

## THE ABSENCE OF DEMOCRATIC OVERSIGHT OVER FRONTEX'S EXTERNAL COOPERATION

- Note addressed to Members of the European Parliament -

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Since it was established in 2004 to "promote, coordinate, and develop European border management", the EU's border agency Frontex has seen significant growth in both its activities and its means. Its annual budget reached 97 million Euros in 2014 with a provisional budget over 114M Euros in 2015.

The agency became operational in 2005 and is tasked with, inter alia, the organisation of joint return flights and the coordination of border control operations at the EU's external borders (land, maritime and air borders). **It can also sign agreements with 'third countries' (i.e. non-EU states) and with international organisations (art. 14 of its mandate).** Frontex has set up **risk analysis networks with non-EU states** to collect and exchange information with other agencies (Europol for example) and plan operations.

The members of the [Frontexit](#) campaign are concerned by the lack of transparency in and the absence of democratic oversight over the agency's external cooperation with non EU states. They argue that such practices reinforce the risk of human rights violations, which are inherent to Frontex's activities, away from EU territory.

### 1- Frontex and non-EU states: a constellation of cooperation

- **Frontex and "working" arrangements with non-EU states**

To date, Frontex has concluded working arrangements with 18 non-EU countries,<sup>1</sup> including Turkey, Belarus and Nigeria. In April 2013, negotiations were pending with seven other countries.<sup>2</sup> Working arrangements are signed between Frontex and non-EU states' competent authorities.<sup>3</sup> In most cases, these agreements mandate the participation of the non-EU state in joint operations (joint return flights, land border operations etc., as observers); in training programmes; and in information exchange and risk analysis.

- **Other forms of external cooperation: risk analysis networks and bilateral cooperation between states**

**- Multilateral cooperation: risk analysis networks and participation in EU/Member State projects**

Frontex has set up a variety of risk analysis networks: the Frontex Risk Analysis Network (FRAN) focused on Europe, and three extra-European networks: the Eastern Borders Risk analysis (EB RAN); the Western Balkans Risk Analysis Network (WB RAN); and the Africa Frontex Intelligence Community (AFIC). These networks are used to exchange information and collect data on migrants (age, nationality, etc.) and migration routes.

This data is used to help the European Commission and the Council of the EU identify border management policy priorities and to decide how the agency should operate and where.

Frontex also participates in the Seahorse Mediterranean Network, established in 2013 between Member States from the Northern Mediterranean and North African countries. Seahorse aims to support direct

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<sup>1</sup> In reverse chronological order: Azerbaijan (April 2013), Turkey, Armenia, Nigeria, Cape Verde, Canada, Belarus, Montenegro, the United-States, Bosnia and Herzegovina, Albania, Serbia, Macedonia, Georgia, Moldova, Croatia, Ukraine and Russia (September 2006)

<sup>2</sup> Brazil, Egypt, Libya, Morocco, Mauritania, Senegal and Tunisia

<sup>3</sup> For example Albania's Ministry of Interior, Ukraine's border guard services, or Cape Verde's national police force

exchange of information on "incidents" at sea and the presence of patrols in the area. This includes using satellite imagery to obtain near-real-time information. Seahorse is a sub-regional project of the surveillance network Eurosur (European Border Surveillance System).

### **- External action via bilateral agreements between EU and non EU states**

The agency has also used bilateral agreements between EU Member States and non-EU states as the basis for its work. For example, Frontex has undertaken operations in Senegalese and Mauritanian territory on the basis of bilateral Memorandums of Understanding between those two countries and Spain.

These agreements have allowed Frontex to intervene in the framework of the HERA joint operation, which aims to control so-called irregular immigration from West Africa to the Canary Islands. The joint operation was launched in July 2006 and is ongoing. Over the agency has been involved in operations off the coasts of Senegal, Mauritania, Cap-Verde and Gambia.

