

CM2307

COMMENT ON FRONTEX'S STATUS AGREEMENTS WITH SENEGAL AND MAURITANIA

JUNE 2023

The intended status agreements with Mauritania and Senegal exemplify the aim of the Union to further externalize migration control. If these agreements will indeed be adopted, border guards of the EU and Member States will enjoy far-reaching executive powers on the territories of these West-African States. The externalization has come with a shift of authority in the chain of command to Mauritania and Senegal: the authorities of these third countries give the instructions to the team members of the joint operation, limiting the possibilities for Frontex and EU Member States to ensure fundamental rights compliance. This creates additional fundamental rights risks because the level of protection in Mauritania and Senegal is lower than in the EU. Should the responsible actor be identified, holding Frontex or the EU accountable is another difficult hurdle. Due to a lack of pathways to redress and the broad immunity granted to team members, victims of extraterritorial border violence by Frontex's statutory staff are designated to the faulty internal complaints mechanism of the Agency. It risks a system of impunity in which Frontex cannot be held accountable for possible violations. Given these severe concerns, the Meijers Committee advises the European Parliament not to give its consent to the conclusion of the status agreements with Mauritania and Senegal in accordance with article 218 TFEU. Additionally, the Meijers Committee makes several recommendations with regards to the regulatory framework, operational plan, and implementation. Next to their general purpose, these recommendations can inform the current negotiations of the status agreements with Senegal and Mauritania.

The logo for the Meijers Committee features a stylized horizontal line on the left that curves upwards and then downwards, resembling a bracket or a stylized 'M'. To the right of this graphic, the word 'Meijers' is written in a large, blue, serif font, and the word 'Committee' is written below it in a larger, blue, sans-serif font.

Meijers Committee

Standing committee of experts on international
immigration, refugee and criminal law

Table of contents

- A. Introduction: status agreements with West-African States
- B. Lack of command and control by Frontex or EU MS in third-country operations
- C. Fundamental rights risks
- D. Difficulties in establishing accountability
- E. Concluding remarks and recommendations

A. Introduction: Status Agreements with West-African States

Since 2019, Frontex (European Border Coast Guard, EBCG) has been conducting operations on the territory of third countries.¹ So far, these operational activities have been carried out in countries adjacent to EU Member States in the Western Balkans. When border guards with executive powers of border control are sent to the territory of a third state, the EU is obliged to conclude a status agreement with the third country concerned.² These status agreements set out, amongst others, the scope of operation, criminal and civil liability, tasks and powers of members of the teams, and fundamental rights compliance. They are based on a model status agreement referred to in the EBCG Regulation and adopted by the European Commission.³ At the time of writing, agreements were concluded by the Council with Albania,⁴ Montenegro,⁵ Serbia,⁶ Moldova,⁷ and recently North Macedonia.⁸

¹ Note that Frontex was already exceptionally intervening extraterritorially before 2019, in the context of operation Hera in the Atlantic.

² Art 73(3) Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 ('EBCG Reg.'). OJ L 295, 14.11.2019, p. 1–131.

³ The EC adopted a model status agreement in 2016 and adopted a modified version in 2021, based on current Art 76(1) EBCG Reg. Communication from the Commission to the European Parliament and the Council of 22 November 2016, model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, COM(2016) 747 final; Communication from the Commission to the European Parliament and the Council of 21 December 2021, model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM(2021) 829 final.

⁴ Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, ST/10290/2018/INIT, OJ 2019 L 46/3. Entry into force: 1 May 2019.

⁵ Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, ST/6846/2019/INIT, OJ 2020 L173/3. Entry into force: 1 July 2020.

⁶ Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, ST/15579/2018/REV/1, OJ 2020 L 202/3. Entry into force: 1 May 2021.

⁷ Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, ST/7204/2022/INIT. Signed: 17 March 2022.

⁸ Status Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, ST/12896/2022/INIT, OJ 2023 L 61. Entry into force: 1 April 2023.

The new EBCG Regulation of 2019 removed the territorial limitations of the Frontex joint operations, extending the scope to *any* third state.⁹ This paved the way for the current initiatives to conclude status agreements with the West-African states of Mauritania and Senegal.

