



## **Refugee Council and the European Council on Refugees and Exiles (ECRE) joint response to Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry**

**24 September 2007**

### **1. Introduction**

1.1. The Refugee Council is the largest charity working with asylum seekers and refugees across the UK. We campaign for their rights and help them to rebuild their lives in safety.

1.2. ECRE is a European network of 76 key non-governmental organisations in 31 European countries, working for the protection and integration of refugees, advocating for a humane and generous European asylum policy. Our strength lies in working together at the European and national level as a united, pan-European network. Together with a broad range of stakeholders, including refugees themselves, we seek to improve asylum and refugee rights in Europe.

1.3. The Refugee Council and ECRE welcome this timely inquiry and the opportunity to comment on the European Agency for the Management of Operational Cooperation at the External Borders of the EU Member States, Frontex. We share the view that the Agency's mandated powers are expanding fast and consider that this is happening without due attention to the establishment and/or clarification of the Agency's role and responsibilities in relation to human rights. We are particularly concerned with the right to seek asylum as enshrined in the Universal Declaration of Human Rights and the extent to which this may be violated as a result of Frontex activities.

1.4. Our comments focus primarily on whether the procedures and operations of Frontex are carried out with full respect for international legal, political and moral obligations, with particular reference to individuals in mixed migration flows who may be in need of international protection. We have also addressed a number of the Committee's questions pertaining to accountability, the legal framework for exercise of border guards' powers, the nature of working agreements, risk analyses, monitoring and evaluation, and the participation of the UK.

## 2. Summary

2.1. Frontex fails to demonstrate adequate consideration of international and European asylum and human rights law including the 1951 Convention relating to the Status of Refugees and European Community (EC law) in respect of access to asylum and the prohibition of *refoulement*.

2.2. There is a worrying lack of clarity regarding Frontex accountability for ensuring compliance with international and EC legal obligations by Member States involved in Frontex coordinated operations. This is compounded by the lack of transparency, and the absence of independent monitoring and democratic accountability of the Agency.

2.3. The relationship between the UK and Frontex requires further clarification, in particular with regard to the applicability of the Schengen Borders Code.

2.4. Frontex involvement in extra-territorial operations raises questions regarding jurisdiction, accountability and responsibility towards asylum seekers.

2.5. All training provided by Frontex should include international human rights and protection principles and obligations.

2.6. Frontex risk analyses and feasibility studies, as the basis for operations and the distribution of resources under the External Borders Fund, must be publicly available.

2.7. Frontex should assist Member States involved in joint operations, to collect data on asylum flows and the impact of Frontex operations on migratory trends.

2.8. Frontex should not advance its involvement in joint return operations until the EU adopts common standards on return.

## 3. General comments

3.1. Frontex must necessarily be viewed in the context of today's increasing and sophisticated barriers to physical access to the EU. Such measures affect all migrants, including amongst them, persons who need protection. With the mandate of *"facilitat[ing]... the application of... Community measures relating to the management of external borders... by ensuring the coordination of Member States' actions in the implementation of those measures"*<sup>1</sup>, Frontex is becoming an increasingly important actor in Member States' efforts to prevent

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<sup>1</sup> Council Regulation (EC) 2007/2004, Article 1.2

irregular migration to Europe. The Agency is growing very quickly and has seen its budget increase from € 12.4 Mio in 2006 to € 35 Mio for 2007.

3.2. Between July and August 2006, Frontex was involved in detecting and diverting over 6000 "illegal migrants" from the Canary Islands<sup>2</sup>, which have also seen a 60% drop in arrivals of undocumented migrants by boat in the past year<sup>3</sup>. Any decreases in the number of irregular entries into the EU stemming from the implementation of immigration control measures are presented as a success by the EU and as a factor that contributes to saving human lives<sup>4</sup>. This interpretation fails to acknowledge the consequences of these measures for individuals fleeing persecution.

3.3. Notwithstanding international protection needs, it is unclear whether there are mechanisms in place to deal with the wider humanitarian needs, particularly medical requirements, of persons rescued, intercepted or diverted during Frontex operations. We would like to see a commitment by Frontex to help ensure adequate reception facilities are available to meet the needs of all migrants wherever they are taken. These could be based on the current model in place at a reception centre on the Italian island of Lampedusa, for example.

3.4. We are extremely concerned that the interdiction of all potential irregular entrants from physical access to the EU at its external borders is indiscriminate. In lacking any specific measures to safeguard the rights of people who are potentially in need of protection, this undermines the right of refugees to seek asylum.

