Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union

by

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
AOM	Association of Mediterranean Ombudsmen
BVMN	Border Violence Monitoring Network
CDDH	Steering Committee for Human Rights (Council of Europe)
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DPD	Data Protection Directive
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ED	Executive Director
ENOC	European Network of Ombudspersons for Children
ENNHRI	European Network of National Human Rights Institutions
EO	European Ombudsman
EU	European Union
FRA	Fundamental Rights Agency
FRM	Fundamental Rights Monitors
FRO	Fundamental Rights Officer of the European Border and Coast Guard Agency
FRO	Forced Return Operations
Frontex	European Border and Coast Guard Agency
FSC	Frontex Situation Centre
FSWG	Frontex Scrutiny Working Group
GANHRI	Global Alliance of National Human Rights Institutions
GDPR	EU General Data Protection Regulation
IGAI	Portuguese Inspectorate General of Home Affairs / Inspeção Geral da Administração Interna
IGGN	Inspection Générale de la Gendarmerie Nationale
IGPN	Inspection Générale de la Police Nationale
IOI	International Ombudsman Institute
IOM	International Organisation for Migration
JRO	Joint Return Operation
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MAF	Moroccan Auxiliary Forces
MB	Frontex Management Board
NHRI	National Human Rights Institutions
NPM	National Preventive Mechanism (under OP-CAT Convention against Torture)
ODIHR	Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE)

OHCHR	Office of the UN High Commissioner for Human Rights
OLAF	European Anti-Fraud Office
OPCAT	Optional Protocol to the Convention Against Torture
OSCE	Organisation for Security and Cooperation in Europe
OSINT	Open-Source Intelligence Technology
SAR	Search and Rescue Zone
SBC	Schengen Borders Code
SEE	South-East European
SIR	Serious Incident Report
SPT	UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review

Foreword

This feasibility study was prepared by a dedicated team set up by Jaeger & Associates (www.jaeger-associates.com) and composed of Markus Jaeger (Jaeger & Associates), Apostolis Fotiadis (freelance researcher), Elspeth Guild (Jean Monnet Professor *ad personam* in law, Queen Mary University of London; Emeritus Professor, Radboud University, Nijmegen, Netherlands; Visiting Professor, College of Europe, Bruges; Researcher, the Centre for Studies of Conflicts, Liberty and Security, Paris), Lora Vidović (former Ombudsman of Croatia; former chair of the European Network of National Human Rights Institutions - ENNHRI). Nicolette Busuttil (Post-Doctoral Researcher, Queen Mary University of London) acted as Research and Editorial Assistant.

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Executive Summary

This study was prepared against the backdrop of multiple developments in the management of the external borders of the European Union. In recent years, the management of these external borders has become increasingly robust. The provision of direct financial support from Brussels to the frontline States has been presented as a manifestation of European solidarity and complemented by a significant increase in the powers and resources of the European Border and Coast Guard Agency (Frontex). Yet this expansion of powers and means appears to have come at the expense of respect for the fundamental rights of migrants who (attempt to) cross the external borders of the EU. Despite the obligations incumbent upon national and European border guards to respect the fundamental rights of all migrants, a considerable number of credible reports have highlighted widespread violations of rights. Nonetheless, these reports appear to have been routinely dismissed by the relevant authorities, with limited legal and political consequences. This has led to a perception of a lack of political oversight and judicial control of events at the European borders, which can result in impunity for violations committed, including possible criminal offences.

Against this background, the study first establishes the relationship between monitoring and political oversight as well as judicial control and scrutinises the criteria and principles that contribute to effective human rights monitoring at the borders: independence of the monitoring bodies; their adequate mandate, funding and powers; transparency and publicity of their work; requirements in terms of expertise; and the importance of solidarity between monitoring bodies in Europe as a corollary of the European solidarity on the side of the border guards. The study then examines the extent to which existing national and regional monitoring mechanisms respond to the criteria of effective human rights monitoring set out in the first part. This examination includes mechanisms that were proposed or in the making at the time of preparation of the study (1 May to 19 November 2021).

This study concludes that the current system for human rights monitoring at the borders does not provide the robust and continuous monitoring required as a prerequisite of adequate political oversight and judicial control; it also fails to produce a deterrent effect against future misconduct. At the same time, it identifies that while some of the existing or proposed monitoring mechanisms fall far short of the criteria required, Ombudsman institutions, National Human Rights Institutions and National Preventive Mechanism against torture fulfil most of them. The study demonstrates how these existing institutions could form key components of a system that provides effective human rights monitoring at the EU's external borders.

To this end, the study explores the feasibility of a 'new response' to the challenge faced by human rights monitoring at the EU's external borders. It proposes a way forward that relies on a collective mechanism of national human rights monitoring bodies to provide effective monitoring, in line with the criteria and principles outlined in the first part of the study. In particular, this study proposes a consortium of independent national institutions that engages

in human rights monitoring at the borders. The salient features of such a consortium are detailed in the last part of the study. Ultimately, this idea is deemed feasible not only by the authors of this study but also by many of the eminent experts and practitioners to whom it was presented.

Introduction

The human rights[1] of migrants (including irregular migrants,[2] asylum seekers, and refugees) are defined in an array of legal instruments at the national, EU, and universal levels.[3] In this respect, EU law imposes a clear legal obligation on all forces and authorities involved in managing the EU's external borders: all action taken by EU authorities and the Member States in the context of border control must comply with all existing human rights obligations, including the prohibition of ill-treatment, the right to asylum, and the prohibition of refoulement.[4]

Notwithstanding these obligations, an increasing number of well-documented allegations of serious human rights violations towards migrants by national forces and authorities, sometimes involving the European Border and Coast Guard Agency (Frontex),[5] have been made over the past two years. In addition to complaints by the alleged victims, these include allegations by independent national human rights bodies, civil society organisations, and media outlets.[6] Despite these multiple reports, the authorities concerned have regularly disputed or refuted claims of violence and other rights violations.[7] Their justification was largely based on the argument that internal monitoring mechanisms had not detected serious cases of violations and the assumption that these mechanisms are sufficient to prevent violations.

The management of European land, sea and air borders is expanding with a significant investment towards securitisation: national budgets on border management have increased, fences and walls continue to be built, and border crossing points become increasingly sophisticated. Border management has become heavy-handed[8] and takes various forms. It includes the use of new technology (e.g., drones) and the involvement of ('outsourcing to') third countries (e.g., agreements with the Libyan Coast Guard). Multiple border areas have

[1] This study uses the term 'human rights' and 'fundamental rights' interchangeably.

[2] The term irregular migrants used in this study refers to all those third-country nationals (TCNs) who do not possess a right of entry, residence or stay under EU law. It includes within it those who, if given the opportunity, would go on to apply for international protection.

[3] Migrants are entitled to the full range of human rights recognised under international human rights law. Any exceptions are clearly defined and provided for in law, e.g., limitations on the right to vote and hold public office; International Covenant on Civil and Political Rights. See, further, Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018).

[4] The rights and obligations enumerated in the Charter of Fundamental RIghts of the European Union apply to all acts of the EU institutions, including the European Border and Coastguard Agency (Frontex), and to EU Member States whenever acting within the scope of EU law; Charter of Fundamental Rights of the European Union [2012] OJ C 326/02 326/391 (Charter or CFREU), Article 51; *Case C-617/10 Åkerberg Fransson* ECLI:EU:C:2013:105 para 19.

[5] Notwithstanding the change of name of the agency in the latest iteration of its regulation, we continue to refer to the agency as Frontex, the name it is most commonly known by: <https://europa.eu/european-union/about-eu/agencies/frontex_en>.

[6] See examples in Chapter 2.

[7] E.g., 'Statement by the Minister of Migration & Asylum of Greece Mr. Notis Mitarachi about Alleged "Pushbacks" | Υπουργείο Μετανάστευσης Και Ασύλου' (13 July 2021) <https://migration.gov.gr/en/statement-by-the-minister-of-migration-asylum-of-greece-mr-notis-mitarachi-about-alleged-pushbacks/>; see also 'EU Ombudsman Launches Probe After Claims Croatia Abused Migrants' (*Balkan Insight*, 10 November 2020) <https://balkaninsight.com/2020/11/10/eu-ombudsman-launches-probe-after-claims-croatia-abused-migrants/>. See also below 2.1.

[8] '(S)ome government officials condone or even praise the heavy-handed border control measures used by their peers in other countries'; 'Pushbacks and Border Violence Against Refugees Must End' (*Commissioner for Human Rights*, 19 June 2020) <https://www.coe.int/en/web/commissioner/-/pushbacks-and-border-violence-against-refugees-must-end>.

been declared security or military zones with severely restricted access.[9] This development increases the possibility of offences being committed in the zones where irregular migrants arrive whilst limiting the chances for wrongdoings to be detected and investigated.

The EU's external border management has also become more collective and solidary. Frontex is tasked with supporting the national authorities of EU Member States and Schengen-associated countries to manage their external borders and coordinating forced return operations.[10] The EU has gradually strengthened Frontex and allowed it to set up Europe's first uniformed service while also providing funds to build its own equipment pool.[11] Compared to a staffing level of over 1,400 statutory staff and long-term secondments[12] and a budget of €543 million in 2021,[13] Frontex is expected to increase its staffing levels further, take the responsibility of a standing corps of 10,000 officers[14] and manage an annual budget of over €900 million by 2027.[15] Arguably, the exponential increase in staff present at the EU's external borders coupled with the right to carry and use arms increases the risks of human rights violations imputable to Frontex.

Against this background, this feasibility study examines whether the current border monitoring landscape contains adequate checks and balances that can prevent serious violations from happening at the borders and allow for effective follow-up of alleged violations whenever they occur. It notably questions whether effective oversight of all those engaged in border control activities at the EU's external borders currently exists.

Chapter 1 of this study explores the relationship between monitoring, political oversight, and judicial control. It further examines the criteria and principles of effective monitoring at the borders.

Chapter 2 assesses the extent to which existing human rights monitoring mechanisms operating at the EU's external borders fulfil the essential criteria of effective monitoring, as outlined in Chapter 1.

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[9] See, recently, 'Poland's Persistent Forbidden Zone on the Border with Belarus' (*POLITICO*, 1 December 2021) <https://www.politico.eu/article/polands-persistent-forbidden-zone-on-the-border-with-belarus/>; Deutsche Welle (www.dw.com), 'Denied Access to Migrants, UN Experts Call Off Hungary Trip' (*Deutsche Welle*, 15 November 2018) <https://www.dw.com/en/denied-access-to-migrants-un-experts-call-off-hungary-trip/a-46318612>.

[10] These are operations where migrants who have been served with a last instance decision ordering them to leave a Member State and who do not do so voluntarily are forcibly returned to their country of origin.

[11] Fabrice Leggeri, 'Foreword about Frontex' (*Frontex*) <https://frontex.europa.eu/about-frontex/who-we-are/foreword/>. See Annexe 4 for a detailed overview of the expansion of the EBCG since its inception as Frontex in 2004.

[12] European Court of Auditors, *Special Report No 08, 2021, Frontex's Support to External Border Management: Not Sufficiently Effective to Date* (Publications Office of the European Union 2021) 9–10 <https://op.europa.eu/publication/manifestation_identifier/PUB_QJAB21010ENN>.

[13] Statista Research Department, 'Frontex Budget 2021' (*Statista*, December 2021) <https://www.statista.com/statistics/973052/annual-budget-frontex-eu/>.

[14] The standing corps will include Frontex staff as well as staff from national authorities of EU Member States and Schengen Associated Countries (Iceland, Norway, Switzerland, Liechtenstein).

[15] European Court of Auditors (n 12) 9–10.

Chapter 3 outlines why some of the existing bodies or mechanisms have the potential to provide robust and effective monitoring at the EU's external borders. It also sets out the action required to empower these bodies and mechanisms for this task. On this basis, it argues for a 'new response' to the challenge of human rights monitoring at the EU's external borders that is grounded in solidarity. It is posited that this 'new response' would allow for effective oversight and judicial control, which in turn has the capacity to end impunity for human rights violations committed at the border and produce a preventive effect.

This feasibility study draws upon a combination of desk-based research and semi-structured interviews with 41 stakeholders in the field. Those interviewed included practitioners from law enforcement and monitoring bodies, academics, international civil servants, civil society representatives, and journalists. The interviews were held under Chatham House Rules, with full records kept on each of them. The list of the interviewees can be found in Annexe 3.

This study takes into account developments that occurred until 19 November 2021.

All digital links were last accessed on 17 March 2022.

1 The Importance of Monitoring for Political Oversight and Judicial Control, and the Criteria and Principles of Effective Human Rights Monitoring at the Borders

This chapter explores the importance of monitoring for political oversight and judicial control. It further sets out some key criteria and principles of effective human rights monitoring of border management operations. Six issues will be examined: effective monitoring as a prerequisite of political oversight and judicial control; the independence of monitoring bodies; the mandates, resources, and powers necessary to monitor borders; transparency and publicity of monitoring activities; necessary expertise; and solidarity.

1.1 The importance of monitoring

Effective protection of human rights and the rule of law – and full accountability of all actors - is achieved when multiple criteria are met. These include: (i) functioning internal compliance monitoring within each relevant authority; (ii) a system for individual complaints that is accessible to victims; (iii) systematic and regular monitoring by qualified, well-equipped, and fully independent bodies; (iv) political oversight and judicial control, where complaints from victims and alerts from monitoring bodies are acted upon promptly and adequately; (v) the imposition of appropriate sanctions that generate a deterrent effect; and (vi) the awarding of remedies and individual redress to victims. This feasibility study focuses on the third factor.

It is essential to underline that monitoring is to be distinguished from political oversight or judicial control, even if it is a prerequisite of both.

Monitoring refers to fact-finding and the process through which monitors observe and document ongoing or past events objectively and impartially. The observation should be reliable, regular and holistic; ideally, nothing should escape the monitor's attention. In practice, this requires a considerable amount of on-site presence. However, it does not necessarily need around the clock presence or presence at all potential border crossings. In addition to the limited feasibility of such a model, unannounced on-the-spot checks can lead to the identification of high-risk situations and patterns of behaviour and activities. Technology can also assist monitors in carrying out their activities, allowing them to oversee what has happened in their physical absence. In essence, monitoring relies on the ability to find out who has done what or who is doing what.

Monitoring is usually not all-embracing and does not purport to cover all possible issues simultaneously. It is generally geared towards a specific thematic issue. Monitoring can take the form of monitoring for vulnerability or susceptibility to corruption, the risk of discrimination or, as is the concern of this study, respect for human rights. The purpose of monitoring is complemented by the general practice of monitoring bodies which juxtapose the rules that govern the area in question – the applicable legal and policy framework – against their implementation in practice, as they emerge from the fact-finding. While juxtaposition as

such is telling and, in principle, suffices to demonstrate gaps between what should be and what is, monitoring bodies often provide an analysis of the gap between the applicable norms and standards and the practice they observe.

Moreover, monitoring bodies with an official mandate are often also asked, or at least entitled, to make recommendations on how to bridge the gap between standards and practice. Although recommendations are not binding, they are an instrument of soft power to achieve change. This is especially so if the recommendations are made public and if the addressee must respond (publicly) to the recommendations, for example, by accepting or not accepting them and possibly by indicating how, with which means, and within which timeline, accepted recommendations are planned to be implemented.

Monitoring can be attempted or done by all sorts of actors: State and non-State actors. Nobody can be prevented from trying to monitor. However, for monitoring to (a) yield soft power and (b) be of use for the bodies in charge of political oversight and judicial control, it must have the necessary authority. This is where the four underlying principles examined hereafter – independence; adequate mandate, resources, and powers; transparency and publicity; and expertise – come into play.

Political oversight and judicial control build on monitoring. They build on the facts found by the monitors to hold accountable those who have acted or omitted to act in a way compliant with the applicable rules. Oversight implies political power, and judicial control means judicial power over the bodies and authorities that are monitored. As a rule, neither national human rights monitoring bodies such as Ombudsman institutions, national human rights institutions (NHRIs) and national preventive mechanisms against torture (NPMs) nor international monitoring bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) or the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) have such powers.[16] They hand over their findings to bodies that do have the power of administrative and political oversight (governments, parliaments) or the power of judicial control (prosecutors and judges). In some countries, human rights monitoring bodies have the power to trigger judicial procedures themselves or be parties to such procedures. Nonetheless, this is not tantamount to judicial control.

Oversight bodies can also conduct their own fact-finding. Parliaments have enquiry commissions, and prosecutors investigate, often with the help of the judicial police. But they do so in a reactive, ad hoc manner rather than on an ongoing basis. This contrasts with monitoring which entails regular observation, regardless of an existing suspicion of wrongdoing. Thus, while a deterring effect can be expected from effective political oversight and even more so from strict judicial control, ongoing and robust monitoring is likely to produce an effective preventive effect with regard to the potential of future human rights violations. An environment that is closely and effectively monitored prevents the commission of misconduct in the first place.

[16] A description and discussion of the roles of these different entities is provided in Chapter 2.

A contrario, the lack of effective monitoring may result in wrongdoing going undetected - especially when internal compliance monitoring and an individual complaints system do not work well in practice. This, in turn, may result in impunity. Impunity can also result from political and judicial oversight that is not functioning well. As noted in a recent OSCE/ODIHR report on border policing, 'the importance of accountability in relation to monitoring mechanisms' means that 'it is essential that such mechanisms provide for monitoring reports to lead to action, redress, and positive change, including through links to prosecutorial agencies and judicial processes.'[17] Monitoring bodies can alert oversight bodies and provide them with objective documentation of instances of wrongdoing. Still, they cannot guarantee the effective work of the oversight bodies that are supposed to follow up on the cases and deal with them appropriately. However, human rights monitoring bodies often also observe the work of the oversight bodies, and they may comment on their functioning from the angle of the right to good administration.

1.2 The importance of independence

There is a consistent line of jurisprudence in which both the ECtHR and the CJEU have considered the independence requirement for different types of bodies. Substantial case law is available on the independence of judicial bodies, even if the independence question has not been limited to this field alone. Both courts have been asked to consider the independence of non-judicial or quasi-judicial administrative bodies, and they have interpreted the requirement of independence for these bodies as aligned closely with the standard of judicial independence. Through the case-law of both courts and the close relationship between them in interpreting the requirement of independence in various monitoring fields, several elements of independence emerge that must be observed by bodies monitoring the authorities and agencies of Member States and the EU, including the police and border and coast guards as well as Frontex.[18]

The monitoring body must not only be at arm's length from the actions of the bodies which it is tasked with monitoring. It must also be protected from any undue external pressure and/or influence. For this purpose, there must be sufficient safeguards in law to ensure that the monitors are not vulnerable to indirect influences. These safeguards relate to the status of the members of the monitoring body, the manner of their appointment, the functional immunities granted to them, the rules specifying the disciplinary procedures, and their dismissal. These elements also ensure that the public does not doubt the neutrality of a monitoring body vis-à-vis the authorities and bodies implicated in alleged human rights abuses.

For example, if members of the monitoring body are government officials or officials from the body implicated in actions involving possible human rights abuses, such as the police or border guards, this undermines its independence. A similar issue arises where members of a

[17] 'OSCE/ODIHR Meeting Report: Border Police Monitoring in the OSCE Region - Upholding a Human Rights Approach to Migration' (OSCE/ODIHR 2021) 8 <https://www.osce.org/odihr/486014>.
[18] For an overview of these cases and their treatments by both Courts, see Annexe 4.

monitoring body are supervised by government officials or by the authority that also supervises the body that is being monitored.

The existence of legal safeguards does not automatically mean that a monitoring body is free from any external pressures. If there are circumstances that raise questions about its independence in practice, a monitoring body may not be deemed independent. The possibilities given to the monitoring body to effectively investigate the actions of authorities implicated in alleged human rights abuses are a determining factor in this regard.

The extent to which a monitoring body has the requisite powers to monitor and investigate these actions is particularly intertwined with the right to an effective remedy and individual redress of people subjected to human rights violations. Consequently, the monitoring body must be able to issue public opinions where it has established that human rights violations have occurred. It must also have the requisite powers to collect evidence related to these abuses and refer to the competent authorities the material that might be used in administrative, civil, and even criminal proceedings.

Independence must be guaranteed both in law and practice. While the courts have focused on institutional independence, the question of independence regarding financial and human resources is a daily challenge. Increasingly, Council of Europe bodies are engaging with the question of financial independence from the executive as regards monitoring bodies. An independent budget voted by Parliament or allocated according to Parliamentary scrutiny rules may be indispensable for a monitoring body to be truly independent, particularly in a field where there is political contestation. This is also a requirement for NPMs that the OPCAT guidelines for their establishment highlight.[19]

The procedures for the appointment of heads of monitoring bodies must ensure that undue influence from any branch of government or political parties is excluded. The Council of Europe and the International Commission of Jurists have engaged with the issue of the appointment of judges, a matter that has come before both the ECtHR and the CJEU recently concerning Poland.[20] The CJEU found that a series of changes to the disciplinary system for judges which effectively permitted the executive to interfere in the continuation of judicial appointments was unlawful. The same high standards of appointment which apply to judges should also apply to the appointment of heads of human rights monitoring bodies. They should be appointed in an independent and transparent process protected from manipulation on political grounds.

The human resources of monitoring bodies must be adequate and sufficiently guaranteed to enable them to carry out their activities. Attention must be paid to the qualifications of the staff, who should have the skills and experience needed for carrying out their tasks effectively. Their

[19] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5 paras 11-12.
[20] *Reczkowicz v Poland App No 43447/19* (ECtHR, 22 July 2021); *Case C-791/19 European Commission v Republic of Poland* (ECLI:EU:C:2021:596).

contracts must be sufficiently secure to enable them to carry out their duties without fear that they will not be renewed for undue reasons.

Specific prescriptions for the independence of NHRIs, Ombudsman institutions and NPMs have been developed in regional and universal instruments. They will be examined in Chapter 2 of this study.

1.3 Adequate mandate, resources, and powers

To comprehensively protect migrants' human rights, the mandate of monitoring bodies must be sufficiently widely drafted to permit them to carry out human rights monitoring of all types of border management activities. The mandate must include monitoring of cross border surveillance operations, search and rescue operations, interceptions at sea (particularly where pushbacks are alleged) and forced return operations.

The mandate must be set out in law, and any variation to it must go through a full (ordinary) parliamentary process. It should be focused on the way people are treated (as opposed to security or efficiency-focused), the objective being to ensure that migrants are not subject to human rights violations.

To allow for effective monitoring on the ground, the mandate of the human rights monitoring body must be holistic. It must not restrict the monitors to observing only certain activities or certain national or international authorities that may be present at the borders because this is unrealistic and jeopardizes the possibility for the monitor to fully apprehend the situation. Indeed, identifying the authorities and bodies that operate at the borders, especially in the heat of the action, is at times a problem in itself. Reports have indicated that certain officials and other actors operating at the borders at times omit to carry distinctive signs that show which unit or body they belong to,[21] and it would be too easy to dismiss monitors' attempts to do their job by telling them that the forces that are in operation are not those they are entitled to monitor. In other words, human rights monitors at the borders must be entitled to watch the entire situation no matter who is involved. Finding out who is operating and who is accountable for which activity can be one of the challenges for the monitors.

Even when the monitoring of human rights compliance at the borders is implicitly included in the mandate of the monitoring body, an explicit acknowledgement of this mandate should be added. It should include the spelling out of an obligation on all state authorities to cooperate fully with the monitoring body. Such acknowledgement will need to come from the national Government, and it needs to include explicit functional immunity for the monitors.

[21] There are reports that so-called 'vigilante groups' - private persons with no mandate – are active at certain external borders of the EU. See for example, the press release dated 19 November 2021 by the Commissioner for Human Rights of the Council of Europe on her visit to Poland, 'Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights' (*Council of Europe Commissioner for Human Rights*, 19 November 2021) <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>; on Croatia, 'Croatian Politicians Deny Culpability in Border Pushbacks' (*InfoMigrants*, 11 October 2021) <https://www.infomigrants.net/fr/post/35628/croatian-politicians-deny-culpability-in-border-pushbacks>.

At the same time, there should also be an acknowledgement by the relevant authorities of the European Union that they will recognise the independent national human rights body as a relevant source of information on the human rights compliance at the external border of the EU.[22] This should be accompanied by an explicit instruction to Frontex to cooperate fully with the monitoring body.

To give the independent national human rights monitoring body the means to carry out border monitoring on top of its other activities, it needs to be entitled to an additional resource allocation (both in terms of human and financial resources). This increase could be implemented as a percentage of the expenditure on the border management budget. The funding should be multi-annual; increases could usefully be linked to any increase in the border management budget. To the extent that national borders are also EU external borders and that EU agencies contribute to their management, the funding of the independent national monitoring bodies that will also report to the EU becomes a matter for EU co-funding. In other words, the EU must contribute significantly to the financing of the monitoring of human rights compliance and abidance by EU law at its external borders, especially when EU border guards are deployed and national authorities use EU funds.

The independent bodies in charge of monitoring human rights compliance at the borders need to have investigative powers. This comprises unfettered access to all places anytime, whether announced or unannounced, the possibility to interview any person to be found there in private, including migrants, border guards from all forces and units, private persons, medical and paramedical staff. Importantly all relevant equipment and all documents, recordings and data repositories must be made available for inspection. Full explanations must be given to the monitors on their use, including the potential use that is made of them. The monitors must be allowed to collect all evidence they choose. Classified information must be shared with the monitors, who may be required to respect the confidentiality of such information vis-à-vis third parties.[23]

1.4 Transparency and publicity

Monitoring means observing activities and describing them accurately, impartially and objectively, thus rendering them transparent. But transparency does not necessarily mean publicity. An administration may be required to be transparent vis-à-vis a higher authority or a monitoring body, but the latter may not be authorised to render public everything they know.

[22] The European Commission seems to be ready to go down that road. Recital 10 of the Schengen monitoring mechanism clearly acknowledges the importance of 'evidence made public or provided through independent monitoring mechanisms […] such as ombudspersons'; European Commission, 'Proposal for a Council Regulation on the Establishment and Operation of an Evaluation and Monitoring Mechanism to Verify the Application of the Schengen Acquis and Repealing Regulation (EU) No 1053/2013' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0278>.

[23] See the conclusions of a Joint Consultation on Independent National Human Rights Monitoring Mechanism proposed in the EU Pact on Migration and Asylum, organised by the UN High Commissioner for Human Rights in 2021: UN High Commissioner for Human Rights, 'Joint Consultation on Independent National Human Rights Monitoring Mechanism Proposed in the EU Pact on Migration and Asylum (23 February 2021)' <https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2596&LangID=E>.

In the field of law enforcement, which includes the policing (or management) of the borders, there is often a necessary tension between the principles of openness and publicity, on the one hand, and the need for confidentiality on the other. For example, as regards border control, it is important not to tip off smugglers, traffickers and other criminals of an impending operation that may be designed to disrupt their activities. For the same reason, some *modi operandi* of border police should not be known to everybody. Another example is forced return operations. While monitors must be informed of upcoming return operations to be able to observe them, information on such operations may need to remain confidential in order to avoid boycotts or other politically motivated activities aimed at preventing the planned law-enforcement operation from happening. Human rights monitors must respect the imperative of confidentiality in such cases. Monitoring bodies may be required to prove that they can keep the information confidential.

However, restrictions to publicity must remain duly justified exceptions. Transparency (and publicity) are the rule, and they have become general principles of administrative law in Europe.[24] These principles foster accountability and, thus, improve the quality of administration. They allow not only for unlawful activities to be detected but also for public discussion on appropriateness to take place. Access to information has become a right for the individuals concerned and the public at large.[25]

Publicity is also a vital tool for independent human rights monitoring bodies since they do not have decision-making or judicial power over the authorities they monitor. The powers of the monitoring bodies are generally limited to making recommendations and presenting facts and findings to those who exercise political oversight and judicial control over the entity that is monitored. This is where the leverage of publicity comes in. Publicity allows for democratic oversight, that is, awareness and oversight by the public. This ultimate form of oversight covers everybody involved: the authority that is monitored in the first place as well as those who have or have not adequately reacted to the facts and findings and recommendations of the monitoring body. Indeed, publicity means that even the monitoring body itself becomes subject to democratic oversight because its own functioning and the quality and relevance of its work become transparent and can, thus, be assessed.

1.5 Expertise

In addition to true independence and an adequate mandate with corresponding powers and resources, credible and effective monitoring also requires the intellectual and technical ability to carry out the function: the necessary expertise.

In the field of human rights, this comprises, on the one hand, knowledge of the applicable universal, European, and national norms and standards and, on the other hand, understanding

[24] See Principle 6, Council of Europe, *The Administration and You: A Handbook, Principles of Administrative Law concerning Relations Between Individuals and Public Authorities* (Council of Europe 2018).
[25] Ibid.

of how the actors to be observed function. In addition, human rights monitoring uses special techniques[26] , and it relies to a large extent on cooperation with civil society organizations. Actors coming from the human rights field are supposed to possess the knowledge of applicable norms and the special techniques required. However, if they have not yet worked in the field of border monitoring, they may need to acquire precise knowledge of border management in general. They may also need to learn how the national and international authorities in charge of a specific border function internally and how they operate in a given geographical, administrative, and political context.

One difficulty for the monitors will be that border management, more than the management of prisons, for example, uses fast-developing technology. Monitors will have to become familiar with these techniques and constantly keep abreast of their developments. Special emphasis will need to be put on the initial and ongoing training of monitors and the variety of expertise required.

