



Submission to The EU Ombudsman's inquiry into How the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations in the context of its search and rescue activities

We are grateful for this opportunity to contribute to your own-initiative inquiry into the role of Frontex in search-and-rescue operations. This submission will address 1) general considerations with respect to Frontex policies and practices as relevant to SAR operations; 2) Frontex's activities in relation to the Adriana shipwreck in June 2023; and 3) aerial surveillance in the central Mediterranean.

General Considerations about Frontex Approach to SAR

Frontex's narrow interpretation of distress puts lives and rights at risk in the Mediterranean Sea.

In a letter to Human Rights Watch dated April 25, 2022, then-executive director Fabrice Leggeri stated that the agency "only issues an initial assessment of the situation [of a migrant boat] for the consideration" of the competent Maritime Rescue Coordination Centers (MRCCs) who have "the mandate to declare an event...a distress case." According to the letter, the agency will issue mayday alerts and radio calls only "in extreme cases."

The Leggeri letter states that Frontex surveillance aircraft had broadcasted a total of 21 mayday alerts between the beginning of 2020 and April 2022. This is a tiny fraction of the boats sighted by its aerial surveillance. According to Frontex, there were 433 detections by aerial surveillance in the central Mediterranean involving 22,696 people in 2021 alone.¹

The International Convention for the Safety of Life at Sea (SOLAS Convention) obliges shipmasters "in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea ... to proceed with all speed to their assistance."² The International Convention on Maritime Search and Rescue (SAR Convention) defines distress as "a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."³ The EU

¹ [Frontex Letter ARES Template \(statewatch.org\)](https://www.statewatch.org/Document-Frontex-Letter-ARES-Template)

² SOLAS Convention, Regulation 33.

³ SAR Convention Annex 1.3.13.

regulation on Maritime Border Surveillance, while distinguishing between phases of uncertainty, alert, and distress, lists a series of factors to be taken into account when determining the need to provide assistance, including the seaworthiness of the vessel, number of people on board, and weather conditions.⁴

In our assessment, any unseaworthy vessel in open waters should be considered in the distress phase, given the prospect of danger to life. We share the conclusion of the United Nations High Commissioner for Human Rights that the notion of distress should be understood broadly to encompass all “unseaworthy vessels even if they are not in imminent danger of sinking.”⁵ We note that in its 2022 Annual Report, the Frontex Consultative Forum recommended Frontex consider the “wider, timely use of mayday relay calls on emergency radio channels when vessels in distress requiring assistance are identified at sea.”⁶

Adriana Shipwreck

The shortcomings in Frontex’s engagement with the *Adriana*, including its failure to issue a Mayday alert, reflect its narrow interpretation of distress at sea. The *Adriana* was a fishing trawler that capsized on June 14, 2023, causing the presumed deaths of hundreds of people. In its public statement on June 16, 2023, the agency said its aircraft had determined that the vessel was “heavily overcrowded and was navigating at slow speed,” yet the agency failed to continue its own monitoring.

On June 30, 2023, Human Rights Watch and Amnesty International sent a letter to current Frontex Executive Director Hans Leijten with questions about Frontex’s role in the *Adriana* disaster. Frontex replied to our letter on September 11, 2023. We welcome that Frontex has opened a Serious Incident Report (SIR).

Failure to act proactively. In its response to our letter, Frontex clarified that it had first learned of the *Adriana* boat when cc-ed in a message from MRCC Rome to JRCC Piraeus “about a fishing vessel with 750 migrants on board.” The Hellenic Coast Guard, in a June 14, 2023, press release,

⁴ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 9, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014R0656>. The factors include : “(i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts.”

⁵ OHCHR, “Lethal Disregard:” Search and rescue and the protection of migrants in the central Mediterranean Sea, 2021, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf> ; UNHCR Comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final, <https://www.unhcr.org/534fd9e99.pdf> ; UNHCR, Proposals for a Central Mediterranean Sea Initiative: EU solidarity for rescue-at-sea, protection and comprehensive responses, 2013, <https://www.refworld.org/docid/52c172f84.html>.

