Member States concerned to take immediate and appropriate measures',⁵⁰ without indicating a necessity to open an

⁴⁸ Art. 22 of the Code of Conduct.

⁴⁹ Para. 15 Fundamental Rights Strategy.

⁵⁰ *Ibid.*

official investigation and prosecute the perpetrators *proprio motu*,⁵¹ and to provide the victims with effective remedies in conformity with EU and international legal standards.⁵²

Perhaps the precise procedures and channels of appeal intended to guarantee individual rights will be laid down in the Action Plan of the Strategy to be agreed between Frontex and its partners for the programming of the relevant activities. At least this is what appears to emerge from paragraph 36 of the Strategy.⁵³ This means that yet another layer of soft-law regulation will be introduced for the implementation of the fundamental rights obligations the observance of which is compulsory for the agency and the Member States.

4. Conclusion

The 2011 changes have the merit of clarifying to some extent the law applicable to Frontex's activities and reinforcing its overall submission to human rights' standards. Nevertheless, it remains open to question whether sufficient provision has been made for the necessary means to ensure compliance with the relevant obligations in every instance. The rights of migrants and persons seeking international protection have not been integrated fully in the *modus operandi* of the agency. The concrete implementation of fundamental rights and international protection obligations in individual cases has been deferred to soft-law instruments and the operational plan of each mission, without provision being made for specific procedures, remedies, or any other legally-binding guarantees in the body of the main regulations.

Nowhere have procedures been introduced for the case in which fundamental rights are violated in the course of, or as a result of, a joint operation for the person(s) concerned to seek adequate redress. The RABIT rules on civil and criminal liability of guest officers have remained unchanged under the 2011 recast. By establishing that guest officers operating in a host Member State 'shall be liable in accordance with its national law for any damage caused' or that they shall be treated 'in the same way as officials of the host Member State with regard to any criminal offences that might be committed ... by them', Articles 10b and 10c of the Frontex instrument limit themselves to distributing liability between contributing Member States and designating the applicable law. They do not provide for individual remedies or specify the procedure to be followed by participating units to 'observe fundamental rights' in practice, as required by the revised Regulation.⁵⁴ Whether this amounts to an implementation in good faith of the obligations concerned, respectful of the effectiveness attached to the rights of refugees and migrants under EU and international law, is very doubtful.⁵⁵

⁵¹ On this obligation see, among others, ECtHR, *Aksoy v Turkey*, Appl. No. 21987/93, 18 Dec. 1996, para. 98, in relation to Art. 3 ECHR. For a similar point concerning arbitrary killings in violation of Art. 2 ECHR, see *Al-Skeini v UK*, Appl. No. 55721/07, 7 Jul. 2011, para. 163. With regard to Art. 5 ECHR in the context of enforced 'disappearances', see *Kurt v Turkey*, Appl. No. 24276/94, 25 May 1998.

⁵² Mainly Arts. 2, 3, and 13 ECHR; Arts. 1, 16, 31 and 33 CSR; and Arts. 4, 18, 19 and 47 European Charter of Fundamental Rights. See ECtHR [GC], *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, 21 Jan. 2011, explicitly endorsed by the CJEU [GC] in Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, judgment of 21 Dec. 2011 (not yet reported).

⁵³ Para. 36 of the Strategy of Fundamental Rights establishes that 'the main tool for the implementation of this strategy will be an Action Plan'.

⁵⁴ Art. 10(2) Frontex Regulation, as introduced by the 2011 recast.

⁵⁵ On this issue, see ECtHR [GC], *Hirsi a. o. v Italy*, Appl. No. 27765/09, 23 Feb. 2012.

ILPA's Proposals

- Frontex should be asked to revise its Fundamental Rights Strategy and Code of Conduct to introduce the procedures and legal safeguards necessary to respect individual guarantees in accordance with EU and international law as required by its founding Regulation – specifically by Articles 2a and 26a thereof.
- Operational plans and mission evaluations should be made available upon request to both the EU Ombuds and the alleged victims of violations of fundamental rights. Without access to such factual information any legal action will be hard to evidence, rendering the exercise of rights of redress futile in practice. Such a situation is in flagrant violation of the right to an effective remedy and standards of judicial protection.
- The EU Ombuds should oversee the follow-up of particular cases in collaboration with the national human rights institutions concerned, through the mechanism of individual complaints. The Ombuds can play a crucial role in establishing the facts, identifying the perpetrators, and determining the forum where legal action should be undertaken.

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