



**Submission to the “own-initiative” inquiry of the European Ombudsman
concerning the means through which Frontex ensures respect for fundamental
rights in joint return operation**

Inquiry no. OI/9/2014/MHZ

2 April 2015

1. INTRODUCTION

The ICJ welcomes the invitation of the Office of the European Ombudsman to submit its feedback as part of its own initiative inquiry “concerning the means through which Frontex ensures respect for fundamental rights in joint return operations.” Of the questions posed in the inquiry, the ICJ has elected in this response to answer aspects of questions 3, 4 and 9, in light of its particular legal expertise in the area of migration and border control. Since Frontex has already issued an opinion responding to the first questions issued to it by the European Ombudsman, the ICJ will also address that response where relevant. It should be noted that the ICJ is a member of the Frontex Consultative Forum on Fundamental Rights. However, this submission is not sent in the ICJ’s capacity as a member of the Consultative Forum and does not necessarily represent the views of the Forum.¹

Finally, the ICJ notes the statement by Frontex in its opinion that it is currently revising the document “Best Practices for Joint Return Operations by Air Coordinated by Frontex”. Since neither the revised document nor its previous version appear to have been published online, the ICJ will not refer to it or its content in this submission. It emphasises, however, that this document should be made public.

2. ANSWERS TO THE OMBUDSMAN QUESTIONS

3. Frontex co-ordinates relatively few JROs, with Member States carrying out the vast majority of forced return operations. Given its co-ordinating role, however, what more do you think Frontex could do to promote among the Member States minimum standards and good practices that ensure respect for human rights and the dignity of returnees? Do you consider that the Frontex Code for joint return operations and its Best Practices for JROs are sufficient in this respect, specifically as regards standards on fitness to travel and medical examination, the use of coercive measures and the return of vulnerable people, in particular families with children?

4. Do you consider that the Code and Best Practices provide for sufficient safeguards in terms of respect for human rights, dignity and the welfare of returnees on board when applied to so-called “Collecting JROs”?

9. Do you have other comments on Frontex opinion? Please be as concise and concrete as possible.

The Code of Conduct for Joint Return Operations Coordinated by Frontex (“the Code of Conduct” or “the Code”),² while a considerable improvement on the previous absence of regulation, does not fully reflect Frontex’s duties in the field of joint return cooperation, organization and execution.

¹ This submission respects the principle of collegiality, the confidentiality of the working sessions of the Consultative Forum¹ and therefore does not refer to any information or discussion held or acquired in the context of the Forum.

² Available at http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf .

Paragraph 3 of the Decision of the Executive Director no. 2013/67, adopting the Code of Conduct, states that the Code reflects, among other things, "the principles contained in the Charter of Fundamental Rights, [the Return Directive], ... Council of Europe's Twenty guidelines on forced return, United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, United Nations Code of Conduct for Law Enforcement Officials ..." and EU law instruments other than the Charter. Although appreciative of this intention to uphold international standards, the ICJ regrets that the Code of Conduct does not fully reflect these international law instruments. As will be explained later below, there are several gaps and inadequacies in the Code's compliance with international human rights law related to joint return operations.

a) Use of force and means of restraint

Article 5.1 of the Code states that the participants of the JRO, whether they are authorities of the Member States (MSs) or others, must "seek cooperation with each returnee at all stages of the JRO in order to avoid, or limit to the minimum extent necessary, the use of force." This encompasses both the Organizing Member State (OMS) and the Participating Member States (PMS).

Article 6 provides that "coercive measures may be used only when strictly necessary on returnees who refuse or resist removal, or in response to an immediate and serious risk of the returnee escaping, causing injury to herself/himself or to a third party, or causing damage to property. The use of coercive measures must be proportional, not exceeding reasonable force, and with due respect to the returnee's rights, dignity and his/her physical integrity. Coercive measures likely to compromise or threaten the possibility of the returnees to breathe normally must not be used. ... The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security."³

The reference to avoidance or limitation of the use of force, while appreciated, is not sufficient to reflect the principles contained in the relevant UN instruments. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles) state, in article 15, that officials must "not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened." Article 9 prohibits the intentional lethal use of firearms unless "strictly unavoidable in order to protect life." The jurisprudence of the European Court of Human Rights on the right to life (article 2 ECHR) provides that the use of force that "may result, as an unintended outcome, in the deprivation of life ... must be no more than "absolutely necessary"⁴ for the achievement of one of the purposes set out in" article 2 ECHR, namely "defence of any person from unlawful violence; ... effect a lawful arrest or to prevent the escape of a person lawfully detained; [or] action lawfully taken for the purpose of quelling a riot or insurrection."⁵ The UN Code of Conduct for Law Enforcement Officials (UN Code of Conduct) stresses that officials "may use force only

³ Article 6.1-4, Code of Conduct.

