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Introduction

Since 2013, the Frontexit campaign has been alerting policy-makers and public opinion to the dangers posed by Frontex operations. All the while, the prerogatives granted to this European agency and the means at its disposal have continued to grow amid a total lack of transparency and outside the scope of any political or judicial scrutiny.

In 2014, the European Union (EU) Regulation No 656/2014¹ of the European Parliament and of the Council of 15 May 2014 establishing the rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex was adopted (hereafter “the regulation on maritime interception operations”). It seeks to clarify the remit and responsibilities of the agency during joint operations at sea. This regulation - which raises concerns as to observance of fundamental rights - has been integrated into the new mandate of the European Border and Coast Guard Agency, in force since 2016².

The Frontexit campaign, which at the time of the vote on the regulation on maritime interception operations, voiced profound misgivings about this text³, is still sounding the alarm over rights violations related to its implementation. Yet the obvious legal void regarding the protection of fundamental rights and the agency’s impunity in the event of rights violations persist under the new mandate. The regulation on maritime interception operations jeopardises the following fundamental rights: the principle of non-refoulement; the right to an effective remedy; the prohibition of collective expulsions.

The risks of violations become even more acute in a context of intensified deployment of surveillance operations at sea, with the EU stepping up activities mainly in the Mediterranean.

1 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

2 [Regulation \(EU\) No 1624/2016](#) of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

3 Frontexit (2014) Regulation on maritime surveillance by Frontex: lives in danger at the external borders of Europe.

1. Which fundamental rights are at stake?

The principle of non-refoulement

This principle forbids States from sending an individual back, either directly or indirectly, to a place where they would be at serious risk of persecution or where they would be under risk of other serious violations of their fundamental rights.

This principle is enshrined in international law, notably through article 33 of the 1951 Convention Relating to the Status of Refugees, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19 of the Charter of Fundamental Rights of the European Union, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, finally, by article 7 of the International Covenant on Civil and Political Rights.

This principle must be accompanied by procedural guarantees in order to ensure it is fully effective.

In its judgement *Hirsi Jamaa and others v Italy*, the European Court of Human Rights found that in the absence of basic procedural guarantees on board Italian vessels which had, in this instance, intercepted migrants on the high seas, compliance with the principle of non-refoulement and the right to an effective remedy could not be guaranteed⁴.

In accordance with this jurisprudence, it must be possible to identify persons on board vessels and their personal circumstances must be assessed. The individuals must also be informed about the possibility of applying for asylum, either in the country of arrival or in the country where their relatives live. This requires the necessary human and physical resources to be made available, in particular, interpreters, legal advice and access to a judge.

All of these provisions and procedural guarantees are also enshrined in the European acquis in the field of asylum and are impossible to ensure when identity is established at sea and/or on board a ship.

Therefore, in order for these guarantees to be observed, ensuring access to European territory is of the utmost importance -- yet this provision is absent from the regulation in question on interception operations at sea.

The right to an effective remedy

Every person has the right to an effective remedy in order to exercise their fundamental rights, in accordance with article 13 of the ECHR and article 47 of the Charter of Fundamental Rights of the European Union.

The prohibition of collective expulsion

According to article 4 of Protocol 4 to the ECHR, "collective expulsions of aliens is prohibited". This principle is also enshrined in article 19, § 1 of the Charter of Fundamental Rights of the European Union.

According to the European Court of Human Rights (ECtHR), "the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority"⁵.

In order to determine whether a case is one of collective expulsion, the circumstances must be examined, and it must be ascertained whether the expulsion orders take account of the particular circumstances of the individuals concerned⁶. This requires the presence of interpreters and legal advisors⁷.

4 ECtHR, Judgement on the case of *Hirsi Jamaa and others v. Italy*, 23 February 2012, application n° 27765/09

5 *Hirsi judgement*, para. 177

6 *Hirsi judgement*, para 183

7 *Hirsi judgement*, para 184

2. Inadequate procedural guarantees

Article 4, § 3 of regulation 656/2014 relates to the identification and assessment of the personal circumstances of people intercepted or rescued during a Frontex operation at sea.