A logical solution is for the human rights monitoring bodies to employ people with insider knowledge, that is, agents or former agents from the forces and authorities to be monitored. This is something which human rights monitoring bodies already practice to some extent, with precautions in terms of distance put between such recruits and their (former) colleagues, for example, by hiring freshly retired staff from law enforcement or individuals that are at the end of a career and will not return to the service they come from once the assignment at the monitoring body has come to an end.

Another area of specific expertise needed when dealing with the management of the external borders of the EU is language skills. National authorities use the local language between them, English will be used for communications between the national and the EU forces and authorities as well as with many migrants. But communication with and between the latter will often happen in other languages.

Also, human rights monitors at the borders need inter-personal skills that allow them to communicate adequately with migrants, asylum seekers, refugees, victims of abuse and trafficking, families, children, unaccompanied minors, persons with disabilities.

1.6 Solidarity

European solidarity is a mantra on the side of border management and migration management. There is hardly any speech on these matters by European decision-makers or any document that does not invoke this principle. Without solidarity, no effective border management is possible, and there is no way for frontline States to manage the incoming migration flows alone. Therefore, Frontex has been set up and continues to grow.

[26] For example, techniques for interviewing (potential) victims of abuse, or measures to implement the do-no-harm principle which considers the need to protect victims and witnesses against retaliation.

Solidarity is mentioned as one of the underlying principles of EU law in Article 2 Treaty on the European Union (TEU). Article 3(3) TEU spells solidarity out as an objective of the EU, to be promoted among the Member States. Article 21(1) TEU states that the principle of solidarity is applicable in external actions and is central to common foreign and security policy (Article 24(2) TEU). The exact meaning of solidarity has been less clear. While the EU treaties prioritise solidarity among the Member States, in international law, the foundation of refugee law can be traced to solidarity not only among States but also of States with refugees.[27]

The creation of the EU's Area of Freedom, Security and Justice (AFSJ) led to the articulation of solidarity among the Member States as a core element. Article 67(2) Treaty on the Functioning of the European Union (TFEU) expresses this intra-Member State solidarity obligation in matters of asylum, immigration and external border controls, with this duty expressed specifically in Article 80 TFEU.[28] The principle of solidarity has been characterised as one which underpins the entire legal system of the EU.[29] While some Member States have argued that solidarity is an abstract, purely political notion and is not a criterion for the assessment of the validity of an act by an EU institution nor indeed of Member State actors,[30] this legal position on solidarity has been refuted by the CJEU. The Court has held that the principle not only obliges Member States to take all measures necessary to guarantee the application and effectiveness of EU law but also imposes on EU institutions mutual duties to cooperate in good faith with the Member States.[31] Like other general principles of EU law, solidarity constitutes a criterion for assessing the legality of measures adopted by the EU institutions.[32] Thus, the CJEU has held that the principle of solidarity entails rights and obligations both for the EU and Member States as being bound by an obligation of solidarity among themselves and with regard to the common interest of the EU and the policies it pursues.[33] This principle is not only a general principle of EU law but also finds specific expression in various parts of EU law, such as the AFSJ and in particular as regards asylum policy (Article 80 TFEU).

The question then is how solidarity must be expressed if it is a legally binding principle of EU law included in the AFSJ, borders and asylum law. Here it is clear from the CJEU that the institutions of the Member States are required to give effect to the principle within their areas of competence. In the leading judgment, where the subject matter is energy solidarity among the Member States, it is made clear that the duty is not only applicable to governmental choices and decisions but also in the application of EU (and national) law by State institutions (at all levels). This principle of collective solidarity among State institutions is also expressed in Article 267 TFEU, whereby any tribunal or court in a Member State which needs clarification

[27] Eleni Karageorgiou, 'Solidarity and Sharing in the Common European Asylum System: The Case of Syrian Refugees' (2016) 17 European Politics and Society 196.
[28] 'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.'
[29] *Case C-848/19 P Germany v Commission* ECLI:EU:C:2021:598.
[30] ibid para 27.
[31] *Case C-514/19 Union des Industries de la Protection des Plantes* EU:C:2020:803 para 49.
[32] ibid para 46.
[33] ibid para 49.

of the correct interpretation of EU law is entitled to make a reference to the CJEU.[34] The duty correctly to apply EU law extends to all State institutions in the Member States. It is not reserved, for instance, to courts of final instance but applies to all judicial instances. This principle is not exclusive to courts but applies to all State bodies. This duty includes an obligation of solidarity to State institutions in other Member States. For the purposes of this study, this is important for two reasons.

First, when national Ombudsman institutions[35], NHRIs and NPMs[36] monitor the activities of national and EU border guards, they are not only monitoring compliance with national law obligations but also with those of the EU (in particular, the Schengen Borders Code)[37].

Secondly, according to the principle of solidarity, they are under an EU legal duty to assist similar bodies across EU borders in other Member States to carry out effective monitoring of the human rights compliance by other State agents involved with border management. Solidarity is not limited to the high echelons of government; it is an essential element of the duties of all State bodies engaged with EU law, such as those who carry out border controls. Monitoring bodies in all Member States are under a duty of solidarity to engage with their counterparts across EU borders to ensure that EU law and fundamental rights, including access to asylum and the prohibition of *refoulement,* are fully respected in practice for all individuals.

The question is the extent to which the existing mechanisms comply with the key criteria and principles developed set out in this chapter. This will be examined in the next chapter.

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[34] The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[35] 'The duty to give full effect to the rights enjoyed by individuals under EU law is owed by "the public authorities" of Member States and there is no reason to assume that ombudsman institutions are exempted from this duty'; Alex Brenninkmeijer and Nikiforos Diamandouros (eds), *'The Role of Ombudsman and Similar Bodies in the Application of EU Law' 5th Seminar of the National Ombudsmen of EU Member States and Candidate Countries, Co-Organized by the National Ombudsman of the Netherlands and the European Ombudsman and Held from 11-13 September 2005 in The Hague* (2006) 90. See also the discussion of the application of EU law by Ombudsman institutions at 2.2.3. below.

[36] As concerns NPMs set up in accordance with the OPCAT, they are also under an obligation to monitor the abidance by the relevant UN standards in the field of deprivation of liberty.

[37] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) ('Schengen Borders Code' or 'SBC') [2016] OJ L77/5.

2 To what extent do the current mechanisms respond to the concepts underlying effective human rights monitoring at the borders?

This Chapter presents the existing landscape of entities involved in border monitoring, including entities or mechanisms that have an official mandate and actors who de facto play an important monitoring role. It examines their key features in view of the concepts outlined in the previous chapter as elements indispensable to effective border monitoring. Four categories are reviewed: Civil society and media, official monitoring mechanisms at the national level, monitoring mechanisms at the EU level or with EU mandates, and regional and universal monitoring mechanisms.

2.1 Civil society and media

Media and civil society organizations have played a significant role in leveraging the issue of violations of fundamental rights at the external borders of the EU by ensuring that the issue captures and maintains public attention. Some of these actors have joined forces to become major international players, as consortia or networks that bring together media outlets and NGOs.

Among these entities, the Border Violence Monitoring Network (BVMN), created in 2016, is a key umbrella organization that brings together NGOs working on border violence. Since April 2019, BVMN has consistently provided a steady flow of information about border violence.[38] It has recorded testimonies of pushbacks and other human rights violations in the Balkan peninsula and has become an essential source for international media reporting on the external borders of the EU in that region.[39] In December 2020, the organisation published the 'Black Book of Push Backs' and presented it to the European Commission.[40] This report documents 892 group testimonies involving 12,654 victims who have experienced human rights violations at the external EU borders along the Balkan migration route.

The fruit of collaboration between civil society and media actors has led to reports that have generated considerable impact at the EU level. Over the last two years, this has included policy developments on the issue of accountability for violations at the external borders of the EU. At the end of October 2020, the joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi revealed that vessels from the European Border and Coast Guard Agency (Frontex) had been complicit in maritime 'push back' operations in the Aegean sea.[41] This

[38] See Border Violence Monitoring Network monthly reports: 'Monthly Report Archives – Border Violence Monitoring Network' <https://www.borderviolence.eu/category/monthly-report/>.
[39] See generally, selection of press mentions of the Border Violence Monitoring Network: 'Press Clippings – Border Violence Monitoring Network' <https://www.borderviolence.eu/press-clipping/>.
[40] Lorenzo Tondo, '"Black Book" of Thousands of Illegal Migrant Pushbacks Presented to EU' (*The Guardian*, 23 December 2020) <https://www.theguardian.com/global-development/2020/dec/23/black-book-of-thousands-of-migrant-pushbacks-presented-to-eu>.
[41] Nick Waters, Emmanuel Freudenthal and Logan Williams, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushbacks' (*Bellingcat*, 23 October 2020) <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>.

prompted the EU Migration and Home Affairs Commissioner to request an extraordinary meeting of the agency's Management Board.[42] It was the first report in a long process of public exposure regarding flaws in the agency's internal monitoring system by the Der Spiegel magazine and Lighthouse Reports.

The collaboration of civil society and media has allowed for technical advancements in human rights monitoring. The recording of testimonies and investigative work done by civil society and media organisations has identified cases of severe fundamental rights violations, which have been corroborated using innovative methods for data-gathering and analysis.[43] The work of Forensic Architecture, a research agency based in London,[44] together with the Greek NGO HumanRights360 and the German magazine Der Spiegel highlighted the practice of pushbacks from Greece to Turkey. Their investigations include the analysis of available photos, videos, WhatsApp messages, emails, court files, police reports, and individual testimonies to reconstruct the events that occur at the border, thereby ensuring that these stories are made public knowledge. The methodology employed for data extraction and analysis ensures that such evidence is not easily dismissed and can form the basis for legal proceedings.[45]

The new techniques and technologies can render visible events that take place in areas like the external borders, where traditional means of monitoring have limited effectiveness given the frequent impediments to access. The use of Open-Source Intelligence (OSINT) tools has led to the introduction of new methodologies and approaches in the field of research and corroboration of fundamental rights violations. Here, civil society organizations (and the media) are one step ahead of the official national and international human rights monitoring bodies, which mainly operate without recourse to these technologies.

Notwithstanding, the considerable success and impact of media-NGO consortia or collaborations using OSINT is not an effective border monitoring mechanism as such, for three key reasons:

First, civil society organisations and the media are largely barred from access to procedures and locations where border control is performed by the authorities. Thus, their role is limited to examining the *results* of border management, primarily upon complaints by individuals at

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[42] 'Extraordinary Meeting of Frontex Management Board on the Alleged Push Backs on 10 November 2020' (*European Commission*, 11 November 2020) <https://ec.europa.eu/home-affairs/news/extraordinary-meeting-frontex-management-board-alleged-push-backs-10-november-2020-2020-11-11_en>.

[43] E.g., The story of Fady, a Syrian refugee in Germany who, trying to return to Greece to seek his missing brother, was apprehended and pushed back to Turkey. He then spent three years trying to recover his documents in order to be able to return to Germany. His case is pending with the UN Committee for Human Rights, where he is represented by HumanRights360 and the litigation group Global Legal Action Network; Giorgos Christides and Maximilian Popp, 'How Europe Breaks the Law' *Der Spiegel* (19 October 2020) <https://www.spiegel.de/ausland/fluechtlinge-illegale-pushbacks-in-die-tuerkei-wie-europa-das-recht-bricht-a-4c1cdccf-33ff-4b5d-a0e1-090b6f66f5aa>.

[44] 'Forensic Architecture' <https://forensic-architecture.org/>.

[45] E.g., The case of the Turkish citizen Ayse Erdogan. A fugitive from Turkey, Erdogan was sentenced for links with the Fethullah Gulen organization. She fled to Greece before an appeal of her case was adjudicated. But she was swiftly pushed back by Greek authorities. The two organizations, Forensic Architecture and HumanRights360, have analyzed the available photos, videos, WhatsApp messages, emails, court files and police reports and presented evidence that she had entered Greece before ending up in custody of Turkish authorities; Giorgos Christides, Steffen Lüdke and Maximilian Popp, 'Illegal Pushbacks in Greece: Authorities Send Asylum Seeker Back to Turkey' *Der Spiegel* (8 February 2020) <https://www.spiegel.de/international/europe/the-turkish-woman-who-fled-her-country-only-to-get-sent-back-a-fd2989c7-0439-4ecb-9263-597c46ba306e>.

the receiving end of these violations. This situation can only lead to a limited understanding of internal structural flaws and problematic decision-making within the authorities under scrutiny. It restricts the perspective when examining issues of accountability and possible corrective initiatives.

Secondly, the absence of ongoing and visible physical presence on the ground and the nature of ex post facto reporting minimises the possibility of a preventive effect that exists through real-time, on-site monitoring.

Finally, civil society-media collaborations are not official bodies or mechanisms. In their capacity as non-State actors that are neither set up by legislation nor qualify as international organisations, they do not operate under an official mandate. Despite the intellectual and moral authority of their findings, their work does not carry official value and is vulnerable to being dismissed by the authorities.[46]

2.2 Official monitoring mechanisms at a national level

Across Europe, various national bodies are involved in monitoring the legality and human rights compliance of border management operations. A distinction is made between bodies that are internal to the authorities in charge of border management and those fully independent of these authorities. While the former entities are presented as internal inspectorates, the latter are designated as independent national human rights bodies.

2.2.1 Internal inspectorates

Virtually all major branches of government (including defence, police, social affairs, and health authorities) in the Member States have internal inspectorates.[47] Inspectorates investigate a range of compliance and performance issues, including financial management and anti-corruption measures, procedural compliance, the state of maintenance of equipment used, respect of security rules, discipline, and relations between officials within the authority concerned. One key function of these inspectorates is the monitoring of respect for ethical rules and guidelines by the staff of the relevant authority. Respect for human rights may or may not be spelt out as being part of the inspectorate's remit.[48]

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[46] See, for example, the statement by the Commissioner for Human Rights of the Council of Europe dated 21 October 2020: 'I am concerned that the reaction of the Croatian government has been to dismiss reports published by NGOs or resulting from investigative journalism', 'Croatian Authorities Must Stop Pushbacks and Border Violence, and End Impunity' (*Council of Europe Commissioner for Human Rights*, 21 October 2020) <https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/croatian-authorities-must-stop-pushbacks-and-border-violence-and-end-impunity>.

[47] In France, for example, there are more than 20 inspectorates, including separate ones for the police (IGPN) and the gendarmerie (IGGN).

[48] The Portuguese Inspectorate General of Home Affairs (IGAI) has the control of the respect of human rights as the third item out of six on its mission statement, 'Mission' (*Inspeção Geral da Administração Interna*) <https://www.igai.pt/en/AboutUs/Mission/Pages/default.aspx>. See also the emphasis on human rights and rule of law in the presentation of IGAI on its web site; 'Presentation IGAI' (*Inspeção Geral da Administração Interna*) <https://www.igai.pt/en/AboutUs/PresentationIGAI/Pages/default.aspx>.

The heads of the inspectorates are typically designated by the minister in charge of the authority concerned or by the head of that authority. As such, they are accountable to and report to them rather than to the Parliament. The individual inspectors are often appointed from among the staff of the authority they inspect. They join the inspectorate for a limited period before potentially returning to the authority they have inspected before.

Inspectorates perform inspections, audits, and studies. Although they have the power of initiative to launch inquiries, they are usually requested to do so by the relevant minister, the Prime Minister, or the head of the authority they scrutinise. Inspectorates release annual activity reports as well as thematic reports and studies, which are public in nature. As a rule, they do not prepare general assessment reports on human rights compliance by the authority they inspect. Ad hoc reports on specific cases of alleged wrongdoing are normally for those who have requested them or for the head of the authority that is under scrutiny, not for the public at large; those who receive them may decide to render them public. Finally, inspectorates have the power to recommend disciplinary sanctions for individual agents. Some of them may initiate disciplinary sanctions themselves.

In several EU Member States, inspectorates in the areas concerned with migrants (police, gendarmerie, border guards, places of detention including prisons, and social affairs services) usually exist alongside Ombudsman institutions, NHRIs, and NPMs. In a few countries, the Government has designated inspectorates as the NPM; this solution is criticised for lack of independence because of the closeness between the NPM and the authorities it monitors.[49] Likewise, a few countries have entrusted the monitoring of forced return operations of irregular migrants to the relevant inspectorate, an option contemplated by the Return Directive.[50] Again, this can be criticised as not amounting to independent monitoring and potentially undermining the legal mandates of existing NPMs.

On the other hand, since inspectorates exist within the authority under their scrutiny, they are likely to enjoy access to the places, staff and evidence required for the purpose of their investigations. This access, in principle and in fact, acts as their greatest strength.

However, their greatest weakness lies in their lack of independence and, crucially, in the perception of their lack of independence, notwithstanding affirmation of the opposite[51] and

[49] In the Netherlands, the Inspectorate of Justice and Security of the eponymous ministry is the coordinator of the Dutch NPM which is composed of various national inspectorates. The SPT found that 'The issue of independence […] is a fundamental concern for the Subcommittee. The proximity of the inspectorates to the ministries, both in their establishment and their functioning, threatens the NPM's credibility'; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Visit to the Netherlands for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism: Recommendations and Observations Addressed to the State Party, Report of the Subcommittee' (2016) UN Doc CAT/OP/NLD/1 para 36. 'Inspectorates which serve as members of the NPM have stated that they are able, in practice, to carry out their work without interference. Nevertheless, these accounts are overshadowed by the appearance of partiality'; ibid para 37. The National Ombudsman, withdrew from the NPM network in 2014 citing 'the limited independence and initiative of the inspectorates from the national authorities with which they are associated' as one of the three reasons; ibid para 17.

[50] E.g., Portugal, where the IGAI monitors forced returns by its ministry.

[51] E.g., the IGAI's website contains the statement that 'The IGAI is an independent organism of external control of police activity. It works directly under the authority of the Ministry of Home Affairs.'; 'Presentation IGAI' (n 48).

efforts made to increase their independence to the greatest extent possible.[52] The other main weakness is that not necessarily all reports prepared by the Internal inspectorates are fully published while they are topical. Finally, since inspectorates are not specialised human rights bodies, they may be familiar with the applicable human rights norms but not necessarily with the processes that are proper to human rights bodies, including close cooperation with NGOs.

2.2.2 Independent national human rights bodies

Independent national human rights bodies are State bodies independent of the Government, with a mandate based on legislation or constitution, and with State funding.

There are two main types of institutions entrusted with monitoring the compliance with virtually the entire range of a State's human rights obligations: Ombudsman institutions and National Human Rights Institutions (NHRIs).

States that have ratified the Optional Protocol to the Convention against Torture (OPCAT) are also required to have a National Preventive Mechanism against torture (NPM), which monitors the rights of persons deprived of their liberty.[53]

As States are largely free to design their institutional human rights framework to best correspond to their needs, priorities, and contexts, a variety of setups can be found across Europe. In most EU Member States, two or three mechanisms are combined under the umbrella of the Ombudsman institution.[54]

Despite their generic name (Ombudsman[55] *of (country*), *National* Human Rights Institutions, *National* Preventive Mechanisms) and their legal basis in national law, independent national human rights bodies are not only national but also international actors, as will be shown below.[56]

2.2.3 Ombudsman institutions

Ombudsman institutions were first established to offer a cost-free, uncomplicated, flexible, and easily accessible complaint mechanism to individuals claiming to be adversely affected by decisions, actions or omissions of public authorities. The protection and promotion of human

[52] At the 'International Conference on Fundamental Rights and Forced Return Operations' held in Lisbon on 27 September 2021, the Inspector General of IGAI confirmed that, to enhance the independence of IGAI, half of its inspectors are now magistrates. A recording of proceedings is available at <https://www.youtube.com/watch?v=lGq76mPELts>.
[53] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT) article 3.
[54] For an overview of the institutional set-ups in EU Member States see Annexe 1.
[55] This study uses the term 'Ombudsman institution' to designate the institution of Ombudsman, and term 'Ombudsman' (or 'head of the Ombudsman institution') to designate the person who heads the institution (whether male or female), following in this respect the terminology used in the Venice Principles.
[56] International cooperation as a branch of activity of Ombudsman institutions, NHRIs, and NPMs can be found in some of their legal mandates. See Article 1.5 (b) of Law 2667/1998 establishing the Greek National Commission for Human Rights, or Article 12 of Law N° 2007-1545 on the institution of the French NPM.

rights were gradually added to their remit.[57] Presently, there are Ombudsman institutions in more than 140 countries, at national, regional and/or local levels and with different competences. As these institutions had to fit in the legal and political system of the respective States, there is no single model of an Ombudsman institution.[58]

After a string of resolutions and recommendations adopted by various bodies of the Council of Europe since 1985 directly or indirectly on the institution of Ombudsman[59], the Commission for Democracy through Law of the Council of Europe (the Venice Commission) adopted in 2019 the Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles)[60]. The United Nations General Assembly followed suit by adopting a Resolution on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance, and the rule of law,[61] which now sets the global standards for Ombudsman institutions.

Independence is a thread that goes through the 25 Venice Principles, as well as the institution's right to free and unhindered access to information or documents necessary to carry out its work. In principle, they are not entitled to make binding decisions but rather issue recommendations and opinions to the decision-makers in order to remedy certain decisions or influence public policy. Ombudsman institutions and their staff are considered human rights defenders and should be free from threats and reprisals by those in power.

There is no accreditation process for Ombudsman institutions. However, the International Ombudsman Institute (IOI) is presently developing a voluntary mechanism of peer review to assess the effectiveness of Ombudsman institutions upon their request[62]. On its side, the Venice

[57] In 1985, when the Council of Europe's Committee of Ministers adopted its 'Recommendation R (85) 13 to Member States on the institution of the ombudsman', the first consideration for doing so was that 'having regard to the complexity of modern administration, it is desirable to complement the usual procedures of judicial control' by developing the non-judicial control by the ombudsman. Furthermore, R (85) 13 'recommends governments (…) to consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved'. Council of Europe Committee of Ministers, Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (adopted and entered into force 23 December 1985) 80. In 2019, the Venice Principles (see below) recognised this extension of the mandate and stated that the Ombudsman is an institution that can act not only against maladministration, but also against alleged violations of human rights and fundamental freedoms. The names of more recent Ombudsman institutions reflect this (Human Rights Commissioner, Human Rights Defender, etc.); European Commission for Democracy Through Law (Venice Commission) 'Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles") (adopted 15-16 March 2019), Council of Europe Doc CDL-AD(2019)005.

[58] For an overview of their variety in Europe, see Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Springer 2008).

[59] See National, regional and local ombudspersons and independent national human rights institutions for the promotion and protection of human rights: non-judicial institutions for the protection of human rights in Council of Europe member states, Collection of texts, COmmDH/OMB(2005)3 and the list on top of page 3 of Document CDL-AD(2019)005.

[60] In parallel, the Committee of Ministers adopted Recommendation CM/Rec(2019) of the Committee of Ministers to Member States on the development of the Ombudsman institution).

[61] UN General Assembly, 'The Role of Ombudsman and Mediator Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law' (2020) UN Doc A/RES/75/186.

[62] International Ombudsman Institute, 'Guide to Peer Reviews - IOI Best Practice Paper - Issue 4' <https://www.theioi.org/downloads/o35t/BPP_Issue%204_Peer%20review%20guidance_May%202020.pdf>.

Commission has developed a corpus of opinions[63] that give specific guidance to States on issues pertaining to Ombudsman institutions, upon request by the former or the latter.

Ombudsman institutions investigate individual cases based on complaints against decisions of public authorities or on their own initiative. They may also examine systemic issues. They are accustomed to working in networks, such as the IOI or the Association of Mediterranean Ombudsmen (AOM), which is helpful for cross-border issues.

Ombudsman institutions are not limited to the application of domestic law. If they consider the law of their country is at variance with international law, they can invoke more protective standards of international law and jurisprudence, challenging the national law and advocating changes to it.

The role of Ombudsman institutions in the application of EU law was discussed back in 2005[64] - a few days before Frontex started operating (on 3 October 2005): '[I]t is important to emphasise an underlying theme from the case-law of the ECJ: the public authorities of the Member States are under an obligation to give *full effect to the rights enjoyed by individuals under EU law*.'[65] '[A]rguably […] Ombudsmen […] are obliged to apply EU law of their own motion […].'[66] The power to 'review the extent to which [national authorities] complied with fundamental rights as defined in EU law […] exists independently from the specific terms of reference which the ombudsman has under domestic law.'[67] 'Ombudsmen are, at least in theory, very well placed to examine in individual cases if EU law has been applied correctly and to confront authorities where failures have occurred'.[68] When it comes to the ex officio application on European law, 'most ombudsmen apply rules of EU law even if the parties did not invoke it.'[69] 'One instrument that certainly distinguishes most […] ombudsmen from the courts, is the power to start investigations *proprio motu*, that is investigations in individual cases or situations where no formal complaint had been brought, or investigations specifically intended to examine the possible existence of structural problems.'[70] 'Given their inherent interest in the protection of individual rights, ombudsmen are likely to care for the rights that individuals, including migrants, derive from EU law'[71]. As to 'the question to what extent national ombudsmen are confronted with cross-border situations, it seems safe to assume they are – or at least that they will be in the not so distant future'.[72] 'A challenge is presented by the fact that it may be difficult in practice to allocate responsibility for specific acts – for instance, if police bodies of two or more countries carry out operational measures together or if national and Union bodies share personal data without proper safeguards. In these circumstances

[63] See Council of Europe Venice Commission, 'Ombudsman Institutions' <https://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN>.
[64] Brenninkmeijer and Diamandouros (n 35).
[65] ibid 75.
[66] ibid 86.
[67] ibid 90.
[68] ibid 72.
[69] ibid 85.
[70] ibid 78.
[71] ibid 90.
[72] ibid 91.

ombudsmen might wish to engage in joint enquiries, and it might be prudent to develop a framework for this at an early stage'.[73]

The central role of the Ombudsman institution for monitoring human rights compliance at the borders was acknowledged by the ECtHR in the recent case of *M.H and Others v. Croatia*, which contains ample references to facts established by the 'Croatian Ombudswoman'.[74]

2.2.4 National Human Rights Institutions (NHRIs)

The main distinctive characteristics of NHRIs compared to other independent national human rights bodies are their broad mandate, pluralistic composition, and the fact that they are regularly assessed against criteria outlined in the UN Paris Principles relating to the status of the national institutions (Paris Principles)[75].

Their broad mandate to promote and protect human rights enables NHRIs to help ensure that national human rights policies are preventive, coherent, and consistent and provide authorities with a general human rights perspective[76]. Their pluralistic composition confers them the adequate authority as representing the relevant components of the society of their country.[77]

In Europe, some Ombudsman institutions are also recognised as NHRIs.[78] Even though the Paris Principles contain a whole section on this possibility,[79] NHRIs usually do not deal with individual cases. Instead, they deal with systemic issues pertaining to human rights protection and promotion, advising all branches of government as well as the legislator. This systemic angle of their work also explains why NHRIs that are separate from the Ombudsman institution often leave (much of the) on-site monitoring to the latter.

To assess compliance with Paris Principles, there is an elaborate peer-based accreditation procedure of NHRIs to ensure that the essential prerequisites for their proper functioning exist.[80] Through the process, the NHRIs ensure their credibility and legitimacy as well as the

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[73] ibid.

[74] *M H and others v Croatia* (Apps Nos 15670/18 and 43115/18 (ECtHR, 18 November 2021)).

[75] UN General Assembly, 'Principles relating to the Status of National Institutions (The Paris Principles)' (1993) UN Doc A/RES/48/134.

[76] Gauthier de Beco, 'National Human Rights Institutions in Europe' (2007) 7 Human Rights Law Review 331.

[77] See Paris Principles: 'Composition and guarantees of independence and pluralism, 1. The composition shall […] ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights […]'.

[78] See table in Annexe 1.

[79] 'Additional principles concerning the status of commissions with quasi-jurisdictional competence', Paris Principles.

[80] The assessment is performed by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) and supported by the UN OHCHR. Based on the UN World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23 para 36. https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx. This is outlined in GANHRI's internal documents, 'GANHRI Statute (Adopted by the UN General Assembly on 5 March 2019)' <https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/EN_GANHRI_Statute_adopted_05.03.2019_vf.pdf>; 'Rules of Procedure for the GANHRI Sub-Committee on Accreditation (Adopted by the UN General Assembly on 4 March 2019)' <https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/ENG_GANHRI_SCA_RulesOfProcedure_adopted_04.03.2019_vf.pdf>. The SCA regularly reviews NHRIs as regards compliance with the Paris Principles and accredits them. The distinction is made between institutions that are fully (A Status) or partially (B Status) compliant with the Paris Principles. As of August 2021, GANHRI is composed of 117 members: 86 'A' status accredited NHRIs and 32 'B' status

perception of such by external partners and stakeholders. The accreditation has significant implications for the NHRI's ability to operate at the international (especially UN)[81] and domestic levels.

The role of NHRIs is also recognised at the regional level, primarily in the work of the Council of Europe. NHRIs are seen as the key stakeholders in ensuring the effective implementation of the European Convention on Human Rights at the national level; they have acted as amicus curiae and submitted third party interventions before the European Court of Human Rights and have an important role regarding the execution of judgments.[82] Working with independent NHRIs is a continuing priority for the Commissioner for Human Rights, who sees them as key sources to understanding the human rights situations in the Member States.

