

# Frontex and the Duty to Respect and Protect Human Rights

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The discussion on human rights obligations and potential human rights violations has been part of the history of Frontex ever since the [agency's foundation](#) in 2004. Yet, the focus of the human rights discourse on Frontex is on the protection against human rights violations 'committed by Frontex'. Much less attention, though, is paid to the duty of Frontex to respect and protect human rights in its operations. The [call](#) for streamlining fundamental rights protection into all Frontex operations is, obviously, less likely to gain public attention than a law suit against an EU agency. Mindful of this important gap in the current human rights debate surrounding Frontex, this blogpost will look at both levels of human rights protection and suggest a way forward in light of the agency's extended tasks and competencies.

## I. The tension between human rights and efficient border controls

As its name suggests, the main aim of Frontex is to avoid irregular border crossings of the external borders. At the same time, the mandate of Frontex clearly states that 'it is necessary to act in full respect of fundamental rights' (Recital 1 of the [2019 Regulation](#)). There is thus an obvious tension between a control logic and a human rights based approach to the European migration policy (see also Recital 1 of the [2011 Regulation](#)). This tension became especially visible with regard to Frontex operations in the Mediterranean Sea. In 2008, the former Frontex director, [Ilka Laitinen](#), stated that [Operation Nautilus](#) had [failed](#), because it actually facilitated irregular entries of persons rescued at sea. By its mere presence (and adherence to human rights standards) Frontex was portrayed as a smuggler agency by its own director. Nevertheless, Laitinen admitted in 2013 that Frontex had been involved in push backs at the external borders. Against this backdrop, fundamental rights protection became a topical issue regarding the work of Frontex as a whole.

## II. Embedded of fundamental rights protection?

### II. 1. Enhanced fundamental rights protection over time

Looking at the question both from a temporal and a numerical point of view, the protection of fundamental rights plays an increasing role in the legal basis for the work of Frontex. In 2004, only Recital 22 of [Regulation No. 2007/2004](#) referred to fundamental rights protection in an affirmative way when stating the (politically)

necessary, namely that '[t]his Regulation respects the fundamental rights and observes the principles recognized by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union.' In contrast, the [2011 amendment](#) called in its Recital 1 more generally for the 'development of a forward-looking and comprehensive European migration policy based on human rights' and made reference to 'fundamental rights' over 30 times. More substantially, the 2011 overhaul introduced the obligation of Frontex to develop a [Fundamental Rights Strategy](#) and a [Code of Conduct](#) as well as to install a Fundamental Rights Officer and a respective [Consultative Forum](#). Moreover, the 2011 mandate revision foresaw a possibility to cooperate with the Fundamental Rights Agency (FRA) and ordered that the first evaluation report on the new Regulation includes 'a specific analysis on the way the Charter of Fundamental Rights was complied with in the application of this Regulation.' Following the trend, in the [2016 Regulation](#) the term 'fundamental rights' is used over 100 times and in the [Regulation \(EU\) 2019/1896](#) the term features over 230 times. This development shows increased attention for the protection of fundamental rights but also hints to the fact that this protection remains an unsolved issue within the work of Frontex.

## II. 2. Challenging role and the need for control

The importance and relevance of human rights for Frontex's mandate was highlighted by the CJEU in a judgment of [5 September 2012](#). The Court annulled [Decision 2010/252/EU](#), which concerned the introduction of additional rules governing border surveillance at the external maritime borders, because it was not taken in accordance with the ordinary legislative procedure. The rules regarding the way Frontex may exercise its powers in such operations were, according to the CJEU, inappropriately labeled as an additional implementing measure under Article 12(5) of the [2006 Schengen Borders Code](#). Consequently, the CJEU pointed out (in para. 77) 'that provisions on conferring powers of public authority on border guards [...] mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.'

In 2019, reports by the Fundamental Rights Officer ([March 2019](#)) and the [Consultative Forum](#) ([March 2019](#)) still suggest that the mechanisms aiming at safeguarding human rights, including the [complaint mechanism](#) as well as the incorporation of a fundamental rights component in the [training modules](#), have not been sufficiently effective to guarantee the respect for fundamental rights in all Frontex operations. The same seems to be [less the case for return operations](#), most probably because of the existing system of [forced-return monitors](#), the specific [Code of Conduct for Return Operations](#), and the implementation of [forced return monitoring projects carried out in cooperation with other actors](#).

