

Frontex's accountability concerning activities held outside of the EU territory

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Introduction

Briefly introducing the Euro-African Migreurop network which ASGI is a member of, as well as ARCI and Statewatch. Frontex's lack of accountability is a long-standing issue since the agency became operational in 2006, as regards both its activities inside and outside of the European Union.

I won't have time here to develop on the narrative as such and what is transmitted in terms of border management spirit with significant political consequences on fundamental rights, and will try to focus on loopholes and serious shortcomings in monitoring and evaluation + potential liability issues (I'm not a legal expert though).

Migreurop initiated the Frontexit campaign in 2013, a collective of 18 NGOs located in Europe and in Africa aiming to demonstrate Frontex's detrimental impact on fundamental rights through research and documentation, possibly through strategic litigation (but not successful so far) and advocate for the agency's mandate to be annulled. Frontexit considers that fundamental rights violations are inherent to Frontex's mandate. A large focus of the agency's work has been given over the past 3 or 4 years on Frontex's non-EU deployments via access to information requests, field observations (West Africa esp. Senegal, and Turkey), and analyses on external cooperation, external cooperation in Africa specifically. Findings in a nutshell are the following:

- no access to information for non-EU/non-EU registered claimant
- hardly any transparency: working arrangements have only been made available on Frontex's website as of 2012 or 2013, before that it's thanks to Statewatch – which had gained access to WA via access to information requests – which had made them public on its website.
- no oversight over Frontex's external activities on the ground that cooperation is purely technical (1st Frontex report on external cooperation accessible to the European Parliament in 2017 only)
 - ➔ all these elements sharply contrast with ever growing external deployment including via the use of bilateral cooperation (Senegal/Spain, MOR/Spain, Germany/EG, Italy/Sudan)

State of play of activities outside of the EU

- Deployment of Frontex Liaison Officers (Belgrade, Niamey, Ankara). Recruitments are in process for FLO in Dakar and Tirana. Frontex Liaison Officers are based within the premises of the EU delegations overseas and cooperate with Member States' Immigration Liaison Officers as well as EU Liaison Officers.
- Working arrangements signed between Frontex and the competent authorities in charge of border management in 18 countries at present: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, the former Yugoslav Republic of Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine and the United States

- Status agreements i.e. international agreements signed by the EU and the non-EU country: Albania (2019)
- Technical assistance, trainings and capacity-building
 - Risk analysis, data collection
 - Border guard tasks such as identification of document fraud
 - “protection-sensitive migration management” in cooperation with EASO/UNHCR/IOM (Western Balkans)
 - strengthening their identification, registration, referral, asylum systems and return mechanisms (Western Balkans)
 - support to border management outside of the EU, e.g. temporary at Belgrade airport in support to Serbian border guards during the temporary visa liberalisation for Iranian nationals in 2018 (information shared in Frontex’s 2018 annual report on external cooperation).
- Regional risk analysis networks (“RAN”)
 - 31 African countries: Algeria, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Congo DRC, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, South Sudan, Sudan, Somalia, The Gambia, Togo, Tunisia
 - Sept. 2019: joint workshop in Algeria on risk analysis and cross-border crime, in cooperation with the African Union Mechanism for Police Cooperation (in the presence of representatives from Gambia, Ghana, Guinea, Mali, Niger and Nigeria)
 - 2018: Support to Italian/Egypt cooperation especially via the support to the International Training Centre at the Egyptian Police Academy (ITEPA), an EU-funded project of Italy and Egypt that entails the delivery of a series of training courses to border police officers from 22 African countries in Cairo
 - 2019: opening of “risk analysis cells” in Niamey and Dakar, and further cells are in prospect in Ghana, Guinea, Kenya, Nigeria and Gambia. Risk analysis cells provide a space for local analysts to be trained by Frontex on collecting data related to cross-border crime (EU funding via DG DEVCO).
 - 5 Western Balkan countries
 - 6 countries in Eastern Europe (EU funding: European Neighbourhood Instrument/DG NEAR): Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine
 - Turkey-Risk Analysis Network in the framework of the EU-Turkey declaration
- Evolutions in the past few years:
 - Working Arrangements may, for some of them, be turned into Status Agreements (most probably in Western Balkan countries) i.e. international agreements
 - Growing resources dedicated to return