⁶ <https://prd.frontex.europa.eu/document/tenth-consultative-forum-annual-report-2022/>

said that alert from MRCC Rome arrived at 11:00 EEST, which is 08:00 UTC, on June 13, 2023. Frontex stated that at the time a “Frontex aircraft [hereinafter a Frontex Surveillance Asset, FSA] was flying over the Ionian Sea,” and was directed to the *Adriana*, leading to the sighting of 09:47 UTC as reported in Frontex’s public statement on June 16, 2023. Frontex clarified that the FSA monitored the *Adriana* for 10 minutes, until it had to return to the base to refuel. Frontex states that, upon sighting the vessel, it immediately informed the Greek and the Italian authorities about it.⁷

Frontex confirmed the agency offered to both dispatch its Heron drone (or “Frontex Remotely Piloted Aircraft System – RPAS”) or to re-dispatch the aircraft from Italy, which was “assigned for another operation”, adding that “it did not receive a response to such offer.” Frontex did not, however, specify when it made these offers, nor did it give a precise answer as to when the Greek authorities requested that the drone be sent to attend to an incident off the coast of Crete.

Investigations conducted by two separate media consortia determined that Frontex offered additional help to JRCC Piraeus on three occasions, though they provide different timelines. An investigation by the organizations Solomon and Forensis in collaboration with The Guardian and ARD concluded that Frontex offered to dispatch its aircraft (“Eagle I”) to the *Adriana* at 19:35 and at 00:34 EEST, and to dispatch its drone/RPAS “Heron” at 00:52, receiving no response.⁸ Solomon research specifies that after Frontex’s first offer, the Greek authorities asked the agency to assist with a SAR incident south of Crete and that the Heron spotted the concerned vessel at 22:50 EEST. Another investigation conducted by Der Spiegel, Reporters United, El País, Siraj, and ARD cited an internal Frontex memo to report that Frontex had offered to send the Eagle I at 18:35 and 21:34 EEST and received no response.⁹

While we appreciate that low fuel may have made it necessary to cease monitoring the *Adriana* after the initial sighting at 12:47 EEST, the failure of Frontex to resume that monitoring after refueling or with another of its aircraft raises concerns about the effectiveness of its support to SAR operations and is at odds with recommendations by the Agency’s Fundamental Rights Office (FRO) and the Frontex Consultative Forum.

In several Frontex Serious Incident Reports concerning SAR events where Frontex participated with FSAs, the FRO considered it a good practice for the FSA to remain on the spot to continue the monitoring of the situation. In SIR no. 12634/2022,¹⁰ which concerned an FSA sighting of a migrant boat initially in the Tunisian SAR zone, and then in the Libyan SAR zone, an FSA was able to monitor the rescue of the boat and even record instances of physical abuse against the migrants on board by Libyan coast guards linked with the Tripoli-based government.¹¹ The FRO commended as good practice that the FSA “*was instructed* to stay and monitor the whole course

⁷ Frontex response of 11 September 2023, on file with Human Rights Watch.

⁸ <https://wearesolomon.com/mag/format/investigation/under-the-unwatchful-eye-of-the-authorities-deactivated-cameras-dying-in-the-darkest-depths-of-the-mediterranean/>

⁹ <https://www.spiegel.de/international/europe/new-accusations-against-the-greek-coast-guard-we-thought-they-knew-what-they-were-doing-a-5b7b93b8-9ca0-4889-b52a-e134bbd84f43>

¹⁰ Compilation of SIRs concerning Frontex Aerial surveillance, SIR 12634/2022 of 2 August 2022
<https://fragdenstaat.de/dokumente/234191-imported-documents-1/?page=1>

¹¹ Conditions on the migrants’ boat in question were comparable to the *Adriana*, as the boat was described as overcrowded, with good buoyancy, and with no life jackets.

of embarkation by the Libyan coast guard, enabling gathering important evidence underlying this SIR.”¹²