3.5. The result of preventing the arrival of refugees in Europe, is that EU Member States fall short of their human rights values and obligations and leave the responsibility to take care of refugees to developing countries which often struggle to do so.

3.6. We urge this inquiry to address the following key questions;

- How does a border guard functioning under Frontex coordination respond when encountering someone who wishes to seek asylum? How is this different when in EU territory, at the external border, in international waters or on third country waters for example?;
- How does Frontex ensure that the operations it coordinates do not breach Member States' obligations, for example when diverting boats back to their place of departure?;

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<sup>2</sup> Frontex Annual Report 2006, p13

<sup>3</sup> EU Observer: EU border agency cuts African migrant numbers

<sup>4</sup> Presidency Conclusions of 21/22 June 2007, paragraph 18. and Frontex press release '*Joint Operation Nautilus 2007 – the end of the first phase*' 6 August 2007  
[http://www.frontex.europa.eu/newsroom/news\\_releases/art28.html](http://www.frontex.europa.eu/newsroom/news_releases/art28.html)

- How can Frontex ensure that operations carried out beyond EU borders do not lead to systematic violations of international law?;
- If violations do occur, who can be held accountable for them and how?

3.7. We are concerned that Frontex border control activities, if not managed properly, could lead to breaches of human rights as serious as *refoulement*. Transparency is called for in Article 28 (2) of Frontex's founding Regulation; lack of public accountability in practice may be giving Member States the opportunity to avoid fundamental human rights obligations.

#### 4. Legal Framework

4.1. We understand that, just as obligations stemming from international and European refugee and human rights law, as well as European Community law, are incumbent upon the relevant authorities of Member States, compliance is also required by these States when their agents participate in Frontex operations. This obligation extends to any other border control mechanisms, such as the Rapid Border Intervention Teams (RABITs) and the newly agreed Coastal Patrol Network, in which states may participate.

4.2. International human rights law stipulates that there can be no exception to the prohibition on directly or indirectly sending persons to a place where they may face torture, inhuman or degrading treatment or punishment. This is outlined in the UN Convention Against Torture<sup>5</sup> and International Covenant on Civil and Political Rights<sup>6</sup> as well as the European Convention on Human Rights to which Member States are bound. The prohibition on return to persecution for reasons contained in the 1951 Refugee Convention itself is often said to form the 'cornerstone' of refugee law.

4.3. However no mention is made in Frontex's founding regulation or operational reports of the prohibition on *refoulement* as contained in all of the above instruments to which Member States have signed up. This is evidently of concern given that Frontex's task is to control international borders. Welcome reference is made to Member States' obligations concerning "*international protection, in particular as regards non-refoulement*"<sup>8</sup> in the subsequent Council Regulation establishing Rapid Border Intervention Teams

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<sup>5</sup> Article 3

<sup>6</sup> Article 7

<sup>7</sup> The EU defines international protection as referring to refugees and those with subsidiary protection status, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Art. 2(a).

<sup>8</sup> Regulation (EC) No 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, Article 2

(RABITs) although no specific reference is made to the 1951 Refugee Convention.

4.4. Turning to European Community law, the Schengen Borders Code sets out the rules on border control and border surveillance and is applicable wherever these activities take place. The Code states that refugees and people in need of protection represent an exception to the requirements normally demanded of third country nationals crossing external borders and that refusal of entry must be substantiated with reasons and accompanied by a right of appeal<sup>9</sup>. There is no indication as to how this may be put into effect in the context of a Frontex operation.

4.5. The Asylum Procedures Directive<sup>10</sup> applies to applications for asylum made in the territory (including territorial waters) of Member States as well as at the border or in transit zones<sup>11</sup>. The Directive requires states to guarantee access to the asylum procedure and affords asylum seekers the right to remain in the territory, at the border or in a transit zone pending the examination of the claim and the right to an effective remedy, including against a decision of inadmissibility.

4.6. The European Commission's view is that *"asylum must be an important feature of the response, and an effective option for persons requiring international protection. To this end, it is necessary to ensure coherent and effective application of the Member States' protection obligations in the context of measures relating to the interception and rescue at sea of persons who may be in need of international protection, as well as the prompt identification of persons with protection needs at reception sites following disembarkation."*<sup>12</sup> Yet there is no evidence to date indicating that any consideration has been given to this in Frontex joint operations in the Mediterranean. All exercise of border control which fails to take into account that refugees and people in need of international protection represent an exception to the ordinary requirements for admission to EU territory runs counter to international and European refugee and human rights law, as well as EC law.