- Increasing role of non-EU staff in Frontex’s activities outside of its territory, not only third-country observers but also escorts during “collecting return operations” since 2016 mandate (the means of transport and escort officers are provided by the non-EU country of destination who are trained, with Frontex return monitors on board). In 2015, the EU Ombudsman had raised serious liability concerns during “collecting return operations”.
- Increasing share of funding dedicated to external cooperation via DG NEAR and DG DEVCO
- Providing equipment to non-EU countries:
 - “To strengthen such collaboration, the EU has provided Tunisia with vessels, thus starting the cooperation within the framework of the Frontex agency and the SeaHorse Mediterranean Network project” ([ARCI, 2017](#))
- What’s foreseen in the new draft Regulation on Frontex:
 - Operational if not executive powers outside of the EU
 - Uncertainty as to the possibility of 3rd c. to 3rd c. return: although the political agreement between EU institutions resulted in withdrawing that possibility from the agreed final version of the draft Regulation, doubt remains which will have to be double-checked in the final version (see esp. Art 60(1) and 74(7))
 - Exchange of personal data with third countries (so far prohibited!)
 - Europol agreements regarding exchange of personal data as part of countering terrorism and cross-border crime with South and South East Mediterranean countries (except Libya) are currently in discussion between the Commission and third countries (oversight of the European Parliament at the very end of the process only). Europol and Frontex are cooperating (interoperability) via a set of cooperation agreements including on personal data; therefore, the forthcoming Europol agreements with Mediterranean neighbours should be looked at as potentially providing greater avenue for access to personal data by Frontex.

Human Rights at risk

Let’s start by citing the EU Ombudsman in her 2015 enquiry on Frontex’s return operations according to whom “By their very nature, forced return operations have the potential to involve serious violations of fundamental rights”.

- Collective deportations even if safeguards are supposedly here to prevent it
- Infringement on non-refoulement cf. deportation to Afghanistan for ex.
 - About this, [UNHCR July 2019](#): « Deportations from Hungary to Afghanistan: "In view of this situation, UNHCR has advised the European Border and Coast Guard Agency, Frontex, to refrain from supporting Hungary in the enforcement of return decisions which are not in line with International and EU law."
- Human rights monitoring mechanisms are not the same for pre-accession countries, countries part of the neighbourhood policy, and others. Same for data collection.

- Risks of ‘push-back’ regarding maritime interceptions (as argued in the [Frontexit analysis mostly drafted by the Progress Lawyers Network](#)): Frontex’s mandate now includes Regulation 656/2014 on maritime interceptions during Frontex operations which leaves open the possibility to re-route or disembark intercepted migrants in the nearest port of safety without explicitly saying that it should be an EU port.
- Risk analysis are suffering from the same methodology weaknesses than other reports (lack of transparency, partiality)
 - o No mention of human rights violations in countries of cooperation including AFIC (Sudan, Algeria, Morocco)
 - o Very oriented political statements // counter-terrorism:

“It is well known that Kenya’s refugee camps have been used as safe havens to harbour operative and plan attacks.” ([AFIC 2017](#), Nov. 2018)

“The use of technology and intelligence in migration management and more efficient law enforcement is expected to have a significant impact on border security. Moreover, common terrorist profiles and alert lists have been established as a means of fighting terrorism” (ibid)