To this end, the Council authorized the European Commission on 29 June 2022 to start the negotiations with Senegal and Mauritania to conclude a status agreement which enables direct operational support from Frontex to the West-African States with a view to countering irregular migration, migrant smuggling, and trafficking from these countries to the Canary Islands.¹⁰ The team members will be granted all executive powers required for border control.¹¹ They are, for instance, entitled to carry service weapons, ammunition, and deploy surveillance equipment (i.e., vessels and drones) in accordance with the national laws of Senegal and Mauritania.¹²

The status agreements are to be based on the 2021 model status agreement. During the negotiations, the European Commission should aim to preserve the core of this model agreement,¹³ although it is unclear what this preservation of the core precisely entails.¹⁴

This further externalization of Frontex operations raises several important concerns, which the Meijers Committee will address in this comment. After discussing the chain of command and exercise of control in these operations (under B), the comment analyzes the fundamental rights implications for the involved individuals (under C) as well as the difficulties to hold Frontex accountable for violations that may occur (under D). Given the severe fundamental rights concerns and difficulties in establishing accountability, the Meijers Committee recommends **the European Parliament not to give its consent to the conclusion of the status agreements with Mauritania and Senegal**. Our Committee also makes additional recommendations on the regulatory framework, operational plans and implementation of status agreements. The latter recommendations could be of general relevance for future status agreements with third countries, but also more specifically for the status agreements with Senegal and Mauritania since negotiations are still ongoing at the time of publication of this

⁹ See for analysis of relevant provisions, Coman-Kund, Florin: *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*, *VerfBlog*, 2020/2/06.

¹⁰ Council of the EU, WK 7143 2022 INIT, Brussels 7 June 2022; Council of the EU, WK 7144 2022 INIT, Brussels 7 June 2022.

¹¹ Whereas Art 54 EBCG Reg provides for the possibility of “return interventions” being carried out by Frontex, the status agreement is not the right instrument for return operations. This is because the regulation only provides for *border management teams* to be deployed operationally in third countries. COM(2021) 829 final. See argument in Coman-Kund, Florin: *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...*, *VerfBlog*, 2020/2/06.

¹² Council Decisions 10453/22 and 10454/22 of 29 June 2022; Council of the EU, WK 7143 2022 INIT, Brussels 7 June 2022; Council of the EU, WK 7144 2022 INIT, Brussels 7 June 2022.

¹³ This core is e.g., related to the territorial scope, purpose, tasks and powers, privileges and immunities, and fundamental rights compliance. Council Decisions 10453/22 and 10454/22 of 29 June 2022; COM(2021) 829 final; the 2021 model status agreement differs in several aspects from its predecessor of 2016. In conformity with the new EBCG Regulation of 2019, the new model status agreement extended the territorial scope from neighboring States to any third State.

¹⁴ Does it for instance entail that differences may occur between the various status agreements on the elements not mentioned on the list of 'core elements' but that 'core elements' need to be identical in all status agreements and in line with the ones in the COM model? Or are there variations possible also on the 'core elements', as long as these are considered to still reflect the COM model? How could then such variations on core elements of various status agreements be justified?

comment. This means that provisions in the agreements can still be amended, as happened in the case of North-Macedonia.¹⁵

B. Lack of command and control by Frontex or EU MS in third-country operations

Chain of command

The chain of command during joint operations implemented on the territory of third states follows the same principles as those within the EU. This means that border management authorities of the third country hosting the operation enjoy the exclusive power to give instructions to all personnel involved in the operation, including team members of Member States and Frontex.¹⁶

This set up is unique for operations abroad. It is fundamentally different from the approach taken in Common Security and Defense Policy (CSPD) operations, where the EU commander retains full command.¹⁷ Frontex joint operations abroad are therefore the only case where EU personnel operates under third state command. This has significant consequences.

Beyond constitutional questions this may raise, the fact that Frontex-deployed border guards will have to act in line with the instructions of the hosting third country also significantly limits the possibilities of Frontex (and relevant Member States) to steer the course of action on the ground.¹⁸ An explicit possibility to disregard orders contrary to fundamental rights law is absent.

Mechanisms to ensure legality of the instructions

There are two main mechanisms to ensure the legality of these instructions. First, the host state's instructions must be in conformity with the operational plan agreed to and binding on Frontex and the host state.¹⁹ Since this operational plan must be agreed with by Frontex, the Agency can to some extent influence the structure of command before the operational activity has started. Second, Frontex retains the possibility to 'communicate its views' to the host state regarding instructions given. The host state 'shall take those views into consideration and follow them to the extent possible'.²⁰

¹⁵ Some provisions on immunity were changed during the negotiations. Status Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, ST/12896/2022/INIT, OJ 2023 L 61. Entry into force: 1 April 2023.

¹⁶ Art 10(3) 2021 model status agreement; Council Decisions 10453/22 and 10454/22 of 29 June 2022; Council of the EU, WK 7143 2022 INIT, Brussels 7 June 2022; Council of the EU, WK 7144 2022 INIT, Brussels 7 June 2022.