There is also increased recognition of the role of NHRIs with respect to the EU and its legal system, as can be seen through their contributions to and the coverage they are given in the Commission's Annual Rule of Law Reports.[83]

2.2.5 National Preventive Mechanisms against torture (NPMs)

The basic idea behind the creation of NPMs is that prevention of torture and ill-treatment requires frequent visits by an independent body to all places under the jurisdiction or control of the national authorities where persons are or may be deprived of their liberty. NPMs have unlimited and immediate access anytime to all places of detention without prior authorisation or notice.[84] On site, they may interview any person in private and access all documents and other items of information such as the recordings of surveillance cameras. In some countries, hampering the work of the NPM is an offence.[85]

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accredited NHRIs. The full list of NHRIs and their accreditation status is available at 'Chart of the Status of National Institutions' <https://ganhri.org/wp-content/uploads/2021/08/StatusAccreditationChartNHRIs.pdf>. The European Network of National Human Rights Institutions (ENNHRI, which goes geographically beyond the EU Member States) comprises 30 A status, and 9 B status institutions (The full list is available at 'Our Members' (*ENNHRI*) <https://ennhri.org/our-members/>.

[81] In the UN fora, A-Status NHRIs have been accepted as individual actors with a position separate from their State and with participation rights that go beyond those of NGOs. The participation rights granted to A- Status NHRIs at the Human Rights Council are not extended to B-Status and non/accredited institutions or those having a thematic mandate, such as specialised Ombudsman institutions, sub-national institutions, or institutions that are not compliant for other reasons. NHRIs regularly engage with treaty bodies and participate at Universal Periodic Review (UPR), where more than half of the accredited NHRIs from the EU have submitted their reports when their country was under review.

[82] There is continuous cooperation and involvement of NHRIs and ENNHRI in different Council of Europe mechanisms and processes, such as inter alia the Steering Committee for Human Rights (CDDH) and the European Committee on the Prevention of Torture (CPT). Recently, the need for strong engagement of NHRIs with Council of Europe's mechanisms was confirmed by the Committee of Ministers asking Member States to strengthen meaningful cooperation of NHRIs with the Organization (Recommendation CM/Rec (2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions, 31 March 2021).

[83] See 'Rule of Law Mechanism' (*European Commission*) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en>; European Commission, 'European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report' 3 <https://ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_methodology_en.pdf>; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report' COM(2020) 580 final; Committee on Civil Liberties, Justice and Home Affairs, 'Report on the Commission's 2020 Rule of Law Report) 2021/2025(INI) (9 June 2021) 16, para 30.

[84] OPCAT article 20.

[85] In France, the law on establishment of the NPM (*Loi n° 2007-1545 du 30 octobre 2007 instituant un Contrôleur général des lieux de privation de liberté*) was completed by Article 13.1. that foresees a €15,000 fine for hampering the work of the NPM

NPMs publish at least one report per year (but often many more).[86] These reports describe the situation in the various types of places of deprivation of liberty (prisons, police settings, closed centres for migrants or minors, army detention places, psychiatric hospitals and increasingly also elderly homes and social care homes). To address shortcomings, NPMs make recommendations to relevant authorities. They may also submit observations concerning existing or draft legislation or propose legislation[87]. Their reports and recommendations are typically submitted to the authorities in charge of the places visited. Annual reports are presented before the Parliament, which examines them and should discuss them publicly.

NPMs are not only national actors, but they are also part of a global system of torture prevention. Set up pursuant to a UN convention (the OPCAT), cooperation with the OPCAT's treaty body, the Sub-committee on Prevention of torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT),[88] is mandatory. The SPT is tasked by the OPCAT to build up the national capacities for torture prevention by fostering the effectiveness of NPMs. For this, it has issued Guidelines on NPMs for the attention of both States and NPMs but stops short of assessing if a given NPM has been established and functions in conformity with its guidelines.[89] Some country visits by the SPT are entirely focused on the NPM issue.[90]

Although their cooperation is not a legal obligation, NPMs also regularly engage with the CPT. They exchange information, including on cases of alleged torture and instances of inhuman and degrading treatment, and ensure follow-up on the CPT's recommendations. In fact, the independence and objectivity of NPMs makes them a trustworthy partner who can provide information to both international monitoring bodies (SPT and CPT) and who can ensure follow-up to their recommendations, in a way continuing their work at the national level.

The OPCAT requires NPMs to establish and maintain cooperation with civil society. Several NPMs include representatives of NGOs and civil society in their composition.

State Parties are free to decide about their preferred institutional NPM setup provided the latter is independent and able to function effectively in accordance with the OPCAT criteria, which in turn refer to the Paris Principles. Most EU Member States have designated already existing Ombudsman institutions as their NPM,[91] as they have likely already dealt with complaints from 'service users' of closed institutions. However, in contrast with the predominantly legal and case-specific work of Ombudsman institutions, the preventive NPM mandate is

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or for reprisals against individuals who have contacted or provided information to the NPM. The draft law foresaw the possibility of a prison sentence, but that was dropped in the subsequent readings.

[86] See Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5 para 36.

[87] OPCAT article 19.

[88] ibid article 2.

[89] 'Whilst the SPT does not, nor does it intend to formally assess the extent to which NPMs conform to OPCAT requirements, it does consider it a vital part of its role to advise and assist States and NPMs fulfil their obligations under the Optional Protocol'; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5 para 3.

[90] E.g., Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Visit to the Netherlands for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism: Recommendations and Observations Addressed to the State Party, Report of the Subcommittee' (2016) UN Doc CAT/OP/NLD/1.

[91] See Annexe 1.

interdisciplinary and needs to resort to a wide range of other competences – e.g., medical, educational, social, policing. In addition, expertise is needed in relation to specific groups such as women, juveniles, members of minority groups, refugees, foreign nationals, persons with disabilities, and others.[92] To that end, Ombudsman institutions need to widen the available expertise and adopt new working methods to allow for this broader approach.

NPMs also work in networks, such as the South-East European (SEE) NPM Network and the European NPM Forum or, for those who operate under the umbrella of Ombudsman institutions, the International Ombudsman Institute (IOI), which has developed specific cooperation programs for the NPM components of its members.

2.3 Monitoring mechanisms at the EU level or with an EU mandate

At the EU level, there are two existing monitoring mechanisms established by Union law that are of relevance: the Fundamental Rights Officer of Frontex and the European Ombudsman. In addition, recent efforts by the European Commission to work with individual Member States to improve border monitoring have resulted in ad hoc national mechanisms. Finally, the proposed Screening Regulation contemplates the establishment of an independent monitoring mechanism.

2.3.1 Fundamental Rights Officer of Frontex (FRO)

Frontex is managed by an Executive Director (ED) under the authority of a Management Board (MB) composed of one representative of each Member State and two representatives of the European Commission. This means that Frontex operates directly under the control of EU Member States and – to some extent – the Commission.[93] Frontex is accountable to the European Parliament and the European Council.[94] The Agency's understanding of its accountability to EU institutions and their exercise of oversight is captured in the following:

> Frontex is accountable to the European Parliament and the European Council. One of the ways that works in practice is that our Management Board provides our annual activity report and annual/multiannual work programmes to the Parliament and the Council. They may ask the Frontex executive director to report on any matter related to our operations. […] Both the Council and the Parliament also exercise

[92] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) UN Doc CAT/OP/12/6 paras (i), (j).

[93] '(T)he composition of the Management Board is rather advantageous, with representatives of the Member States and of the Commission but not from FRA or independent organisations, and with no role for the European Parliament'; European Council on Refugees and Exiles (ECRE), 'Editorial: Fronting up to Frontex' (2 April 2021) <https://ecre.org/editorial-fronting-up-to-frontex/>.

[94] 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 OJ L 295 (Frontex Regulation) article 6.

> financial supervision over the Agency's budget […] We're also obliged to inform the Parliament before concluding working arrangements with non-EU countries. Frontex is also accountable to national border guard authorities whose representatives are members of the Agency's Management Board.[95]

One notices that (a) the European Commission is not mentioned among the oversight bodies, that (b) the type of supervision that is expressly mentioned is financial supervision and that (c) there is no word on judicial control.

Ad (a) it can be observed that the European Commission, as the body responsible for implementing the EU budget, exercises budgetary oversight over Frontex and reports on its implementation. Additionally, as part of its function to supervise the implementation of the EU treaties and legislation, the European Commission oversees the work of EU agencies, including Frontex.[96]

Indeed (ad b), the only supervision expressly foreseen in the Frontex Regulation is 'financial supervision over the Agency's budget.'[97] This means that whatever problem Parliament or Council may have with Frontex, their only leverage is the power to approve or to withhold discharge of the annual budget reports.

As regards judicial control over Frontex (ad c), the fact that the EU is not a party to the ECHR (despite Article 6 TEU, which makes it an obligation for the EU to accede thereto) excludes judicial control by the ECtHR. Yet there are now cases pending before the CJEU against Frontex.[98] Their outcome will show to what extent this control works. Guest officers deployed by Frontex fall within the jurisdiction of their own national courts and/or those of the State where they may have committed an offence under the rules of the applicable national penal laws. As regards Frontex's own agents, experts interviewed on this issue for this feasibility study saw no possibility for national courts to take up cases against Frontex as such or against the agents involved. In other words, there is a risk of impunity here.

If, as required by EU law and reiterated by Frontex, 'respect for and the protection of fundamental rights are unconditional and essential components of effective integrated border management',[99] it is crucial to examine the mechanisms in place to ensure that this absolute requirement is respected. Frontex explains that the 'main components of [its] system for fundamental rights protection and monitoring' are its Fundamental Rights Strategy through

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[95] 'How We Are Accountable' (*Frontex*) <https://frontex.europa.eu/accountability/how-we-are-accountable/>.
[96] 'EU Partners: European Commission' (*Frontex*) <https://frontex.europa.eu/we-build/eu-partners/european-commission/>.
[97] Of course, the standard supervision over financial management, through the Court of Auditors and possibly OLAF etc., also applies.
[98] 'First Legal Action for Damages against Frontex Before The Court of Justice of the European Union | Human Rights at Sea' (*Human Rights At Sea*, 21 October 2021) <https://www.humanrightsatsea.org/news/first-legal-action-damages-against-frontex-court-justice-european-union>. For a copy of the submissions filed before the CJEU, see, <https://www.statewatch.org/media/2999/eu-frontex-front-lex-case-non-confidential-version-application-to-ecj-5-21.pdf?t=1621958131>; Nikolaj Nielsen, 'Dutch Lawyers Take Frontex to EU Court Over Pushbacks' (*EUobserver*, 21 October 2021) <https://euobserver.com/migration/153294>.
[99] 'Fundamental Rights at Frontex' (*Frontex*) <https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-at-frontex/>.

which fundamental rights are mainstreamed in its planning, functioning and operations;[100] the Serious Incident Report (SIR) system that obliges officers to bring to the attention of the Agency any serious breach of rules they observe; the mechanism that allows persons affected to complain directly to Frontex; the Consultative Forum, that provides independent advice on fundamental rights issues to the agency; as well as a specific supervisory mechanism on the use of force, which covers all members of the standing corps.

The functioning of the SIR procedure has been criticised as letting human rights violations go potentially undetected.[101] Likewise, the complaints mechanism put in place by Frontex has been judged not effective.[102] As for the Consultative Forum of Frontex, this is clearly an advisory body to the Agency and its Management Board (MB) and is not a monitoring body.[103]

Thus, the linchpin of human rights monitoring of Frontex activities is the FRO, together with the Deputy FRO[104] and the Fundamental Rights Monitors (FRMs). They make up the Office of the FRO, which is governed by Articles 109 and 110 of the Frontex Regulation. The FRO is tasked with contributing to the agency's fundamental rights strategy and monitoring its compliance with fundamental rights, including by conducting investigations into any of its activities. They are also to handle the SIRs of fundamental rights relevance, provide opinions on all documents that may have human rights relevance, and carry out on-the-spot visits to any joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation or return intervention, including in third countries. Crucially, the FRO must inform the Executive Director (ED) about possible violations of fundamental rights during activities of the Agency and select and manage the FRMs, who report only to them.

In response, the ED must reply to the FRO's reported concerns regarding possible human rights violations to indicate how they have been addressed. The FRO reports directly to the Management Board (MB) and cooperates with the Consultative Forum. The MB must lay down special rules to guarantee that the FRO and their staff are independent in the performance of their duties. The MB has to ensure that action is taken regarding recommendations of the FRO.

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[100] 'The European Border and Coast Guard Agency ('The Agency') Fundamental Rights Strategy' <https://prd.frontex.europa.eu/document/fundamental-rights-strategy/>.

[101] ECRE, 'Holding Frontex to Account: ECRE's Proposals for Strengthening Non-Judicial Mechanisms for Scrutiny of Frontex' (2021) Policy Paper <https://ecre.org/wp-content/uploads/2021/05/Policy-Papers-07.pdf>.'Frontex Failing to Protect People at EU Borders' (*Human Rights Watch*, 23 June 2021) <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>; Nikolaj Nielsen, 'Frontex's "Serious Incident Reports" - Revealed' (*EUobserver*) <https://euobserver.com/migration/151148>. The Management Board of Frontex has itself expressed misgivings with the system, 'Conclusions of the Management Board's Meeting on 20-21 January 2021 on the Preliminary Report of Its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea' (*Frontex*, 21 January 2021) <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-20-21-january-2021-on-the-preliminary-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-GnFaIc>.

[102] 'EU: Updates to Frontex Complaints Mechanism Shrouded in Secrecy' (*Statewatch*, 11 September 2020) <https://www.statewatch.org/news/2020/september/eu-updates-to-frontex-complaints-mechanism-shrouded-in-secrecy/>; ICJ, 'An Effective Accountability Mechanism for Frontex (European Border and Coast Guard Agency)' (*International Commission of Jurists*, 20 June 2018) <https://www.icj.org/an-effective-accountability-mechanism-for-frontex-european-border-and-coast-guard-agency/>; *Decision in OI/5/2020/MHZ on the Functioning of the European Border and Coast Guard Agency's (Frontex) Complaints Mechanism for Alleged Breaches of Fundamental Rights and the Role of the Fundamental Rights Officer* (European Ombudsman, 15 June 2021).

[103] 2019 EBCG (Frontex) Regulation article 109.

[104] The Deputy FRO is appointed by the MB from a list of at least three candidates presented by the FRO.

The FRO publishes annual reports on the extent to which the activities of the Agency respect fundamental rights. The Agency has to ensure that the FRO can act autonomously and be independent in the conduct of their duties. The FRO must be given sufficient and adequate human and financial resources at their disposal necessary for the fulfilment of their tasks. The FRO must be given access to all information concerning respect for human rights in all the activities of the Agency.

Yet, despite these safeguards contained in the Frontex Regulation, the FRO remains an integral component of the Agency's structure. They are selected by and report to the representatives of executive power of the Agency that they are then expected to scrutinize (the Member States' representatives in the MB are mostly Interior Ministry or border police officials). This falls clearly short of the minimum threshold criteria for independence set out at 1.2. above.

The issue of the FRO's independence is of particular importance since Frontex's ED has not appeared eager to implement some of the abovementioned Frontex Regulation provisions. Despite the rapid expansion of the Agency's mandate and operational footprint and an explicit provision in the Frontex Regulation (Article 110(6)), the 40 fundamental rights monitors who should have been hired by the end of December 2020 were not. This has hampered the capacity of the Office of the FRO to scrutinize the growing Frontex operational activity since early 2021, a period in which recurrent press reports exposed serious deficiencies in the Agency's capability to monitor and safeguard its own operations. The ED has been blamed by a Commission official for explaining the lack of recruitment of fundamental rights monitors in a 'misleading manner'.[105] The European Parliament's Frontex Scrutiny Working Group concluded that the ED 'caused a significant and unnecessary delay in the recruitment of at least 40 fundamental rights monitors'.[106] As a result, the European Parliament voted in October 2021 to put part of the Agency's 2022 budget in reserve.[107]

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[105] Letter by Monique Pariat (European Commission) to ED Fabrice Leggeri, dated 18 December 2020, <https://www.statewatch.org/media/1708/eu-com-letter-to-frontex-18-12-20.pdf>.

[106] Frontex Scrutiny Working Group (LIBE Committee on Civil Liberties, Justice and Home Affairs), 'Report on the Fact-Finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations' (2021) <https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf>. By October 2021, the agency had recruited and was training 20 FRMs while the appointment of the final 20 remained pending. In her speech at the plenary of the European Parliament in Strasbourg on 21 October 2021, Home Affairs Commissioner Ylva Johansson called on the agency to 'appoint the remaining 20 fundamental rights monitors quickly'; 'Commissioner Johansson's Speech on the 2019 Discharge of the European Border and Coast Guard Agency' (*European Commission*, 21 October 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-2019-discharge-european-border-and-coast-guard-agency_en>.

[107] On 27 September 2021, the European Parliament's Budget Committee, exercising the Parliament's budgetary oversight duties, proposed part of the Frontex 2022 budget to be frozen. It recommended that this should be made available 'only once the agency has fulfilled a number of specific conditions. These include recruiting 20 missing fundamental rights monitors and three deputy executive directors who are sufficiently qualified to fill these positions, setting up a mechanism for reporting serious incidents on the EU's external borders and a functioning fundamental rights monitoring system'; 'EP Committee Asks for Part of Frontex Budget to Be Frozen' (*News European Parliament*, 27 September 2021) <https://www.europarl.europa.eu/news/en/press-room/20210923IPR13401/ep-committee-asks-for-part-of-frontex-budget-to-be-frozen>. On 21 October 2021, the European Parliament plenary voted in favour of the proposal to put in reserve €90 M of the next budget of Frontex which amounts to around 12% of the agency's draft budget for 2022 (€757,793,708). This position will be the Parliament's starting point in negotiations with the European Council in November 2021 ('EP Asks for Part of Frontex Budget to Be Frozen Until Key Improvements Are Made' (*News European Parliament*, 21 October 2021) <https://www.europarl.europa.eu/news/en/press-room/20211014IPR14931/ep-asks-for-part-of-frontex-budget-to-be-frozen-until-key-improvements-are-made>. In response, Frontex launched the recruitment for the 20 pending monitors positions in the second week of October 2021.

In sum, the new Frontex Regulation of 2019 has significantly enhanced the potential effectiveness of the mechanism for human rights monitoring within Frontex. Internal compliance monitoring is expected from every public authority, which is particularly important for law enforcement agencies where, by the nature of their tasks, there is an increased risk of serious human rights violations. Considering the extended powers of Frontex and its rapid growth, this development is to be welcomed. But it cannot do away with the need for truly independent, that is, external monitoring in parallel to the internal mechanism. Moreover, while this internal monitoring mechanism looks good on paper, its success in practice remains to be seen.[108]

2.3.2 European Ombudsman

The institution of European Ombudsman (EO) was created by a Decision of the European Parliament in 1994, and the office came into being in 1995.[109] Initially, the remit of the office was rather narrowly defined.[110] Only EU citizens (a status only created by the Maastricht Treaty in 1991) and any natural or legal person with a registered office in the EU were allowed to make complaints within scope. But from the outset, the European Ombudsman was given the possibility to launch own initiative investigations to clarify any suspected maladministration in the activities of Community institutions and bodies. The importance of independence was recognised by requiring 'every guarantee of independence' of the post holder.[111] The nomination and term of the European Ombudsman were linked to that of Parliament itself; the EO is elected by Parliament and is accountable to it. A duty was created on EU institutions to provide the European Ombudsman with information requested and access to files. Similarly, an obligation was included that EU officials are required to testify at the EO's request, and national administrations are to provide them with any information that may help to clarify instances of maladministration by Community institutions or bodies through their permanent representations (with some exceptions). However, the powers are limited after that. Where the European Ombudsman finds maladministration, their power is to notify the institution and make recommendations. Assuming no action is forthcoming, they then report to Parliament itself.

[108] See Annexe 4 for a detailed discussion on how previous legislative amendments designed to enhance effective human rights protection failed to result in improved human rights protection by Frontex.
[109] 94/262/ECSC, EC, Euratom: Decision of the European Parliament of 9 March 1994 on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties OJ L 113/15. In 1992, the Maastricht Treaty had made provision to insert the legal basis for the establishment of the office of the European Ombudsman into the EC Treaty, Steel and Coal Community and the Atomic Energy Treaty (Article 138e (4) of the Treaty establishing the European Community, Article 20d (4) of the Treaty establishing the European Community, Article 20d (4) of the Treaty establishing the European Coal and Steel Community; Article 107d (4) of the Treaty establishing the European Atomic Energy Community)
[110] '[T]he Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role and make recommendations with a view to putting an end to it. No action by any other authority or person may be the subject of a complaint to the Ombudsman' (Article 2(1) Decision 94/262).
[111] 'The Ombudsman shall be chosen from among persons who [...] offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledge[d] competence and experience to undertake the duties of Ombudsman.' (Article 6(2) Decision 94/262). See also Articles 9 and 10 of the Decision.

In 2009, the EU Charter of Fundamental Rights became legally binding through the entry into force of the Lisbon Treaty. The new legal right to good administration enshrined in Article 41 in the Charter provided a strong basis for the extension of the powers of the European Ombudsman. The governing legal structure of the EO was revised and extended by regulation in July 2021.[112]

The possibility of cooperation with colleagues at the national level was foreseen from the start.[113] The European Network of Ombudsmen was created in 1996 and brought together 95 national and regional bodies from 36 countries (going beyond EU Member States). In 2014, the European Ombudsman set up a system of parallel inquiries with its national counterparts to enhance the effectiveness of ensuring good administration. One of the difficulties, however, of cross-Member State cooperation among national Ombudsman institutions and the EO has been that the mandates of the former vary significantly. In some States, there are several Ombudsmen with specific sectoral responsibilities. As regards competence for refugees, border controls or migration, there is not always coherence in the mandates of national Ombudsman institutions

The office's initial focus was very much on the rights of EU citizens and ensuring the correct administration of EU bodies, as is apparent from the press releases published at the time. Among the most important contributions of this first period was the European Ombudsman's development of the doctrine of transparency and access to official documents, which has been central to the accountability of all bodies in the EU. Under the second post holder (from 2003 onwards), migration and border management became a subject of investigation. The first press release on the subject was on 18 December 2003 relating to deaths of migrations from North Africa to Spain[114]. Since then, the treatment of refugees, border controls and migration has become an important part of the work of the EO's office. The European Ombudsman has used the tool of own initiative investigations to examine how Frontex has dealt with human rights issues.

In October 2011, the Frontex Regulation of 2004 was amended for 'further enhancement of the role of the Agency [...] to develop a policy with a view to the gradual introduction of the concept of Integrated Border Management'.[115] But the amendment also required the Agency to take a number of measures to ensure respect of fundamental rights (including adopting a code of conduct for all activities, code of conduct for forced-return operations, the drawing up of a fundamental rights strategy, setting up of the Fundamental Rights Forum, the establishment of the FRO). Simultaneously, civil society kept raising concerns about the human rights implications of Frontex's activities. In March 2012, the European Ombudsman decided to

[112] 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 253/1.

[113] 'The Ombudsman may cooperate with authorities of the same type in certain Member States provided he complies with the national law applicable.' (Article 5 Decision 94/262).

[114] 'Ombudsman Receives Complaints from Citizens About Death of Illegal Immigrants in Spanish Waters' (*European Ombudsman*, 17 December 2003) <https://www.ombudsman.europa.eu/fr/press-release/en/124>.

[115] Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 304/1 recital (7).

launch an own-initiative inquiry to check how Frontex implemented the new provisions.[116] The inquiry resulted in a detailed draft recommendation on how Frontex could improve and render its mechanism to monitor respect for fundamental rights in all its activities more effective. While Frontex responded positively to the EO's recommendations concerning the Fundamental Rights Strategy, Action Plan, Codes of Conduct, termination/suspension of operations, and the Consultative Forum, 'it failed to take on board the Ombudsman's recommendation that [...] the Fundamental Rights Officer should consider dealing with complaints on infringements of fundamental rights in all Frontex's activities submitted by persons individually affected by infringements and also in the public interest.'[117] The new European Ombudsman decided in November 2013 to close the inquiry regarding the first set of aspects but to address a special report with final recommendations to the European Parliament 'seeking its support' concerning the contentious issue of the powers of the FRO.[118]

In October 2014, the European Ombudsman launched another own initiative investigation 'to clarify how Frontex, as coordinator of (Joint Return Operations) JROs, ensures respect for the fundamental rights and human dignity of returnees during these operations'; four of the five items the EO was specifically looking into were linked to how JROs were monitored.[119] In deciding to close the investigation in May 2015, the European Ombudsman noted that 'Frontex needs to enhance the transparency of its JRO work, amend its Code of Conduct in areas such as medical examinations and the use of force, and engage more with the Member States. Frontex must do all in its power to promote independent and effective monitoring of JROs'.[120] Concrete proposals were added to the decision. In her press release, the European Ombudsman did not forget to mention that she 'continue(d) to be unhappy with the refusal of Frontex to establish its own complaints mechanism'.[121]

The 2016 overhaul of the Frontex Regulation created the individual complaints mechanism that the EO had requested.[122] In November 2020, the latter decided to open an own initiative investigation 'to look into how […] Frontex deals with alleged breaches of fundamental rights

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[116] The EO submitted Frontex's reply to his questions for comments to the Fundamental Rights Agency (FRA) and launched a public consultation in which international organisations, NGOs, one national Ombudsman, and private persons took part.

[117] *Decision of the European Ombudsman Closing Own-initiative Inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)* (European Ombudsman, 14 November 2013).

[118] ibid.

[119] '(I)n her inquiry the Ombudsman wished to establish whether there is scope for: - Greater **clarity** as to what Frontex could and should do concretely if fundamental rights violations threatened to occur or occurred during a JRO - More **effective** monitoring (…) - More **comprehensive** monitoring: national ombudsmen, some of whom have monitoring responsibilities, were invited to share their experience - Greater **cooperation** among monitoring bodies (…).- More **transparent** monitoring (in relation to how the reports drafted by monitors are taken into account by Frontex).' *Decision of the European Ombudsman Closing Her Own-initiative Inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)* (European Ombudsman, 4 May 2015).

[120] ibid. This conclusion was reached based on information obtained from Frontex, the FRO, an inspection of Frontex files and contributions by FRA, UNHCR and civil society organisations and the European Network of Ombudsmen.

[121] 'Ombudsman: How Frontex Can Ensure Respect for Migrants' Fundamental Rights During "Forced Returns" | Press Release | European Ombudsman' (*European Ombudsman*, 5 May 2015) <https://www.ombudsman.europa.eu/en/press-release/en/59744>.

[122] Regulation (EU) 2016/1624 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 OJ L 251/1 article 72.

through its 'complaints mechanism' and to address the role and independence of Frontex's Fundamental Rights Officer in this regard.'[123] In her decision on the case, published on 15 June 2021, she 'assess(ed) the overall effectiveness of the complaints mechanism, against a background of public concerns about fundamental rights violations in the context of Frontex operations' in the following terms:

> Since its creation, the complaints mechanism has dealt with a very low number of complaints, with no complaints as yet concerning the actions of Frontex staff members. Between 2016 and January 2021, the Fundamental Rights Officer had received 69 complaints of which 22 were admissible. With operations made up of staff members from different bodies, who are responsible to different authorities, it may be difficult for potential complainants to identify the alleged perpetrators and to understand how and to whom they can report alleged violations, and seek redress through the appropriate channels. […] (T)he Ombudsman also reviewed complaints dealt with by the complaints mechanism and identified various potential shortcomings that may make it more difficult for individuals to report alleged fundamental rights violations and seek redress. The […] inquiry […] identified delays by Frontex in implementing its new obligations concerning the complaints mechanism and the Fundamental Rights Officer.[124]

The European Ombudsman set out a series of suggestions to Frontex, with a view to improving the accessibility of the complaints mechanism for potential victims of fundamental rights violations and to make it easier for potential victims of fundamental rights violations to be aware of redress possibilities and to report incidents, as well as suggestions to improve how complaints are handled and followed up.

She also made suggestions to 'strengthen [..] the accountability of Frontex operations and all those involved therein'. Those included notably

> that the Executive Director should act on recommendations by the Fundamental Rights Officer […] that […] officers […] should accept and transmit any complaints they receive, and that […] complainants will not be penalised for submitting a complaint [and that] Frontex […] consider accepting anonymous complaints, and […] improve the information it makes available to the public including publishing all of the Fundamental Rights Officer's annual reports, which in future should include a section on the concrete actions taken by Frontex and Member States in reaction to recommendations by the Fundamental Rights Officer.[125]

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[123] 'How the European Border and Coast Guard Agency (Frontex) Deals with Complaints About Alleged Fundamental Rights Breaches Through Its "Complaints Mechanism"' (*European Ombudsman*) <https://www.ombudsman.europa.eu/en/case/en/57955>.

[124] *Decision in OI/5/2020/MHZ on the Functioning of the European Border and Coast Guard Agency's (Frontex) Complaints Mechanism for Alleged Breaches of Fundamental Rights and the Role of the Fundamental Rights Officer* (n 102).

[125] 'Ombudsman Makes Suggestions to Improve Accountability of Frontex's Work' (*European Ombudsman*, 16 June 2021) <https://www.ombudsman.europa.eu/en/news-document/en/143159>.

