

What Monitoring for Fundamental Rights at EU Borders?

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The legal and structural problem of fundamental rights protection and its monitoring at the EU's external borders in the context of border police operations is high on the EU political and legislative agenda at the moment. In this blog I argue that a truly independent system for monitoring human rights compliance at EU borders must be established which is the responsibility of state bodies, building on existing entities such as Ombudspersons, National Human Rights Institutions, National Preventive Mechanisms. The border monitoring activities must be coordinated across Member States and the competent monitoring bodies must have access to their sister bodies in relevant third countries.

The [ground-breaking work](#) of Bellingcat, the Washington Post and other news outlets two years ago revealed to an international audience the extent of violence perpetrated by border police against migrants at EU external borders, including Frontex tolerated pushbacks of (presumed) asylum seekers from Greece to Turkey. In this blog, I examine why there has been a proliferation of fundamental rights violations at EU external borders by border police against migrants, including those entitled to international protection, and what can be done about it. The purpose is not to examine, once again, the quality of the evidence of shortcomings, but rather to review the legal framework within which these claims are arising and where effective solutions lie.

What Fundamental Rights Monitoring at EU Borders?

In 2021-2022 I participated in the research and preparation of a [Feasibility Study](#) on how to set up a robust and independent fundamental rights monitoring mechanism at the external borders of the EU. We set out in the Study, published on 4 May 2022, our detailed proposals on how to resolve the gaps and (re-)establish fundamental rights compliant border controls in the EU. This blog is based on that Study, focusing on the problem and the necessary solutions.

The establishment of an EU external border agency, [Frontex](#), in 2004 predated the adoption of the first EU regulation on the crossing of the external border in 2006 (the [Schengen Borders Code \(SBC\)](#)). The failure to incorporate the correct application of the SBC into the duties of Frontex officers has meant that the agency is not bound by the specific duties of the SBC to ensure border police respect dignity and fundamental rights in the exercise of their duties (see Article 7 SBC). Nor is Frontex specifically obliged to ensure that Member State border police respect the duty to provide every person, which is refused entry to the EU, with a form setting out the

reasons for the refusal (a SBC duty: see Article 14 SBC), as well as information about his or her right of appeal and how to exercise it (albeit from outside the EU: Article 14 SBC). The Frontex legal framework has been amended many times but neither have the SBC obligations been incorporated nor have the increasing references to fundamental rights in the text resulted in a diminution of [allegations of violence at EU borders](#). One argument against the integration of the SBC into the Frontex structure is its sui generis geographical scope (including some non-EU states) and its material scope of short stays in the EU. However, it is the cornerstone of EU law on border crossing cross-referenced as regards lawful residence, for instance in the [Return Directive](#), and specifically providing for the application of the [CEAS](#). In so far as the job of Frontex is ensuring border control it is problematic that the main EU legal measure on border crossing, that is to say the SBC, has no specific place in it.

As a number of other contributions in this series demonstrate, the political project to make Frontex a 'real' external border police service, was founded on concerns about the adequacy of external border controls by Member States. The conflation of the arrival of protection seekers who, in international and European law, have a right to seek asylum in the EU and irregularly arriving migrants who may or may not have a ground for seeking entry has led to a demonisation of irregular external border crossing – completely out of proportion to [the figures](#). However, the result of the emphasis to 'control' irregular migration appears to have led to a certain disregard for fundamental rights by national border police in some [Member States](#) and the complicity of Frontex in that regard. While Frontex remains to some extent a simulacrum of a border police force in the [Baudrillard](#) sense, as national and seconded border police are putting on Frontex armbands when performing some of their duties related to Frontex, the consequences of these operations clearly include or involve violence against migrants.

Searching for Fundamental Rights

The introduction of a Fundamental Rights Officer (FRO) in 2011 into Frontex's governing regulation came as a result of concerns about fundamental rights compliance of the agency. However, the FRO was inserted into the Frontex hierarchy as part of the system, dependent on Frontex's Director. Internal monitoring mechanisms are necessary in all state agencies, in particular those which are exercising coercive powers. Employees of such agencies need to have a protected mechanism through which they can, *inter alia*, make complaints about fundamental rights deficiencies. While this is a useful body as a mechanism for internal complaints and notifications, it does not fulfil the requirements of an independent monitoring body as determined by the [Court of Justice of the European Union](#) (CJEU) and [European Court of Human Rights \(ECtHR\)](#).