⁴ *McCann and others v UK*, ECtHR, GC, application no. 18984/91, Judgment of 27 September 1995. See further jurisprudence in the European Court of Human Rights factsheet on the right to life available at http://www.echr.coe.int/Documents/FS_Life_ENG.pdf.

⁵ Article 2.2 ECHR.

when strictly necessary and to the extent required for the performance of their duty.”⁶ The Council of Europe’s Twenty Guidelines on Forced Return state that the “only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used. ...”⁷

It is established in the jurisprudence of the European Court of Human Rights, in clarifying the scope of the obligation of the prohibition of torture and inhuman or degrading treatment or punishment under article 3 ECHR, that “[i]n respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.”⁸ This force may be used “only if indispensable and must not be excessive Recourse to physical force which has not been made strictly necessary by the detainee’s own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.”⁹

The ICJ considers that the approach taken in the Code of Conduct with reference to the generic use of force, which includes but is not limited to means of restraint, is reductive and does not reflect the standards set out in UN and Council of Europe standards and in the jurisprudence of the European Court of Human Rights. The ICJ stresses, in particular, that the meaning and scope of obligations of EU institutions, bodies and agencies such as FRONTEX under the EU Charter of Fundamental Rights (including its article 4 prohibiting torture and inhuman or degrading treatment or punishment) must accord with the European Court of Human Rights. This is made clear in article 52 of the EU Charter.¹⁰ The European Court, through its jurisprudence, definitively and authoritatively defines and clarifies the meaning and scope of the obligations under the European Convention on Human Rights.

Article 5.1 of the Code refers to the need to seek cooperation with a returnee to avoid or limit the use of force. However, it does not establish a standard on the use of such force, that would be useful for the officials participating in a JRO. There is a difference between requiring that officers participating in a JRO seek cooperation of the returnee to avoid or limit the use of force and the clear statement that force can be used only when strictly necessary and in a way that is proportionate and in accordance with human dignity (article 1 EU Charter), the right to the integrity of the person (article 3 EU Charter) and the prohibition of torture and inhuman or degrading treatment (article 4 EU Charter), and that

⁶ Article 3, UN Conduct of Conduct for Law Enforcement Officials.

⁷ Guideline 19.1 and 2.

⁸ Vladimir Romanov v Russia, ECtHR, Application no. 41461/02, Judgment of 24 July 2008, para 57, citing see Sheydayev v. Russia, no. 65859/01, § 59, 7 December 2006; Ribitsch v. Austria, judgment of 4 December 1995, Series A no. 336, § 38; and Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004. See also, Eur. Ct. HR (4th sect.), *Berlinski v. Poland* judgment of 20 June 2002 (Appl. No. 27715/95 and 30209/96), at para. 59-65.

⁹ Vladimir Romanov v Russia, ECtHR, Application no. 41461/02, Judgment of 24 July 2008, para 63, citing Ivan Vasilev v. Bulgaria, no. 48130/99, § 63, 12 April 2007.

¹⁰ Article 52.3, EU Charter : « In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

lethal force may be used only when absolutely necessary to achieve one of the purposes of article 2 ECHR, in compliance with the right to life under article 2 EU Charter. Article 5.1 does not reflect these obligations under international and EU human rights law.

These standards are, on the other hand, contained in article 6 of the Code, which refers to means of restraint of a returnee. While a reference to these standards in this context is indeed appropriate, it does not make the Code accord with international and EU law, because means of restraint are only one way in which force may be used against the returnee. The ICJ therefore recommends that article 5.1 the Code of Conduct be amended to include the obligations of participating officials to respect the principles of strict necessity, proportionality, and respect for dignity of the returnee, as well as the right to physical integrity and the prohibition on inhuman or degrading treatment or torture in relation to all aspects of the use of force in JROs, and not only to measures of restraint.

Article 5.2 of the Code states that 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.” The ICJ is concerned that nowhere in the Code is it specified what procedure should be made available for such a complaint and how it should be followed up to ensure that an effective remedy and appropriate reparation are afforded to the returnee if the allegations are found to be justified. Furthermore, the ICJ considers that there is no reason to limit such a complaint mechanism to allegations of ill-treatment. Rather, full implementation of the right to an effective remedy (article 47 EU Charter, article 13 ECHR, article 2.3 ICCPR) requires that it should extend to all violations of rights under the EU Charter occurring during a return operation. Finally, the ICJ notes that the reply by Frontex to the Ombudsman in its opinion that “[t]here has been no complaint launched in relation to a JRO coordinated by Frontex so far”¹¹ does not contain an assessment of the reasons that there have been no complaints. One reason for the absence of complaints may be lack of information about the complaints process. More empirical evidence from Frontex and participating MSs is needed to assess the proper implementation of article 5 of the Code.