- o Identification of “hot spots” such as Morocco and Tunisia without substantiation (ibid)
- Infringement on the right to leave any country
 - o Deployment in non-EU countries aiming to stop irregular immigration but de facto resulting in supporting non-EU countries stopping unauthorised emigration, which contradicts Art.13 UDHR and Art. 12 ICCPR
 - o “While this downward trend mainly resulted from the development reported from the main departure areas in Libya and its territorial waters, the flow of migrants transiting in Niger has also been curbed over the course of 2017. This was directly associated with a wide set of law-enforcement measures implemented by Niger whose aim is to control irregular migration of ECOWAS migrants going into Libya of Algeria without valid documentation” ([AFIC 2017](#), Nov.2018)
- Use of force : Reinforced risk with the presence of non-EU staff not bound by the same legislation and not trained the same way (ex. [The Parliamentary Assembly of the Council of Europe](#) recently called on Frontex to suspend its operations at the Serbian-Hungarian border because of systematic human rights violations occurring there.)
- Examples of potential human rights violations in countries covered by the project:
 - o Deportation flights to countries where the situation is unsafe for many (inter alia Egypt, Afghanistan)
 - o Libya: Libyan border guards reinforced capacities
 - o MOR/TUN/EG: Europol agreements and exchange of personal data
- Issues in relation to sovereignty in draft mandate (55(2)): “The Agency shall deploy members of the European Border and Coast Guard standing corps as members of the border management teams, migration management support teams, return teams in joint operations, rapid border interventions or return interventions or any other relevant

operational activities in the Member States or in third countries. **In accordance with Article 83, such activities can only be carried out with the authorisation of the Member State or the third country concerned. The actual size of the deployments of the standing corps shall depend on the operational needs” [add-up by the EP]**

- Issues with extensive executive powers upon external deployments based on draft mandate under discussion: 56(5) ‘l’ and ‘h’

Accountability so far

- Weak preventive human rights monitoring mechanisms:
 - Codes of Conduct (including on return, available on Frontex’s website) are not binding and their applicability to non-EU staff is questionable even though they are meant to apply to ‘all persons involved in Frontex’s activities’
 - No preliminary assessment of the situation in non-EU countries, as pointed out by the EU Fundamental Rights Agency ([2018 opinion on the draft Regulation](#), recommendation No.22)
- Weak monitoring mechanisms:
 - Evaluation by the Executive Director only, and only for operational activities
 - No control by the European Parliament of working arrangements because they are “technical arrangements”
- Frontex staff are hardly involved alone and most of the time, it is the host Member State which will bear full responsibility (e.g. Art. 58(2))
 - Pool of return specialists (Art.31): mix between Frontex staff and agents seconded by Member States
 - No liability for the agency (only Member States) as set forth in Art. 42 & 43 + limited non-contractual liability for the Agency only when staff involved and damaged is proved (Art.60); contractual liability worth looking into?
 - Forthcoming mandate: The standing corps should be composed of four categories of operational staff, namely statutory staff members employed by the European Border and Coast Guard Agency, staff seconded to the Agency by the Member States for long-term durations, staff provided by Member States for short-term deployments and staff forming part of the rapid reaction pool for rapid border interventions.
- In the texts:
 - Management board (Art.26): evaluation of activities but no details as to the applicable criteria meant to guide this assessment which, as often, lies in the hand of the Executive Director (discretion)
 - EP has no oversight (mere questioning) regarding activities in non-EU countries
- External funding: very weak monitoring mechanisms esp. for non-candidate countries

- Presumably DEVE & AFET committees of the European Parliament may monitor
- Also to keep in mind: the establishment of the Neighbourhood, Development and International Cooperation Instrument, a 2021-2027 multi-annual framework where the EP is seeking greater oversight over cooperation programmes, implementation, impact assessment and consultation with relevant stakeholders including CSOs ([recital 47](#)). A very important battle will be fought by the end of 2019 here, suffice is to quote proposed recital 49(a):

“The European Parliament should be fully involved in the design, programming, monitoring and evaluation phases of the instruments in order to guarantee political control and democratic scrutiny and accountability of Union funding in the field of external action. An enhanced dialogue between the institutions should be established in order to ensure that the European Parliament is in a position to exercise political control during the application of this Regulation in a systematic and smooth manner thereby enhancing both efficiency and legitimacy”.