In its 2022 Annual Report, the Frontex Consultative Forum similarly recommends considering that “unless otherwise dictated by force majeure, Frontex assets remain at the location of detected incidents to document border police/ coast guard measures until completed, based on defined criteria established together with the FRO and regularly monitored.”¹³ Moreover, in its 2021 report on “Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea,” the Frontex Management Board Working Group said that “Frontex surveillance flights or other Frontex assets could in future remain at the location of detected incidents to document border police measures until they have been completed, provided that operational activities are not weakened and no gap in the surveillance system occurs.”¹⁴

Notion of distress. Frontex’s failure to act proactively in the *Adriana* case reflects the agency’s interpretation of its mandate in relation to distress situations at sea as well as the notion of distress itself, as discussed above. In its letter to Human Rights Watch and Amnesty International dated September 11, 2023, Frontex said it “does not designate the phase of emergency (uncertainty, alert, and distress) and does not bear the responsibility to organise and coordinate SAR operations. These responsibilities lie exclusively with the Rescue Coordination Centres.”

Frontex’s stance regarding its lack of competence to designate a phase of emergency is inconsistent with its practices; various SIRs refer to FSA sightings that include “classification” of situations to trigger the appropriate response.¹⁵ Frontex’s own publication of Multipurpose Aerial Surveillance (MAS) states: “[...] [SAR] missions are performed every time MAS detects a boat in distress. Relevant authorities are notified and act to rescue the people on board.”¹⁶ In a reply to a question by a European Commission DG Home officer on “Detection and notification of maritime emergencies,” Frontex said that, while unable to “declare a case as SAR,” Frontex FSAs can assess a situation as one of distress and “when FSAs detect a distress situation at sea and the uncertainty - alert phases are exceeded and there is an imminent danger of human life loss (e.g. shipwreck, boat adrift, bad weather conditions etc.), Frontex Surveillance Aircrafts broadcast a MAYDAY alert, that is received by all vessels (military, law enforcement, merchant and NGO vessels) and aerial assets in the area/vicinity of the incident.”¹⁷

¹² The FRO made similar considerations regarding the continued monitoring of incidents in SIR no 13489/2021, concerning an episode where Libyan coast guard members shot at migrants in a SAR operation in the Libyan SRR.

¹³ <https://prd.frontex.europa.eu/document/tenth-consultative-forum-annual-report-2022/>

¹⁴ Final Report of the Frontex Management Board Working Group, Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (FRALO), 1 March 2021, www.frontex.europa.eu/assets/Key_Documents/MB_Documents/Agenda_Point_WG_FRaLO_final_report.pdf. The CF also issued detailed recommendations in relation to the fundamental rights implication of Multipurpose Aerial Surveillance (MAS), including to “annex the respective mitigating measures to each MAS activity to ensure compliance with the obligations set out in Article 80 of the Frontex Regulation”, regarding the principle of non-refoulement. The report also recommends as “measures to be considered,” to ensure compliance with non-refoulement, “systemic adjustments, such as the parallel deployment of Frontex and Member States’ naval assets to ensure that people rescued at sea following sightings by Frontex officials may be disembarked in a place of safety.”

¹⁵ See: Final SIR 12634/2022 – FSC Aerial surveillance 2022 of 2 August 2022 and Final SIR report – 10347/2022 – SIR Cat 1 FSC Aerial Surveillance 2022 – of 27 October 2022, discuss Frontex classification of “vessels requiring immediate rescue.” Available at [imported-documents-1 - FragDenStaat](#).

¹⁶ <https://op.europa.eu/en/publication-detail/-/publication/b96286e0-1aa8-11e8-ac73-01aa75ed71a1>

¹⁷ Communication from Frontex to Mr Matthias OEL, Director of Directorate B – Schengen, Borders & Visa DG HOME, European Commission, regarding the written question E-1755/2022 on “Detection and notification of

As noted above, Human Rights Watch believes any overcrowded, unseaworthy boat in the Mediterranean Sea should be considered in distress and requiring immediate assistance. In the case of the *Adriana*, there were sufficient elements to say it was in distress even according to the protocol Frontex describes and in line with a literal reading of the EU Regulation on Maritime Border Surveillance.