Article 6.4 and 5 of the Code operationalize the legal standards on the use of coercive measures. They say that the “OMS and Frontex decide on a list of authorized restraints in advance of the JRO. This list must be distributed to relevant PMSs prior to the JRO. ... No PMS is required to use coercive measures not allowed under its national legislation even if those measures are accepted by the OMS and Frontex for that particular JRO.”

In its opinion in relation to the replies to question 3, Frontex states that the “Frontex Code for JROs does not serve as a definitive list of authorized/prohibited restraints as this list can vary amongst JROs.” It would, however, be useful if Frontex could list those restraint techniques to which it would never agree in a JRO, since according to article 6 of the Code, Frontex agreement is necessary to decide upon the list of admissible restraint measures. In the absence of such detailed information, it is not possible to evaluate the operational impact of article 6 and the role Frontex envisages for itself in ensuring that the human rights enshrined in the EU Charter of Fundamental Rights are fully respected in a JRO.

¹¹ Question 4, p. 3.

Finally, the ICJ notes and shares the position of the Committee for the Prevention of Torture of the Council of Europe 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.”¹²

b) Training and identification of escorts

Article 8.3 of the Code states that “[e]scorts are carefully selected and trained taking into account their particular functions in the JRO.” This standard does not explicitly require that all escorts involved in a JRO must have undergone general human rights training and/or specific human rights training related to their assigned task. The ICJ considers this to be a major gap in the implementation of human rights guarantees as enshrined in the EU Charter in a JRO coordinated by Frontex.

Article 9 states that the “participants should be identifiable and fully distinguishable from returnees. For this purpose official vests, armbands, badges or some other distinguishing signs are required to be worn while on duty.”

The ICJ is concerned that this provision of the Code does not oblige participants in the JRO to have distinct and individual identification signs (whether numbers, codes or names) that allow for their individual identification, whether directly or indirectly. The Council of Europe’s Twenty Guidelines on Forced Return provide that “members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.”¹³ It is worth noting that the explanatory report to the Guidelines states that this provision could be implemented by identification “by name or they could have their name or a number indicated on a badge.”¹⁴

The ICJ considers that individual identification is essential to ensure accountability and an effective remedy for human rights violations occurring in a JRO. Furthermore, no security or privacy reasons can be put forward against such an arrangement, since systems of individual codes or numbers can well ensure the protection of these rights of the escort personnel. Without this guarantee and condition to the carrying out of a JRO coordinated by Frontex, the Code does not reflect nor respect the Council of Europe Twenty Guidelines on Forced Return and is not in line with the positive obligation to investigate alleged violations of several rights enshrined in the EU Charter, including the right to dignity (article 1), to life (article 2), to personal integrity (article 3) and not to be tortured or subject to inhuman or degrading treatment or punishment (article 4). This omission is also in breach of Frontex’s duties under the right to an effective remedy as enshrined in article 47 EU Charter.

c) The right to an effective remedy and reparation

The ICJ considers that a primary weakness of the Code of Conduct is the lack of proper standards, guarantees and guidelines in relation to the returnee’s right to an effective

¹² CPT/Inf (2015) 14 , para 32.

¹³ Article 18.4, Twenty Guidelines on Forced Return.

¹⁴ Article 18.4 – para. 1 , Explanatory Report to the Twenty Guidelines on Forced Return.

remedy and reparation, as enshrined in article 47 EU Charter, article 13 ECHR and article 2.3 ICCPR.

While it is positive that all participants in a JRO have an obligation to report violations of fundamental rights that have occurred in a JRO,¹⁵ this is not a substitute for a proper and effective procedure to ensure that the returnee him- or herself has an effective remedy and reparation for any such human rights violation. Indeed, it is of concern that, in its opinion to the EU Ombudsman, Frontex states that “[n]o allegations of violation of fundamental rights have been received regarding return operations via the Frontex Serious Incident Reporting System.”¹⁶ It is furthermore of concern that Frontex reports a 2011 incident, prior to the elaboration of the Code of Conduct, regarding the use of force by escorts, reportedly because of resistance of the returnee, that allegedly led to the returnee bleeding from facial injuries. Frontex reports that the national public prosecutor decided not to prosecute those involved in the incident,¹⁷ without mentioning the possibility that a human rights violation might have occurred or that an inquiry should have launched in that respect. It is indeed worrying, in relation to the human rights internal culture of Frontex, that this episode is referred to as one of three situations “regarding non-compliance by returnees.”¹⁸