In the meantime, the EU legislator adopted other measures which have muddied the legal situation. In particular the [Surveillance Regulation](#), adopted in 2014, which deals with sea border controls, yet fails to impose the strict legal requirements of the SBC, such as the guarantee of individual rights. Although the Regulation requires observance of the international law [non-refoulement](#) requirement, there are no

apparent procedural duties on border police, which an individual can rely upon to claim said rights. Further, the creation of a separate Frontex [Regulation on sea borders](#) which is different from the SBC reveals a coherence problem.

More generally, however, the EU legislator's actions, notwithstanding the fundamental rights crisis in external border policing operations and the allegations of Frontex complicity, have been to increase the references to fundamental rights in Frontex's governing documents, most specifically the 2019 [Regulation](#). Yet at the same time, the legislator has both increased Frontex's budget enormously, provided it with [extensive new powers](#) and the authority to establish a standing border police force without the introduction of an independent monitoring body. These reforms require a more effective system of protection of fundamental rights and independent monitoring of the Agency.

The Urgency of Effective and Independent Monitoring Mechanisms

The European Parliament's LIBE committee has been particularly vigilant in respect of the problem, not least through the creation of the Frontex Scrutiny Working Group and the freezing of some Frontex funding. However, a wider-angle approach including, for instance, widening the responsibilities of the EU Ombudsman and by regulation establishing a duty on Member States to provide comparative powers of border monitoring to national ombudsmen together with a coordination body to ensure cross border solidarity is one approach. The Schengen Evaluation Regulation provides an opportunity to widen the availability of independent monitoring for instance by including a requirement for cooperation in the evaluation process with national human rights institutions, ombudsmen and/or National Preventative Mechanisms (see below) in so far as they have border monitoring powers. What is clear is that in every Member State, independent monitoring of border police activities by a relevant independent state body is necessary. These bodies must also participate in a system of coordination with their counterparts in other Member States in a common EU framework. In short, effective EU-wide monitoring of border policing specifically addressing the border violence problem is needed. This can only be carried out by independent state bodies, with powers (and obligations) to cooperate across borders – and not just internally. Among the powers these bodies will need are cooperation from border police as regards all aspects of operations including access to the ground, and the right to carry out independent monitoring of all places – where the body considers it necessary with sufficient resources required for this purpose. These bodies will also need authority to require state authorities to take action where border violence by border police cannot be justified, including with national and EU prosecutors where there is evidence of crimes having been committed. In this regard, a key problem with border violence is that all too often the victims are on the 'wrong' side of the border – having been beaten and pushed back across a border, hampering the capacity of the state body to collect evidence. To resolve this problem, cross border cooperation is necessary and the EU added value comes into high relief as a system of coordination at the EU level. However, even with an EU focus, engaging the bodies at the national level remains necessary.

It can be noted that Article 80 of the Treaty of the Functioning of the European Union (TFEU) requires Member States to demonstrate solidarity in the EU's Area of Freedom, Security and Justice (which provision the [CJEU](#) has found to have legal effect). But to achieve solidarity there must be coordination and a fully integrated system to promote cooperation and assistance among the bodies charged with monitoring border police operations. In light of this, identifying the most appropriate national bodies for border violence monitoring is critical. Three kinds of national bodies are already in existence in all Member States (which also includes candidate states). These are: the [Ombudspersons](#), [National Human Rights Institutions](#) (NHRIs) and [National Preventive Mechanisms](#) (against torture) (NPMs). Frequently, one or more of these roles are carried out by the same institution. All three must have full [independence](#) from the executive and border police of their state in order to do their work properly. Various mechanisms have been put into place to address problems of lack of independence (with varying success).

Confidence among these state bodies depends on the assurance that their homologues in other Member States with whom they need to work also fulfil the requirements established by the CJEU and ECtHR regarding independence. In this regard, cooperation can only be achieved if there is a permanent structure within which these bodies charged with fundamental rights monitoring can carry out the effective monitoring of the external borders. Additionally, the structure must enable cross-border cooperation and secure multi-annual funding, including for the purpose of seconding experts from a body in one Member State to another. As Frontex's budget has increased exponentially year-on-year, an independent monitoring structure must be funded to ensure effective monitoring of border operations led by Frontex, or within which Frontex participates.

In summary, fundamental rights abuses against migrants by border police are a stain on the reputation of the EU and contrary to its law (the EU Charter). As the [leaked passages](#) of the OLAF report on Frontex reveal, Frontex officials even at the highest offices have had knowledge of and condoned border violence by border guards against migrants. Only independent and effective monitoring by bodies which are part of the state and have full powers and resources to carry out their work – and effective follow up – can result in ending the impunity which currently surrounds border violence at EU external borders.