In light of the persisting human rights protection deficiencies, the European legislator saw the need to stress underlying legal obligations that are rooted inter alia in Public International Law and EU law including but not limited to the [Charter of Fundamental Rights](#). Consequently, recital 24 of the [2019 Regulation](#) states that '[t]he extended tasks and competence of the Agency should be balanced with strengthened

fundamental rights safeguards and increased accountability and liability, in particular in terms of the exercise of executive powers by the statutory staff’.

But even if the need for human rights protection is being widely accepted, including by the Frontex Regulation itself, an apparent implementation gap persists, and, what is more, legal remedies often lack effectiveness and efficiency. The [complaint mechanism](#) (now Article 111 of the [2019 Regulation](#)) is institutionally weak and seldom used as it does not constitute an independent and effective legal remedy. What is more, the unsettled question of competency and effective control makes it difficult to assess [against whom and in which forum to seek redress in the context of operations conducted by Frontex and Member States](#). The attribution and redress issue might become even more complicated if Frontex cooperates more extensively and out of its own competency with [third countries](#). In order to avoid confusion and ineffectiveness of legal remedies, it would be necessary to establish a clear legal remedy scheme for all types of operations in which Frontex is involved. [Lehnert](#) has convincingly [argued for a choice](#) of the persons concerned regarding the addressee of a potential lawsuit in order to facilitate the effectiveness of legal remedies ‘against Frontex’, at least as long as the EU has not joined the [ECHR](#).

## **II. 3. The relevance of human rights protection: returns and border controls**

Fundamental rights protection is most acute in relation to returns and border controls. Concerning the first issue, namely returns, two levels are of particular importance: individual protection and independent monitoring. Regarding the former, the protection against refoulement (Article 19 [CFR](#)) and the protection of human dignity (Article 1 [CFR](#)) form the non-negotiable basis of fundamental rights protection. Yet, other considerations may equally play an important role, including vulnerabilities, the right to family union, or the best interests of children (as stated in Article 5 of the [Returns Directive](#)). The issue of return monitoring features prominently in the [2016](#) and the 2019 Regulations. However, the independence of the return monitoring is at risk given its full incorporation into the legal framework of Frontex and the constitution of the pool of forced-return monitors (Article 51 of the [2019 Regulation](#)). This monitoring task deriving from Article 8(6) of the [Returns Directive](#) would be better placed with the Fundamental Rights Agency ([FRA](#)) in order to ensure independent monitoring.

When it comes to the second issue, namely border controls, the controls themselves have of course to abide by fundamental rights standards. This includes the dissemination of information on protection procedures and potential immediate returns that might follow a non-application (see also [ECHR, Hirsi](#)). Moreover, the surveillance of sea borders may inevitably lead to search and rescue activities. In this context, the agency’s Integrated Border Management ([IBM](#)) gains increasing attention including regarding the cooperation with and work in third countries. From a human rights perspective, [the extraterritorial dimension of IBM lacks clear and workable fundamental rights protection standards](#). As operations in or with third countries are often coupled with the fight against cross-border crimes (smuggling

and trafficking of human beings feature prominently in this area), information is mostly not readily available. In a relatively deferential judgment, the CJEU has on 27 November 2019 declined access to such information for security reasons ([Case T-31/18](#)), which makes it even more complicated to assess and address fundamental rights concerns in these operations.

Moreover, the respect for and protection of fundamental rights should be included into Frontex's work related to risk management, migration management at large, all training activities (not only in specialized courses), and data exchange. As a matter of fact, data protection considerations are heavily underdeveloped in Frontex operations.

### **III. What Frontex has to say about fundamental rights protection**

The [2018 activity report of Frontex](#) suggests that fundamental rights protection is key to the agency's work: Fundamental rights play an important role in the [agency's training curriculum](#) and are currently also one of the [14 strategic action areas of Frontex](#). Yet, the main reference to the protection of fundamental rights and sensitivity towards potential human rights violations is efficiency: Protecting fundamental rights is presented as a means to enhance efficiency in the fight against cross border crimes as it facilitates the detection and identification of victims of trafficking.