4.7. As a new EU agency, there is a particularly worrying lack of clarity and transparency concerning the exact scope of Frontex's coordinating role and the way in which its operations are conducted. Ultimately *"responsibility for the control and surveillance of external borders lies with the Member States"*<sup>13</sup>,

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<sup>9</sup> Regulation (EC) No 562/2006, Article 13.1, 13.2 and 13.3.

<sup>10</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Member States bound by it shall have or bring into force domestic legislation necessary to comply with the Directive by 1 December 2007.

<sup>11</sup> Council Directive 2005/85/EC, Article 3.1

<sup>12</sup> Commission Communication on Reinforcing the Management of the Southern Maritime External Borders of the EU, paragraph 12.

<sup>13</sup> Council Regulation (EC) 2007/2004, Article 1.2

and most Frontex operations are undertaken following a request from an EU Member State and can only be realised with the involvement of Member States. However Frontex also has the power to "*launch initiatives for joint operations and pilot projects*"<sup>14</sup> and the Agency's staff have some "*executive powers*"<sup>15</sup>. The separation of tasks and the issue of proper accountability therefore lack clarity in theory and in practice.

#### 4.8. **Recommendations**

4.9. *As an EU agency acting with and on behalf of Member States, Frontex should explicitly demonstrate on a regular basis, how its activities fully respect Member States' obligations of non-refoulement under international and European refugee and human rights as well as EC law.*

4.10. *Frontex should seek support from joint "Asylum Expert Teams"<sup>16</sup>, which could be deployed at short notice alongside Rapid Border Intervention Teams.*

4.11. *The legal framework and mechanisms available to hold Frontex accountable for possible breaches of international and European refugee and human rights as well as EC law should be clarified.*

4.12. *Frontex should be required to demonstrate what mechanisms it has in place to comply with the Schengen Border Code requirement to ensure access to an appeal procedure upon refusal of entry.*

4.13. *Any revision of EU legislative instruments under the development of the Common European Asylum System should incorporate respect for the principle of non-refoulement into the Frontex regulation. Any reviews of Frontex's mandate should be subject to the co-decision procedure (as in the case of the Schengen Borders Code) which would give equal power to the European Parliament and thus increase democratic accountability.*

### **5. Extra-territorial operations and working agreements with third countries**

5.1. The issue of responsibility and accountability is further complicated when Frontex coordinates operations which take place beyond EU borders. Article 14 of its founding Regulation allows for "*integrated border management*" in the form of operational cooperation with third countries in the framework of working arrangements concluded with the relevant authorities. The 2006 Frontex Annual Report refers to a number of working arrangements that are being negotiated and concluded with international

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<sup>14</sup> Council Regulation (EC) 2007/2004, Article 3.1

<sup>15</sup> Council Regulation (EC) 2007/2004, Article 10

<sup>16</sup> As proposed by the European Commission Communication on Reinforcing the Management of the European Union's Southern Maritime Borders, COM (2006) 733 final of 30.11.2006.

organisations and third countries<sup>17</sup>. These agreements could significantly impact on Frontex operations in the Mediterranean and West African areas with regard to control and surveillance, readmission, or training of border guards. Working arrangements between Frontex and authorities of a third country agreed to date<sup>18</sup> do not appear to provide any solid legal framework for operations beyond the EU borders.

5.2. In addition, there is evidence to suggest that Frontex has already been involved in operations beyond the EU borders, in the territorial waters of Senegal and Mauritania where "*informal contacts*" have been established<sup>19</sup>. It is not clear what legal jurisdiction Frontex is acting under when providing assistance with such operations. Furthermore, unlike Frontex Working Agreements with third countries, Member States' agreements are often not publicly available and therefore beyond scrutiny for compliance with international, European and EC law. While international obligations of EU Member States still apply, we are concerned that extraterritorial activities carried out under the framework of bilateral agreements may prevent the applicability of EC law such as the Schengen Borders Code and the Asylum Procedures Directive.

### 5.3. **Recommendations**

5.4. *The legal framework for Frontex-assisted operations in the territory of non-EU states should be clarified. The framework decision on how Frontex can cooperate with third countries, as referred to in the Frontex Annual Report 2006, should be publicly available.*

5.5. *All Frontex agreements, whether political or technical, which are liable to have an impact on the physical access to the EU for refugees and people in need of protection, should adequately address the issue of responsibility towards people who wish to seek asylum. This is particularly important in light of plans to intensify operational cooperation with third countries in Africa and Asia. Working agreements must not be concluded with countries that have not signed up to key international instruments that guarantee protection for those seeking asylum. All future working arrangements with third countries must be publicly available and therefore subject to scrutiny for compliance with international and EC law.*

## 6. **Independent monitoring**

6.1. At present there is no independent monitoring of the workings of Frontex. Since it is not known whether any of the thousands of individuals

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<sup>17</sup> Permitted under Council Regulation (EC) 2007/2004, Articles 13 and 14.