¹⁷ Arribas, G. F. (2014). International Responsibility of the European Union for the Activities of its Military Operations. The issue of effective control. SYbIL, 2013, 33-59, at 55-58; Naert, F. (2013). 'The International Responsibility of the Union in the Context of its CSDP Operations', in Evan, M. and Koutrakos, P. (eds) (2013). The International Responsibility of the European Union. Hart, Oxford; 313, at 317–321; this differentiation is arguably justified by the deployment of military personnel in these CSDP operations.

¹⁸ Fink, M. & Idriz, N., 'Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?' in Kassoti, E. & Idriz, N. (Eds.) (2022). The Informalisation of the EU's External Action in the Field of Migration and Asylum. Global Europe: Legal and Policy Issues of the EU's External Action. Springer. 117-146, at 135.

¹⁹ Arts 7(4) 2021 model status agreement. This plan further elaborates on the specific instructions to the deployed personnel and is legally binding on the Agency, host state and other participating states. Art 38(3) EBCG Reg.

²⁰ Articles 74(3) EBCG Reg in conjunction with 43(2) EBCG Reg.

There are some structures in place to enable Frontex to gain knowledge of instructions – or conduct more generally – that is not in compliance with fundamental rights. During the operation, the coordinating officer shall notify the relevant third country officers and the executive director of Frontex of instructions contrary to the operational plan or other obligations.²¹ The fundamental rights officer must also inform the executive director when possible fundamental rights violations occur.²² The executive director can then decide to suspend or terminate the operational activity if needed.²³ Whereas Frontex thus retains some tools to ensure fundamental rights compliance during joint operations abroad, its possibilities, and those of the Member States, are limited. This increases the risk that EU border guards may be instructed by third country authorities to perform actions contrary to EU standards and fundamental rights (see below under C).²⁴ The fact that the border guards that exercise effective control on the ground do not act under the Agency’s instructions also has implications for the question of international responsibility (see below under D).

C. Fundamental rights risks

Human rights situation in Senegal and Mauritania

Senegal and Mauritania are not bound by the same standards as the EU (Member States), so the level of protection may well be lower than in the EU. Recent human rights reports illustrate significant human rights issues in Mauritania.²⁵ There is no bill ensuring refugee status determination and prevention from statelessness, there are no clear procedures against refoulement, nor is access to basic social services and protection against arbitrary arrest, detention, and expulsion guaranteed.²⁶ There is also information that Mauritanian authorities have *refouled* people to war-torn Mali.²⁷

In Senegal – where human rights are generally better respected in comparison to other surrounding countries – human rights monitors report worrisome practices as well.²⁸ Refugees and asylum-seekers face excessively long waiting periods before a decision on refugee status is rendered.²⁹ Moreover, there is a lack of due process and security, as the committee responsible for original cases also examines appeals.³⁰

²¹ Arts 7(4) and 7(2)(b) 2021 model status agreement.

²² Art 8(3) 2021 model status agreement. The FRO can make on-the-spot visits to the third countries concerned. Additionally, the Serious Incident Report (SIR) standard operating procedure (SOP) establishes a direct reporting by the Frontex participant to the FRO. The FRO receives all SIRs to assess their relevance and categorize them as a possible fundamental rights violation.

²³ Art 18 2021 model status agreement.

²⁴ Cf. the Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391–407. Entry into force: 1 December 2009 (‘EUCFR’) and the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. Entry into force: 4 November 1950. ETS 5 (‘ECHR’).

²⁵ E.g., harsh prison conditions, arbitrary arrests, serious government corruption, gender-based violence, human trafficking, slavery (and related practices), LGBTQ-violence, and severe forms of child labor are reported. See US Department of State, 2022 Country Reports on Human Rights Practices: Mauritania.

²⁶ United Nations (UN), CCPR/C/MRT/CO/2. International Covenant on Civil and Political Rights (ICCPR), Distr.: General. 23 August 2019, points 36, 37.

²⁷ ECRE: ‘Spain: Authorities Denounced for Indirect Returns to Mali’. 7 February 2020.

²⁸ E.g., arbitrary killings, inhuman treatment on behalf of the government, harsh prison conditions, arbitrary arrest and detention, serious problems with independence of the judiciary, and corruption. See US Department of State. 2022 Country Reports on Human Rights Practices: Senegal.

²⁹ UN, CCPR/C/SEN/CO/5. ICCPR, Distr.: General. 11 December 2019, point 32.

³⁰ US Department of State. 2022 Country Reports on Human Rights Practices: Senegal.