Importantly, the EO 'noted that decisions by the Executive Director on complaints forwarded by the Fundamental Rights Officer may be challenged before the European Ombudsman'.[126] While making it clear that the European Ombudsman does indeed supervise the Frontex supervisors of human rights compliance (i.e. the FRO in the first place and the ED in the second), it still remains that the European Ombudsman can only issue non-binding recommendations regarding any FRO findings – or, more likely, ED reactions thereto - the EO may object to. The European Ombudsman has no decision-making power to quash decisions of the authorities they observe and whose human rights compliance they assess. Moreover, in practice it remains likely that only very few individuals will complain to Frontex / the FRO about violations of their human rights during Frontex operations. This may, however, not be the case for civil society organizations, who are more likely to go down the road of complaints to the FRO of Frontex now that they know that appeals against the decisions on such complaints made by the ED of the Agency will be reviewed by the European Ombudsman.

In sum, a truly independent institution with significant funding, expansive investigative powers, and years of relevant insight and expertise, the European Ombudsman fulfils today not only a monitoring role but even an oversight role with respect to Frontex.

However, there is room for a yet more prominent role that maximises the mandate entrusted to the institution. As it stands, the European Ombudsman has not yet ventured into the area of proactive monitoring at the borders, meaning that the institution itself does not currently assess if human rights violations are taking place in the field. Proposals in that respect will be made below in Chapter 3.

2.4 Ad hoc mechanisms negotiated between the European Commission and individual Member States

2.4.1 The Croatian Case

Discussions between the EU and the Croatian authorities regarding monitoring of border control operations date back to 2018.[127] After allegations of violent pushbacks at the Croatian borders had been published, officials of the European Commission and the Fundamental Rights Agency (FRA) requested, during a visit to Zagreb in November 2020, that the Croatian Ministry of the Interior prepare a draft memorandum of understanding for the establishment of a monitoring mechanism, to be used as a basis for negotiations.[128] The post-visit report contained ideas regarding the design and mandate of the mechanism floated by stakeholders and civil society activists in their meetings with the EU delegation.

[126] ibid.
[127] Apostolis Fotiadis, 'Croatia Drags Heels on Border-Monitoring Mechanism to Prevent Migrant Abuses' (*Balkan Insight*, 11 February 2021) <https://balkaninsight.com/2021/02/11/croatia-drags-heels-on-border-monitoring-mechanism-to-prevent-migrant-abuses/>.
[128] Report on the meetings and mission to Croatia DG HOME/Fundamental Rights Agency 13, 16, 17 and 18 November 2020, unpublished and on file with the authors.

The Croatian Ministry of the Interior delivered the draft memorandum of understanding by late February 2021. This was followed by an internal exchange between it and Commission expert staff which led to an agreement about the mechanism's architecture and operational mandate on 8 June 2021. No details were published at the time of the agreement.

Information regarding the design and mandate of the new monitoring mechanisms came to light with the appearance of two documents later in the autumn of 2021: the response letter of Home Affairs Commissioner Ylva Johansson to European Parliamentarians on 29 August 2021 and the response letter of State Secretary Terazija Gras from the Ministry of the Interior following a freedom of information request by the Zagreb based legal aid organisation Center for Peace Studies in early September 2021.[129]

Both documents contained identical information regarding the design of the new mechanism, which comprises a two-level structure: A Coordination Board will manage the operations of the mechanism. Those are limited to the border crossing points with Bosnia and Herzegovina, Montenegro, and the Republic of Serbia. The Coordination Board is composed of two representatives each from the Association of Croatian Academy of Medical Sciences, the Association of Croatian Academy of Legal Sciences, the Association of Centre for Cultural Dialogue, the Association of Croatian Red Cross, as well as of Prof. Goldner Lang from the Faculty of Law of the University of Zagreb. The Coordination Board will also draft the mid-term and annual report of the mechanism.[130]

An Advisory Board will involve representatives of the European Commission, Frontex, the Fundamental Rights Agency, EASO, UNHCR, IOM, the Ombudsman, the Ombudsman for Children, and the State Attorney's Office of the Republic of Croatia. This less formal body is tasked to analyse the reports produced by the Coordination Board and advise it as well as the Croatian authorities on how to improve the performance of the mechanism.

Comments have been made on the independence and potential effectiveness of the mechanism calling it 'toothless' and 'ineffective.'[131] The mechanism can carry out unannounced visits only at border crossing points while monitoring at the green border (areas outside official border crossings, where reports place the vast majority of violent push back incidents) can only take place in coordination with the Ministry of the Interior which will maintain 'a purely logistical role during the announced visits to the green border in order to ensure safety of the mechanism implementers in hard-to-reach areas, minefields'.[132] The mechanism will carry out a maximum of 20 monitoring missions per year. It will be granted access only to the files of cases regarding complaints of alleged mistreatment that are already closed. Although a semi-annual and final report will be submitted to the Advisory Board, only an edited version of the latter will appear

[129] Apostolis Fotiadis, 'Croatia's New Border-Monitoring Mechanism Seen as "Toothless" and "Ineffective"' (*Balkan Insight*, 12 October 2021) <https://balkaninsight.com/2021/10/12/croatias-new-border-monitoring-mechanism-seen-as-toothless-and-ineffective/>.
[130] Ylva Johansson's response letter to European Parliamentarians, 29 August 2021, unpublished and on file with the authors.
[131] Apostolis Fotiadis (n 129).
[132] Response by the Ministry of the Interior State Secretary of the Republic of Croatia to a freedom of information request by the Centre for Peace Studies (16 September 2021), unpublished and on file with the others.

on the website of the Ministry of Interior. The mechanism will initially function for a year, and its extension is subject to revision.

The role played in its setting up by the same authority (Ministry of the Interior) which it is to monitor, the role which this authority continues to play in the functioning of the mechanism, as well as the above-mentioned operational limitations let the Croatian mechanism fall clearly short of the requirements explained in Chapter 2 of this study. The fear that 'the mechanism risks being a fig leaf behind which violations continue'[133] was a widely shared concern of those interviewed for the study.

It should be noted, though, that the legal mandate of the Ombudsman institution of Croatia, which includes monitoring the activities of the Croatian authorities at the borders, remains untouched by the setting up of the new, additional mechanism. However, the political signal is for the authorities to cooperate with the new mechanism rather than the Ombudsman institution, which has not benefited from much cooperation from the relevant national authorities when it comes to human rights issues at the border[134]. In any event, according to interviews held for this study, the present resources of the Ombudsman institution would not allow it to provide monitoring of the human rights situation at the borders that would be sufficiently robust to deter violations there.

The budget for the new mechanism will come out of EU financial resources but will be administered through the Croatian State budget. On 18 June 2021, the European Commission signed an agreement with the Croatian Ministry of the Interior to provide €14.4 million of emergency assistance to Croatia, of which €116,000 are allocated to activities of technical monitoring of border control and €320,000 to support the functioning of the monitoring mechanism.[135]

2.4.2 The Greek case

Discussions between the European Commission and the Greek Government about the establishment of a national independent monitoring mechanism for the borders have been engaged since late 2020. Until recently, there has been very little public information on the issue, apart from some rare mentions in press reports.

This changed suddenly in August 2021 when the Greek daily paper *Kathimerini* revealed that the European Commission had frozen the extension of an emergency budget line requested by the Hellenic Coast Guard for border control operations and had made the release of this money conditional on the creation of an independent border monitoring mechanism.[136] It was the first

[133] Joint Statement by ECRE, Amnesty International, Human Rights Watch, International Rescue Committee, Danish Refugee Council, Oxfam International, Refugee Rights Europe, Save the Children, 'Turning Rhetoric Into Reality: New Monitoring Mechanism at European Borders Should Ensure Fundamental Rights and Accountability' <https://ecre.org/turning-rhetoric-into-reality-new-monitoring-mechanism-at-european-borders-should-ensure-fundamental-rights-and-accountability/>.
[134] See the judgment of the ECtHR, *M. H. and others v Croatia* (n 74).
[135] Apostolis Fotiadis (n 129).
[136] Γιάννης Σουλιώτης, "Η Καμπούλ διχάζει τις Βρυξέλλες"(*e-kathimerini-com*, 27 August 2021)

time that access to EU budget lines was directly used as a pressure tool towards a Member State for setting up such a mechanism. One day later, the German magazine Der Spiegel published a report with comments from Home Affairs Commissioner Johansson that confirmed the use of conditionality as a pressure tool.[137] The Commissioner was quoted as saying that 'Greece has requested additional funds for border management, especially in the Aegean. We have said that such a payment should be linked to the establishment of a fundamental rights monitoring mechanism. I expect progress on this issue.' After this, the Greek Migration Minister repeatedly denied in public that Greece was considering creating a mechanism. On 29 September 2021, when the Minister had just denied again that a border monitoring mechanism was being discussed with the Commission, the Commission issued a Communication saying an independent and credible monitoring mechanism was 'being developed by the Commission and the Greek authorities.'[138] According to people involved in discussions on the issue in Brussels, the European Commission and Greek authorities have been exchanging non-papers regarding the establishment of a border monitoring mechanism. No details of the discussion's context have been made public. On 16 October 2021, a new report in *Kathimerini* disclosed that the Greek government had examined the option of designating the 'the National Transparency Authority (EAD) to act as the independent body that will investigate reports of migrant push backs.'[139] Unconfirmed sources cited in the report mentioned the presentation of a comprehensive plan for the structure and operation of the mechanism, which provided for the participation of representatives of the Migration Ministry, court officials and academics, but seemed to exclude representatives of UNHCR or civil society organizations.

EAD is a new structure created by legislation introduced in the summer of 2019 after the new government administration took office.[140] It incorporated five existing public sector inspectorates.[141] It is worth noting that neither the EAD nor the inspectorates it has incorporated have previously carried out monitoring of security structures or worked on issues directly related to border control and migration policy. According to its constituting legislation, the new authority 'enjoys functional independence, administrative and financial autonomy and is not subject to control or supervision by government bodies, government agencies or other Administrative Authorities.' [142] Its chairman, the members of the Board of Directors, and the Executive Director of the Authority 'enjoy personal and operational independence', and the

<https://www.kathimerini.gr/opinion/561475783/i-kampoyl-dichazei-tis-vryxelles/>.

[137] Giorgos Christides, Steffen Lüdke and Maximilian Popp, 'EU-Kommission blockiert Zahlungen an griechische Küstenwache' *Der Spiegel* (29 August 2021) <https://www.spiegel.de/ausland/pushbacks-von-fluechtlingen-eu-kommission-kuerzt-griechischer-kuestenwache-das-geld-a-028e8f42-cb75-41b9-97dd-bc28add93967>.

[138] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum COM (2021) 590 final.

[139] Yiannis Souliotis, 'Transparency Authority May Probe Pushback Claims' (*e-kathimerini-com*, 16 October 2021) <https://www.ekathimerini.com/news/1169960/transparency-authority-may-probe-pushback-claims/>.

[140] Newsroom, 'Greek Pm: National Transparency Authority a "Significant Innovation"' (*eKathimerini.com*, 9 December 2019) <https://www.ekathimerini.com/news/247332/greek-pm-national-transparency-authority-a-significant-innovation/>.

[141] These are the Office of the Inspector General of Public Administration, the Body of Inspectors-Auditors of Public Administration, the Body of Inspectors of Health and Welfare Services, the Body of Inspectors of Public Works, and the Body of Inspectors-Transport Controllers, which includes the General Directorate of Transport, and the General Secretariat for Combating Corruption.

[142] Νόμος 4622/2019 : Επιτελικό Κράτος: οργάνωση, λειτουργία και διαφάνεια της Κυβέρνησης, των κυβερνητικών οργάνων και της κεντρικής δημόσιας διοίκησης, Articles 82-103 and 118-119, https://www.e-nomothesia.gr/kubernese/nomos-4622-2019-phek-133a-7-8-2019.html (in Greek only)

authority is only accountable to the Greek Parliament.[143] Links to the executive are observed in the appointment process of the Executive Director as well as its Board of Directors (Management Board).[144]

On this brand-new development in Greece, the authors of this study, as well as a number of the persons interviewed, have observed the following with respect to the principles set out in Chapter 1 above:

The safeguards of independence of the EAD remain lower than those of the Greek Ombudsman's Office, whose autonomy and operational independence derive directly from the Constitution. Contrary to those of the Ombudsman institution, the scope and autonomy of EAD could potentially be restricted by the introduction of new legislation in the future.

Whereas the Ombudsman institution has held an increasingly broad human rights mandate since its inception in 1997-98, the mandate of EAD was initially geared toward anti-corruption[145] before being extended into areas like auditing NGOs involved in providing support to refugees (see below). Its sphere of competence does not seem appropriate for the monitoring of human rights compliance.

The persons interviewed for this study confirm that the Ombudsman institution works in the open and duly publishes all its findings and recommendations in annual and numerous special reports. However, there have been issues with the lack of publicity and transparency of audits conducted by EAD in 2020 into the functioning of NGOs that operate in support of refugees, leaving room for rumour and insinuation.[146]

In terms of expertise, it is difficult to understand the choice of the EAD over the Ombudsman. The Ombudsman institution has a wealth of experience in human rights monitoring, including monitoring on the ground,[147] as well as specific monitoring of the police in its function as an independent police complaints authority.[148] The EAD clearly does not have such expertise.

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[143] Ibid.

[144] EAD's board of directors involves a Selection Committee which comprises high ranking public officials. After an open tender, the Selection Committee submits a list of candidates to the Council of Ministers. The Ministers choose candidates for the positions to be filled and submit them for approval to the Special Parliamentary Permanent Committee on Institutions and Transparency. If the Parliamentary Permanent Committee does not approve one or more of the proposed candidates, the Council of Ministers proposes new candidates from the list of personalities put in place by the Selection Committee. Formally, the Chairman and the members of the Board of Directors of the Authority are appointed by a decision of the Council of Ministers published in the Government Gazette. A similar process is followed for the appointment of the Executive Director of EAD.

[145] Newsroom (n 140).

[146] 'The Findings of the National Transparency Authority Audit' (*METAdrasi*, 1 February 2021) <https://metadrasi.org/en/the-findings-of-the-national-transparency-authority-audit/>.

[147] Its NPM branch, for example, carries out unannounced in-depth visits to various types of places where individuals are or can be deprived of their liberty and there is a specialized team in the Ombudsman's office for the monitoring of forced-return operations both by the national authorities and by Frontex (participation in the pool of forced-return monitors set up according to Article 51 of the Frontex Regulation).

[148] See the latest report by the Greek Ombudsman for an overview of their investigatory functions: The Greek Ombudsman, 'National Mechanism for the Investigation of Arbitrary Incidents (Special Report 2020)' (2021) <https://www.synigoros.gr/resources/docs/report-2020_en_web.pdf>.

As a result, the designation of the EAD as the new independent body for human rights monitoring at the borders appears to side-line the existing Ombudsman institution, which is as such ready to ensure the independent monitoring of human rights compliance at the borders, provided it is given the necessary means.

It is worth noting that the Venice Commission has recently dealt with an infringement of the mandate of the Parliamentary Ombudsman of the UK.[149] It underlined how 'recently adopted international standards [...] were an opportunity to recall the importance of the Ombudsman Institution in a democracy and in the protection of human rights'.[150] Additionally, it highlighted the value of these instruments in 'remind[ing] States of their duty to support the institution and not to hinder or diminish its missions and mandates.[151] Its comments on the case before it noted how, although the State in question's decisions were not primarily intended to undermine the Ombudsman, 'it follows from the provisions and choices made that the mandate, independence and credibility of the [ombudsman] are affected.[152] This led the Commission to highlight how 'the possible harm done to the mandate, to investigative powers, [and' to the image of the [ombudsman] […] can lead to infringements of the interests […] of citizens in the defence of their rights.'[153] The Venice Commission, therefore, invited the authorities to refrain from the indirect infringement of the ombudsman's mandate, which they had contemplated.

2.5 Current proposal: The Independent Monitoring Mechanism in the proposed Screening Regulation

In September 2020, the European Commission published its proposal for a new European Pact on Migration and Asylum,[154] which included a proposal for a new Screening Regulation. The Proposed Regulation includes a novelty for border monitoring as it contemplates the establishment of national border monitoring mechanisms. This marks the first time the European Commission has proposed legislation that instals border monitoring mechanisms as part of the EU legal framework.

Article 7 of the Proposed Regulation reads as follows:

> 'Monitoring of fundamental rights
>
> 1. Member States shall adopt relevant provisions to investigate allegations of non-respect for fundamental rights in relation to the screening.

[149] Venice Commission, 'Opinion No 1044/2021 on the Possible Exclusion of the Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill (United Kingdom)' <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)041-e>.
[150] ibid para 90.
[151] ibid para 91.
[152] ibid para 88.
[153] ibid para 94.
[154] European Commission, 'New Pact on Migration and Asylum' (*European Commission*, 23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706>.

> 2. Each Member State shall establish an independent monitoring mechanism
> – to ensure compliance with EU and international law, including the Charter of Fundamental Rights, during the screening;
> – where applicable, to ensure compliance with national rules on detention of the person concerned, in particular concerning the grounds and the duration of the detention;
> – to ensure that allegations of non-respect for fundamental rights in relation to the screening, including in relation to access to the asylum procedure and non-compliance with the principle of non-refoulement, are dealt with effectively and without undue delay.
>
> Member States shall put in place adequate safeguards to guarantee the independence of the mechanism.
>
> The Fundamental Rights Agency shall issue general guidance for Member States on the setting up of such mechanism and its independent functioning. Furthermore, Member States may request the Fundamental Rights Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes.
>
> Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring'. [155]

The wording in the proposal provides for scrutiny of compliance with fundamental rights only within the spectrum of border procedures at the newly established 'screening' stage ('in relation to the screening'). This implies that any investigation of human rights violations refers to those that occur after an individual's arrival within EU territory. If interpreted strictly, it appears to exclude any actions taking place during crossings of the external EU border and before the start of the formal screening. Given the multiple allegations and documented instances of pushback operations at the EU's borders, the exclusion of these acts from the scope of the monitoring mechanism would appear to limit its effectiveness ab initio.

Numerous analyses of the proposal have found the scope of the proposed mechanism too narrow and have called for clarifications concerning the independence of the monitoring mechanisms to be set up.[156] Many have proposed to expand the mechanism's scope[157] so that it encompasses 'all alleged fundamental rights violations by national border management authorities or during border control activities.'[158]

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[155]European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817'.

[156] European Council on Refugees and Exiles (ECRE), 'ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612' (2020) <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>.

[157] 'EU: Independent Monitoring Mechanism on EU Borders Must Ensure Fundamental Rights and Accountability' (*Amnesty International*, 6 November 2020) <https://www.amnesty.org/en/latest/news/2020/11/eu-independent-monitoring-mechanism-on-eu-borders-must-ensure-fundamental-rights-and-accountability/>.

[158] Joint Statement by ECRE, Amnesty International, Human Rights Watch, International Rescue Committee, Danish Refugee Council, Oxfam International, Refugee Rights Europe, Save the Children (n 133).

The CPT, in a dedicated chapter on Independent Border Monitoring, has pronounced itself on the proposal and 'developed a number of criteria it considers should be met if any new monitoring mechanisms are to be considered effective and independent':[159]

> '[…] any such monitoring mechanism should have a mandate to:
>
> ● conduct unannounced inspections of law enforcement establishments and have access to all files, registers and video recordings in respect of all categories of migrants 'diverted' and 'intercepted' by law enforcement agencies;
>
> ● inspect all relevant documentation (including shift handover logbooks, shift distribution charts and shift reports) of law enforcement patrols operating on the external borders of the EU as well as access to all recordings of stationary and mobile video and motion-detecting devices covering the external borders;
>
> ● at its discretion, be present as an independent observer during 'diversion' and 'interception' operations at the border;
>
> ● liaise with International Organisations and other relevant stakeholders operating on the other sides of external borders of the EU in order to collect real-time information on possible cases of malpractices.
>
> In order to safeguard its independence, any such mechanism should also be:
> ● free from any institutional connection with the Ministry or other authorities responsible for policing the borders;
>
> ● adequately staffed by appropriately qualified staff, including medical professionals, and provided with the necessary financial resources;
> ● empowered to produce periodic and ad hoc visit reports with clear recommendations to the competent authorities and to report on the implementation of those recommendations;
>
> ● entitled to communicate directly with the competent prosecutorial authorities in the event that malpractice is uncovered in the course of its monitoring activities and to secure rapid access to forensic medical examinations for alleged victims of ill-treatment.'

Clearly, the criteria developed by the CPT do require a mandate for the monitoring bodies that goes beyond the mere screening procedure to encompass 'diversion' and 'interception' operations at the border' and 'law enforcement patrols operating on the external borders of the EU'. The essential powers of the mechanism are spelt out just as the safeguards for its independence. Guidance that the FRA might give to EU Member States on the setting up and

[159] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '30th General Report of the CPT (1 January - 31 December 2020)' (Council of Europe 2021) 15–16.

functioning of a human rights monitoring mechanism at the borders is not likely to ignore the guidance provided by the CPT, which is the specialised regional monitoring body in Europe (see the discussion hereafter at 2.6.1.).

But the negotiations in the European Parliament and the European Council on the Pact in the months that followed its publication made it clear that the proposed Screening Regulation was unlikely to be adopted in its current format in the near future.[160] This appeared to prompt a shift in the Commission's strategy. From an approach that institutionalises mechanisms through the proposed Regulation, its focus moved to bilateral negotiations for the creation of national independent monitoring mechanisms with selected Member States. This change of approach was illustrated in a speech that Ylva Johansson, European Commissioner for Home Affairs, gave about pushbacks at the European Parliament plenary in Strasbourg on 20 October 2021, in which she called on Member States 'not to wait for the Pact'.[161] The results of this approach as regards Croatia and Greece have been discussed above in Section 2.4 of this study.

2.6 Monitoring mechanisms of the Council of Europe

2.6.1 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The importance of the CPT for human rights monitoring at the borders has three aspects: its own functioning illustrates the implementation of the criteria and principles explained in Chapter 1 of this study, the CPT has refined these criteria and principles, and it is itself an important actor of the human rights monitoring at the borders.

The CPT was set up under the Council of Europe's 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', which came into force in 1989. All EU Member States and Schengen Associated Countries are parties to the Convention, as are many neighbouring European countries. The CPT builds on Article 3 of the ECHR, which provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

The setup and working methods of the CPT fulfil to a considerable extent the criteria of an effective human rights monitoring mechanism offered in Chapter 1 above. Its main activity is to observe the situation on the ground and report on it, which is the essence of monitoring. The CPT is not an investigative body but a non-judicial preventive mechanism to protect persons

[160] 'No Breakthrough Between Member States to Rapidly Adopt 'Screening' Regulation for Migrants at External Borders' (*Agence Europe*, 29 September 2021) <https://agenceurope.eu/en/bulletin/article/12800/12>; Nikolaj Nielsen, 'Commissions' New Migration Pact Still Seeking "Landing Zone"' (*EUobserver*, 22 October 2021) <https://euobserver.com/migration/153306>; 'Birgit Sippel Believes That It Is Time to Try to Move Forward with "the Most Serious Countries" on Asylum Pact Rather Than Seeking Consensus at All Costs' (*Agence Europe*, 17 July 2021) <https://agenceurope.eu/en/bulletin/article/12764/3>.

[161] 'Commissioner Johansson's Speech at the Plenary Debate on Pushbacks at the EU External Border' (*European Commission*, 20 October 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-plenary-debate-pushbacks-eu-external-border_en>.

deprived of their liberty against torture and other forms of ill-treatment, thus complementing the judicial work of the European Court of Human Rights (ECtHR).[162] The CPT provides authoritative monitoring through thorough fact-finding on the ground and precise, impartial reporting on the findings.[163] Although the CPT does not examine or provide information on individual cases and does not alert any judicial body of individual instances of torture or ill-treatment, it nonetheless contributes to judicial oversight. For example, the ECtHR uses the CPT findings to assess the contextual likeliness of allegations of individual cases of torture or ill-treatment.[164] And the CPT does clearly trigger and feed political oversight at the international level in the Council of Europe and the European Union as well as at the national level. Interestingly, the CPT does not report to national or international parliaments but to the governments of State Parties with which it engages in a dialogue.

The structure of the CPT guarantees, to a very large extent, its independence vis-à-vis the authorities it monitors.[165] The CPT is made of one independent and impartial expert in respect of each State Party, elected by the Council of Europe's Committee of Ministers. The members serve in their individual capacity and do not represent the State in respect of which they have been elected. To further guarantee independence, members do not visit the State in respect of which they have been elected. The Secretariat of the CPT forms part of the Council of Europe. It is composed of international civil servants who have made a formal commitment not to serve the interest of any individual state and over whom it is only the Council of Europe, rather than the Member States, which exercises authority.

The CPT has a clear mandate and strong powers derived from the CPT Convention and its Rules of Procedure. It must notify the State concerned that it intends to visit. However, after formal notification, the CPT delegation may go to any place where persons are or may be deprived of their liberty at any time and without advance notice. This includes a large variety of places such as prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals, and social care homes. CPT delegations have unlimited access to places of detention and the right to move inside such places without restriction. They interview in private persons deprived of their liberty and communicate freely with anyone who can provide information. After each visit, the CPT sends a detailed report to the State concerned with its findings, recommendations, comments, and requests for

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[162] 'About the CPT' (*European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*) <https://www.coe.int/en/web/cpt/about-the-cpt>.

[163] See the explanations of the CPT on its 'very distinctive fact-finding role' in its report on the visit to Hungary in October 2017, wherein the Committee 'express[es] its deep regret and dismay about the dismissive nature of the Hungarian authorities' response to the delegation's preliminary observations, which totally disregards the specialist nature of the CPT's work and its *modus operandi*.' 'CPT, "Report to the Hungarian Government on the Visit to Hungary Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017" (18 September 2018) CPT/Inf (2018) 42' paras 21-22 <https://rm.coe.int/16808d6f12>. The Hungarian authorities had 'simply denied the delegation's findings' indicating inter alia 'that visits by delegation from the European Commission in 2016 and the Fundamental Rights Agency of the European Union (FRA) in 2017 did not reveal any instances of ill-treatment'; ibid para 20, Executive Summary.

[164] E.g., See ECtHR judgement, *MSS v Belgium [GC]* (2011) 53 EHRR 2, para 227. '(T)he CPT's findings are regularly and widely relied upon by the European Court of Human Rights', Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, '25 Years of the CPT: Achievements and Areas for Improvement' (30 March 2017) Doc 14280 para 11.

[165] 'About the CPT' (n 162).

information. A detailed response to the issues raised in its report is expected from the State Party concerned.[166] The funding level of the CPT is decided by the Council of Europe as such, not by the Member States that are visited.

One inherent power of monitoring bodies – while not being standard-setting bodies - is that they refine the standards expected on behalf of those who are being monitored. The CPT's annual General Reports, in their substantive chapters, have served as an occasion for normative clarification such as, for example, of the standards for the deportation of immigration detainees by air.[167] When the Council of Europe's Committee of Ministers adopted its Twenty Guidelines on Forced Returns that had been prepared by the Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), it relied heavily on the CPT's above mentioned substantive chapter of the General Reports.[168] In turn, a Factsheet on 'Immigration Detention' published in March 2017 by the Secretariat of the CPT summarizes the 'detailed set' of 'CPT standards [which] build on legal principles originating from international (human rights) instruments, such as the ECHR, the Committee of Minister's Twenty Guidelines on Forced Return, relevant UN treaties, and 2008 EU Return Directive.'[169]

Also, monitoring bodies are led to clarify themselves the limits of their remit. With respect to the monitoring of border management, the CPT does not limit itself to places of deprivation of liberty such as detention facilities at border crossing points, police stations, closed centres for migrants, and vehicles in which migrants can be transported. It monitors all situations 'where persons are deprived of their liberty by a public authority',[170] including where people are not actually held in premises, such as alleged push-back operations or alleged acts of violence during border control operations, where the risk of *refoulement* or ill-treatment is high. The CPT made it very clear that it had competence for those situations when stating, following its visit to Italy in July 2009, that '[t]he main purpose of the visit was to look into the new policy of the Italian authorities to intercept, at sea, migrants approaching Italy's Southern Mediterranean maritime border and to send them back to Libya or other non-European States (frequently referred to as the 'push-back' policy).'[171] A section reserved to pushbacks of its report on a visit to Hungary in 2017 contains more explanations on the CPT's competence and standards in this field.[172] In 2014, the CPT conducted a visit to Spain 'to examine certain

[166] ibid.

[167] The CPT set out its standards first in its 7th General Report of 1997 (CPT/Inf (97) 10), paragraphs 24 to 36) and updated them in its 13th General Report of 2003, Paragraphs 27 to 45, (reproduced in a separate document, CPT, 'Deportation of Foreign Nationals by Air' (10 September 2003) CPT/Inf(2003)35-part.

[168] Council of Europe, 'Twenty Guidelines on Forced Return' <https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf>. See for example Guidelines 15 to 19 on the practical conditions of removals.

[169] 'CPT, "Immigration Detention" (March 2017) CPT/Inf(2017)3' <https://rm.coe.int/16806fbf12>.

[170] See Article 2 of the CPT Convention.

[171] 'Council of Europe Anti-Torture Committee Publishes 2009 Report on Italy' (*CPT*, 28 April 2010) <https://www.coe.int/en/web/cpt/news-2010/-/asset_publisher/F4MCR6Bvx1tS/content/council-of-europe-anti-torture-committee-publishes-2009-report-on-italy>. In its judgment Hirsi Jamaa and Others v. Italy of 23 February 2012 the ECtHR confirmed the position taken by the CPT, *Hirsi Jamaa v Italy (2012) 55 EHRR 21*.