<sup>18</sup> Working arrangements were concluded with Switzerland, the Russian State Border Guard Service and the Ukraine State Border Guard Service.

<sup>19</sup> Frontex Annual Report 2006, p13

that have come into contact with Frontex coordinated border guards wanted or attempted to seek asylum, we cannot be satisfied that adequate safeguards are in place to ensure that access to asylum is guaranteed.

6.2. Urgent formulation of measures is required to ensure independent oversight that guarantees operations under the coordination of Frontex facilitate access to asylum and that the principle of *non-refoulement* is being respected in the context of their duties to implement immigration control. The involvement of NGOs with expertise in refugees, as well as UNHCR, would go some way to safeguarding the right to asylum and enhancing refugee protection in Europe, in view of their existing experience in this area<sup>20</sup>.

### 6.3. **Recommendations**

6.4. *Member States and Frontex should allow the independent monitoring of their border operations by relevant NGOs and international organisations, according to a jointly defined framework.*

6.5. *The European Union should develop or support pilot projects with this aim under the EU External Borders Fund.*

6.6. *Frontex should establish regular cooperation with international organisations with a mandate in the areas of asylum and/or human rights as allowed by its founding regulation (Art 13).*

6.7. *Frontex should ensure maximum transparency of its activities and operational rules. This should include the publication of all annual reports by the specialised branches of Frontex.*

## 7. **The UK and Frontex**

7.1. The relationship between the UK and Frontex set out in its Regulation and its 2006 report requires further clarification. The current situation appears to be that since Frontex constitutes a development of the provisions of the Schengen *acquis* in which the UK is currently not taking part, the UK is, therefore, not bound by or subject to the Regulation establishing Frontex<sup>21</sup>. However, the UK has been involved in a number of Frontex-assisted operations, including Operation Torino at Heathrow, Operation Poseidon in Greece and Operation HERA I in the Canaries, which all took place in 2006.

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<sup>20</sup> Examples include a project co-ordinated by the Hungarian Helsinki Human Rights Committee, the project monitors six major airports: Amsterdam - Schiphol, Budapest - Ferihegy, Madrid - Barajas, Prague - Ruzyně, Vienna - Schwechat International, and Warsaw - Frederic Chopin and ECRE's current AENEAS-funded project 'The protection of refugees, asylum seekers and forced migrants' which includes monitoring and training of Ukrainian border guards.

<sup>21</sup> Council Regulation (EC) 2007/2004, Preamble (25)

7.2. Our main concern is that this creates a possible vacuum of accountability. While the UK clearly remains bound by its international and European obligations, it must be clarified what EC rules the UK is bound by when acting collectively under Frontex auspices. It is also unclear if it will be possible for Frontex to undertake any operations on UK territory in the future and how, given that Member States are subject to the Schengen Borders Code and the UK is not.

### 7.3. **Recommendation**

7.4. *The exact nature of the UK's role in Frontex needs to be clarified, crucially, the accountability of the UK under EC law vis-à-vis participation in Frontex.*

7.5. *Details of the agreement that Frontex has concluded with the UK, setting out the framework for cooperation including its meaning and scope should be made public<sup>22</sup>.*

## 8. Training

8.1. Frontex currently provides extensive training and assists the development of a Common Core Curriculum and the establishment of common training standards. We wish to emphasise the imperative for adequate training of border guards in the identification of asylum and protection needs and in particular amongst vulnerable persons - notably women and children - given the additional hurdles they may face in articulating an asylum claim. There is a high risk of failing to recognise specific forms of persecution or underestimating the particular fears of women and children as well as elderly persons. Furthermore, it is essential that officials are trained in their approach towards trafficked persons, some of whom may also be able to establish a refugee claim.

### 8.2. **Recommendations**

8.3. *Any training provided by Frontex should enable Member States to fulfil their duty under Article 16 (4)<sup>23</sup> of the Schengen Borders Code by offering specific guidance on the legal rules that border guards must comply with when exercising their duties, taking full account of international human rights principles and responsibilities.*

8.4. *Relevant existing capacity building programmes provide training on international protection principles with an emphasis on the early identification*

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<sup>22</sup> Frontex Annual Report 2006

<sup>23</sup> Article 16 (4) states that 'Member States shall provide for training on the rules for border control and on fundamental rights.'