## **2- Issues arising from these different types of cooperation**

- **No democratic control**

The working arrangements concluded by Frontex with non-EU states are not subject to European Parliament (EP) scrutiny. The EP is only informed about agreements after they have been signed, is not asked for prior approval of the agreements, and is not empowered to control their implementation. Because they are deemed "technical", these agreements are not considered as international agreements, yet they can have important and potentially detrimental effects on migrants in non-EU countries.

In fact, contrary to what is argued by Frontex, these agreements provide a general cooperation framework whose provisions directly affect migrants (including interceptions prior to entry in the European territory, forced return, arrest).

In September 2012, the [Court of Justice of the European Union criticised the absence of a genuine consultation of the Parliament](#) prior to the adoption of decision 2010/252 on maritime interceptions during Frontex operations. The Court [annulled the decision](#) as it considered that the EP was not sufficiently involved in the legislative process, despite the substantial consequences of the new prerogatives entailed in the Decision on migrants' rights.

Therefore, particularly in an international context, [agreements reached by Frontex should be subject to scrutiny and control by the Parliament before and after their signature.](#)

- **Restricted access to information**

Working arrangements have only been made public on [Frontex's website](#) after repeated requests by the NGO [Statewatch](#). In many cases their publication came years after the agreements were signed.

In 2013, members of the Frontexit campaign sought information<sup>4</sup> on the implementation of working arrangements between the agency and the Serbian authorities. The Serbian authorities have refused to answer our questions concerning information exchange between Frontex and Serbia and cooperation on joint return flights, leaving number issues unaddressed, especially as regards the human rights situation in Serbia.

### **So far, crucial questions remain open:**

1. On what criteria does Frontex base its decision to conclude a working arrangement?
2. Is the human rights situation in these countries taken into account (criminalisation of unauthorised exit, migrants' rights)?
3. What is the role of non-EU observers during joint operations (e.g. with regard to data collection, respect of rights)?

Obtaining further information on Frontex's involvement in other forms of cooperation remains a challenge, for example the agency's role in Seahorse Mediterranean or the three extra-European risk analysis networks.

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<sup>4</sup> Letter to Frontex on 11 March 2013 by Frontexit member organisations

- **Dilution of responsibilities**

Certain forms of cooperation between Frontex and non-EU states have no specific legal basis (at least none that is officially cited), or are developed on the basis of bilateral agreements signed between some Member states and non-EU countries.

**Such practices result in a "grey zone" when it comes to identifying responsibilities in the case of human rights violations.**

Operation HERA is illustrative of this situation: Frontex plays a part in this joint operation on the basis of bilateral agreements between Spain on the one hand, and Senegal and Mauritania on the other hand, to "prevent clandestine emigration to Spain by sea in the framework concerted/integrated border management".<sup>5</sup> [Unofficial translation]

According to statements made in 2011 by the Spanish ambassador to Senegal,<sup>6</sup> neither Frontex nor EU states involved in HERA can be held accountable in the case of human rights violation(s) or violence perpetrated against migrants outside of the EU's external borders. As a consequence, the responsibility is fully that of Senegal or Mauritania, through their agents directly involved in the operations.

- **Risks of human rights violations**

#### **In working arrangements**

Working arrangements establish the framework for operational interception operations and exchange of information with non-EU states. These activities may infringe on the human rights of migrants, in particular:

- The right to leave any country including one's own: Art. 13 Universal Declaration of Human Rights – UDHR, Art. 2 European Convention on Human Rights - ECHR
- Right to seek asylum: Art. 14 UDHR, Art. 18 EU Charter of Fundamental Rights
- Non-refoulement principle: Art. 19 EU Charter, Protocol 4 art. 4 ECHR (prohibiting collective expulsions)
- Right to effective remedy: Art. 8 UDHR, Art. 47 EU Charter, Art. 13 ECHR

Since the recast of the agency's mandate in 2011 and the establishment of a fundamental rights strategy by Frontex, working arrangements have included a fundamental rights clause (pursuant to point 15.2 of [Frontex's action plan](#)). However, this clause is not binding since Frontex does not consider these arrangements as a fulfilment of international obligations but as purely technical documents.