Applicability of Fundamental Rights

In the absence of strong human rights standards in Mauritania and Senegal, the question is whether team members (i.e., Frontex statutory staff and Member State personnel) are bound to follow EU and international human rights law. As an EU Agency, Frontex must comply with the obligations enshrined in the Charter of Fundamental Rights, most notably chapters 1-3 on Dignity, Freedoms, and Equality. Furthermore, since all Member States are party to the ECHR and often other international human rights conventions, they have additional obligations to respect, protect and fulfil human rights.

References to fundamental rights can also be found in the model status agreements. The first model agreement of 2016 stated that “all actions of the Agency on the territory of [the third state] should fully respect fundamental rights”.³¹ Fundamental rights are more articulated in the 2021 version, which is the basis for the agreements with Mauritania and Senegal.³² For instance, the relevant international instruments are explicitly mentioned, as well as certain specific rights enshrined in these instruments.³³ The model agreement reiterates the Charter that interferences can only be justified when they are necessary, proportionate, and preserve the essence of the right at stake.³⁴ It follows that team members are bound to respect human rights standards during operations in third countries in the same manner as on the territory of the Member States.

Particularly complex is the question of the extraterritorial applicability of fundamental rights law. Many human rights treaties, including the ECHR, only impose obligations on contracting parties in relation to individuals within their jurisdiction.³⁵ While this does not exclude extraterritorial application, it creates an extra hurdle for individuals because they will first have to establish that they were under the control of an EU Member State at the relevant moment for the ECHR to be applicable.

The Charter of Fundamental Rights, in contrast, does not contain an explicit limit comparable to the ECHR. While the exact circumstances under which the Charter applies extraterritorially may thus be disputed, it seems that it is not more limited extraterritorially than it is territorially.³⁶ However, it is debated whether there is an implicit limitation, or whether this means that the Charter indeed applies the same within and beyond EU territorial boundaries.³⁷

Monitoring

Fundamental rights can be relevant in different phases of the cooperation with the third countries: before the adoption of the status agreement and during the operation. The EBCG Regulation prescribes that *before* concluding the status agreement with the third country, the European Commission should investigate the fundamental rights situation and inform the European parliament accordingly.³⁸ Since the conclusion of the status agreement is dependent on the consent of the European Parliament, this *ex ante* fundamental rights assessment could play an important role in the

³¹ Art 8(1) 2016 model status agreement.

³² Art 8 2021 model status agreement.

³³ Art 8(1) and (2) 2021 model status agreement.

³⁴ Art 52 EUCFR; Art 8(2) 2021 model status agreement.

³⁵ For an overview see Milanović, M. (2011). *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford University Press, 11-18.

³⁶ AG Mengozzi in Case C- 638/16 PPU X and X v Belgium, ECLI:EU:C:2017:173, in particular paras 89– 101.

³⁷ Gombeer, K. C. N. (2022). *Relations of duty in an age of rights: a study of the supply side of human rights in the context of maritime migration* (Doctoral dissertation, Leiden University); Moreno-Lax, V., & Costello, C., ‘The extraterritorial application of the EU charter of fundamental rights: from territoriality to facticity, the effectiveness model’, in Peers, S., et al. (2014). *The EU Charter of Fundamental Rights*. Nomos, 1700-1727.

³⁸ Recital 88 EBCG Reg.

co-legislator's considerations to accept the deal.³⁹ Without such fundamental rights reporting, the European Parliament cannot make an adequate estimation of the risks involved in the Frontex operation. At the time of writing, this required assessment by the Commission had not yet been conducted. The European Commission seems to follow a similar logic as in the case of cooperation with Moldova and North-Macedonia. In these instances, it initiated the investigation after the negotiations, arguably because only then it can appropriately estimate the scope and any geographical restrictions that may or may not be included in the status agreement. However, this practice may undermine the potential of the negotiations. When the fundamental rights assessment is instead completed prior to the negotiations, it can be taken into account during the negotiations and the agreement can be adjusted accordingly.

The model agreement also contains monitoring obligations *after* conclusion of the status agreement. For example, it clarifies the monitoring and evaluating roles of fundamental rights officer (FRO) and fundamental rights monitors (FRMs) in operational activities, and it prescribes that all operational plans must include a transparent reporting and evaluation scheme. The Agency has one FRO, and at least one FRM per operation on the ground.⁴⁰ The FRO can make on-the-spot visits to the third countries concerned, provide its views on the envisaged operational plans, and report to the executive director about possible violations.⁴¹ The FRMs assist and advise the coordinating officer and monitor compliance in every operational activity and report to the FRO.⁴² This is to ensure that every incident in the context of the operation is reported and followed up.⁴³ What is however not included in the model agreement is the obligation of the Executive Director to explicitly request the FRO to comment on whether the joint operation should be launched.⁴⁴ It is also unclear how authoritative the views of the FRO are.