[172] 'CPT, "Report to the Hungarian Government on the Visit to Hungary Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017" (18 September 2018) CPT/Inf (2018) 42' (n 163). The CPT delegation, on its official visit to Hungary, also enquired on the other side of the border: 'On the Serbian side of the border, the delegation also held interviews with foreign nationals who had recently been

aspects of the treatment of irregular migrants intercepted in the enclave of Melilla along the border with Morocco […] [after] allegations of excessive use of force by members of the Guardia Civil when apprehending irregular migrants attempting to enter Spanish territory at the multi-fence land border with Morocco'.[173] The CPT also looked into concrete cross-border cooperation of border guards and found cases where third-country nationals 'were subjected to physical ill-treatment […] by members of the Moroccan Auxiliary Forces (MAF) after they had been apprehended by the MAF at the border fence within Spanish territory, or once they had been returned to Morocco by Guardia Civil officers.'[174] The CPT's competence to examine these situations has not been challenged.

As a result, it is now established that the CPT has the competence to monitor the entire range of situations where a risk of ill-treatment can occur at the external borders of the EU. Human rights monitoring at the borders has become a new full-fledged activity for the CPT, which has increased its responsiveness to urgent situations. In 2020 it carried out 'a five-day rapid reaction visit to Croatia to examine the treatment of persons attempting to enter the country and apprehended by the police'; As of 19 November 2021,[175] the Croatian Government had not yet authorised the publication of the report on this visit during which the CPT has also assessed 'the effectiveness of police accountability mechanisms'.[176] The CPT conducted another 'rapid reaction ad hoc visit' to Greece in March 2020. In its report, the CPT calls on the Greek Government to 'stop pushbacks', and it 'raises concerns over acts by the Greek Coast Guard to prevent boats carrying migrants from reaching any Greek island and it questions the role and engagement of FRONTEX in such operations.'[177]

The CPT has also monitored several Forced Return Operations (FROs) coordinated by Frontex. These operations are carried out under the primary responsibility of EU Member States or Schengen associated countries that all happen to be also Council of Europe Member States for which the CPT has competence. The CPT does not monitor Frontex, but the States Parties to the CPT Convention while operating in the framework of an activity coordinated or supported by Frontex. In line with this reasoning, the CPT's reports on these operations are addressed to the State Party of the CPT Convention, who acts as 'Organising Member State' of a Joint

taken by border police officers to the Hungarian border fence and 'pushed back' to Serbia' (ibid, first paragraph of the executive summary).

[173] 'Council of Europe Anti-Torture Committee Publishes a Report on Spain' (*CPT*, 9 April 2015) <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-a-report-on-spain>.

[174] ibid.

[175] The date after which developments were no longer considered for this feasibility study (see above Introduction).

[176] 'Council of Europe Anti-Torture Committee Carries Out Rapid Reaction Visit to Croatia to Examine Treatment of Migrants' (*European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 18 August 2020) <https://www.coe.int/en/web/cpt/news-2020/-/asset_publisher/F4MCR6Bvx1tS/content/council-of-europe-anti-torture-committee-carries-out-rapid-reaction-visit-to-croatia-to-examine-treatment-of-migrants>.

[177] 'Council of Europe's Anti-Torture Committee Calls on Greece to Reform Its Immigration Detention System and Stop Pushbacks' (*CPT*, 19 November 2020) <https://www.coe.int/en/web/cpt/-/council-of-europe-s-anti-torture-committee-calls-on-greece-to-reform-its-immigration-detention-system-and-stop-pushbacks>.

Return Operation (JRO) [178] or a National Return Operation (NRO).[179] While in the beginning, the dialogue further to the report was exclusively between the CPT and the Government to whom the report was addressed,[180] the CPT has initiated dialogue also with Frontex by asking the Governments concerned to either share the CPT report with Frontex or authorise the CPT to do so.[181] The latest Frontex Regulation of 2019 endorses the present state of affairs.[182]

Regarding transparency and publicity, the analysis of the functioning of the CPT itself must be a nuanced one. Indeed, at first sight, the principles of confidentiality and cooperation prevail over the principle of publicity because the CPT Convention and the CPT's Rules of Procedure contain stringent confidentiality rules, including the clear rule that the authorities of the Member State visited by the CPT must authorise the publication of the report on the visit.[183] As a matter of fact, the vast majority of CPT reports are published,[184] most of them without delay. Moreover, some countries have accepted the so-called 'automatic publication procedure'.[185] In effect, not authorising the publication of a CPT report or significantly delaying such authorisation has become a political liability that not many State Parties are willing to take. In addition, 'if a Party fails to co-operate with the Committee or refuses to

[178] E.g., 'CPT, 'Report to the Government of the Netherlands on the Visit to the Netherlands Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 October 2013 (2 February 2015) CPT/Inf (2015) 15' <https://rm.coe.int/168069782c>.

[179] 'CPT, "Report to the German Government on the Visit to Germany Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 15 August 2018" (9 May 2019) CPT/Inf (2019) 14' <https://rm.coe.int/1680945a2d>.

[180] See cover letter by CPT President to the Dutch Minister of Justice, 'CPT, 'Report to the Government of the Netherlands on the Visit to the Netherlands Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 October 2013 (2 February 2015) CPT/Inf (2015) 15' (n 178) 3.

[181] 'I should like to inform the Italian authorities that the CPT intends to raise with Frontex some issues regarding the rules and practices followed during joint removal operations in general. In this context, it would be very useful if Frontex could be informed of the contents of the enclosed report, either through transmission by the Italian authorities or by authorising the CPT to transmit the report to Frontex' (Letter of the CPT President to the Italian authorities, CPT report on the visit to Italy in December 2015, 'CPT, 'Report to the Italian Government on the Visit to Italy Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 December 2015 (15 December 2016) CPT/Inf (2016) 33' 3 <https://rm.coe.int/16806ce532>. Idem in Report to Spanish authorities on visit in February 2016 , 'CPT, 'Report to the Spanish Government on the Visit to Spain Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 19 February 2016 (15 December 2016) CPT/Inf (2016) 35' 3 <https://rm.coe.int/16806ce534>. No such letter and no such mention are contained in the Report to the German Government on the NRO observed in August 2018, 'CPT, "Report to the German Government on the Visit to Germany Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 15 August 2018" (9 May 2019) CPT/Inf (2019) 14' (n 179).

[182] 'The Agency should allow, subject to the agreement of the Member State concerned, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe to conduct visits to where it carries out return operations, within the framework of the monitoring mechanism established by the members of the Council of Europe under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.' Attention is drawn to the world 'should' – and not 'shall' – which seems to leave leeway to Frontex for not accepting CPT monitoring even when the Member State concerned does give its consent; 2019 EBCG (Frontex) Regulation Recital 82.

[183] The principle of confidentiality is spelled out in Article 11(1) of the CPT Convention (European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Text of the Convention and Explanatory Report, CPT/Inf/C (2002)1): 'The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential.' The publication of reports is governed by Article 11 (2): 'The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party'. But Rules 39 and 41 of the CPT's Rules of Procedure allow for narrow exceptions to the principle of confidentiality ('European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Rules of Procedure (Adopted on 16 March 1989) CPT/Inf/C (2008) 1' <https://rm.coe.int/16806db824>.

[184] 'About the CPT' (n 162).

[185] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '29th General Report of the CPT (1 January - 31 December 2019)' (Council of Europe 2020) para 29.

improve the situation in the light of the CPT's recommendations, the Committee may decide (…) to make a public statement on the matter'.[186]

The CPT is widely credited as having an outstanding amount of expertise, thanks to its membership made of experts from a wide variety of backgrounds and to a particularly robust and stable secretariat that acts inter alia as the guardian of the CPT acquis of knowledge and know-how. [187]

Its website highlights that one of the 'important features' of CPT is that 'it is European'.[188] Indeed, the CPT is a joint action of the State Parties to prevent torture and ill-treatment within their jurisdictions. It involves the right of unrestricted access for their common monitoring body to any part of their national territories which the monitoring body considers of interest, and the right for that body to freely work there with unlimited access to places, persons, and information. As such, the CPT has set a precedent that is relevant for this study which examines the feasibility of another joint human rights monitoring mechanism.

From this analysis, it appears that the CPT itself could be seen as the ideal human rights monitoring mechanism at the external borders of the EU, covering both national authorities and Frontex. The prospective role of the CPT as an ongoing, robust border monitoring mechanism at the EU borders has, however, been considered unrealistic by relevant interviewees in the context of this feasibility study. Because even if it wanted to,[189] the CPT does not have the considerable means it would take to move from sporadic[190] – *pars pro toto* – in-depth monitoring to ongoing, preventive monitoring of all EU borders.

2.6.2 Commissioner for Human Rights

The institution of the Council of Europe Commissioner for Human Rights was created on 7 May 1999 by Resolution (99)50 of the Committee of Ministers.[191] The first Commissioner was appointed on 15 October 1999. The Office of the Commissioner is an independent institution within the Council of Europe, not subjected to any instructions from the organisation's bodies, and with a separate budget. An 'eminent personalit(y) of a high moral character having recognised expertise in the field of human rights, a public record of attachment to the values of the Council of Europe and the personal authority necessary to discharge the mission of the Commissioner effectively',[192] the Commissioner is elected by the Parliamentary Assembly; during a non-renewable term of office of six years the post-holder is expected 'to function

[186] 'European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Rules of Procedure (Adopted on 16 March 1989) CPT/Inf/C (2008) 1' (n 183) Rule 41.
[187] E.g. Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 351; Rodney Morgan and others, *Combating Torture in Europe: The Work and Standards of the European Committee for the Prevention of Torture (CPT)* (Council of Europe Publishing 2001) 26.
[188] 'About the CPT' (n 162).
[189] This aspect is discussed further in Section 3.1.7.
[190] The CPT carries out re*gular* visits to each State Party every four years on average.
[191] Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted and entered into force 7 May 1999), Council of Europe Committee of Ministers 1999.
[192] ibid article 10.

independently and impartially' and enjoys functional privileges and immunities; the Commissioner has to submit annual reports to the Committee of Ministers and the Parliamentary Assembly[193] and may address, anytime, reports on specific matters to either to the Committee of Ministers alone or to it and the Parliamentary Assembly.[194] In practice, the Commissioner is invited to personally present the reports, followed by an exchange of views.

Resolution (99)50 does not spell out the word monitoring as one of the functions of the Commissioner. However, it does state that the Commissioner 'shall […] identify possible shortcomings in the law and practice of Member States' and that the latter 'shall facilitate the Commissioner's contacts, including travel', [195] two indications that the Commissioner (and the members of their office) are expected to undertake fact-finding in the field. Indeed, to cut short any discussion about the reliability of the information provided in their reports, the Commissioners have underlined that their 'observations are based on first-had information collected during the Commissioner for Human Rights' country visits and field missions'.[196] Accordingly, the Commissioner's website indicates that 'country work' is carried out by the Commissioner through 'visits to all member states to monitor and evaluate the human rights situation'.[197]

The thematic work of the present Commissioner is organised around 16 themes, of which 'migration' is one[198] in which she is particularly active and fast to respond to new developments,[199] often with clear and outspoken statements.[200]

Resolution (99) 50 emphasises the Commissioner's mandate with respect to 'human rights structures in the member States' of whom the Commissioner should 'make use', adding that 'where such structures do not exist, the Commissioner will encourage their establishment'.[201] The Commissioner is also expressly tasked to 'facilitate the activities of national ombudsmen and similar institutions'.[202] The four Commissioners to date have always put the cooperation with Ombudsman institutions, NHRIs and NPMs high on their agenda.[203] Very recently (in

[193] ibid articles 2, 6 (2), 11.
[194] ibid article 3(h), 3(f).
[195] ibid articles 3(e), 6(1).
[196] 'Letter by Council of Europe Commissioner for Human Rights to European Commission Vice President, Margaritis Schinas and Commissioner Ylva Johansson' <https://rm.coe.int/letter-to-mr-margaritis-schinas-vice-president-for-promoting-our-europ/16809cdcb4>.
[197] While the Commissioner 'cannot act upon individual complaints (he or she) can draw conclusions […] on the basis of reliable information regarding human rights violations suffered by individuals'; 'Mandate' (*Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/mandate>.
[198] Council of Europe Commissioner for Human Rights, 'Thematic Work' (*Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/thematic-work>.
[199] Council of Europe Commissioner for Human Rights, 'Human Rights of Immigrants, Refugees and Asylum Seekers' (*Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/thematic-work/migration>.
[200] 'Migrants, including asylum seekers, who do manage to enter irregularly Council of Europe member states are often criminalised, locked up in prison-like conditions, and expelled as quickly as possible – even to countries where they risk persecution and torture. […] In an attempt to fight abusive asylum requests, states undermine the rights of genuine asylum seekers, who are frequently detained and unable to access fair and efficient asylum procedures'; ibid.
[201] Resolution (99) 50 article 3(c).
[202] ibid article 3(d).
[203] Country visits virtually always include meetings with these national institutions and many meetings of the IOI, ENNHRI, the South-East European NPM Network and other networks have been attended by the Commissioners in person or senior members of the Office. The first Commissioner – who had previously been the National Ombudsman of Spain – organised annual meetings with the heads of national Ombudsman institutions. The second Commissioner put in place a specific human

November 2021), the present Commissioner has made a step that is significant for this study by carrying out a monitoring mission at the Polish border with the team of the National Ombudsman.[204]

Since the entry into force of Protocol 14 in 2010, the Commissioner can act at their own initiative as amicus curiae by submitting written comments to the European Court of Human Rights and taking part in hearings in any case before a Chamber or Grand Chamber. Some of the Commissioner's third party interventions before the European Court concern allegations of pushbacks at the EU border. [205]

The Commissioner can also intervene in the process of execution of judgments of the European Court of Human Rights by addressing communications to the Committee of Ministers of the Council of Europe, the body supervising this process. So far, none of the communications concerned pushbacks or other violations committed at EU borders. [206]

Given the Commissioner's focus on the human rights of migrants, refugees and asylum seekers, the explicit mandate concerning the cooperation with national human rights structures, and the repeated calls for accountability of border management operations, the Commissioner could provide meaningful support to a collective European monitoring mechanism. The features of this monitoring mechanism are developed in the next section.

3 Proposed New Response: A Collective European Monitoring Mechanism Based on the Solidarity of Existing Independent Human Rights Bodies in EU Member States

Considering the criteria and principles laid out in Chapter 1, the analysis of Chapter 2 and the discussions held with relevant interlocutors, the research team has elaborated a proposal for a new response to the need for a fully independent and robust mechanism that could provide

rights training programme for the staff of independent national human rights structures (the 'Peer-to-Peer Project' as well a 'Regular, Selective Information Flow' wherein his Office conveyed every second month relevant information on human rights issues to all independent national human rights structures in the member States; Council of Europe, 'Regular Selective Information Flow (RSIF)' (*Human Rights National Implementation*) <https://www.coe.int/en/web/national-implementation/publications/rsif>; 'The Commissioner and the European Union Start a Training Programme for National Structures' (*Council of Europe Commissioner for Human Rights*, 3 April 2008) <https://www.coe.int/ga/web/commissioner/news/-/asset_publisher/easZQ4kHrFrE/content/the-commissioner-and-the-european-union-start-a-training-programme-for-national-structures/pop_up?>.) In later years, this service was provided by the the Directorate General of Human Rights and Legal Affairs of the Council of Europe).

[204] 'Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights' (n 21).

[205] *Amicus curiae* interventions are based on the Commissioner's country work and thematic activities. The third party interventions submitted in the following (both pending and decided) cases of the ECtHR are relevant to the theme of this study: *RA and others v Poland (ECtHR, App No 43120/21, pending)*; *SB v Croatia, AA v Croatia and AB v Croatia (ECtHR, Apps No 18810/19, 18865/19 and 23495/19, pending)*; *SS and others v Italy (ECtHR, App No 21660/18, pending)*; *ND and NT v Spain [GC] App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020)*. The Commissioner's third-party interventions can be found on a dedicated webpage; 'Third Party Interventions' (*Council of Europe Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/third-party-interventions>.

[206] More information is available on the Commissioner's dedicated webpage 'Rule 9' (*Commissioner for Human Rights*) <https://www.coe.int/en/web/commissioner/rule-9>.

ongoing human rights monitoring at the external borders of the EU. The new response is explained in this chapter which presents the salient features of the proposed mechanism. Solutions that were envisaged in the course of the work but have not been retained are not mentioned.

3.1 A new mechanism made of existing bodies which fulfil most criteria

Globally, Europe has the highest density of independent national human rights bodies whose national mandates include or should normally include border monitoring: Ombudsman institutions, NHRIs and NPMs. A host of international instruments protects the independence of these bodies. For those which are (also) NHRIs, there is a regular assessment by peer review. They are State institutions, all created at least by legislation, with some established by the respective State's constitution. As such, they enjoy authority and have access to and relations of equality with the other State institutions. In particular, Ombudsman institutions and NPMs have operational mandates (mandates that include work on the ground) and broad investigative powers, including, for some of them, issues covered by State secret. Many combine Ombudsman/NHRI/NPM functions. They have established networks, and they are accustomed to working together bilaterally and multilaterally. They also cooperate with relevant international organizations and actors who respect and trust them and rely on their fact-finding.[207] They are aware of international human rights norms and standards and incorporate them into their work. This all points towards a scenario where they are ideal candidates on which to build a European monitoring system.

On the contrary, creating parallel bodies can hardly be an effective choice, both in terms of responsible use of public resources and the risk of overlap with the mandates of the existing bodies. The obligation to respect the existing legislative mandate of an Ombudsman institution was confirmed in October 2021 by the Venice Commission.[208] According to the authors of this study and the vast majority of those interviewed for its purposes, setting up parallel human rights structures risks undermining the authority of the existing ones. In cases where this happens, the issue could be brought before the Venice Commission by the Ombudsman institution concerned.

However, to form a new European monitoring mechanism at the borders, the existing bodies would need to get organised and be supported in a way that would allow them to live up to the daunting and evolving requirements of the task.

[207] The judgment issued by the ECtHR on 18 November 2021 in *M. H. and others v Croatia* (n 74). illustrates the central role that can be played by the national Ombudsman institution when it comes to monitoring human rights compliance at the borders and collecting evidence - but also of the limits of what this institution can achieve alone. The number of references in the judgment to the findings of the Croatian Ombudswoman is striking. Another illustration is the Commissioner for Human Rights of the Council of Europe who 'may act on any information relevant to the Commissioner's functions. This will notably 'include information [from]) national ombudsmen or similar institutions'; Resolution (99) 50 article 5.
[208] See above 2.4.2.

3.2 A Collective European Endeavour

The EU has approximately 14,000 km of land borders with third countries, including enclaves in Africa and approximately 66,000 km of sea borders. All EU Member States also have international airports, which are external air borders of the EU. It takes tens of thousands of national border guards and 10,000 European border guards (target figure for the Standing Corps of Frontex in 2027) to protect them. Increasingly sophisticated equipment is being deployed. Managing the borders is a huge task that is shared by the authorities of the EU Member States in the application of the principle of solidarity. Monitoring compliance with the rule of law and human rights during these operations is just as huge a task that would require commensurate means. Crucially, it would require the application of the principle of solidarity here as well.

One might argue that European solidarity is even more important for human rights monitoring than it is for border guarding. This is due to how, in the eyes of public opinion, border guarding appears to be the less controversial task compared to protecting the human rights of migrants. Standing up for the rights of 'irregular migrants' is politically more difficult than keeping 'illegal migrants'[209] out of Europe. Individually, alone, most independent national human rights bodies cannot face the political headwind to which human rights monitoring at the borders would expose them.[210]

Robust human rights monitoring at the external borders could become a collective European endeavour[211] to which the necessary political support and financial means would be given. A consortium of existing Ombudsman institutions / NHRIs / NPMs (hereafter: 'a consortium') could be set up.

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[209] It is telling that human rights defenders use the former term, while law enforcement mostly uses the latter.

[210] As the Commissioner for Human Rights of the Council of Europe has put it: 'When it comes to protecting migrants' rights […] there are two key challenges […] from a European perspective. The first is the erosion of the idea that migrants have rights in the first place. The current political climate in Europe is moving more and more towards the dehumanisation of migrants, and therefore the notion that they do not deserve rights. What is worse, it is leading to a perception that those who attempt to cross borders without permission have called upon themselves whatever horrible fate they face, whether it is drowning at sea, being shot at, beaten up, held in detention for prolonged periods, or being deprived of access to basic services, starvation, or forced to live in appalling conditions, rather than seeing these as results of state action. […] What does this mean for NHRIs? Firstly, blatant violations of migrants' rights must be addressed head-on. […] This will require further strengthening of NHRIs monitoring work and strategic litigation against regressive measures'; 'At GANNHRI's Annual Meeting, Commissioner Mijatović Underlines the Role of NHRIs in Protecting the Human Rights of Migrants' (*Commissioner for Human Rights,* 6 March 2019) <https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/at-gannhri-s-annual-meeting-commissioner-mijatovic-underlines-the-role-on-the-role-of-nhris-in-protecting-the-human-rights-of-migrants>.

[211] When the Greek Ombudsman contributed in 2012 to the own initiative investigation of the European Ombudsman into the way in which Frontex complied with its human rights obligations she 'enclosed with her contribution her special report, dated March 2011, on the treatment of irregular migrants and asylum seekers in the border region of Evros [stating] that she had received complaints from individuals and NGOs concerning Frontex operations in Greece, namely, complaints about access to the asylum procedure, the identification and screening procedure and even the erroneous registration of personal data. In [her] view […] there [was] an urgent need […] to undertake initiatives. […]. *As regards the joint operations and pilot projects carried out by Frontex together with the Greek authorities, the monitoring mechanism of fundamental rights violations should be established at the EU level in order to investigate and prevent such violations*'; *Decision OI/9/2014/MHZ* (n 117) para 55. Emphasis added. The European Commission, at the end of Article 7 of its proposed Screening Regulation, also contemplates the idea of joint monitoring of fundamental rights: 'Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring'; European Commission, 'Proposal for a Screening Regulation' (n 155).

To preserve the independence of the participating national human rights bodies, a consortium would have to be set up by them and managed under their exclusive authority. The legal form should not pose major difficulties. One option would be a not-for-profit association under the national law of an EU Member State.[212] Its functioning could be laid down in by-laws; it would have a legal personality distinct from that of the participating institutions and, as such, could receive and manage funds coming from third sources. It could employ a secretariat and a pool of dedicated border monitors who would be selected, trained,[213] and deployed by it.

When deployed, the pool monitors would be incorporated as external experts in the team of the consortium member who would request assistance. Engaging external experts is standard practice for many national human rights bodies. Their foreign (EU) nationality should not be an obstacle.

3.3 Voluntary basis for participation in the consortium

Contrary to border guards, independent national human rights bodies cannot be given instructions on where to work or on what. It is up to them to decide how much attention and resources they are willing to dedicate to monitoring human rights at the borders. The only authority to which they would have to explain their choice is their national parliament. They could underline that international cooperation is a standard part of their national mandates. They could also argue that the principle of solidarity is applicable to them under EU law.[214] Finally, there is the argument that the EU's external borders are also, to some extent, the borders of their own country because of the principle of free movement.

One additional argument could be drawn from the fact that national border guards participate in Frontex operations. The monitoring of the respect of human rights by officers of their country can be seen as part and parcel of the mandate of an independent national human rights institution, even if the activities take place abroad. The Spanish Ombudsman institution, for example, carries out on-site monitoring of the way in which Spanish consulates all over the world carry out their duty to assist Spanish citizens who are detained abroad. One could argue that it should also be allowed to monitor how Spanish border guards discharge their duties when on a Frontex operation abroad.

3.4 Holistic mandate, both national and international, of a future consortium

For monitoring at the borders to be effective and practically possible – it would be necessary to entrust the monitors of a future consortium with a holistic mandate that would cover not only all places and situations but also all possible actors, national or international, public or private because it is often hard to know who operates at a given place at a given moment. This may be

[212] For example, the European Network of Ombudspersons for Children (ENOC) is a not-for-profit association governed by the regional law of Alsace, France; 'ENOC' (*European Network of Ombudspersons for Children*) <https://enoc.eu/>.
[213] Training would be conducted with the support of relevant international actors.
[214] See above 1.6.

so for acceptable reasons, like the need for border guards to act or react rapidly or change pre-established plans in the heat of action. But the identity of the real actors at the borders can also be concealed or blurred on purpose so that nobody can be held responsible. Hence the need to allow the monitors of a future consortium to look at the situation as a whole, with no restrictions. When it comes to establishing responsibilities and making recommendations to the relevant bodies, a future consortium would try to identify accurately who did what. It should be stressed that any impossibility for observers equipped with robust investigative powers to establish the identity of units or agents operating at the external borders of the EU is, as such, a major human rights issue.

The monitoring of forced-return operations should be part of a future consortium's mandate. The pool of forced-return monitors set up and operated by Frontex pursuant to Article 51 of the Frontex Regulation is staffed partly by monitors of independent Ombudsman institutions and NPMs and partly by bodies that do not offer the required guarantees of independence, such as inspectorates and private entities. Moreover, fundamental rights monitors under the authority of the FRO of Frontex also participate in the pool whose monitors are selected, trained, and deployed by Frontex and who report to the agency through the FRO. This means that, despite the participation of some monitors from truly independent national bodies, the pool of forced-return monitors as such does not live up to the requirement of independence explained in the first chapter of this study.

3.5 Obligation to fully cooperate with a consortium and its monitors: Need for clear instructions to Frontex and for conditionality imposed on Member States

At present, several Member States restrict or totally forbid access to sensitive stretches of the external borders of the EU, not only to NGOs and media but also to human rights monitors.[215] To protect the observers of a future consortium against formal or informal access restrictions, the European Parliament, which exercises political oversight over the Agency, could make an unambiguous public statement instructing Frontex to cooperate fully with the future consortium and its monitors. The European Parliament could also ask the consortium to report directly to it on operations that are organised and carried out by Frontex or with support from the Agency. Likewise, the European Parliament could call on the Member States to grant the consortium and its monitors unfettered access to all operational sites, all personnel, and all individuals the monitors deem of interest and to all information and equipment (see above 1.3.). This request could be backed up by a conditionality requirement for future EU payments to the Member States to support their border management or asylum systems. The Governments of Member States would be expected to issue instructions to all relevant national authorities to the effect that they cooperate fully with all monitors deployed by their own independent national human rights body, in particular as regards access to all places and information that is

[215] See the declaration made on 19 November 2021 by the Council of Europe's Commissioner for Human Rights on the situation at the Polish – Belarus border, 'Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights' (n 21).

deemed necessary by that body to carry out its tasks. This could include monitors from other members of a future consortium.

3.6 EU funding of human rights monitoring at the external borders

For independent national human rights bodies to be able to participate in a future consortium, the direct and indirect costs of their contributions would need to be covered by the EU. In the long run, the budget for solidary European human rights monitoring could be defined in terms of percentage points of the Frontex budget. In other words, the cost of 'external compliance control' could be integrated into the cost of border management.

3.7 Participation of relevant European and universal bodies

Relevant European and universal bodies could be invited to participate in the work of a future consortium in various ways.

The Fundamental Rights Officer of Frontex (FRO), the Fundamental Rights Agency of the European Union (FRA), the European Ombudsman, the Council of Europe's Commissioner for Human Rights, the European Committee for the Prevention of Torture (CPT), the UN Subcommittee on Prevention of Torture (SPT), the Office of the High Commissioner for Human Rights (OHCHR), the UN High Commissioner for Refugees (UNHCR) and possibly other stakeholders such as the International Ombudsman Institute (IOI), the European Network of NHRIs (ENNHRI) and the European Network of Ombudspersons for Children (ENOC) could be invited to participate in an advisory board. The advisory board would receive detailed information on the working methods, findings and recommendations of the consortium and discuss those.

Holding a mandate that includes the possibility of field missions to monitor EU authorities, including Frontex, the European Ombudsman's office could be invited to accompany consortium monitors on missions. Its representatives would report to the European Ombudsman, not to a future consortium.

Similarly, members of the Office of the Council of Europe's Commissioner for Human Rights could support a future consortium by participating from time to time in monitoring missions at the borders. The visit in mid-November 2021 by the Commissioner to the border between Poland and Belarus, together with a team of the Polish Ombudsman, was an example of joint monitoring.

The SPT and the CPT do not need prior authorization but must notify their intention to carry out a visit to the authorities of the country concerned. Theoretically, they could carry out joint monitoring missions with their colleagues from the local NPM and a consortium. However, some interviewees have pointed out that it is not likely that either of these bodies would want

to compromise their independence vis-à-vis the NPMs through joint missions. (For the same reason, they may decline to participate in the advisory board.)

Different ways of cooperating on the ground could be envisaged between consortium monitors and international actors, such as the UNHCR, who do not have a monitoring mission but rather a mission to assist refugees and asylum seekers (not to speak of the other missions of UNHCR). Nonetheless, their intelligence, insight and analyses are invaluable assets.

3.8 New working methods and cross-border investigations

Several Ombudsman institutions, NHRIs and NPMs are already engaged in inspections at the borders to assess human rights compliance by law enforcement authorities there. As concerns Ombudsman institutions, these are often (but not always) ex post facto investigations into specific cases of alleged human rights abuses. In contrast, NPMs conduct preventive inspections that correspond to the type of regular monitoring needed to foster human rights compliance and report rapidly on systemic situations likely to result in violations. NHRIs are examining patterns of possible violations. However, interviewees for this feasibility study have underlined that most of the existing bodies do not yet possess the full know-how needed to monitor the various means of border management effectively.