It states that before people are disembarked in, forced to enter, conducted to “third” countries (i.e. non-Member States of the EU) or otherwise handed over to the authorities of a “third” country, the units participating in the operation must abide by certain procedural guarantees.

Firstly, participating units must take into account the assessment of the general situation in that “third” country. This assessment is contained within the operational plan and is not available to the public. The legality of the operational plans has not been validated by any independent authority nor is it subject to any democratic scrutiny, despite the significant consequences it could have on the rights of the individuals concerned.

Secondly, participating units are duty-bound to use all means to identify people who are to be disembarked in a non-EU country. They are obliged to assess their personal circumstances, inform them of their destination in a way they understand or may reasonably be presumed to understand. They also have an obligation to give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement.

The regulation states that for the purposes of identifying and informing individuals, further details are provided in the operational plan (which is not available to the public).

Alongside this, the regulation states that the operational plan shall include, when necessary, information as to the availability of shore-based medical staff, interpreters, legal advisors and other competent experts of the host and participating Member States. This implies that this information may be communicated if

disembarkation is ultimately proceeded within the EU and not on the other side of the border.

It is also important to remind that the principle of non-refoulement applies to all cases of returns and that it cannot therefore be side-stepped by assuming that all disembarkations in a Member State of the EU necessarily comply with this principle. The numerous reports documenting breaches of rights in terms of the asylum procedure, reception conditions, respect of the rights of minors, arbitrary deprivation of liberty have warned of the situation in different EU coastal countries. In some cases, these warnings have been substantiated by significant judicial rulings in the context of returns under the Dublin regulation.

Consequently, the regulation fails to provide adequate procedural guarantees in order to ensure compliance with the principle of non-refoulement and the prohibition on collective expulsions. It merely defers to the operational plan, which may, if necessary, allow for access to an interpreter and legal advice.

Furthermore, article 4 of the regulation is silent on the right to an effective remedy.

These failures are worrying. Leaving such a wide margin of discretion to agents in matters affecting fundamental rights is unacceptable.

To that extent, the European Court of Human Rights offers a reminder in its ruling on Conka⁸:

“It should be noted that the requirements of Article 13, and of other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement.”⁹

By failing to ensure that intercepted or rescued people have effective access to the procedural guarantees required in articles 3 and 13 of the ECHR and in article 4 of Protocol No 4 to the ECHR, as interpreted in the Hirsi judgement, the regulation cannot be regarded as being compliant with these provisions.

8 ECtHR, Conka v. Belgium Judgement, § 83, 5 February 2002, application n° 51564/99

9 See, mutatis mutandis, Iatridis v. Greece [GC], no 31107/96, § 58, EtCHR 1999-II

3. Does the regulation put an end to the practice of push-back (“refoulement”)?

The regulation provides for different interventions depending on whether the operation is carried out in territorial seas (which are considered part of a State’s territory) or on the high seas (which are not regarded as being part of any State’s national territory).

However, some of these interventions allowed within the regulation are incompatible with the respect of fundamental rights.

Interception in territorial seas: Ordering a vessel to divert its course so as to leave territorial waters

The regulation stipulates (article 6, § 2-b) that units participating in a maritime operation may order a vessel located within territorial sea (that is to say on the territory of the host Member State or of a neighbouring participant Member State) to alter its course in order to leave the territorial sea or the contiguous zone or move away from it. They may also escort the vessel or remain close by until it is confirmed that the vessel is keeping to that given course.

The regulation (article 6) legalises the practice of push-back at sea (refoulement): as a matter of fact, it allows vessels located in territorial sea to be forced to leave territorial waters without the people on board being identified or, more importantly, for them to have an opportunity to apply for international protection.