The aforementioned monitoring and reporting by the FRO and FRMs can lead to the refusal to launch the operational activity in question at all,⁴⁵ or the withdrawal of the financing, and/or the suspension or termination of an ongoing operational activity. This happens when the executive director concludes that the fundamental rights violations are of serious or persistent nature.⁴⁶ However, one could question the effectiveness of this enforcement tool, as suspension of operations has only occurred once in relation to the shortcoming asylum system in Hungary.⁴⁷

D. Difficulties in establishing accountability

Determination of responsibility

Under international law, states and international organizations bear responsibility for violating their obligations if the conduct in question is attributable to them. As a rule, acts of organs or agents of an

³⁹ Art 218(6)(a)(v) TFEU states that the consent of the Parliament is necessary in the field where the ordinary legislative procedure applies. The ordinary legislative procedure applies to the Area of Freedom, Security and Justice pursuant to Art 77(2) TFEU.

⁴⁰ See generally, Arts 109 and 110 EBCG Reg.

⁴¹ Ibid.

⁴² Art 9 2021 model status agreement.

⁴³ Art 4(3)(i) 2021 model status agreement.

⁴⁴ Recital 88 and art 73(3) EBCG Reg.

⁴⁵ Art 3(2) 2021 model status agreement.

⁴⁶ Art 18(4) 2021 model status agreement; Art 46(4) EBCG Reg.

⁴⁷ Politico: 'EU border agency suspends operations in Hungary'. 27 January 2021.

international organization are attributable to it.⁴⁸ However, this is not the case when these acts are directed or controlled by another state.⁴⁹ While the conduct of Frontex's staff is thus in principle attributable to it, the power of third states to issue instructions (see above under B) may shift attribution – and with it responsibility – to the third state. That is particularly problematic in light of the more limited human rights obligations of Mauritania and Senegal (see above under C).

Importantly, however, this does not exclude Frontex's own responsibility. International responsibility also arises for rendering aid or assistance in the commission of an internationally wrongful act, such as a human rights violation.⁵⁰ By providing the framework, funding, staff, and equipment, Frontex may thus incur responsibility for being complicit in the third state's human rights violations, provided it had knowledge of the circumstances that led to the infringements.⁵¹ However, considering the lack of an available mechanism to hold the EU internationally responsible, it will be extremely difficult for victims of fundamental rights violations during joint operations abroad to seek redress for Frontex's complicity.

While the framework for responsibility for 'complicity' is underdeveloped under EU law, Frontex may incur responsibility for a violation of positive obligations under EU fundamental rights law. In this regard, it is relevant that Frontex has means available to prevent or end foreseeable violations of fundamental rights (see above under C). It can for instance use its influence over the choice of partners, locations, and extent of cooperation. Through the adoption of the status agreement and operational plan, the Agency can also control the framework of activities, joint operations, and – to some degree - decision-making within these operations.

Frontex's responsibility will always have to be assessed on a case-by-case basis. However, the diffuse character of these multi-actor operations paired with the complex questions they raise in relation to the determination of legal responsibility make it very difficult to successfully vindicate fundamental rights, in particular because of the necessity to determine the responsible actor in advance so as to identify the competent court.

Apart from these difficulties to determine responsibility, the Charter requires the provision of effective judicial protection for individuals to be able to hold Frontex accountable for possible fundamental rights violations law during joint operations in third countries, if these operations fall within the scope of EU law.⁵²

Effective remedies?

⁴⁸ Art 6 of the Draft articles on the responsibility of international organizations (ARIO). Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). Yearbook of the International Law Commission, 2011, vol. II, Part Two.

⁴⁹ Art 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. For commentary, see Crawford, J. (2002). *The International Law Commission's articles on state responsibility: introduction, text and commentaries*. Cambridge University Press, 110.

⁵⁰ Art 14 ARIO.

⁵¹ Fink, M. (2018). *Frontex and Human Rights*. Oxford University Press, 160-167.

⁵² Art 47 EUCFR.