Monitors of a future consortium would need to become acquainted with the technology and techniques used at the borders. They would need to be familiar with the equipment and understand how it can be used. This would imply that border guards and technology subcontractors would need to be requested to share knowledge with them. A future consortium would need to use Open-Source Intelligence (OSINT) tools and other new investigative technologies to document events that cannot be observed directly or in real-time. A future consortium would have to acquire or otherwise benefit from the know-how that certain civil society organisations and media have developed in recent years.

Effective border monitoring requires cross-border work. This implies cooperation with counterparts and NGOs in third countries and the possibility for the monitors of a future consortium to cross the external borders of the EU frequently. Many independent national human rights bodies are already engaged in cross-border cooperation, whether bilaterally or through their regional associations.

3.9 Constructive relations with civil society and the media

Independent national human rights bodies are used to working with civil society organizations. In some countries, NGOs are part of the independent national human rights body or bodies. The members of a future consortium would carry out their own fact-finding on the ground. They would cooperate with NGOs and complete each other but not be aligned; NGOs have their own agendas, they are engaged in advocacy, whereas independent State bodies are not. Therefore, it is not suggested that national or international NGOs be part of a future consortium.

Instead, the latter should build confident and respectful relationships with the relevant civil society actors and be ready to act rapidly upon information that they may wish to share.

On their side, NGOs may also wish to keep the consortium at arm's length to be able to play the role of the 'watchdogs of the watchdog' and offer public assessments of the effectiveness of a future consortium.

A future consortium would need to reach out to NGOs and – possibly – to private consultants to acquire technical and forensic know-how that is necessary to find and secure evidence of border management operations that use new techniques and technologies (see above 3.1.8.)

Relations with the media would be precious for a future consortium in a context where the public perception of migrants is often negative, and the sensitivity for the obligation to respect their fundamental rights is generally low.

3.10 Perspective in the long run: a mechanism to be enshrined in EU law, including rules for its funding

If the feasibility of the envisaged mechanism were to be confirmed by the results of a pilot (see Conclusion), the mandate and provisions for the funding of the mechanism could be introduced in relevant EU legislation, allowing it to operate at all external EU borders in the long run.

With a sound and stable legal and financial basis, the mechanism could become the linchpin of a system of checks and balances to ensure that the management of the European borders is indeed carried out in full respect of the fundamental laws and values of the Union.

Conclusion

In light of the conceptual and empirical research and of the individual interviews carried out for this study and considering the fact that relevant institutions have already met to discuss the concept sketched here, the authors conclude that the setting up of a robust and truly independent and effective human rights monitoring mechanism at the external borders of the EU by existing independent national human rights structures is feasible.

It appears advisable to try out the concept through a pilot project entrusted by the EU to a limited number of suitable national institutions for one stretch of the external borders over a time span of two to three years.

There are no good reasons to wait with this. Developments that occurred while this feasibility study was in the making[216] – including the additional flow of asylum seekers caused by disorderly withdrawal from Afghanistan, the sudden arrival of migrants at so far unconcerned EU borders orchestrated by Belarus, and the demand by the UK that France / the EU prevent irregular migrants from reaching its shores – have created new challenges, both for collective EU border management and for securing its human rights compliance. They need to be addressed as a matter of urgency.

[216] From 1 May to 19 November 2021.

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Annexe 1: Institutional setups of Ombudsman institutions, National Human Rights Institutions and National Preventive Mechanisms against torture in European Union Member States

In the below table, the use of a hyphen (-) denotes that the mandates are fulfilled by offices within the same institution. The use of a forward slash/oblique (/) indicates that the mandates are fulfilled by separate institutions.

EU Member State	Monitoring Bodies
Austria	Ombudsman – NHRI - NPM
Belgium	Ombudsman / NHRI (for Francophones, not yet accredited)
Bulgaria	Ombudsman – NHRI - NPM
Croatia	Ombudsman – NHRI - NPM
Cyprus	Ombudsman – NHRI - NPM
Czech Republic	Ombudsman – NPM - NHRI
Denmark	Ombudsman – NPM (together with one NGO and the NHRI) / NHRI
Estonia	Ombudsman – NHRI - NPM
Finland	Ombudsman – NHRI (together with one other institution) - NPM
France	Ombudsman / NHRI / NPM
Germany	Ombudsman / NHRI / NPM
Greece	Ombudsman – NPM / NHRI
Hungary	Ombudsman – NHRI - NPM
Ireland	Ombudsman / NHRI
Italy	NPM
Latvia	Ombudsman – NHRI - NPM
Lithuania	Ombudsman – NHRI - NPM
Luxembourg	Ombudsman - NPM / NHRI

Malta	Ombudsman / NPM
Netherlands	Ombudsman / NHRI / NPM
Poland	Ombudsman – NHRI - NPM
Portugal	Ombudsman – NHRI - NPM
Romania	Ombudsman - NPM
Slovakia	Ombudsman
Slovenia	Ombudsman – NHRI - NPM
Spain	Ombudsman – NHRI - NPM
Sweden	Parliamentary Ombudsman - NPM

Annexe 2: Pilot Project

Type: Pilot Project / New

Title: Collective fundamental rights monitoring at the land borders of Greece by a consortium of Ombudsman institutions / National Preventive Mechanisms against torture

Authors: MEPs Tineke Strik (Greens), Juan Fernando Lopez Aguilar (S&D, LIBE Chair), Sophie In't Veld (Renew), Cornelia Ernst (Left)

Contact: …

Preferred DG: Home

Heading: …

Budget Line: ….

Amounts proposed: 3 000 000 € for two years

Remarks:

The aim of the pilot project is to ensure ongoing human rights monitoring at the land borders of Greece on a trial basis over a period of two years, by ombudsman institutions and national preventive mechanisms against torture of various Member States who would form a consortium under the leadership of the Greek ombudsman. The creation of this consortium is envisaged in the framework of the proposed project.

If the experience proves useful, the approach would be extended to other external borders of the EU, especially those of frontline states, supported by suitable EU legislation to that end.

The principle of solidary, collective fundamental rights monitoring as a corollary of solidary, collective border management is drawn from a feasibility study that is presently being conducted.

The consortium will need to be made up of national Ombudsmen and National Preventive Mechanisms against torture (NPMs) that have been established under the laws or constitutions of Member States. Their wide human rights mandates are of an operational character and cover law enforcement authorities. They have robust investigative powers and facts provided by these State institutions rely on their own findings; they are therefore normally not disputed.

The staffing levels and financial resources do not allow these bodies to take aboard the envisaged task unless the necessary additional means are put at their disposal.

With the additional means requested, the members of the consortium will be in a position to hire, train and deploy 15 dedicated fundamental rights monitors, prepare joint reports and

subsequent actions resulting from the findings of the monitors as appropriate, and ensure full transparency of their operations.

The consortium will provide the relevant EU bodies (Parliament, Commission, Council) as well as the relevant national authorities directly with objective up-to-date assessments of the respect of fundamental rights at the external EU borders. This will allow the recipients of the findings to exercise oversight over the forces deployed at the borders.

The consortium will probably be organized as a non-profit organization registered in a Member State.

It will need to establish institutional working relations with relevant organizations, agencies, and bodies such as the FRA, Council of Europe, OHCHR, UNHCR as well as with the Fundamental Rights Officer (FRO) of Frontex.

It will also need to establish direct channels for communication with relevant civil society organizations.

Justification (in 500 characters)

Allegations of serious wrongdoings at the external borders by NGOs/media are often contested. The EU Ombudsman investigates ad hoc. LIBE has set up a standing Frontex Scrutiny WG. Internal Frontex compliance mechanisms are being improved. The EC proposal for a Screening Regulation foresees independent monitoring but with a narrow scope. Coherent oversight is missing. If given the means, existing independent State bodies could ensure robust monitoring that produces reliable information allowing for effective oversight.

Annexe 3: List of Interviews (in order of interview date)

Entity	Name	Title	Interview Date
United Nations High Commissioner for Refugees (UNHCR), Representation for EU Affairs	Sophie Magennis	Head of Policy and Legal Support	21.05.21
McGill University	Prof. François Crépeau	Hans & Tamar Oppenheimer Professor of Public International Law	03.06.21
Human Rights Ombudsman of Bosnia and Herzegovina	Prof. dr Ljubinko Mitrović Dr Jasminka Džumhur Nives Jukić	Ombudspersons of Bosnia and Herzegovina	04.06.21
Independent Chief Inspector of Borders and Immigration (United Kingdom)	David Bolt	Former Independent Chief Inspector of Borders and Immigration	07.06.21
European Council on Exiles and Refugees (ECRE)	Josephine Liebl	Head of Advocacy	07.06.21
UNHCR	Dr Valérie Svobodová	Senior Human Rights Liaison Officer	07.06.21
German Institute for Human Rights (DIMR)	Anna Suerhoff	Researcher and Policiy Adviser	08.06.21
Amnesty International	Niels Muižnieks	Director for Europe	08.06.21
Office of the Commissioner for Human Rights Council of Europe	Christian Mommers	Advisor	11.06.21
European Network of National Human Rights Institutions (ENNHRI)	Gabriel Almeida	Human Rights Officer (Accreditation)	11.06.21
Office of the United Nations High Commissioner for Human Rights	Pia Oberoi	Senior Advisor on Migration and Human Rights, OHCHR Regional	14.06.21

		Office for South-East Asia	
Portuguese National Preventive Mechanism against torture and other forms of ill-treatment of persons deprived of their liberty	João Costa	Head	15.06.21
Associazione per gli Studi Giuridici sull'Immigrazione (ASGI)	Lucia Gennari	Lawyer and Legal Consultant	17.06.21
Human Rights Ombudsman of the Republic of Slovenia	Peter Svetina	Human Rights Ombudsman of the Republic of Slovenia	17.06.21
	Dr Polona Mozetič	Senior Counsellor to the Human Rights Ombudsman of the Republic of Slovenia	
University of Sheffield	Dr Maurice Stierl	Lecturer	17.06.21
United Nations High Commissioner for Refugees (UNHCR)	Madeline Garlick	Chief of Section, Protection Policy and Legal Advice	22.06.21
Office of the Protector of Citizens of the Republic of Serbia	Zoran Pašalić	Ombudsman	23.06.21
People's Advocate Institution of Albania	Erinda Ballanca	Ombudsperson	24.06.21
	Ermonela Xhafa	Commissioner of NPM	
Office of the United Nations High Commissioner for Human Rights	Birgit Van Hout	Regional Representative for Europe	28.06.21
	Edyta Tuta-Lorenz	Human Rights Consultant	
	Roanna Tay	Human Rights Officer Europe and Central Asia Section, Field Operations and Technical Cooperation Division	
Border Violence Monitoring Network	Milena Zajović Milka	President of "Are You Syrious" and Head of Advocacy of the Border	29.06.21

		Violence Monitoring Network (BVMN)	
	Antonia Pindulić		
Federal Police Academy in Lübeck	Volker Westphal	Author and retired lecturer	29.06.21
Office of Public Defender (Ombudsman) of Georgia	Dr Tamar Gvaramadze	First Deputy	29.06.21
Defensor del Pueblo de España	Marta Ballestero	Técnica del Área de Migraciones e Igualdad de Trato	30.06.21
European Union Agency for Fundamental Rights (FRA)	Dr Tamás Molnár	Programme Officer, Legal Research, Research and Data Unit	08.07.21
Université libre de Bruxelles	Dr Julien Jeandesboz	Professeur	08.07.21
The Greens / EFA in the European Parliament	Lise Schwimmer	Parliamentary assistant to MEP Saskia Bricmon	09.07.21
	Gil Arias Fernández	Former Deputy Executive Director of Frontex	15.07.21
Bellingcat	Nick Waters	Senior Investigator	22.07.21
Office of the Ombudswoman of Croatia	Tena Šimonović Einwalter	Ombudswoman	27.07.21
Forensic Architecture	Stefanos Levidis	Advanced Researcher on Migration	23.08.21
European Border and Coast Guard Agency (Frontex)	Dr Jonas Grimheden	Fundamental Rights Officer	24.08.21
Defensor del Pueblo de España	Carmen Comas-Mata Mira	Directora de relaciones internacionales del Defensor del Pueblo de España	25.08.21
Nationale Ombudsman (Netherlands)	Stephane Sjouke	Head International Affairs	25.08.21
	Petra von Dorst	Researcher (Onderzoeker structurele aanpak)	
The Greens / EFA in the European Parliament	Aleksejs Dimitrovs	Legal Advisor on Civil Liberties, Justice and Home Affairs	03.09.21

Commissioner for Human Rights Poland	Dr Hanna Machińska	Deputy Commissioner for Human Rights Poland	26.10.21
Office of the European Ombudsman	Dr Marta Hirsch-Ziembińska	Principal Adviser on Charter Compliance	12.11.21

An additional 5 interviews were held on condition of anonymity.

It is again underlined that the analyses, findings, opinions, views and ideas expressed in this feasibility study are those of the authors.

Annexe 4: Background Legal Analysis - Examining the Issue of Fundamental Rights Protection in the context of EU Border Violence

Authors: Jean Monnet Professor ad personam Elspeth Guild, Queen Mary University of London; Emeritus Radboud University Netherlands; Dr Elif Kuskonmaz, University of Portsmouth; Dr Nicolette Busuttil, Queen Mary University of London; and Ashleigh Guest, University of Bristol

(Appendix 3 by Dr Paolo Gambatesa, PhD candidate in constitutional law, University of Milan)

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Appendices:

Executive Summary

In this annexe we examine the legal and structural problem of fundamental and human rights protection at the EU's external borders in the context of border police operations. Our aim is to understand why there has been a proliferation of allegations of breaches of both fundamental and human rights at EU external borders by border police against migrants, including refugees, over the past five years and what can be done about it. The purpose of this Annexe is not to examine, once again, the evidence of shortcomings but rather to review the legal framework within which these claims are arising. In summary:

The establishment of an EU external border agency, Frontex,[217] in 2004 predated the adoption of the first EU regulation on the crossing of the external border in 2006 (the Schengen Border Code).[218] The failure to incorporate into the duties of Frontex the correct application of the SBC has meant that the agency is not bound by the specific duties of the SBC to ensure border police respect dignity and fundamental rights in the exercise of their duties. Nor is Frontex specifically obliged to ensure that Member State border police respect the duty to provide every person refused entry to the EU with a form setting out the reasons for the refusal (a SBC duty)[219] as well as information about his or her right of appeal and how to exercise it (albeit from outside the EU).

The introduction of a Fundamental Rights Officer into Frontex's governing regulation came as a result of concerns about human and fundamental rights compliance of the agency in 2011. But the FRO was inserted into the Frontex hierarchy as part of the system, dependent on the Director. While this is a useful body as a mechanism for internal complaints and notifications, it does not fulfil the requirements of an independent monitoring body as determined by the CJEU and ECtHR. We do not suggest that the FRO should be abolished, we merely point out that the body is structurally unable to fulfil a wider monitoring mandate consistent with EU and ECHR obligations, which is evidently what is now needed.

The EU legislator's response to the fundamental and human rights crisis in external border policing operations and the allegations of Frontex complicity has been to increase the references to fundamental rights in Frontex's governing documents, most specifically the regulation. While this has been valuable to highlight the importance which the legislator places on fundamental rights, it does not seem to have had a substantial impact on how the agency operates. In the meantime, the EU legislator has adopted other measures which have muddied the situation. In particular the Surveillance Regulation, which deals with border controls on persons but within the strict requirements of the SBC. While the European Parliament's LIBE committee has been particularly vigilant in respect of the problem, not least through the

[217] Notwithstanding the change of name of the agency in the latest iteration of its regulation, we continue to refer t the agency as Frontex, the name it is most commonly known by: https://europa.eu/european-union/about-eu/agencies/frontex_en [accessed 11 October 2021].
[218] Consolidated text: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) http://data.europa.eu/eli/reg/2016/399/2019-06-11 [accessed 11 October 2021].
[219] Specifically limited to the reason set out in the SBC as held by the Court of Justice of the European Union (CJEU): see *Fahimian* ECLI:EU:C:2017:255.

creation of the Frontex Scrutiny Working Group and the freezing of funding, a wide angle approach which includes amendments to the EU Ombudsman Regulation, the Schengen Evaluation Regulation and some other measures to provide for effective independent monitoring could be effective in providing a long term solution.

One of the Article 80 TFEU requirements for solidarity in the AFSJ (which the CJEU has found legally effective) is confidence among state authorities responsible for monitoring external border policing (Ombudspersons, NHRIs and NPMs) that their homologues in other Member States with whom they need to work are also fulfil the requirements established by the CJEU and ECtHR regarding independence.

Finally, a culture of zero tolerance for unlawful use of force by border police needs to be developed in all Member States. This has been underlined many times by Council of Europe bodies in the monitoring of police violence generally and has recently been highlighted by the OSCR/ODIHR in a report on border policing. One of the more effective ways to create such a culture of zero tolerance is to ensure that unlawful use of force by border guards is the subject of criminal prosecution. Instead of prosecutors and others turning a blind eye to complaints or allegations of unlawful use of force by border police, not least because of the complications which cross border investigations involve, privileged channels of communication with Ombudspersons, NHRIs and NPMs need to be established so that where these state authorities encounter an instance of apparently unlawful use of force by border police, they can alert the prosecution authorities immediately and a criminal investigation can be commenced. Of course, criminal law is not the solution for many social problems, but its use can have a calming effect on individuals in border police teams in particular where there are persistent complaints in respect of a specific team.

As we have stated, we do not consider that there is a single ‘silver bullet’ which will resolve the independent monitoring gap in use of force by border police at EU external borders. Multiple measures need to be adopted but, in this Annexe, we set out those which many experts whom we have interviewed between April and October 2021 consider necessary.

Acronyms

AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ENNHRI	European Network of National Human Rights Institutions
EU	European Union
Frontex	European Border and Coast Guard Agency
LIBE	European Parliament Committee Civil Liberties, Justice and Home Affairs
NHRI	National Human Rights Institutions
NPM	National Preventive Mechanism (under OP-CAT Convention against Torture)
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Cooperation in Europe
SBC	Schengen Border Code
UNHCR	United Nations High Commissioner for Refugees

1. Introduction: the legal problem which is addressed in this legal section

This Annexe constitutes an integral part of the Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union. The need to examine a human rights monitoring mechanism at the EU's external borders is the result of a substantial history of allegations of human rights abuses carried out by border police against persons crossing those borders.[220]

The purpose of the Annexe is to examine in depth four issues which are central to the Feasibility Study itself. These are:

- Frontex and the history of the Fundamental Rights Officer as a monitoring mechanism;
- The EU legislator's response to the challenges of fundamental rights compliance in Frontex related border control operations;
- How to achieve effective monitoring? The centrality of independence of the monitors: EU and ECHR standards on independence;
- The problem of impunity regarding use of force at borders and the need for monitoring.

The field of EU borders and their controls is covered by a number of legal frameworks which overlap and intertwine. The starting place is, of course, national law on border controls which often makes substantial differences between controls on persons and controls for other purposes (such as customs). Secondly there is a substantial body of EU law on EU border controls on persons ranging from the right of free movement of EU citizens and their family members to detailed instructions in regulations including the Schengen Border Code (SBC) and the Border Surveillance Regulation on the treatment of third country nationals. Thirdly, the European Convention on Human Rights as interpreted by the European Court of Human Rights has an established case law which commits state parties to maintain a high standard of human rights protection in the application of border controls on persons.[221] These standards have been transposed into EU law through Article 6(3) TEU and the EU Charter of Fundamental Rights which constitutes a floor below which EU law cannot fall in the treatment of persons crossing EU borders.

Fourthly, international human rights law commencing with the Universal Declaration of Human Rights and crystalised into legally binding commitments in particular in the International Covenant on Civil and Political Rights (1966), the UN Convention against Torture, Inhuman and Degrading Treatment or Punishment (1984), the UN Convention against Enforced Disappearances (2006), and international refugee law in particular the UN Convention on the status of refugees 1951 and its 1967 Protocol, all contain rights which have important consequences for border controls on persons. Two rights are of particular

[220] The Black Book of Push Backs: https://left.eu/issues/publications/black-book-of-pushbacks-volumes-i-ii/ [accessed 2 October 2021]
[221] For instance *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: https://www.refworld.org/cases,ECHR,4f4507942.html [accessed 2 October 2021]

significance; the first is the right to leave any country and the second is the right to non-refoulement (the prohibition on sending someone to a country where there is a real risk the individual will be subject to treatment contrary to the convention). All human rights are relevant to treatment at EU borders starting with the right to dignity. The EU and its Member States most recently confirmed their commitment to delivering these rights when they adopted the two UN Global Compacts, one for Refugees the other for Safe, Orderly and Regular Migration.[222] In practice, however, these two – departure and non-refoulement – form the backbone of rights concerning crossing of international borders.

Notwithstanding the plethora of law applicable to border controls on persons, allegations of human rights violations at EU external borders, in particular, have been a constant problem since the introduction of an EU coordination competence.[223] Yet, notwithstanding the allegations or the cases which have come before the EU and ECHR courts, border police behaviour giving rise to the allegations has not gone away.[224] The purpose of the Feasibility Study is to examine what new institutions and systems of operation are needed which are capable of addressing the problem: the case for independent monitoring.

The purpose of this Annexe is to provide a clear outline of the problem from a legal perspective and provide specific detail for the main Study. In this regard, we commence by looking at how and why the Frontex internal monitoring mechanism has not proven sufficient for the challenge. Then we turn to the efforts of the EU legislator to incorporate better fundamental rights compliance in the legal structure of Frontex and examine why these efforts do not appear to have resulted in an improvement of the situation (indeed, from reports from many sources, the problem seems to be intensifying). One of the profound issues regarding monitoring of use of force at borders is the power, status and independence of those charged with carrying out the monitoring. This problem is particularly acute at the time of writing regarding various proposals for a monitoring mechanism in Greece.[225] In the context of the EU, the constitutional principles of solidarity and mutual trust depend on the institutions responsible for monitoring the implementation of EU law (including external border control) being both structurally independent and evidently independent to the external observer. Only where this independence is clearly defined and delivered can the cross-border cooperation necessary to effective monitoring take place. Thus, we have carried out an in depth examination of the case law of the two European courts on the requirements of independence in order to distil the essential elements which a monitoring body must have. Finally, we examine the issue of determining the legitimacy of border police use of force against persons crossing the external borders and the need to ensure that there is no impunity where such force is not lawful.

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222 https://www.unhcr.org/the-global-compact-on-refugees.html; https://refugeesmigrants.un.org/migration-compact [accessed 13 October 2021].

223 https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece [accessed 2 October 2021].

224 https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html [accessed 2 October 2021].

225 https://www.infomigrants.net/en/post/35116/unhcr-calls-for-independent-border-monitoring-in-greece [accessed 2 October 2021].

2. Frontex and the history of the Fundamental Rights Officer as a monitoring mechanism

Frontex (the Agency) was created by Regulation 2007/2004.[226] Since the Agency's creation, 'there has been significant concern, both from the European Parliament as well as NGOs and other civil society organisations that the executive mandate of the agency has not been counterbalanced by effective mechanisms for accountability, particularly with respect to fundamental rights'.[227]

This concern has grown in recent years, particularly following the entering into force of Regulation 2019/1896 (the 2019 Regulation), which vastly expanded the resources of the Agency and mandated it to hire up to 10,000 of its own border polices.[228] Whilst the powers, remit, and operational capacity of Frontex have grown exponentially, independent accountability mechanisms 'have been overlooked in the process'.[229] The Agency has been under heavy criticism for the shortcomings of its internal monitoring and accountability mechanisms. In June 2021, the UN Special Rapporteur on the Rights of Migrants noted that 'Frontex's limited accountability mechanisms have come under criticism for failing to provide prompt, transparent and thorough investigations into allegations of human rights violations in the context of the agency's operations'.[230]

Gil Arias Fernández, the former deputy of Frontex, in an audacious interview with the Guardian, explained that the culture of impunity comes from the very top and runs through the whole organisation.[231] Similarly, a now retired senior Member State border official has noted that there is 'a culture where certain unlawful behaviour is normalised because everybody engages in it, especially if the behaviour is implicitly condoned by politicians'.[232] This is particularly worrying given the inadequate mechanisms in place to protect fundamental rights and hold the Agency to account.

This section will map the development of the Agency's internal accountability mechanisms to analyse whether they have ever been fit for purpose.

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[226] Council Regulation (EC) No 2007/2004 establishing the former European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004).
[227] Lena Karamanidou and Bernd Kasparek, 'Global Migration: Consequences and Responses – Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex', *Respond Migration* (31 July 2020) <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>.
[228] Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019).
[229] Elspeth Guild, 'The Frontex Push-Back Controversy: Lessons on Oversight (Part I)', *EU Migration Law Blog* (19 April 2021) <https://eumigrationlawblog.eu/the-frontex-push-back-controversy-lessons-on-oversight-part-i/>.
[230] Felipe Gonzáles Morales, UN Special Rapporteur on the Rights of Migrants, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea', A/HRC/47/30 (12 May 2021) <https://undocs.org/en/A/HRC/47/30>.
[231] José Bautista and Ana Rojas, 'Frontex turning 'blind eye' to human rights violations, says former deputy' (11 June 2021) <https://www.theguardian.com/global-development/2021/jun/11/frontex-turning-blind-eye-to-human-rights-violations-says-former-deputy>.
[232] A senior Member State border official, now retired [interview record on file with the author].

Fundamental Rights Officer

The Fundamental Rights Officer (FRO) position came into existence in 2011 and was established by Regulation 1168/2011.[233] It has been described as 'one of Frontex's key internal fundamental rights monitoring and accountability mechanisms'.[234]

The 2019 Regulation expanded the tasks and responsibilities of the FRO. Article 109 governs the role and responsibilities of the FRO, according to which she/he is responsible for contributing to the Agency's Fundamental Rights Strategy, advising the Agency, providing opinions on the operational plans and working arrangements, and informing the Executive Director about possible violations of fundamental rights during activities of the Agency.[235] She/he is also responsible for monitoring the Agency's compliance with fundamental rights, including by conducting investigations into any of its activities irrespective of whether they take place inside or outside the EU.[236]

Beyond these monitoring and advisory functions, the powers of the FRO are limited. The FRO has no capacity to take direct action or to force implementation of its recommendations on the Agency. Her/his recommendations are not binding on the Agency and therefore are fairly limited. Under Article 46, the Executive Director can simply disregard the FRO's advice, with no requirement to give any justification. Since 2017, the FRO has filed seven expressions of concern about fundamental rights situations, Annual General Reports on Serious Incident Reports, three Complaints Mechanisms Annual Reports, and 11 FRO reports to the Management Board, to which no response followed by the Executive Director.[237] The Frontex Scrutiny Working Group (FSWG),[238] found that the Executive Director 'repeatedly did not respond to recommendations, opinions, advises, evaluations or requests for information' submitted by the FRO over the course of four years.[239] The FRO's reports are also not publicly available.

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[233] Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 304, 22.11.2011).

[234] European Council on Refugees and Exiles, 'Holding Frontex to Account: ECRE's Proposals for Strengthening Non-Judicial Mechanisms for Scrutiny of Frontex' (May 2021) <https://www.ecre.org/wp-content/uploads/2021/05/Policy-Papers-07.pdf> 10.

[235] The 2019 Regulation, Article 109(2).

[236] *Ibid*.

[237] Frontex Scrutiny Working Group, 'Working Document: Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (14 July 2021) < https://www.statewatch.org/media/2590/ep-frontex-scrutiny-group-final-report-14-7-21.pdf> 11.

[238] The Frontex Scrutiny Working Group ('FSWG') of the European Parliament's LIBE Committee was constituted on 1 March 2021. The FSWG's mandate is to permanently monitor all aspects of the functioning of Frontex, including its reinforced role and resources for integrated border management, the correct application of the EU acquis, and its execution of Regulations (EU) 2019/1896 and 656/2014.

[239] Frontex Scrutiny Working Group, *op. cit.*, 11.

The 2019 Regulation reiterates the independence of the FRO and states that she/he must act independently in the conduct of her or his duties.[240] The reality is, however, quite different. The FRO is appointed by the Management Board, which is given a choice of only three candidates, after consultation with the Consultative Forum. The 2019 Regulation fails to make clear who prepares this list of candidates. Further, whilst the FRO is technically independent in the conduct of their duties, the Management Board is responsible for the implementation of the recommendations. The FRO also reports directly to the Management Board, rather than to an external body such as the European Parliament.[241] Despite explicit provisions reassuring us of the FRO's independence, she/he 'is not genuinely independent as the position is embedded in Frontex's administrative and management structure and she/he is a Frontex employee'.[242] The FRO is completely integrated into the hierarchy of Frontex, and therefore has no independence.