This article can only be applied when the participating units have confirmed suspicions that the vessel may be carrying people intending to circumvent checks at border crossing points or engaged in the smuggling of migrants. It does not, however, provide for any guarantees that checks will be carried out to ascertain whether persons in need of international protection are present on board.

The regulation thus leaves it to the participating units to decide if and how to request information regarding the identity of the individuals on board (article 6.1-a). As a result, there is no requirement to establish the circumstances of the persons on board, while they are de facto on the territory of Member States of the EU (and therefore where European Law applies) before the measures outlined in article 6.2-b, notably the place of disembarkation, are decided.

Either way, it is worth recalling that, while at sea, it is not possible to establish a person’s circumstances in full compliance with European legislation, in the way the regulation implies (European asylum law, Schengen Borders Code, Charter of Fundamental Rights, ECHR).

Individuals who may wish to submit a request for international protection are prevented from doing so de facto. This article also contravenes the principle of non-refoulement and the prohibition of collective expulsion. The provisions of article 6.1 enable units at sea to take “one or more measures” before deciding to divert the course of a vessel. Requesting information about “whether there are people in urgent need of medical assistance” on board (6.1.-a) is included among these possible measures. This check on the personal circumstances of individuals is provided for as an option, not as an obligation, leaving open the possibility that authorities may not be aware of people on board in need of urgent medical assistance. Such an approximation means that the overriding duty to provide rescue at sea may not be met.

Interception on the high seas: Order not to enter territorial seas

The regulation (article 7.2-b) stipulates that in the event of interception on the high seas, the participating units can order a vessel not to enter the territorial sea or the contiguous zone, and, where necessary, they can request that the vessel alter its course to move away from territorial seas.

This article follows the same rationale as that described above for article 6.2. It thus also legalises the practice of “push-back” (or refoulement) as it states that vessels may be

prevented from entering territorial sea without the persons on board having first been identified or been given an opportunity to request international protection.

Even on the high seas, this practice contravenes the principles of non-refoulement and prohibition of collective expulsion once States take measures during the exercise of their official powers as a public authority.

Indeed, according to the case-law of the European Court of Human Rights, measures taken by a State that have “the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4. [prohibition of collective expulsion]¹⁰.” The same applies to the principle of non-refoulement.

Disembarkation in a third country

• Interceptions on the high seas

The regulation states (article 7.2-c) that in the event of interception on the high seas, the participating units may also conduct the vessel or persons on board to a “third” country, or hand over the vessel/persons on board to the authorities of a “third” country.

By providing for the handover to the authorities of a “third” country, without the guarantees inherent in the principles of non-refoulement and the prohibition of collective expulsions (see explanations in point 2) being provided for in article 4 of the regulation, article 7 of the regulation contravenes these principles.

• Search and rescue operations at sea

In the context of a search and rescue operation, the regulation does not exclude the possibility of disembarking rescued persons in a country that is not a Member State of the EU (Article 10.1-b). In order to do so, the port of disembarkation must be considered “the nearest port of safety”. Although this has never yet occurred, according to Frontex¹¹, given the current debates within

the EU over the concept of “safe” countries, it is not outside the realm of possibility that disembarkations of this type could occur in Morocco, Tunisia, Algeria, the Balkan States or Turkey.

However, serious human rights abuses are known to occur in these places, against both citizens and foreign nationals: the right to leave any country is obstructed¹², as is the principle of non-refoulement.

By providing for disembarkation in a “third” country without allowing for the guarantees inherent in the principles of non-refoulement and the prohibition of collective expulsions in article 4 of the regulation (see explanations in point 2), articles 9 and 10 of the regulations contravene these principles.