Individuals have only few possibilities to hold the EU/Agency accountable for fundamental rights violations in cooperation with third countries. International law provides no options, as the EU has not acceded to the ECHR yet.⁵³ Also remedies in the EU Treaties offer little chance of success, since individuals hardly pass the high thresholds under EU law.⁵⁴

The internal complaints mechanism of the Agency can be seen as the best option for individuals to hold Frontex accountable, although this internal administrative remedy cannot be deemed an “effective remedy” in the sense of the Charter.⁵⁵ Pursuant to the EBCG Regulation, anyone who considers themselves to have been the direct victim of a fundamental rights violation committed by staff involved “in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention or an operational activity of the Agency in a third country” can submit a complaint to the Frontex Fundamental Rights Officer (FRO), who can recommend appropriate follow-up, such as disciplinary measures or the initiation of civil and criminal procedures.⁵⁶

Though an important and welcome accountability instrument, it lacks independence, effectiveness, and accessibility.⁵⁷ While the fundamental rights officer (FRO) reviews complaints, forwards registered complaints to the executive director, and can make recommendations about appropriate follow up, the executive director is the ultimate decision-maker on the merits of the case. The executive director is not bound by the recommendations of the FRO on the follow up. Moreover, the FRO is still an internal reviewing body and cannot ascertain genuine independence like an external auditing body, such as the European Ombudsman, would.⁵⁸

Furthermore, only a small number of complaints has been submitted since the mechanism was established.⁵⁹ This may be partly explained by the narrow personal scope of the mechanism, in which persons should be *directly* affected by actions or omissions.⁶⁰ This limited scope excludes for instance third parties who want to lodge complaints in the public interest.

⁵³ Note Art 6(2) TEU; beyond the ECtHR, there are few international options.

⁵⁴ Note the action for annulment ex Art. 263 TFEU; action for damages ex Art. 98 EBCG reg, which is based on art. 340(2) TFEU. Case C-352/98 P *Bergaderm and Goupil v Commission*, 4 July 2000, ECLI:EU:C:2000:361, para 43; For literature on the limitations of the action for annulment, see Majcher, I. (2015). Human Rights Violations During EU Border Surveillance and Return Operations: Frontex’s Shared Responsibility or Complicity? *Silesian Journal of Legal Studies*, (7), 45-78, 70-72; for possibilities in the context of action for damages, see Fink, M. (2020). The action for damages as a fundamental rights remedy: Holding Frontex liable. *German Law Journal*, 21(3), 532-548.

⁵⁵ Art 111 EBCG Reg. Note that under this mechanism, the executive director can take disciplinary measures and start civil and criminal procedures when Frontex staff or national border guards violate fundamental rights. Arts 111(6) and (7) EBCG Reg.

⁵⁶ Generally, Art 111 EBCG Reg. More specifically, Arts 111(6) and (7) EBCG Reg.

⁵⁷ See generally for accountability challenges of Frontex, Marco, S. & Den Hertog, L. 'Frontex: Great Powers but No Appeals', in Chamon, M., Volpato, A., and Eliantonio, M. (eds) (2022). *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* Oxford Academic.

⁵⁸ The European Ombudsman can investigate complaints by any person present on the EU territory regarding the maladministration of EU agencies, which includes violations of fundamental rights and the principle of good administration. Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman’s duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom. *OJ L 253*, 16.7.2021, p. 1–10.

⁵⁹ Note numbers in 2020, Statewatch, Deportation Union: Rights, accountability and the EU’s push to increase forced removals. August 2020.

⁶⁰ Art 111(2) EBCG Reg.

Lastly, under this mechanism no complaints can be lodged against the conduct of third country officers. The drafters of the model status agreement sought to account for this by requiring all parties to set up a complaint mechanism to deal with alleged fundamental rights violations by its staff in Frontex-coordinated operations.⁶¹ The envisaged mechanisms however do not include any requirement in terms of nature and quality or minimum standards. In other words, the precise content of these mechanisms remains unclear. Furthermore, the Model Status Agreement does not include any guarantee that complaints will be followed up or tools to enforce decisions which have been issued based on these complaints.

Immunities

An additional significant limitation to hold Frontex accountable is that domestic courts of the host state cannot exercise full jurisdiction. Team members namely enjoy full criminal immunity (“under all circumstances”) and functional civil immunity (“in the exercise of their official functions”) in the courts of the host state.⁶² The full immunity from criminal jurisdiction goes even further than the functional immunity of personnel in peacekeeping missions.⁶³ Yet, in comparison to peacekeeping missions, this extensive approach on immunity of members of the Frontex-led operation does not seem warranted.⁶⁴ While the use of force is in some border situations needed, team members of Frontex operations are not deployed in the context of an armed conflict. Hence, there is less reason to shield team members from criminal jurisdiction in domestic courts of the host State.

This immunity framework creates a situation in which border guards of the host state can be tried at the domestic courts of the host state and Member State personnel can be subject to the national civil and criminal law (procedures) of their home Member States. However, team members of Frontex statutory staff do not have a similar connection to a (Member) state and cannot therefore be held personally responsible for criminal acts before a court in any state.