In its letter to us, the agency said it had informed Greek authorities in its “sighting report” at 12:47 EEST that no life jackets were visible on the slowly moving, “heavily overcrowded” *Adriana*. Furthermore, Frontex received subsequent information about conditions of people on the *Adriana* via the NGO Alarm Phone indicating the need for assistance. In an email at 17:53 EEST to several stakeholders, including Frontex, Alarm Phone, which was in touch with people on the *Adriana*, reported that women and children were on board, several people were “very sick” and that people said “they cannot go on” and “are urgently asking for help.”¹⁸ Frontex Situation Centre replied to AP’s email at 18:20 EEST stating that the information had been relayed to the Greek authorities.

The EU regulation on Maritime Border Surveillance stipulates that a vessel “shall be considered to be in a phase of distress in particular: (i) when positive information is received that a person or a vessel is in danger and in need of immediate assistance,” among other situations.¹⁹

Regrettably, in its reply, Frontex failed to address Human Rights Watch and Amnesty International’s question as to whether the agency considered issuing a Mayday based on its assessments of the conditions of the *Adriana* and information received from Alarm Phone, and if not, why.

Aerial Surveillance in the central Mediterranean Sea

Frontex aerial surveillance in the central Mediterranean Sea contributes directly and meaningfully to interceptions of migrants and asylum seekers at sea by Libyan forces. While Frontex argues that aerial surveillance saves lives, and in some circumstances there is no doubt that is true, the evidence Human Rights Watch gathered in partnership with Border Forensics demonstrates surveillance is used in service of interceptions by Libyan forces rather than to ensure rescue by nongovernmental rescue organizations or merchant ships.²⁰ These interceptions result in forced returns to well-documented indefinite, inhuman, degrading, and arbitrary detention and other serious human rights violations in Libya. This engages Frontex responsibility for internationally wrongful acts.

Over the last few years, Frontex has established contracts with private companies to operate a remote-piloted Heron drone—a relatively large, unarmed drone designed for intelligence gathering and surveillance—and several piloted planes out of airports in Malta and Italy. Each of

maritime emergencies”: www.statewatch.org/media/3427/07072022_transmission-letter-from-frontex-to-com-regarding-written-question-e-1755-2022.pdf

¹⁸ <https://alarmphone.org/en/2023/06/14/europes-shield/> - Updates on the state of *Adriana* were published by activist Nawal Soufi on social media.

¹⁹ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0656>

²⁰ <https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>

these aircraft monitors a specific area of the central Mediterranean. This surveillance forms a central plank of the EU's strategy to prevent migrants and asylum seekers from reaching Europe by boat despite knowing the consequences are that migrants will be returned to face systematic and widespread abuse in detention by armed groups linked with Libyan authorities and smugglers and traffickers in Libya.

Statistical analysis conducted by Border Forensics supports the conclusion that the EU's approach is designed not to rescue people in distress but to prevent them reaching EU territory.²¹ The statistics indicate that Frontex's use of aerial assets under its current strategy has not had a meaningful impact on the death rate. However, there is a moderate and statistically significant correlation between its aerial assets' flights and the number of interceptions performed by the Libyan Coast Guard. On days when the assets fly more hours over its area of operation, the Libyan Coast Guard tends to intercept more vessels. Simply put, without the information from EU aircraft, the Libyan Coast Guard would not have the technical and operational means to intercept as many boats as it does.