According to Article 109(5), the FRO should have sufficient and adequate human and financial resources at her/his disposal necessary for the fulfilment of her/his tasks. The Consultative Forum and other bodies have repeatedly criticised the 'long-standing challenge of inadequate resources of the FRO office'.[243] The FSWG argues that '[a]lthough the capacity of the office of the FRO has increased, it is still very limited compared to its increased number of tasks'.[244]

The FRO is also required to appoint Fundamental Rights Monitors ('FRMs'), who are tasked with monitoring compliance with fundamental rights and providing advice and assistance to the FRO.[245] In order to maintain independence, the FRMs are required to work under the overall supervision of the FRO. By 5 December 2020, the Agency was required to ensure that at least 40 FRMs had been recruited.[246] As of May 2021, the Agency had still failed to recruit any of the 40 FRMs required under the 2019 Regulation.[247] This is the subject of investigation by the European Parliament. The FSWG found that the Executive Director 'has caused a significant and unnecessary delay in the recruitment of at least 40 FRMs, which seriously hampered the Agency's capability to monitor fundamental rights compliance during joint operations'.[248]

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[240] The 2019 Regulation, Article 109(5).
[241] The 2019 Regulation, Article 109(4).
[242] European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*, 12. See sections 3 and 4 regarding the requirement of independence in EU and ECHR law. The legislator has been much firmer about the requirement of independence in, for instance, the European Banking Authority Regulation 1093/2010 (Article 46) or the European Public Prosecutor Regulation 2017/1939 (as amended) (Article 6).
[243] European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*, 12; Karamanidou and Kasparek, *op. cit.*; Frontex Consultative Forum on Fundamental Rights, 'Seventh Annual Report: 2019' (2020) <https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf> 17; Frontex Consultative Forum on Fundamental Rights, 'Sixth Annual Report: 2018' (2019) <https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2018.pdf> 16, European Council on Refugees and Exiles, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)', (November 2018) <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf> 26.
[244] Frontex Scrutiny Working Group, *op. cit.*, 9.
[245] European Border and Coast Guard Regulation (EU) No. 2019/1896 ('The 2019 Regulation'), Article 110(2).
[246] The 2019 Regulation, Article 110(6).
[247] Frontex Management Board, 'Conclusions of the Management Board's meeting on 5 March 2021 on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea' (05 March 2021) <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-aFewSI>; European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*
[248] Frontex Scrutiny Working Group, *op. cit.*, 10.

However, even once the full number of FRMs are recruited, the European Council on Refugees and Exiles (ECRE) argues that 'their number still looks disproportionately weak compared to 10,000 border polices that the Agency will hire by 2027'.[249] Further, it is unlikely that the FRMs will have an impact without an overhaul of the powers granted to the FRO itself.

Serious Incident Reports

The Frontex Code of Conduct 'obliges every officer who has reason to believe a provision of the code or fundamental rights was violated, to report this immediately to Frontex in the form of a Serious Incident Report (SIR)'.[250] According to Frontex, a SIR:

'pursues the goal of informing Frontex and Member States as soon as possible about an event or occurrence, natural or caused by human action, which may affect or be relevant to, the Frontex mission, its image, the safety and security of the participants on the operation, or any combination thereof including violations of Fundamental Rights and of EU or international law rules related to the access of international protection and infringements of the Frontex Code of Conduct'.[251]

There are four categories of SIR. Category 1 includes situations of high political and/or operational relevance, such as terrorist attacks, natural disasters, and man-made disasters.[252] Category 2 includes incidents in Frontex activities with a high public or political interest, such as death of persons and high number of arrivals in unexpected regions, use of force and the use of firearms. Category 3 includes death or severe injury of Frontex staff, or serious accidents or illness involving Frontex staff. Category 4 is the most relevant to the current discussion and includes situations of suspected violations of fundamental rights, including in the European or international law related to the access to international protection, observed or witnessed possible violations, in particular against right to human dignity, prohibition of torture and inhuman or degrading treatment or punishment, right to liberty and security, right to asylum, principle of non-refoulement and non-discrimination, rights of the child, and right to an effective remedy.

The Agency makes clear that '[s]erious incidents shall be reported to the Frontex Situation Centre (FSC) immediately after knowledge to ensure that Frontex is able to react properly if needed. It is crucial that participants/actors involved in a Joint Operation understand the importance of the SIR … as serious incidents might have big impact on Frontex work and reputation'.[253] If a serious incident occurs, the actors of a Joint Operation who are directly involved or get knowledge of this incident must immediately report to the FSC within 2 hours

[249] European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*, 12.
[250] Frontex, 'Fundamental Rights' (2021) <https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-at-frontex/>. Frontex,
[251] Frontex, 'Annexe14 Serious Incident Reporting' <https://www.statewatch.org/media/documents/news/2016/aug/frontex-serious-incident-reporting.pdf>.
[252] *Ibid*.
[253] *Ibid.*

after recognition. A SIR must then follow as soon as possible, containing comprehensive details of the incident.

The number of SIRs are 'said to be few in number, a reason Frontex attributes to not having people deployed in the frontline to witness violations'.[254] However, allegedly 'Frontex officers are in fact actively discouraged from filing the reports to avoid repercussions later on'.[255] The FSWG found that 'some deployed border polices, who needed to submit a SIR through the chain of command, were discouraged from submitting one'.[256] ECRE has criticised the modest number of incidents reported under this mechanism, particularly given that it is one of the main tools for Frontex to monitor how it respects human rights.[257] In 2019, Markus Jaeger from the Council of Europe stated that '[t]he internal system of Frontex produces close to nil reports on serious incidents, in other words, the internal system of Frontex, says there is never a human rights incident'.[258]

Even when an incident is reported to the FSC, it is unclear what is done with the SIR. Having reviewed a number of documents obtained from the Agency, the FSWG concluded that it was 'clear that the Management Board has taken note of many SIRs, but does not seem to have discussed or drawn any conclusions on the overall picture that arises from the total number of reports and the seriousness of the allegations'.[259]

The FSWG further noted that the FRO was not informed about all SIRs, and accordingly she could not correct a potential wrongful categorisation.[260] According to the FSWG report, the Executive Director recategorised a category 4 SIR situation related to a suspected violation of fundamental rights and requested the FRO to remove all information gathered on the matter.[261] The Frontex Management Board Working Group recommended that 'any incident implying a possible violation of fundamental rights must be categorized in a Serious Incident Report category 4 and immediately allocated to the coordination of the Agency's Fundamental Rights Officer'.[262] It went on to recommend that '[c]orresponding investigative measures must be carried out without any delay and finalized as soon as possible'.[263] It is worrying that the Executive Director has actively obstructed the internal investigation of fundamental rights and highlights the attitude of the Executive Director to SIRs and the role of the FRO.

Consultative Forum on Fundamental Rights

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[254] Nikolaj Nielsen, 'Frontex's 'serious incident reports' – revealed' (8 March 2020) <https://euobserver.com/migration/151148>.
[255] *Ibid.*
[256] Frontex Scrutiny Working Group, *op. cit.*, 8.
[257] European Council on Refugees and Exiles, 'Renewed Critical Focus on Frontex Internal Reporting' (4 October 2019) <https://ecre.org/renewed-critical-focus-on-frontex-internal-reporting/>.
[258] *Ibid*.
[259] Frontex Scrutiny Working Group, *op. cit.*
[260] *Ibid*, 14.
[261] SIR 11095/2020, 'Formal SIR – Frontex Surveillance Aircraft's Sighting in Eastern Aegean' (30 April 2020).
[262] Frontex Management Board Working Group, 'Final Report: Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea' (1 March 2021) <Agenda_Point_WG_FRaLO_final_report.pdf (europa.eu)> 16.
[263] *Ibid*.

The Consultative Forum was established by Regulation 1168/2011. It currently consists of thirteen organisations,[264] bringing together key European institutions, international and civil organisations to advise the Agency in fundamental rights matters. It was established to 'assist it [the Agency] by providing independent advice in fundamental rights matters'.[265] The 2019 Regulation, under which the Consultative Forum now operates, provides that it should 'be consulted on the further development and implementation of the fundamental rights strategy, on the functioning of the complaints mechanism, on codes of conduct and on the common core curricula'.[266]

The 2019 Regulation also stipulates that:

'without prejudice to the tasks of the Fundamental Rights Officer, the Consultative Forum shall be provided with effective access in a timely and effective manner to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State or the third country, as applicable, to hotspot areas and to return operations and return interventions, including in third countries'.[267]

The Consultative Forum publishes an Annual Report, covering its activities and opinions and recommendations made to Frontex and the Management Board.[268] It published its seventh annual report in October 2020.[269] The Forum has and continues to express concerns over the absence of an effective monitoring system to prevent and address potential fundamental rights violations in the Agency's activities.

The 2019 Regulation 'explicitly foresees that the Agency has the responsibility to provide the Forum with information on how it follows-up on its recommendations'.[270] Despite this, the FSWG found 'that the recommendations and opinions of the Consultative Forum are not sufficiently taken into account by the Management Board and the Executive Director'.[271] Notably, in January 2021, this led to one of the Forum's previous members leaving, on the basis that 'the Consultative Forum's working methods did not allow for [their] meaningful

[264] The European Asylum Support Office (EASO), European Union Agency for Fundamental Rights (FRA), United Nations High Commissioner for Refugees (UNHCR), The Council of Europe (CoE), International Organization for Migration (IOM), Organization for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights (OSCE ODIHR), Office for the High Commissioner for Human Rights (UN Human Rights), Amnesty International European Institutions Office (EIO), Churches' Commission for Migrants in Europe (CCME), International Commission of Jurists (ICJ), Jesuit Refugee Service Europe (JRS), Red Cross EU Office (RCEU) and Save the Children (SC).
[265] The 2019 Regulation, Article 108.
[266] *Ibid*.
[267] The 2019 Regulation, Article 108(5).
[268] The 2019 Regulation, Article 108(4).
[269] Frontex Consultative Forum on Fundamental Rights, 'Seventh Annual Report' (2019) <https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf> .
[270] The 2019 Regulation, Article 108(3); Frontex Consultative Forum on Fundamental Rights, 'Working Methods of the Frontex Consultative Forum on Fundamental Rights' <https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_on_Fundamental_Rights_2021.pdf>.
[271] Frontex Scrutiny Working Group, *op. cit.*, 10.

participation'.[272] Whilst the Forum is more independent than the FRO, it is entirely unintegrated into the hierarchy of Frontex and therefore the Executive Director seemingly does not feel an obligation to respond to the Forum's opinions and recommendations.

For example, in November 2016, the Forum recommended that Frontex withdraw from the Hungarian-Serbian border due to fundamental rights concerns. It recommended that 'operational support at the Hungarian-Serbian border must be contingent upon Frontex being satisfied that people arriving at that border are duly registered' and 'are not summarily returned to Serbia, and that instances of police abuse and violence are investigated in an independent and impartial manner'.[273] It argued that until this could be guaranteed, the Executive Director should immediately take action and suspend operational activities at the Hungarian-Serbian border.[274] The Executive Director rejected the proposal and failed for four years to take measures to prevent or stop human rights violations, despite repeated calls from the Consultative Forum to do so. The Agency suspended operations in Hungary only after a ruling by the Court of Justice of the European Union in December 2020, which found that Hungary was violating EU law by pushing migrants back into Serbia.[275] This example highlights the Executive Director's contempt for the recommendations and opinions of the Consultative Forum, and the Consultative Forum's superficial role in safeguarding fundamental rights.

Individual Complaints Mechanism

The Individual Complaints Mechanism was introduced in 2016 by Article 72 of Regulation 2016/1624.[276] This was introduced in response to long-standing demands by the European Ombudsman, who had called for the mechanism since 2013.[277] An individual, or a person or party acting on their behalf, may submit a complaint to Frontex if they believe that their fundamental rights have been breached by an action or inaction of staff involved in a Frontex activity.[278] The Agency notes that if a 'complaint refers to actions or failure to act performed by a Frontex staff member, the Executive Director of the Agency shall ensure the appropriate follow-up and report back to the FRO'.[279] Beyond this there is no guarantee on when or how the complaint will be dealt with.

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[272] PICUM, 'PICUM is No Longer Part of the Frontex Consultative Forum' (29 January 2021) <https://picum.org/picum-is-no-longer-part-of-the-frontex-consultative-forum/>.

[273] Frontex Consultative Forum on Fundamental Rights, 'Fourth Annual Report' (2016) <https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2016.pdf>.

[274] *Ibid*.

[275] Court of Justice of the European Union, Case C-808/18 *European Commission v Hungary* [17 December 2020]; Court of Justice of the European Union, 'Press Release No 161/20: Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals' (17 December 2020) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf>.

[276] Regulation (EU) 2016/1624 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 (OJ L 251, 16.9.2016).

[277] European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (7 November 2013) <https://www.ombudsman.europa.eu/en/special-report/en/52465>.

[278] Frontex, 'Complaints Mechanism' <https://frontex.europa.eu/accountability/complaints-mechanism/#:~:text=Complaints%20Mechanism%20The%20Frontex%20Complaints%20Mechanism%20was%20established,who%20monitors%20and%20promotes%20fundamental%20rights%20within%20Frontex.>.

[279] *Ibid*.

The 2019 Regulation introduced an explicit requirement that the complaints mechanism be both independent and effective. However, the FSWG recently found that the complaints mechanism 'does not meet the criteria of effectiveness concerning accessibility, institutional independence and transparency'.[280] Whilst the 2019 Regulation expands the role of the FRO in the complaints procedure, giving them a greater say in the admissibility of complaints and in recommending the appropriate course of action to the Executive Director, the Executive Director remains responsible for ensuring 'appropriate follow-up' to complaints, and only if he considers necessary. Further, there are no time frames within which complaints must be dealt with, or even a requirement for investigations to be prompt.

In November 2020, the European Ombudsman opened an inquiry to look into how the Agency deals with alleged breaches of human rights, and in particular the effectiveness of the complaint mechanism.[281] The decision was released on 15 June 2021. It concluded that there has been delay by the Agency in implementing the important changes introduced by the 2019 Regulation and identified a number of areas for improvement. In its fifth annual report in 2018, the Consultative Forum noted that: '[t]he rules should, among other points, provide further details on the respective roles of the different actors involved in the procedure, specify the timeframe for the processing of complaints, and provide for the possibility of anonymous complaints'.[282] Statewatch has also raised concerns about the continued lack of a possibility to appeal against decisions on the outcome of complaints.[283]

Despite the words of the 2019 Regulation, the individual complaints mechanism cannot be considered independent or effective. It is concerning that there is still no effective remedy available to individuals whose fundamental rights have been violated by Frontex staff.

Management Board Working Group

In October 2020, the findings and criticisms by investigative journalists of Frontex's involvement in pushbacks at the Greek-Turkish border brought significant public attention to its activities and initiated a number of investigations.[284] Several external investigations were launched in response to the investigative journalists' findings, including by the European

[280] Frontex Scrutiny Working Group, *op. cit.*, 14.
[281] European Ombudsman, 'Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer', Decision in Case OI/5/2020/MHZ (15 June 2021) <https://www.ombudsman.europa.eu/en/decision/en/143108>.
[282] Statewatch News Online, 'EU: Frontex condemned by its own fundamental rights body for failing to live up to obligations' (21 May 2018) <https://www.statewatch.org/news/2018/may/eu-frontex-condemned-by-its-own-fundamental-rights-body-for-failing-to-live-up-to-obligations/>.
[283] Statewatch, 'EU: Updates to Frontex complaints mechanism shrouded in secrecy' (11 September 2020) <https://www.statewatch.org/news/2020/september/eu-updates-to-frontex-complaints-mechanism-shrouded-in-secrecy/>; Statewatch, 'Deportations: rights and responsibilities – What could possibly go wrong?' <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/frontex-the-eu-s-deportation-machine/deportations-rights-and-responsibilities/>.
[284] Bellingcat, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks' (23 October 2020) <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>.

Ombudsman,[285] the European Anti-Fraud Office (OLAF),[286] and the FSWG.[287] ECRE noted that the 'unprecedented number of investigations shows a growing awareness that in recent years Frontex's powers have grown disproportionately to its accountability mechanisms'.[288]

On 27 October 2020, the Management Board of Frontex[289] launched an internal inquiry into the incidents reported by the journalists.[290] The Management Board consisted of representatives of seven Member States and the Commission, and was set up to investigate media allegations that staff, ships or aircraft working with or financially supported by Frontex had been engaged in violations.[291] Officially called the 'Frontex Management Board Working Group', it produced its final report in March 2021.[292]

The Working Group examined 13 incidents. It concluded that in eight of those incidents, 'no third-country nationals were turned back in violation of the principle of non-refoulement'.[293] The report however failed to provide any details on these incidents. The Working Group did note five cases which required further investigation and remained unresolved, due to the deficits and need for improvement of the reporting and monitoring system.[294] It also noted 'with concern that the reporting systems currently in place are not systematically applied, do not allow the Agency to have a clear picture of the facts relating to (potential) serious incidents and do not allow for a systematic analysis of fundamental rights concerns'.[295] It stated that the 'Agency needs to make urgent improvements in this respect'.[296]

Since then, the Working Group concluded that four out of five of the outstanding cases had been closed despite noting its 'strong belief that the presented facts support an allegation of possible violation of fundamental rights' in two of those cases.[297]

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[285] European Ombudsman, 'Ombudsman opens inquiry to assess European Border and Coast Guard Agency (Frontex) 'Complaints Mechanism'' (11 November 2020) <https://www.ombudsman.europa.eu/en/news-document/en/134739>.
[286] Jacopo Barigazzi, 'EU watchdog opens investigation into border agency Frontex' (11 January 2021) <https://www.politico.eu/article/olaf-opens-investigation-on-frontex-for-allegations-of-pushbacks-and-misconduct/>.
[287] European Parliament, 'Respect of fundamental rights by Frontex: European Parliament inquiry launched' (23 February 2021) <https://www.europarl.europa.eu/news/en/press-room/20210223IPR98504/respect-of-fundamental-rights-by-frontex-european-parliament-inquiry-launched>.
[288] European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*
[289] The Management Board is composed of representatives of the heads of the border authorities of the EU Member States that are signatures of the Schengen acquis, plus two members of the European Commission.
[290] Frontex, 'Frontex launches internal inquiry into incidents recently reported by media' (27 October 2020) <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-internal-inquiry-into-incidents-recently-reported-by-media-ZtuEBP>; European Commission, 'An extraordinary meeting of the Frontex Management Board on 9 December 2020' (17 December 2020) <https://ec.europa.eu/home-affairs/news/extraordinary-meeting-frontex-management-board-9-december-2020_en>.
[291] Elspeth Guild, *op. cit.*
[292] Frontex Management Board Working Group, *op. cit.*
[293] Frontex, 'Management Board updates: Conclusions of the Management Board's meeting on 5 March 2021 on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea' (05 March 2021) <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-aFewSI>.
[294] Frontex Management Board Working Group, *op. cit.*, 16
[295] Frontex, 'Management Board updates: Conclusions of the Management Board's meeting', *op. cit.*
[296] *Ibid*.
[297] Explanatory note on the state of play of the five incidents reviewed in the final report of the management board working group on fundamental rights and legal and operational aspects of operations (23 April 2021).

The FSWG noted that the FRO and Consultative Forum did not participate in the Working Group despite their fundamental rights expertise and knowledge.[298] Human Rights Watch argued that this inquiry 'only exposed the tip of the iceberg' and that it 'raises questions about its willingness or capacity to hold itself accountable'.[299] They noted that 'with one exception, the incidents analyzed by the inquiry were the few that were reported on internally at Frontex. But the inquiry failed to look into scores of other incidents that affected thousands of people'.[300] They further argued that:

'Frontex's management board says it is concerned about the effectiveness of reporting and monitoring mechanisms within the agency and wants improvements. But if it is serious about addressing Frontex' failures to uphold rights, the board should examine a much larger spectrum of reported abuses and press Frontex to reconsider operations when abuses are committed under its oversight'.[301]

Conclusion

To a certain extent, the internal monitoring and accountability regime of the Agency has improved since 2011 through legislative changes.[302] However, having analysed the development of the Agency's various internal accountability mechanisms, it is clear that despite the incremental additions of new mechanisms and supposed strengthening, the system remains entirely opaque, ineffective, and inadequate. Despite the continued legislative changes, 'these efforts have again not resulted in an effective system for monitoring, investigating, addressing, and preventing fundamental rights violations at Europe's external borders'.[303] In a recent policy paper, ECRE found that 'the existing mechanisms are generally underused'; '[i]n the context of the considerably expanded powers and funds of Frontex … scrutiny tools should be systematically used and strengthened'.[304] Even when the mechanisms are used, they 'fall short of holding Frontex to account'.[305] In essence, they allow the Agency to simply 'mark its own homework'.

[298] Frontex Scrutiny Working Group, *op. cit.*, 13.
[299] Eva Cossé, 'Frontex Turns a Blind Eye to Greece's Border Abuses: Internal Inquiry Only Exposed Tip of the Iceberg', Human Rights Watch (10 March 2021) <https://www.hrw.org/news/2021/03/10/frontex-turns-blind-eye-greeces-border-abuses>.
[300] *Ibid*.
[301] *Ibid*.
[302] Karamanidou and Kasparek, *op. cit.*
[303] *Ibid*.
[304] European Council on Refugees and Exiles, 'Holding Frontex to Account', *op. cit.*
[305] *Ibid*.

3. The EU legislator's response to the challenges of fundamental rights compliance in Frontex related border control operations

This section outlines the legislative framework that has established and shaped Frontex since 2004, in its capacity as the European Agency entrusted with coordinating control and surveillance at the EU's external borders, and the gradual explicit integration of EU fundamental rights obligations.[306] Now reshaped into the European Border and Coast Guard Agency,[307] Frontex's role at the EU external borders has expanded significantly over the years, through successive amendments to its mandate and revisions to the underlying legislative framework. This expansion in mandate and operational footprint has taken place against a background characterised by allegations and evidence of Frontex's involvement, be it through acts or omissions, in considerable violations of the fundamental rights of those traversing the EU's external borders.[308]

As this section will show, concerns about the lack of fundamental rights protection prompted considerable attempts to embed fundamental rights obligations within Frontex's constitutive legal framework. It becomes apparent that the legislator's response to the fundamental rights concerns that accompanied the Agency's rapid growth led to a significant increase in references to fundamental rights obligations and attempts to create accountability mechanisms that would guarantee effective rights protection. This emerges as the main way in which the European legislator sought to integrate fundamental rights compliance from within the Regulations themselves. Yet, despite the multiple references to fundamental rights obligations within the Frontex legislation currently in force, the anticipated improvement in respect for fundamental rights has not materialised. This calls into question the extent to which a strategy that relies on integrating references to fundamental rights without interrogating the Agency's structural design can deliver on the Agency's duty to fulfil its functions in compliance with binding EU fundamental rights obligations.

Establishment of Frontex: The Early Years

As the predecessor to the European Border and Coast Guard Agency (EBCG), Frontex was created in 2004 through Regulation 2007/2004 which established a European Agency for the Management of Operational Cooperation at the External Borders.[309] Frontex's establishment sought to improve the integrated management of the external borders of the EU Member States.[310] While EU Member States remained responsible for the control and surveillance of these borders, Frontex was 'to facilitate and render more effective the application of existing

[306] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 'the 2004 Frontex Regulation'.
[307] Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).
[308] E.g., Human Rights Watch, 'Frontex Failing to Protect People at EU Borders' (2021) https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders; Statewatch, 'Legal Actions Pile Up Against Frontex for Involvement in Rights Violations' (23 February 2021) https://www.statewatch.org/news/2021/february/eu-legal-actions-pile-up-against-frontex-for-involvement-in-rights-violations/.
[309] 2004 Regulation.
OJ L 349, 25.11.2004.
[310] 2004 Regulation, article 1(4). These comprise the land and sea borders together with airports and seaports.

and future [EU] mechanisms' relating to these external borders.[311] As such, the Agency was meant to ensure the coordination of Member States' actions in implementing those measures, so as to contribute to 'an efficient, high and uniform level of control on persons and surveillance' at the external borders.[312] It would further provide the Commission and the Member States with technical support and expertise in their management, while promoting solidarity among Member States.[313]

The 2004 Regulation accorded limited attention to fundamental rights. The instrument contained a single reference to the protection of fundamental rights, which was contained in a preambular paragraph specifying that the Regulation 'respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union'.[314] This statement made it clear that the Agency and its work were to be embedded in fundamental rights, with explicit reference to the rights contained in the Charter.[315] After all, as an EU Agency, it was indisputable that Frontex would be bound by the obligations accruing within EU primary law. At the same time, the reference to fundamental rights was restricted to a single recital, with no connections to the protection of human rights, refugees, or respect for non-refoulement obligations in the substantive legal provisions.

The first amendment to the Frontex legislative framework came in 2007, through the supplementary Regulation (EC) No 863/2007 which created 'Rapid Border Intervention Teams' (RABITs).[316] This instrument contemplated a rapid response mechanism through which Frontex would provide operational assistance on border control and surveillance at a Member State's request in times of 'urgent and exceptional pressure'.[317] RABITs were foreseen as fulfilling the need for an emergency response mechanism whenever a Member State sought support to address large-scale movements at the external borders through the involvement of specialised border guards.

Unlike the earlier Regulation, the RABIT Regulation was more explicit in its references to fundamental rights obligations. Beyond stating that the Regulation respected fundamental rights and observed such principles, particularly as recognised by the Charter, it specified that the instrument was to 'be applied in accordance with Member States' obligations as regards international protection and non-refoulement'.[318] It acknowledged the context at the EU's sea-border, and maintained that its application was to be fully compliant with 'obligations arising under the international law of the sea, in particular as regards search and rescue'.[319]

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[311] 2004 Regulation, article 1.
[312] 2004 Regulation, article 1.
[313] 2004 Regulation, article 1.
[314] Recital 22, Regulation No 2007/2004.
[315] Charter of Fundamental Rights. The Charter would not become legally binding until 2009.
[316] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.
[317] Ibid Article 1.
[318] RABIT Regulation, Recital (17).
[319] RABIT Regulation, Recital (18).

Crucially, the RABIT Regulation embedded effective respect for the rights of refugees within its substantive provisions, since the Regulation was to 'apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[320] This latter provision mirrored that found in the Schengen Borders Code which had been adopted in 2006 to govern the movement of persons across borders.[321] The SBC specified that its application was to be without prejudice to 'the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[322] The SBC also went beyond references to non-refoulement, with the inclusion of substantive guarantees for those refused entry onto EU territory.[323] This engagement with substantive protection has been regarded as a direct result of the European Parliament's involvement in the legislative process, in view of its (then) newly assumed role as co-legislator.[324] Indeed, the SBC includes a right of appeal for this cohort, together with the entitlement to a standard form that states the precise reasons for refusal of entry onto EU territory.[325]

The RABIT Regulation referred to the SBC, with the instrument meant to 'contribute to the [SBC's] correct application'.[326] 'Guest officers' participating in the rapid response teams were enabled 'to perform all tasks and exercise all powers for border checks or border surveillance' contemplated under the SBC, in so far as these were necessary to realising the Regulation's objectives.[327] Yet, the relationship between the guarantees provided for in the SBC and the RABIT, or indeed 2004, Frontex Regulation, were never integrated within the legislation. In its absence, the implementation of the SBC safeguards was left outside the scope of the obligations incumbent in the performance of Frontex operations.

Despite the more detailed reference to fundamental rights obligations, the expansion of Frontex operations was accompanied by increased criticism of the Agency and its involvement in human rights violations. This included the end of the first RABIT mission, in which Frontex had provided Greece with human resources and material support, as made available by participating Member States, in response to its claim that a large number of applicants for international protection crossing into the country from Turkey.[328] A damning report identified Frontex as having 'facilitated the detention of those migrants in sub-human conditions'.[329]

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[320] RABIT Regulation, Article 2.
[321] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)
[322] 2006 SBC Article 3.
[323] On the SBC generally, see, E Guild 'Danger – Borders under Construction: Assessing the First Five Years of Border Policy in an Area of Freedom, Security and Justice, in J. de Zwaan and F. A. N. J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (T.M.C. Asser Press 2006) 62.
[324] S Carrera, 'The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document No. 261/March 2007, https://www.ceps.eu/ceps-publications/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary/.
[325] Article 13 SBC (2006).
[326] RABIT Regulation, Recital (16).
[327] RABIT Regulation, Article 10.
[328] Frontex, 'Frontex Deploys Rapid Border Intervention Teams to Greece' (25 October 2010) https://frontex.europa.eu/media-centre/news/news-release/frontex-deploys-rapid-border-intervention-teams-to-greece-PWDQKZ.
[329] Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece#_ftnref12. Additional criticism pointed out that the justification for the RABIT deployment on the basis of the number of irregular arrivals at the land borders was not borne out by the evidence. S Carrera and E Guild, ''Joint Operation RABIT

Attempts to Embed Oversight Mechanisms: The 2011 Regulation

The shortcomings in fundamental rights protection in the context of the Agency's operations were well-known to the EU legislator by 2011. The raft of amendments to the Regulation adopted in response sought to integrate respect for fundamental rights within the Frontex structure at the time that its mandate was expanded to strengthen its operational capabilities.[330] Primarily, the amendments embed a substantive article mandating the Agency to 'fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental rights […]'; equally, the Agency's tasks were to comply with the Refugee Convention, obligations related to access to international protection, the non-refoulement obligation and other fundamental rights.[331] The Regulation refers to the main human rights treaties that engender refugee law and law of the sea obligations including the Convention on the Law of the Sea. With the Charter having since come into force, it also makes repeated reference to the obligation that all Frontex activities to be carried out in full compliance with the Charter, with multiple rights, including the right to dignity, the prohibition of torture and of refoulement as well as the right to an effective remedy, identified accordingly.[332]

The amendments clearly sought to integrate fundamental rights considerations in the multiple areas of Frontex's work. The obligation to draw up a Code of Conduct saw the Agency under an obligation to develop procedures that would guarantee respect for fundamental rights, which would highlight the needs of unaccompanied minors, vulnerable persons, and those in need of international protection.[333] Violations of fundamental rights, including international protection obligations, were to be subject to disciplinary measures by the Home Member State, when they occurred in the course of a joint operation or pilot project.[334] Moreover, Frontex was to provide fundamental rights training, including on access to international protection and asylum procedures, for those instructors of Member States' national border policies.[335] In ensuring the coordination of or organisation of joint return operations, Frontex was to define a code of conduct to be followed during these return operations, with Union funding for these activities precluded if activities or operations were not compliant with the Charter.[336] The amendments engaged with the situation on the ground, in prescribing that the training curricula of border guards needed to integrate fundamental rights, particularly on issues relating to access to

2010' – Frontex Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System' (CEPS 2010) https://www.ceps.eu/ceps-publications/joint-operation-rabit-2010/.