This risks establishing a system of impunity. While the provisions on immunity have sometimes been softened in the negotiation phase of status agreements, it only changed the immunity from absolute to functional.⁶⁵ This has been a welcome change for victims of violence by team members “outside office”, but it cannot account for violations pivotal to this Meijers Committee comment – namely those committed as part of the official functions in border operations.⁶⁶

⁶¹ Art 4(3)(n) and Art 8(5) 2021 model status agreement.

⁶² Art 12(3) 2021 model status agreement. Note that the first generation of status agreements in the Western Balkans, criminal immunity is not absolute (i.e., no immunity from the criminal jurisdiction of the host state for acts committed outside the exercise of official functions). Note also some other guarantees integrated in the agreement with Montenegro.

⁶³ But, since this comment focuses on fundamental rights violations during operations, the distinction between functional and full is not that important.

⁶⁴ See this argumentation in Letourneux, L. (2022). Protecting the Borders from the Outside: An Analysis of the Status Agreements on Actions Carried Out by Frontex Concluded between the EU and Third Countries. *European Journal of Migration and Law*, 24(3), 355-356.

⁶⁵ See for instance Art 12 of the Status Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, ST/12896/2022/INIT, OJ 2023 L 61. Entry into force: 1 April 2023.

⁶⁶ Note as well the exclusive competence of the Executive Director to determine whether the act in question qualifies as in the exercise of official functions.

There are moreover few safeguards in place to address the concerns of impunity. Theoretically, the criminal immunity of Frontex statutory staff in host state courts may be waived by the Executive Director, but this happens very rarely.⁶⁷ In addition, the sovereignty to start a legal process would thereby lie with the Executive Director and be taken away from the host state. While the host state has the option to terminate the Frontex operation in case of disagreement with the Executive Director, this would be an implausible step. The consequences of such decision by the host state for the capacity of its border control authority should furthermore not be underestimated - especially in countries with systematic under capacity in border guards, such as Mauritania and Senegal.

The procedure of waiver itself is also unclear. The criteria on whether the Executive Director decides to waive immunity are absent in the model status agreement. The procedure in UN peacekeeping missions is more transparent, as it is clearly stated that the Secretary-General can waive immunity if “the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations”.⁶⁸

E. Concluding remarks and recommendations

The intended status agreements with Mauritania and Senegal exemplify the aim of the Union to further externalize migration control. If these agreements will indeed be adopted, border guards of the EU and Member States will enjoy far-reaching executive powers on the territories of these West-African States. The externalization has come with a shift of authority in the chain of command to Mauritania and Senegal: the authorities of these third countries give the instructions to the team members of the joint operation, limiting the possibilities for Frontex and EU Member States to ensure fundamental rights compliance. This creates additional fundamental rights risks because the level of protection in Mauritania and Senegal is lower than in the EU.

Should the responsible actor be identified, holding Frontex or the EU accountable is another difficult hurdle. Due to a lack of pathways to redress and the broad immunity granted to team members, victims of extraterritorial border violence by Frontex’s statutory staff are designated to the faulty internal complaints mechanism of the Agency. It risks a system of impunity in which Frontex cannot be held accountable for possible violations.

Given these severe concerns, **the Meijers Committee advises the European Parliament not to give its consent to the conclusion of the status agreements with Mauritania and Senegal** in accordance with article 218 TFEU. While several of these issues – such as lack of command, control, and accountability – are not new and indeed present in existing cooperation agreements with Balkan States, the latter countries generally have higher human rights standards than Mauritania and Senegal.⁶⁹ The Meijers Committee posits that the EU can only enter cooperation in border management with third countries when they provide adequate human rights protection. It means that third countries should at least guarantee absolute rights enshrined in the European human rights instruments, such as the prohibition of torture, slavery, and refoulement.⁷⁰

⁶⁷ Art 12 2021 model status agreement. Note that the criminal immunity of Member State border guards can be waived by that Member State.

⁶⁸ Section 20 of the UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946.

⁶⁹ Since they are parties to the ECHR, contrary to Mauritania and Senegal.

⁷⁰ Arts 3 and 4 ECHR; Arts 4 and 5 EUCFR. The protection level should be determined in an *ex ante* fundamental rights assessment (see above under C).

Additionally, the Meijers Committee makes the following recommendations with regards to the regulatory framework, operational plan, and implementation. Next to their general purpose, these recommendations can inform the negotiations of the status agreements with Senegal and Mauritania. These recommended points will ascertain that, in the event that the European Parliament nonetheless gives its consent to conclude the status agreements, safeguards are in place with regards to the monitoring and protection of fundamental rights, accountability and legal remedies, transparency, and legal certainty. The Meijers Committee therefore particularly advises the European Commission to take these points into account during the negotiations.