#### **Cooperation with countries with poor human rights records**

Frontex is involved in Libya in the framework of the EUBAM mission (European Border Assistance Mission). Although the EUBAM has been temporarily [put on hold](#) since July 2014 due to the instability in Libya, the agency has been involved in training border guards, coast guards and border police officers over the past few months. The degree of training and competence of these agents on fundamental rights is unknown.

Many people who entered Libya irregularly have been forcibly removed (25,000 persons between May 2012 and May 2013 according to [Amnesty International](#)). EUBAM, including through Frontex, thus increases the risk that migrants and refugees are detained in Libya and subsequently deported. The agency has also stated, in the [AFIC 2013](#) report, that one of the priorities in North Africa would involve "*balanc[ing] the increased SAR capacity with more effort to prevent unauthorized departure (in full respect of the non refoulement principle) in particularly from Libya.*" (p.62). This action, as such, would **infringe on the right to leave any country including one's own**.

A number of issues arise in relation to Operation HERA as well. Many migrants have complained of being

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<sup>5</sup> Memorandum of understanding between Spain and Senegal on the implementation of joint patrol as part of the fight against clandestine emigration by sea through Frontex operation, 24 August 2006, Art. 2

<sup>6</sup> Interview with Franziska Keller (Member of the EP), Sara Prestianni (Migreurop) and Sophie Chabridon (Assistant of H el ene Flaute, MEP) with the Spanish Ambassador to Senegal on 09/02/2011.

wrongly identified as Senegalese, as if they were considered Senegalese by default. It appears this practice is intended to facilitate the removal of migrants from Spain, on the basis of the Spain-Senegal readmission agreement. It has also been reported that migrants lack information on how to access asylum, and that many could not access an interpreter or a lawyer.<sup>7</sup>

Finally, [in a report from 2013](#), the EU Fundamental Rights Agency identified 8 countries in the Southern Mediterranean where unauthorised exit is criminalised. This is a breach of the right to leave any country, enshrined in the UDHR. **All these countries are current or prospective partners of Frontex.**

### **The right to the protection of personal data at risk**

Frontex is not allowed to transmit personal data to non-EU states (Art. 11C6 of its mandate). However, non-EU states are free to transmit information, including personal data, to the agency. Such information exchange may potentially target non-EU nationals who might be arrested during joint operations conducted at the border of a non-EU country party to a working arrangement.

Information collected by border control authorities in non-EU countries is also used in Frontex's risk analyses. Yet no information is publicly available on the methodology followed by partner countries to collect [information](#). Although risk analyses are de-personalised, they sometimes identify specific groups, e.g. when Roma asylum-seekers from Balkan countries are identified as constituting a "migration risk" (irregular migrants). There is therefore a **substantial risk of discriminatory controls if not ethnic profiling** of these people.

The fundamental rights impact of Frontex's external cooperation has never been monitored or assessed by an EU institution. Despite the concerns over the effects of such cooperation on the fundamental rights of migrants and refugees, this element was absent from the [EU Ombudsman's enquiry](#) in 2012.

## **RECOMMENDATIONS**

- **The European Parliament and national parliaments of partner countries should have access to and control working arrangements, given their political impact.** MPs/MEPs must give prior approval to their signature and control their implementation.
- **The European Parliament and national parliaments should call for greater transparency on European and extra-European risk analysis undertaken by Frontex.** Information should be accessible on the way these networks function, the data sources used, the way information is exchanged as well as the methodology used to feed them into risk analyses.
- **The European Parliament, through the LIBE Committee, should commission a study on Frontex's external cooperation in its different forms** (working arrangements, risk analysis networks etc.)

***Launched in 2013, the Frontexit campaign aims to raise awareness of and denounce the human rights violations in connection with Frontex's action.  
The campaign bring together 19 civil society organisations from Europe and Africa.***

[www.frontexit.org/en](http://www.frontexit.org/en)

<sup>7</sup> Interview with the Guardia Civil Commander Eduardo Lobo on 19 October 2006: Mission report by H el ene Flautre on the situation of migrants in the Canary islands from 16 to 19 October 2006 on Tenerife and Gran Canaria islands, p. 15.