Another observation concerns the language used by Frontex in its reports. The aim of respecting fundamental rights is presented as a balancing act between efficiency and (full) human rights protection. For example, 'vulnerabilities' may concern both *borders*—a 'vulnerability assessment' of borders is mandatory according to Article 32 of the [2019 Regulation](#)—and *persons*—inter alia with the aim of identifying vulnerable persons according to Article 3(1)(a) of the [2019 Regulation](#). On a more general note, the use of this language appears to provide borders with personality and they also seem to have some kind of ethical standing and a right to be free from the risk of being violated. Moreover, this personalization is embedded into a security rhetoric that suggests a permanent threat by 'irregular migration and cross-border crimes' at the external borders and is often used in order to justify the use of technology and force.

The only exception to this efficiency-based approach to human rights protection is the principle of non-refoulement. This principle is presented as a non-negotiable key component of all Frontex measures. In practice, this principle also plays a vital role in shaping Frontex operations. Its relevance is further supported by the fact that in 2018, all [three admissible complaints](#) under Article 72 of the [2016 Regulation](#) had at least a non-refoulement component. Looking at the Frontex reports, the main issue brought up by the [Consultative Forum](#) seems to be also the main challenge for fundamental rights in the agencies' daily work: Are fundamental rights (just) one strategic action area or is the protection of fundamental rights a cross-cutting issue that needs to be mainstreamed into all action areas?

## IV. Operationalizing fundamental rights protection —the way forward

In order to operationalize the respect for and the protection of fundamental rights the [Consultative Forum](#) has put forward some institutional considerations: On the EU level, the [Consultative Forum](#) suggests to enhance the involvement of the intra-Frontex human rights protections institutions (like the Fundamental Rights Officer and the [Consultative Forum](#)) and the intensification of intra-EU-cooperation, which in turn includes an important role for [Fundamental Rights Agency](#) as the competent EU agency in this area. On the international level, enhanced cooperation with [IOM](#) and [UNHCR](#) is mentioned as an additional safety and potentially supervisory net with regard to the adherence to international human rights standards.

It is argued in this blogpost that this cooperation should be formalized by cooperation agreements with the external institutions, especially in light of the agency's new remit and geographical scope. From a human rights protection perspective, the cooperation with third countries must be accompanied by a monitoring component as well as a mechanism safeguarding the access to remedies. In a similar vein, it is recommended that impact assessments on fundamental rights should be mandatory for each of these measures as well as for return operations and physical border controls. Yet, formalizing these cooperation schemes requires some profound changes to the way Frontex operates with regard to the independence of monitors, the access to operational data, and the transparency of the operations in general. For the time being, though, strong and functioning legal remedies are underrepresented in most of Frontex activities, as is a fundamental rights friendly mindset.

Therefore, as long as the protection of fundamental rights is seen as an obstacle on the way to efficient and speedy procedures, persons subject to the effective control by Frontex are left with no other choice but to rely on national as well as European courts to bring claims. In the long run, the protection of fundamental rights can only be effectively guaranteed through appropriate procedures if the perceived contradiction of effective border management and rights protection is dissolved and replaced by a different mindset that is less fixated on controls and sanctions.

To conclude, operational practice has significantly enhanced the role of human rights in Frontex operations. While the [2019 Regulation](#) reinforces this development on the regulatory level, the current human rights protection framework remains incomplete, in particular in light of weak or lacking complaint mechanisms. It is difficult to foresee whether the increase of human rights obligations for Frontex keeps up with the agency's ever stronger institutional independence. Currently, the fundamental rights protection framework seems to lack the necessary mechanism for enforcement on different levels, in particular monitoring. As monitoring is a key component to supervise and implement human rights protection, it needs to be coupled with an effective and efficient complaint mechanism which is currently not the case: Human rights standards as well as 'ethical standards' for Frontex operations are (partly) blurred, and enforceable legal protection is lacking not least because the

[complaint mechanism](#) of the [Frontex Regulation](#) that should provide for enhanced protection of fundamental rights is difficult to access and not fully independent as it is administered by the Frontex Fundamental Rights Officer.

Additionally, and even more importantly, a human rights culture needs to be fully established as outlined in the introduction to [Frontex 2019 – in brief](#): ‘We also aim for Frontex to comply with the best EU standards for sound administrative and financial management and EU legal and ethical standards, which include fundamental rights.’ While strengthening the [complaint mechanism](#) to further the role of human rights may serve as a crutch for the distressed protection of fundamental rights, it will never be more than a lame duck if this protection is not fully embedded in the agency’s working culture. So although structural changes remain key to the (future) protection of fundamental rights, a mentality shift within Frontex will make all the difference.