*of asylum seekers and persons with special needs<sup>24</sup>. A similar commitment to instruction on safeguards and protection needs should be applied to Frontex training programmes, including in particular, a focus on gender and age-sensitivity.*

8.5. *Training on international protection principles and obligations should be extended to all Frontex officials to ensure decisions made at all levels are informed by an adequate knowledge and understanding of the principles of asylum and international protection.*

## **9. Risk analyses and feasibility studies**

9.1. The 2006 Annual Report states that the Frontex Risk Analysis Network (FRAN) has compiled a risk analysis covering all the external borders which will be used to inform the distribution of resources under the External Borders Fund. It is unclear what precise risks are being identified with regard to a particular region or country.

9.2. Frontex has also been exploring the technical feasibility of establishing surveillance systems covering the southern maritime border of the EU and the Mediterranean Sea, as well as a Mediterranean Coastal Patrols Network involving North African countries.

9.3. We would like to know whether Frontex includes in its risk analyses and feasibility studies, an assessment of the security situation and humanitarian context within migrants' countries of origin and transit. The management of external borders, design of surveillance systems and distribution of funding can only be confidently undertaken with a full understanding of the causes and contexts of migration flows, including forced migration.

### **9.4. Recommendations**

9.5. *Consideration of the root causes of migration, including forced migration should be built into any future risk analysis programmes.*

9.6. *Frontex risk analyses provide an assessment of the context, the need and the modus operandi for all Frontex operations and, as such, must be declassified in due course. All feasibility studies undertaken by Frontex (such as BORTEC) should be made public.*

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<sup>24</sup> *Ten point plan of action for refugee protection and mixed migration for countries along the eastern and south eastern borders of European union member states*, UNHCR, 29 June 2007 and UNOG press release 'Committee against Torture hears response of Hungary', 16 November 2006 at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/18A5E5A949271D3FC1257228005937C/?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/18A5E5A949271D3FC1257228005937C/?OpenDocument)

## 10. Development and dissemination of research

10.1. There is currently a significant lack of collection, analysis and exchange of reliable data on migratory and asylum flows within the regions targeted by Frontex. This should improve with the permanent establishment of the European Migration Network (EMN) and implementation of Regulation (EC) No 862/2007, which calls on Member States to produce statistics on third country nationals refused entry at the external border, beginning in 2008. However, this does not include statistics on third country nationals intercepted and diverted before they reach an EU border. As such, there will continue to be an unclear picture of migratory trends and patterns, and the consequences of Frontex operations on access to attempts to make claims for asylum in Europe.

### 10.2. *Recommendations*

10.3. *Frontex is well placed to coordinate the collection of data on migrants intercepted or diverted by Member States during Frontex joint operations and we urge the Agency to develop mechanisms to do this.*

10.4. *In this way, Frontex could usefully support the analysis and dissemination of more reliable data and research related to migration trends, and contribute to Member State compliance with Article 13 (5) of the Schengen Borders Code<sup>25</sup>.*

## 11. Return operations

11.1. Provisions for joint return operations to be assisted by Frontex are provided for in Article 9 of the Regulation establishing Frontex. We remind the Committee of their previous inquiry into the draft returns Directive<sup>26</sup> at which the Refugee Council raised its concerns with regards to safeguards in return operations, pre-removal detention, judicial remedies, monitoring and return to third countries.<sup>27</sup> The Directive is of direct relevance to the role of Frontex in return as the preamble to the Regulation establishing Frontex stipulates that return assistance is "*subject to the community return policy*".

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<sup>25</sup> Article 13 (5) places a duty on Member States to '*collect statistics on the number of persons refused entry, the grounds for refusal, the nationality of the persons refused and the type of border (land, air or sea) at which they were refused entry.*'

<sup>26</sup> Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final, 1 September 2005

<sup>27</sup> See also ECRE Comments Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final), CO2/5/2006/ExtPC

## 11.2. *Recommendation*

11.3. *Until the EU adopts common standards for return, the role of Frontex in joint return operations should not be developed as a priority. A Directive should not only facilitate cooperation on an operational level but also establish safeguards. This would provide a more consistent set of standards framing any Frontex- assisted return operations.*

**12. We urge the House of Lords to put some of these important concerns to Frontex and the UK Government. We will be pleased to provide any necessary clarification, including oral evidence upon request.**

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