Articles 17 and 18 provide:

Article 17 - Investigation procedure and Right to be informed

- 1. If the violation was committed by a person assigned by a MS, the facts must be communicated to the competent national authority concerned that provides for an effective and independent investigation.*
- 2. The authorities of the MS are expected to inform Frontex of the conduct and results of the investigation.*
- 3. The Frontex Executive Director may request information on the conduct and results of the investigation and may decide to inform the Management Board accordingly.*
- 4. The returnee may request information and should be informed of the measures taken and his/her possible right to compensation.*

Article 18 - Sanctions

- 1. In accordance with Article 9 of the Frontex Regulation, Frontex’ financial support to MSs for the JRO is conditional upon full respect of the EU Charter of Fundamental Rights.*
- 2. In the case of violation of this Code by a Frontex staff member, the Frontex Executive Director takes appropriate measures in accordance with the relevant applicable rules.*

While the European Union, through Frontex, does not bear primary responsibility for human rights violations in a JRO, unless the violation is caused or linked to actions of a Frontex employee on whom the Agency has authority or control, it may often have ancillary responsibility for aiding or assisting in a human rights violation, the OMS or the PMS, by

¹⁵ Article 16 Code of Conduct.

¹⁶ Question 7, p. 4.

¹⁷ Question 7, p. 4.

¹⁸ Question 7, p. 4, first paragraph.

action or by omission.¹⁹ Finally, it is under the obligation to do all it can to fulfill the right to an effective remedy (article 47 EU Charter) at least whenever an agency of the EU is involved and EU law is applied, which is the case in Frontex coordinated JROs.

The ICJ considers that the provisions related directly to Frontex in articles 17 and 18 are insufficient to satisfy these obligations under EU and international law. The power of the Executive Director, in article 17.3, to request information on the investigation and to inform the management board is discretionary. A proper remedial mechanism requires that the Executive Director must request information on the conduct and results of the investigations, and, where relevant, prosecution and sanctions, in case of human rights violations taking place or alleged in a JRO. This is particularly compelling in light of the fact that, according to article 9.1 of the Frontex Regulation, and as recalled in article 18.1 of the Code, Frontex “shall ensure that in its grant agreements with Member States any financial support is conditional upon the full respect for the Charter of Fundamental Rights.” Without any such binding, rather than discretionary, mechanism of follow-up to investigations, prosecution, sanctions and their effectiveness, Frontex is not in a position to assess whether the right to an effective remedy and reparation is ensured for returnees included in their JRO. As such, they cannot evaluate and abide by their duty under EU law to base their financing of JROs on the **full** respect of the EU Charter. The Frontex opinion on this issue states 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.”²⁰ The ICJ considers that this answer is not in line with Frontex’s obligations under its own founding regulations which states that Frontex **must ensure** that support is conditional upon full respect of the EU Charter. This obligation entails the undertaking of preventive measures as well as the duty not to finance any operation in which fundamental rights violations are at risk of occurring, for example in light of past experience of violations by personnel of an OMS or PMS.

In general, the Code of Conduct does not include any standard on effective remedy and reparation. Considering that this Code applies also to Member States involved in a Frontex coordinated JRO, and not only to Frontex, this is a major gap in human rights protection. The reference in article 17.4 to information on measures taken and possible compensation, which is not even phrased in mandatory terms (“must”), is insufficient. A provision should be inserted according to which, in the preparation of a JRO, Frontex ensures that OMS and PMS have appropriate effective remedies and reparation mechanisms for any human rights violations that may occur during the JRO. This may also be done prior to any preparation of a JRO by requesting, via the Management Board, that any MS provides a list of these mechanisms with an assessment of their effectiveness. This could later be checked by

¹⁹ In the case *El-Masri*, the Grand Chamber of the European Court of Human Rights found a State responsible for complicity in gross human rights violations because “its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.” See, *El Masri v the former Yugoslav Republic of Macedonia*, ECtHR, GC, application no. 39630/09, Judgment of 13 December 2012, para. 211. Article 14 of the ARIO about aid or assistance in the commission of an internationally wrongful act states that:

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization 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.

²⁰ Question 5, p. 4.

Frontex and discussions can be tabled with those States having remedies or reparations which are considered to be ineffective, with a view to their amelioration. This will also make it easier to communicate such remedies and reparation mechanisms to the individual returnee. This is of course a general assessment about the structure of these mechanisms to be reviewed against the experience in JRO complaints, including on the basis of the follow-up to investigations.

The ICJ hopes that these observations will assist the European Ombudsman in her own initiative inquiry and remains at the Committee's disposal for any information needed.