We acknowledge that Frontex has an obligation under maritime law to alert competent coastal authorities about situations of distress at sea. The SAR and Solas conventions stipulate that a rescue operation should conclude in disembarkation in a place of safety, which International Maritime Organization guidelines define as a place where "the survivors' safety of life is no longer threatened and where their basic human needs ... can be met."²²

Frontex obligations under international maritime law should be considered in conjunction with its obligations under regional and international human rights law, in particular its obligations with respect to the right to life, the prohibition against torture and cruel, inhuman and degrading treatment or punishment, and the corollary prohibition on refoulement under human rights and refugee law. As an EU agency, Frontex is bound to carry out its operations in a manner consistent with the EU Charter of Fundamental Rights (including the right to asylum), the European Convention on Human Rights, and other norms of international law. These binding laws oblige Frontex not to expose anyone to human rights abuse either directly or indirectly, and to take necessary measures to protect people from prohibited ill-treatment. We note that Frontex's Fundamental Rights Action Plan says the agency's aerial surveillance should be in line not only with international maritime law but also "in compliance with international human rights and EU law including the principle of non-refoulement and the EU Charter of Fundamental Rights." Under Article 46 of the Frontex Regulation, the agency has a duty to suspend or terminate operations where it could lead to serious or persistent abuse.

Conclusions with respect to the EU Ombudsman own-initiative inquiry [How the European Border and Coast Guard Agency \(Frontex\) complies with its fundamental rights obligations in the context of its search and rescue activities](#)

²¹ Ibid.

²² Amendments to SAR and SOLAS, entry into force 2006, and IMO Resolution MSC 167.78, "Guidelines on the treatment of persons rescued at sea," chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.167%20(78).pdf.

1. Frontex’s narrow interpretation of the notion of distress puts lives and rights at risk in the Mediterranean.

Any unseaworthy vessel in open waters should be considered in the distress phase given the prospect of danger. We share the conclusion of the United Nations High Commissioner for Human Rights that the notion of distress should be understood broadly to encompass all “unseaworthy vessels even if they are not in imminent danger of sinking.”

In the case of the *Adriana*, there were sufficient elements to say it was in distress even according to existing Frontex protocols and in line with a literal reading of the EU Regulation on Maritime Border Surveillance.

2. Frontex’s narrow interpretation of its mandate that makes it beholden to national authorities’ decision-making, leads to the agency’s inability to ensure human rights compliance in its operations as required under EU law.

Furthermore, Frontex’s stance regarding its lack of competence to designate a phase of emergency is inconsistent with its practice; various SIRs refer to FSA sightings that include “classification” of situations to trigger the appropriate response.

3. While Frontex argues that aerial surveillance saves lives, evidence shows it is in service of interceptions rather than rescue.

The statistics indicate that Frontex’s use of aerial assets under its current strategy has not had a meaningful impact on death rates. However, there is a moderate and statistically significant correlation between its aerial assets’ flights and rates of interception. These interceptions result in forced returns to well-documented abusive and indefinite arbitrary detention and other serious human rights violations in Libya.

4. In order to ensure that Frontex carries out its operations in a manner consistent with the EU Charter of Fundamental Rights (including the right to asylum), the European Convention on Human Rights, and other norms of international law, the EU Ombudsman should recommend that Frontex re-examine and revise its interpretation of key concepts such as the notion of distress as well as the scope of its own competencies.

Recommendations for immediate steps by Frontex

Frontex should:

1. Conduct an Article 46 assessment of aerial surveillance in the Mediterranean Sea.
2. Alert all vessels in the vicinity of a boat in need of assistance, based on a broad definition of distress that considers all overcrowded, unseaworthy boats in open waters to be in peril.
3. Cooperate with nongovernmental rescue ships, including by alerting them of all overcrowded, unseaworthy boats detected by aerial surveillance or any other means.
4. Ensure its aerial assets remain at the scene when they detect boats to monitor their situation and document rescue or interception operations, unless called away by other emergencies or forced to stop because of force majeure, in which case Frontex should evaluate whether feasible to deploy other assets.
5. Implement effective measures to fulfill its [obligation to assess](#) whether its activities, including aerial surveillance, violate fundamental rights. This should include being more transparent and accountable about its operations.
6. Deploy their own ships in areas where they deploy aircraft so they can respond directly and quickly to situations of distress.