Regulatory framework

1. The EBCG Regulation and (model) status agreement should include an obligation for the **executive director to request FRO to provide views** on whether **to launch a joint operation**, based on a fundamental rights assessment. Currently, the FRO can merely provide its views regarding ongoing operational activities. A negative recommendation by the FRO should implicate that the joint operation will not be launched.
2. To ensure the independence of the internal complaints mechanism, there should be an **external auditing body**, such as the European Ombudsman, **involved in the mechanism**.⁷¹ This should be included in the EBCG Regulation. Pursuant to its statute, the European Ombudsman already has the mandate to investigate complaints by any person present on the EU territory regarding the maladministration of EU agencies, which includes violations of fundamental rights and the principle of good administration. To ensure full consistency, this involvement of the Ombudsman in the Frontex internal complaints mechanism should also be reflected in the Statute of the European Ombudsman.
3. To create a more accessible accountability procedure, it should be included in the EBCG Regulation that **all persons affected by actions or omissions** in Frontex operations, including third parties in the public interest (e.g., an NGO with evidence of consistent fundamental rights violations in Frontex operations), **can lodge complaints** through the internal complaints mechanism.⁷²
4. To prevent impunity, the EBCG Regulation and the (model) status agreement should contain that the **EU cannot deploy Frontex statutory staff to third country operations**. Alternatively, **clear standards and procedures for waiving immunity** of Frontex personnel should be established in the EBCG Regulation and in the model status agreement (see immunities procedure in UN peacekeeping missions). When the operations involve grave or structural fundamental rights violations, it is contrary to the interest of the EU to maintain the immunity for statutory staff. Immunity should then be waived.
5. Should the Council wish to **provisionally apply** the status agreements with Senegal and Mauritania,⁷³ this should **only be allowed** with the **consent of the European Parliament** (after there has been an *ex ante* fundamental rights monitoring and the European Parliament has

⁷¹ The Meijers Committee may consider working out a model to involve the Ombudsman as an instance of appeal to the FRO, or something similar.

⁷² Cf. ECRE, Holding Frontex to Account: ECRE's Proposals for Strengthening Non-Judicial Mechanisms for Scrutiny of Frontex. Policy Paper 7, May 2021.

⁷³ Like foreseen in the status agreement with Montenegro.

been informed of the results). Without these democratic guarantees, the temporary application could lead to an undesirable and irreversible situation. Amendments to the EBCG Regulation and (model) status agreement should be made accordingly.

6. To ensure public scrutiny, the **operational plans, fundamental rights impact assessments, and evaluation reports** should be made **publicly available** by Frontex – or at least shared with the European Parliament. In any event, non-confidential information from operational documents should be made publicly accessible. This transparency safeguard should be included in the EBCG Regulation and (model) status agreement.⁷⁴

Operational plan

7. There should be a **clear format** in the operational plan for what the **mandatory complaints mechanisms** should look like and what minimum standards are to be ascertained. This includes clear provisions on follow-up and tools to enforce lodged complaints.

Implementation

8. The **European Commission** should render a **fundamental rights assessment** when it recommends the authorization to start the negotiations of the status agreement (cf. Recital 88 EBCG Reg.). This should be done as soon as possible and at least before the end of the negotiations. A **negative assessment or omission** should be reason for the European Parliament to **withhold consent** (Art 218 TFEU).
9. **Frontex** should **uphold** its **positive obligations** to end foreseeable violations of fundamental rights. It can do so through its influence over the choice of partners, locations, and extent of cooperation, as well as the adoption of the operational plans and working arrangements with third-country authorities based on the EBCG Regulation.

⁷⁴ An elaboration of the crucial issue of how transparency exacerbates the problem of establishing accountability goes beyond the scope of this comment. In short, Operational plans, serious incident reports, fundamental rights impact assessments, and evaluation reports are not publicly accessible. It creates a situation in which essential information to monitor and evaluate Frontex's fundamental rights compliance is missing. And while EU citizens and residents have a right to public access to documents – which requires Frontex to provide for objective, reliable and accessible information on the Agency's work – the Agency often refuses access to documents requests or makes sure the documents are heavily redacted under the guise of public security. See e.g., Gkliati, M., & Kilpatrick, J. (2021). Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations. *Utrecht Law Review*, 17(4), 57–72.

About

The Meijers Committee is an independent group of experts that researches and advises on European criminal, migration, refugee, privacy, non-discrimination and constitutional law.



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