10 Hirsi judgement, para. 180

11 Frontex’s [Annual Report](#) on the implementa-

tion on the EU Regulation 656/2014

12 [Asylum - A Right Denied: NO to the EU’s lists of ‘safe countries’](#) (2016)

4. Can a court be seized for fundamental rights abuses resulting from this regulation?

Between 2014 and 2016, no effective remedy made it possible to meaningfully challenge the true legality of the regulation in any meaningful way; the highly restrictive conditions regarding the admissibility of an annulment appeal before the Court of Justice of the European Union (CJEU) by legal persons (article 263 of the Treaty on the Functioning of the European Union¹³). These difficulties weigh even more heavily on physical persons affected by this regulation (and potentially sent back to their country of origin or prevented from accessing European territory) in light of their situation of extreme vulnerability.

The remaining course of action would therefore be to refer a question for a preliminary ruling, which would allow a national court to question the CJEU regarding the interpretation of European law for implementation at a national level.

Two major issues arise in this regard:

- On the one hand, the regulation (unlike a directive) is immediately integrated into the national body of law (with no internal transposition measures), so that it is not possible to refer a question for preliminary ruling to the CJEU to question the measure transposed in national law before a court of national jurisdiction. The integration of the present text on maritime interception operations into the new regulation, establishing a European Border and Coast Guards Agency, does not alter this situation in any way. One would have to challenge the measures implementing the regulation, notably the operational plans drafted by Frontex and approved by the European Commission. Once again, the legal avenues are blurry and cumbersome.

- On the other hand, the internal complaint mechanism of Frontex, in the event of allegations of rights abuses submitted by the European Parliament following a recommendation by the European Ombudsman, is included in the new mandate of the agency and continues to be ineffective and inoperative. A decidedly hollow structure, it does not allow Frontex to be held directly accountable before an independent judicial authority. The available mechanism only allows potential victims or persons involved during the operations of the agency to report any “incidents” to the fundamental rights Officer, who is in turn responsible for redirecting these complaints to the competent authorities of the Member States involved in the operation. Only internal disciplinary and administrative measures may be taken, at the sole discretion of the executive director who alone can decide whether an operation should be suspended or not in the event of violations “that are of a serious nature or are likely to persist” (article 25 of the new mandate).

Thus, despite increased budget and increased powers which allow the agency to coordinate (and also initiate) maritime operations by committing their own human and material resources, to question intercepted persons using the data they have gathered (or by transferring the data to European agencies) and, even though its role in the appraisal of situations on the external sea borders largely determines the deployment of joint surveillance and interception forces, Frontex is entirely unaccountable in the event of rights violations.

Under these conditions, there is no legal recourse to challenge the regulation on maritime interception operations. Frontex now enjoys a de facto and de jure impunity within the application framework of the aforementioned regulation.

¹³ See in particular: CJEU, Commission of the European Communities v Jégo-Quéré & Cie SA, 1 April 2004, 263/02

Conclusion

EU Member States have a duty to abide by the principles of non-refoulement and the prohibition of collective expulsion, as well as the right to an effective remedy in the exercise of their official powers as a public authority, be it in territorial waters or on the high seas.

Provisions in the regulation on “maritime interception operations” do not afford persons in need of international protection access to the guarantees inherent in these fundamental rights. The regulation (articles 6 and 7) effectively legalises “push-backs”, without providing adequate guarantees of respect for fundamental rights (article 4).

In view of this, the information contained in a non-public operational plan, even if it were binding, does not amount to such guarantees.

In addition to being incompatible with respect for the fundamental rights mentioned, the regulation lacks effective judicial safeguards. Today, it appears to be impossible to challenge the lawfulness of the text or hold Frontex accountable in its implementation of the regulation, either before a European court or a national court. Having been repeatedly probed on the subject by members of Frontexit and other stakeholders (journalists, NGOs), the agency has always highlighted that responsibility for rights violations, notably at sea, lays with the Member States involved¹⁴.

In light of this analysis, it is clear to members of Frontexit that the only way individuals can see their rights fully respected – as upheld by the ECtHR case law– is by accessing European soil.

14 “Shoot first : Coast guard fired at migrant boats, European border agency [documents show](#)”, Zach Campbell, The Intercept, 22 July 2016



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