➔ Pb with this document: no explicit mention of EU agencies

- Fundamental rights: charter applicable to all activities but non-binding
- No access to info for non-EU stakeholders even EU stakeholder
- Consultative Forum (see Consultative Forum 2018 annual report):
 - Insufficient staff
 - “In spite of the team’s hard work and dedication, the work of the Fundamental Rights Office continues to be compromised in areas such as monitoring of operations, handling of complaints, provision of advice on training, risk analysis, third country cooperation and return activities”
 - “Frontex advised against the visit to Niger on security and operational grounds”
 - 2018: “Delivery of Advice on the Fundamental Rights Implications of Frontex Cooperation with Third Countries” + visit with Frontex Liaison Officers in Western Balkans and in Warsaw with the FLO based in Niger
 - Lack of information and of timely access to it
- Ombudsperson: so far no enquiry on EU’s external cooperation
- Complaint mechanism
 - Weak, administrative and internal disciplinary procedure when Frontex staff involved
 - Restricted to Frontex operations i.e. exclusionary of piggy-bagging activities or access to personal data

Taking action

- First and foremost : Frontex will never be in the frontline of entities held accountable. The most to be hoped for (but it never translates in practice) is that Frontex staff face internal disciplinary sanctions i.e. individual responsibility and not Frontex's responsibility. More likely is that a judicial procedure is launched
 - ➔ As long as the mandate will not be annulled (many reforms in the previous years have not substantially changed the situation) the problem will remain
 - ➔ It is highly problematic that none of the EU agencies can be effectively held accountable before the ECHR or the ECJ
 - ➔ A ground issue: any external element of public policies at EU level is highly reliant on Member States' sovereignty, even more than within the EU
 - ➔ It should also be stressed that the hypocrisy underling Frontex's external action (full responsibility of Member States/host states; technical matters) is illustrative of the European Commission's unwillingness to confront Member States on fundamental rights issues

In the meantime, before the mandate is annulled – if ever – some pathways for damage limitation may be worth exploring. But the question is: doing so, aren't we losing sight of justice, by over-'judicialising' our approach to make the agency accountable (with the risk of improving its practices)?

- Research / questioning including post-deportation monitoring but it's very challenging
- Be careful about bilateral agreements, mobility partnerships etc.
- Information request on Frontex fundamental rights trainings in relation to ext action
 - "In 2018, 37 specialists in the area of fundamental rights were certified by Frontex after completion of Frontex fundamental rights training for border guards. In addition, four of them were certified as Frontex trainers" (Consultative Forum 2018 annual report)
- Collect info outside of EU including regarding risk analyses, data collection
- Bids on (quasi)military equipment
- Interest of the child and return operation: ask for information on how many under-age migrants were returned
- Binding oversight and compulsory report on a regular basis on activities (as opposed to the technical argument always brought forward to avoid parliamentary oversight)
 - Possibility to use the oversight mechanisms via European Parliament's DEVE and AFET committees
 - Opportunity with [Dec. 2018](#) European Parliament LIBE committee's request following the latest cooperation agreement with Albania

- ➔ Human rights impact assessment should PRECEDE any conclusion of cooperation agreement between Frontex and non-EU countries. Attention: this does not mean a human rights impact assessment of the cooperation as such, but an IA of the human rights situation in the country. Still, a welcome point echoing a long-standing recommendation from [Frontexit](#)
 - Human rights impact assessment (possibly using the EU delegations internal mechanisms even if they are non-binding and soft)
 - External funding: issue with weak human rights monitoring mechanisms
- Strategic litigation on forthcoming mandate and/or current activities? Need individual cases..
 - European courts cf. extra-territoriality of art.3 ECHR
 - Council of Europe incl. for Turkey to use possible ground-breaking case-law to be reproduced on non-CoE countries of deployment?
 - Outside of European courts: Africa, national courts in African countries, UN Mechanisms (UPR Germany in 2023, on Morocco in 2022, on Egypt and Italy in 2024)