330 European Union, Regulation No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 25 October 2011, available at: http://www.refworld.org/docid/533d212c4.html2011 recital 9.

331 2011 Regulation Article 1(1).

332 2011 Regulation Recital (29).

333 2011 Regulation Article 1(4).

334 2011 Regulation Article 5.

335 2011 Regulation, recital 18.

336 2011 Regulation, recital 20.

international protection, with guidelines for the purpose of identifying those who wished to exercise the right.[337] The establishment of cooperation with third countries was presented as relevant to promoting Union standards of border management which included respect for fundamental rights and human dignity.[338]

Beyond this restatement of the obligation for operations to be fundamental rights-compliant, the 2011 amendments seek to change the Frontex structure to embed fundamental rights oversight from within the organisation itself. These changes included the creation of the Fundamental Rights Officer and the Consultative Forum as well as the development of a fundamental rights strategy.[339] Information about 'credible allegations of breaches of, in particular, [the Frontex Regulation or the SBC], including fundamental rights, during joint operations, pilot projects or rapid interventions' was to be transmitted to the relevant national public authorities and the Frontex Management Board, through the incident reporting scheme.[340] Yet, as considered in the previous chapter, the design of these mechanisms limited the extent to which they could secure effective oversight and accountability. In practice, they have failed to counter a situation where the Agency is implicated in allegations of the gravest of violations and emerge as unsuited to the task.

Frontex at Sea: Regulation 656/2014

The criticism of Frontex and the allegations of involvement in human rights violations did not subside following the 2011 amendments. Instead, Frontex increasingly came under fire for its operations at sea, amidst allegations of omissions in search and rescue operations in the Mediterranean, which post-2011 saw an alarming death toll among those attempting to cross from Libya to European shores.[341] Concurrently, the CJEU annulled Council Decision 2010/252, which had been adopted to supplement the SBC during Frontex operations at sea, albeit on procedural grounds.[342] This annulment set the stage for the adoption of the Regulation No 656/2014 which established rules for Frontex's role and operations in coordinating the surveillance of the external sea borders.[343]

The instrument includes a substantive provision for the protection of fundamental rights and restates that operations must conform with the non-refoulement obligation, through which no one can be 'disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country' where they are at risk of serious harm or onward removal to a place

[337] 2011 Regulation, Article 8.
[338] 2011 Regulation, recital 22; article 19.
[339] 2011 Regulation Article 1(26).
[340] 2011 Regulation, recital 16.
[341] Statewatch, 'Criticism of Frontex's Operations at Sea Mounts' (November 2012) https://www.statewatch.org/media/documents/analyses/200-frontex-search-rescue.pdf.
[342] Case C-355/10, 5 September 2012 http://curia.europa.eu/juris/document/document.jsf?text=&docid=126363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1280714.
[343] 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

where such risk exists.[344] The resulting instrument makes it clear that the obligation, which is key for those in need of international protection, applies in the context of all of Frontex's operations, although as pointed out by UNHCR, the absence of reference to the obligation in the individual articles addressing disembarkation and interception is regrettable.[345] Beyond this, the lack of integration of the SBC, and its safeguards, in Frontex's operations at sea emerges as problematic. The Regulation does not provide for access to legal remedies with a suspensive effect and there is limited consideration of procedural safeguards that would ensure that the obligation of non-refoulement is fully complied with in practice.[346]

The European Border & Coastguard Agency: Fundamental Rights (Violations) Take Centre Stage

The 2015-16 'migration crisis' prompted a purported revamp of the EU migration and asylum framework. This resulted in the revision of the SBC which sought to accord Member States greater latitude with respect to management of their internal borders.[347] The 'crisis' generated greater change at the EU external borders, with yet another Frontex Regulation that substantially expanded the role of the Agency and refashioned it into the European Border and Coast Guard Agency (EBCG).[348] The discussions to revise the earlier Regulation and expand Frontex's mandate preceded the events of 2015-2016, with the European Parliament and European Council long calling for a stronger role for the Agency.[349] In particular, the European Parliament had expressed grave concern at the loss of life that was taking place at sea, especially in the Mediterranean Sea, and the ongoing human rights abuses during migrants' attempts to enter the EU.[350] In this context, the European Parliament had welcomed Frontex's revised mandate, the agreement on Eurosur which had since entered into force,[351] and the prioritisation of the non-refoulement obligation within the instrument. It recalled that Frontex's activities were to respect 'international law, the acquis and, in particular, the case law of the European Court of Human Rights [which] should be observed by the Union and its Member

[344] 2014 Regulation, article 4. In the interim, the European Court of Human Rights had articulated the applicability of the prohibition of refoulement in the context of operations on the High Seas. See, European Court of Human Rights, Hirsi Jamaa and others v Italy, Application No. 27775/09, 23 February 2012

[345] UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council 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 (Frontex) COM 2013(197) final, https://www.unhcr.org/534fd9e99.pdf.

[346] This position is further complicated by the European Commission's response to an enquiry by the Frontex Working Group on Fundamental Rights and Legal Operational Aspects of Operations on the application of Article 14 and Annexe5 SBC which address refusal of entry and the procedures to be followed therein. See, https://www.statewatch.org/media/2023/eu-com-pushbacks-legal-analysis-frontex-inquiry-3-3-21.pdf (March 2021).

[347] European Union (2016), Regulation (EU) 2016/399 of The European Parliament and of The Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, p.1-52. Brussels, 23.3.2016; See generally, E Guild et al, 'Study for the LIBE Committee, Internal Border Controls in the Schengen Area: Is Schengen Crisis-Proof?' (2016) https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU%282016%29571356_EN.pdf.

[348] 2 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L251, 16.9.2016, p 1.

[349] European Parliament Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme (2013/2024(INI)), https://www.europarl.europa.eu/doceo/document/TA-7-2014-0276_EN.html?.

[350] Ibid.

[351] Eurosur

States in the context of interventions on the high seas or when carrying out the surveillance of the Union's external borders'.[352]

This Regulation made it amply clear that the legislator was well-aware of the unfolding fundamental rights tragedies occurring at the EU external borders. The instrument contains 102 references to fundamental rights, with references to these obligations mainstreamed throughout the whole Regulation illustrating the legislator's anxiety in ensuring that the expansion of Frontex's mandate would be accompanied by fundamental rights protection.[353] As such, 'the increased number of its tasks' meant the Agency was to 'further develop and implement a strategy to monitor and ensure the protection of fundamental rights',[354] with an expansion in the role contemplated for the Fundamental Rights Officer and the establishment of a complaints mechanism.[355] 'Strengthened fundamental rights safeguards and increased accountability' were clearly seen by the legislator as a necessary corollary to the Agency's 'extended tasks and competence'.[356]

In response, the 2016 Regulation sets out the protection of fundamental rights as a general rule in the performance of the EBCG's tasks, referring in particular to the Refugee Convention and the non-refoulement obligation, as it had done in previous iterations.[357] References to fundamental rights were also included in the detail of the Regulation, such as in the design of the Agency's operational plan for joint operations which was to include a description of the tasks and responsibility of the EBCG teams 'with regard to the respect for fundamental rights', together with a reporting and evaluation scheme setting out benchmarks for the evaluation report that would further integrate these fundamental rights considerations.[358] Members of EBCG teams were to fully respect fundamental rights throughout their deployment, with this explicitly including access to asylum procedures and human dignity.[359] Training and Codes of Conduct would lay down procedures and develop specific tools to address respect for fundamental rights.[360] Crucially, the Executive Director was under an obligation to terminate the Agency's activities in cases where they considered that there were 'violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist'.[361]

Yet, the Frontex Regulation was to be subjected to another round of amendments, most recently in 2019. These were spurred on by the European Council conclusions of June 2018 which emphasized the need for EU Member States to ensure the 'effective control of the EU's external

[352] European Parliament Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme (2013/2024(INI)), https://www.europarl.europa.eu/doceo/document/TA-7-2014-0276_EN.html? Para 75.
[353] Appendix 3.
[354] 2016 Regulation Recital (48).
[355] 2016 Regulation Article 71. See previous chapter.
[356] 2016 Regulation Recital (14).
[357] 2016 Regulation Article 34.
[358] 2016 Regulation Article 16.
[359] 2016 Regulation Article 21.
[360] 2016 Regulation Articles 35-36.
[361] 2016 Regulation Article 25.

borders' and the need to 'significantly step up the effective return of irregular migrants'.[362] To achieve these twin goals, the European Council called for Frontex's role to be strengthened through increased resources and an enhanced mandate.[363] These calls were taken up in the Commission's proposal later that year,[364] with the co-legislators going on to adopt Regulation 2019/1896 which entered into force in December 2019.[365]

The 2019 Regulation expanded Frontex's role, with significant changes to its operational powers and mandate. Among the most controversial developments, the Regulation authorizes the gradual establishment of a standing corps of 10,000 staff, including staff from the Agency and Member States, who have the power to conduct identity checks and carry weapons.[366] The amendments further resulted in an expanded return mandate which contemplates a role for the Agency throughout the entire return process.[367]

Concern for fundamental rights protection appears to assume centre stage in the 2019 Regulation. References to fundamental rights increase exponentially, with over 230 references to the term.[368] The need to strengthen fundamental rights safeguards was acknowledged 'in particular in terms of the exercise of executive powers by the statutory staff', reflecting the concern that there was insufficient accountability for violations in this regard.[369] This time round, fundamental rights are presented as 'overarching components in the implementation of European integrated border management'.[370] Among the Agency's tasks, it must 'monitor compliance with fundamental rights in all of its activities at the external borders and in return operations', cooperate with the Fundamental Rights Agency to ensure application of these obligations, assist Member States and third countries in training national border guards on fundamental rights while following 'high standards for border management allowing for transparency and public scrutiny in full respect of the applicable law and ensuring respect for, and protection and promotion of, fundamental rights'.[371] References to fundamental rights permeate the entire instrument, ranging from attention thereto in operational plans for joint operations,[372] to the technical and operational reinforcement provided by the standing corps in the work of migration management support teams,[373] and to the instructions issued to all teams engaged in border management, return and migration management support.[374]

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[362] European Council Conclusions June 2018, https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/, paragraph 10.
[363] Ibid.
[364] European Commission, Proposal (September 2018) https://eur-lex.europa.eu/resource.html?uri=cellar:3550f179-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF.
[365] 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.
[366] Statewatch, 'Frontex Launches Gamechanging Recruitment Drive for Standing Corps of Border Guards' (March 2020) https://www.statewatch.org/media/documents/analyses/no-355-frontex-recruitment-standing-corps.pdf.
[367] On the main changes see, Marina Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?' (17 April 2019), http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html.
[368] See Appendix 3: 84 of those references refer to the Fundamental Rights Officer.
[369] 2019 Regulation Recital (24).
[370] 2019 Regulation Article 3(2).
[371] 2019 Regulation Article 10.
[372] 2019 Regulation Article 38.
[373] 2019 Regulation Article 40.
[374] 2019 Regulation Article 43.

Yet, despite the increased attention to fundamental rights in the legislative framework, the issues with human rights protection raised by Frontex operations, be it through coordination or participating have not dissipated. Over 2020-2021, the Agency has been the focus of significant critique on the basis that its activities constitute egregious fundamental rights violations. There has been considerable evidence of border violence which implicates Frontex. In view of this, it becomes clear that embedding references to fundamental rights in the legal framework has not achieved the desired effect. Instead, the implementation of the 2019 Frontex Regulation remains problematic with serious consequences for migrants. Accordingly, the likelihood that legislative reform that consists of increased emphasis on fundamental rights obligations will lead to effective rights protection appears unlikely. This is even more so given how the accountability mechanisms inbuilt within the Regulation have failed to deliver on their promise.[375] This has led to a situation where, despite the appearance of accountability and respect for fundamental rights compliance, the Agency's powers remain unchecked in practice, with lip service paid to effective fundamental rights protection.

Conclusion

Since its inception in 2004, the legislative framework underpinning Frontex progressively increased references to fundamental rights and sought to embed it within the wider fundamental rights obligations that operate to constrain the Agency's work. From scant references to fundamental rights obligations, the latest Frontex Regulation contains over two hundred references, qualifying as an exponential increase in a fifteen-year period. Although this can in part be attributed to the increased awareness of the violations of fundamental rights happening at the EU's external borders and the expanding role of Frontex in these contexts, it is amply clear that these violations have not been affected by the increased references to fundamental rights in the legislative setup. Accordingly, to secure compliance with fundamental rights as they emanate from the wider acquis, an approach that focuses on including references to existing fundamental rights obligations in the legislative framework emerges as insufficient. Despite the increased attention given to fundamental rights, the profound border guard violence against migrants at the border shows how the resulting framework remains inadequate in securing compliance with EU fundamental rights obligations.

[375] See Chapter 2.

4. Examining the Issue of Fundamental Rights Protection in the context of EU Border Violence

The Centrality of Independence of Monitoring Bodies for Solidarity

Solidarity and Cooperation under EU Treaties

Article 2 TEU recognises solidarity as one of the founding values of the EU. In Opinion 2/13, the CJEU emphasised the key importance of the shared values in constituting the EU legal order by noting that 'this legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU'.[376] These values, including solidarity, comprise the untouchable core of the EU legal order,[377] and sustain the mutual trust among Member States on the implementation of EU law.[378] To sustain solidarity and consequentially mutual trust among Member States, the principle of sincere co-operation (or loyalty) is recognised under Article 4(3) TEU, which reads that '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

There is thus a symbiotic relationship between solidarity and the principle of sincere co-operation (or loyalty).[379] The lack of solidarity among Member States in securing effectiveness of EU law would undermine their co-operation in fulfilling the tasks flowing from it[380] since the presumption of compliance would be compromised in the first place. For this reason, the Advocate General Sharpston observed that under the principle of co-operation 'each Member State is entitled to expect other Member States to comply with their obligations with due diligence'.[381] In this way, the principle of co-operation is essential to the principle of solidarity, which in essence denotes the respect among Member States to their adherence to EU law and to the co-operation and support among them in the EU integration process.[382]

Solidarity in the EU Policy on External Border Control, Asylum, and Immigration

In the policy field of external border control, asylum, and immigration, solidarity is first mentioned in Article 67(2) TFEU in connection with framing a common policy on asylum, immigration, and external border control that is based on solidarity between Member States,

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[376] Opinion 2/13 of the Court, ECLI:EU:C:2014:2454, para. 168.
[377] Nicolaos Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in Filippo Fontanelli, Giuseppe Martinico, and Paolo Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law Publishing 2009) 119.
[378] Opinion 2/13, para. 168.
[379] Marcus Klamert, 'Article 4 TEU' 35-60, 42 in: Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin *The EU Treaties and the Charter of Fundamental Rights* (OUP 2019).
[380] C284/16, *Achmea*, EU:C:2018:158, para. 34.
[381] C-715/17 *European Commission v Republic of Poland, C-718/17 European Commission v Republic of Hungary, C-719/17 European Commission v Czech Republic*, ECLI: EU: C:2019: 917 (Opinion of Advocate General Sharpston), para. 245. [emphasis added].
[382] Ester di Napoli and Deborah Russo, 'Solidarity in the European Union in Times of Crisis: Towards 'European Solidarity'? 195-248, 202 in Veronica Federico and Christian Lahusen (eds) Solidarity as a Public Virtue?: Law and Public Policies in the European Union (Nomos 2018); Iris Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) 22 European Journal of Migration and Law 39, 41.

which is fair towards third-country nationals including stateless persons as part of the Area of Freedom, Security, and Justice (AFSJ). Solidarity is further reiterated in Article 80 TFEU, according to which common policies on external border controls, asylum and immigration shall be 'governed by the principle of solidarity and fair sharing of responsibility … between the Member States'.

This is not an abstract principle. The CJEU has held that it is legally binding[383] and equally applicable to Article 80 TFEU and the AFSJ as to other parts of the treaties. Further, the obligation of cooperation to achieve solidarity is not limited to Heads of State or Executive branches of governments. It applies to all state authorities carrying out activities within the scope of the Treaties. For our purposes, external border control is within the scope of the Treaties as not only is it a competence under Article 67(2) TFEU, but this competence has been exercised both by the SBC[384] and the Border Surveillance Regulation (656/2014).[385] The competence of the EU Ombudsman to investigate allegations of fundamental rights abuses in Frontex coordinated external border control activities is now unchallenged. That office has commenced numerous investigations into these allegations (see Section 2 above).

The competences of national ombudsperson's offices, and national human rights institutions (including national preventative mechanisms) frequently extend similarly (though not in all cases). The harmonisation of such competence is foreseen in Article 111(4) Frontex Regulation[386] which creates a system of coordination for the correct investigation of allegations of mistreatment between the Frontex Fundamental Rights Officer and the competent national authorities. This system is under-developed at the current time and merits review and revision to ensure that cooperation in respect of complaints is made to an independent monitoring body at the national level in every Member State and that the relevant independent monitoring body fulfils the requirements of full independence from the authorities concerned. Solidarity as required by Article 80, among independent monitoring bodies can only be achieved if the complete independence of these bodies is guaranteed both legislatively and in practice.

For the purposes of this section, it is the quality of independence required which is examined. Both the CJEU and the ECtHR have frequently been required to elucidate what independence means in a variety of different categories. The objective of the rest of this section is to examine that case-law and distil out the key principles which are relevant for the monitoring of the activities of both Member State border police activities and those of Frontex.

How to achieve effective monitoring? The centrality of independence of the monitors: EU and ECHR standards on independence

[383] C-848/19, *Germany v Commission*, ECLI:EU:C:2021:598, paras 40-42.
[384] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L77/1 (23 March 2016).
[385] 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, OJ L 189/93 (27 June 2014).
[386] 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, OJ L295/1, (14 November 2019).

The Fundamental Rights Basis of the Independence Requirement

There are two fundamental rights guaranteed by EU law that either have a connection with the requirement of independence or make explicit reference to it for administrative and/or judicial bodies. Firstly, the Charter sets out the requirement of good administration in Article 41. This includes the right to have one's affairs handled impartially, fairly and within a reasonable period of time by the institutions and bodies of the EU.[387] It includes the right to be heard, access to his/her file (with necessary privacy protections) and the duty of the administration to give reasons.[388] The addressees of the Charter's right to good administration are institutions, bodies, and agencies of the EU.[389] The interpretation of this right in EU law is particularly relevant to all monitoring bodies as it establishes the threshold of good administration which they must uphold. It is through the maintenance of the common standard of Article 41 that Member State authorities have the necessary confidence for the delivery of solidarity.

One of the standards required by Article 41 is the impartiality of the administrative bodies, which must be observed by monitoring bodies. This requirement of impartiality has two aspects; subjective and objective impartiality.[390] Subjective impartiality relates to the bias and prejudice of the members of the institutions involved.[391] Objective impartiality requires 'sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned'.[392] As we discuss in the relevant section, this dual aspect of impartiality comes close to the independence standards relevant for judicial bodies that embody an element of impartiality.

The ECHR does not enshrine a right to good administration. But the ECtHR has referred to a few requirements in demanding a certain standard of good administrative conduct in relation to allegations of a range of ECHR rights violations. In Beyeler v Italy, where it was asked to consider an alleged violation claim of the right to property (as enshrined in Article 1 of Protocol No. 1 to the ECHR), the ECtHR alluded to the general principle of good governance as it noted that 'where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency'.[393] Following the Beyeler decision, the explicit reference to the principle of good governance has been made in relation to situations involving interferences with property rights.[394] But the ECtHR came close to the element of good governance when recognising procedural safeguards for the protection of several ECHR rights[395] because it has placed an obligation on states to carry out an

[387] Art 41(2)(a), Charter.
[388] Art 41(2)(b)-(c), Charter.
[389] Joined Cases C-141/12 and C-372/12, *YS. (C141/12) v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel (C372/12) v M., S*, ECLI:EU:C:2014:2081, para 66.
[390] C- 439/ 11, *Ziegler v Commission*, EU:C:2013:513, para 155.
[391] Ibid.
[392] Ibid.
[393] *Beyeler v Italy*, Appl. No. 33202/96, (28 May 2002), para 120. See also *Moskal v Poland*, Appl. No. 10373/05 (15 September 2009), para 51. Following the *Beyeler* case, the *Moskal* case was the first time that the ECtHR explicitly referred to the notion of 'good governance' using *Beyeler* as the precedent.
[394] *Rysovskyy v Ukraine*, Appl. No. 29979/04 (20 October 2011); *Öneryıldız v Turkey*, Appl. No. 48939/99 (30 November 2004).
[395] See for example David Harris et al., Harris, O'Boyle and Warbrick: *Law of the European Convention on Human Rights* (OUP 2018), 514.

administrative procedure with certain qualities.[396] In the next section we will consider these safeguards in connection with the complaints involving allegations of human rights violations. One quality of these investigations is relevant for monitoring bodies because it requires the investigating body to be independent from the body implicated in the violations.

Secondly, Member States and EU institutions are bound to observe the right to an effective remedy enshrined in Article 47 of the Charter. Accordingly, they must ensure that everyone is afforded effective remedy in respect of action within the scope of EU law. This right draws inspirations from the right to an effective remedy under Article 13 of the ECHR, which guarantees the right to an effective remedy before a court. The Article 47 right further reads that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. This second aspect of the Article 47 right corresponds to the right to a fair trial enshrined in Article 6 of the ECHR. As per Article 52(3) of the Charter, Article 47 of the Charter must be read in conjunction with Articles 13 and 6 of the ECHR, and the independence requirement set out for remedial and judicial bodies by the ECtHR. We will discuss below the ECtHR and CJEU standards for judicial bodies as it arises from the relevant rights.

The Fields of Independence

There are four main fields of activity where the independence of a monitoring body has been considered by the ECtHR and the CJEU. First, both bodies have examined the requirement of independence as regards controls of the activities of intelligence services particularly in the field of secret surveillance to ensure respect for privacy (and personal data protection). Secondly, Article 8(3) of the Charter specifically requires an independent authority to control the protection of personal data. The CJEU case-law on independence in this context is particularly relevant to the issue of independence of monitoring bodies in respect of border controls and fundamental/human rights compliance. Thirdly, there is a rich case law of the ECtHR on the requirement for and meaning of independence as regards the investigation of allegations of human rights abuses particularly relating to Article 2 (the right to life), Article 3 (prohibition on torture, inhuman or degrading treatment), Article 5 (liberty of the person). In the next section we will examine each of these lines of the case-law to determine the essential elements of independence of these purposes. Finally, there is a substantial case-law of both courts regarding the independence of the judiciary. As in many cases, the independence of monitoring bodies is aligned to the standards relevant to judicial bodies, this case law is particularly pertinent for our purposes. In this consideration we are not examining the case-law which has developed in respect of banking authorities as this is somewhat removed from our subject. Further, in this section we are not considering the requirements of independence as set out by the EU legislator in a variety of fields, in particular for the EU Ombudsman,[397] the

[396] Ulrich Stelkens and Agnė Andrijauskaitė, 'Sources and Content of the Pan- European General Principles of Good Administration' 19-54, 29 in Ulrich Stelkens and Agnė Andrijauskaitė *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (OUP 2020).

[397] ['Article 41 of the Charter recognises the right to good administration as a fundamental right of citizens of the Union. Article 43 of the Charter recognises the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union. In order to ensure that those rights are effective and to enhance the capacity of the Ombudsman to conduct thorough and impartial inquiries, thereby underpinning the Ombudsman's

Frontex Management Board regarding the Fundamental Rights Officer,[398] the European Supervisory Authority (the European Banking Authority)[399] or the European Public Prosecutor.[400] An analysis of the evolution of the EU legislator's approach to independence of the agencies is beyond the scope of this study.

The Independence Requirement Based on the Legal Challenges against Secret Surveillance and Retention of Personal Data

ECtHR Standards on the Independence of Bodies Controlling the Activities of Secret Surveillance and Retention of Personal Data

The case-law of the ECtHR reveals that an effective remedy as specified under Article 13 of the ECHR does not only encompass access to a judicial remedy. It also requires the existence of other remedial mechanisms in the form of available resources controlling the activities of intelligence and security services. In its Leander decision, the ECtHR was asked about the compatibility of Swedish law allowing the police to collect and retain information about individuals with Article 8 of the ECHR, which requires states to respect the privacy of individuals and their communications, including in collecting and retaining information about their private lives. In considering the necessity of the information collection under the Article 8 right, the Court sought the existence of supervisory bodies including the Parliamentary Ombudsman and the National Police Board to prevent the potential abusive use of powers.[401] It later referred to the same bodies in connection with the observance of Article 13 of the ECHR because they also had the competence to receive individual complaints. In so doing, the Court recognised them cumulatively as means of legal redress.[402] In this context, the ECtHR called

independence upon which they both depend, he or she should be provided with all the tools necessary to successfully perform the Ombudsman's duties referred to in the Treaties and in this Regulation'.]. See: Preamble para. 3, 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 July 2021).

[398] ['establish special rules in order to guarantee the independence of the fundamental rights officer in the performance of his or her duties']. See: Article 100(aa), 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, OJ L 295/1, (14 November 2019).

[399] ['When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body. Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks.']. See: Article 42, Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331 (15 December 2010).

[400] ['(1) The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks. (2) The EPPO shall be accountable to the European Parliament, to the Council and to the Commission for its general activities, and shall issue annual reports in accordance with Article 7.']. See: Article 6, Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283 (31 October 2017).

[401] *Leander v Sweden*, Appl. No. 9248/81 (26 March 1987), paras 60-67.

[402] Ibid, para 81.

the powers and guarantees of the monitoring bodies into question in determining whether they satisfied being effective remedies as per the Article 13 right.[403] It paid particular attention to whether the monitoring bodies could deliver legally binding decisions as opposed to non-binding recommendations.[404] The Records Board was a body introduced post-Leander with the powers to monitor day-to-day collection of personal data by the police. But in the Court's view, it did not amount to an effective remedial mechanism because it did not have the power to order the destruction of files, or the rectification or erasure of information kept in the files.[405] Another newly established board, Data Inspection Board, had wider powers compared to those of the Records Board. But there was no evidence whether these powers specified in law had been resorted to provide effective remedy in practice.[406]

In another case concerning secretive personal data collection operations under Swedish law, the ECtHR elaborated further on the effectiveness of the Parliamentary Ombudsman, Chancellor of Justice, and another two bodies established post-Leander to address data collection by the police as remedial mechanisms.[407] In assessing the effectiveness of the Parliamentary Ombudsman and Chancellor of Justice, the ECtHR repeated its earlier finding in Leander, and held that it was not convinced of the effectiveness of these control bodies because neither could render legally binding decisions, despite the fact that they had the competence to start criminal and disciplinary proceedings following an individual complaint on the application of law.[408]

In the following years, the ECtHR has had opportunities to address further the interaction between the existence of monitoring bodies and effective remedial mechanisms for surveillance operations, especially where a judicial body is involved in controlling the activities of intelligence and security services.[409] Particularly in Kennedy v the UK, the ECtHR referred to its observation on the Article 8 right in connection with two monitoring bodies available under the challenged law: an ex post judicial mechanism, and a non-judicial body tasked with overseeing the general functioning of the surveillance regime.[410] In relation to the former monitoring body, the Court observed that people who suspect that they might have been subject of surveillance operations could bring legal claims before this specialised court, even though the law did not require them to be notified of any such operations.[411] The Court was satisfied that the court was independent and impartial because (i) it had adopted its own rules; (ii) had access to closed materials; (iii) had the power to require the other monitoring body to provide it with assistance; (iv) its members must hold or have held high judicial offices; (v) had the

[403] Ibid, para. 83. See also *Klass and others v Germany*, Appl. No. 5029/71 (6 September 1978), para. 67.
[404] *Leander v Sweden*, paras 82-83.
[405] *Leander v Sweden*, para 120.
[406] Ibid, para 120.
[407] *Segerstedt-Wiberg and Others v Sweden,* Appl. No. 62332/00 (6 June 2006).
[408] Ibid, 118.
[409] *Association for the European Integration and Human Rights and Ekimdzhiev v Bulgaria,* Appl. No. 62540/00 (28 June 2007).
[410] *Kennedy v the UK*, Appl. No. 26839/05 (18 May 2010).
[411] Ibid, para 167.

power to quash interception orders, delete the material and ask for compensation.[412] The other monitoring body established by law, the Interception of Communications Commissioner, was found to satisfy the condition of independence because although the Commissioner would be appointed by the Prime Minister, they must be a person who holds or has held judicial office.[413] The Commissioner further had sufficient powers to scrutinise the surveillance regime because they had to report to the Prime Minister.[414] The report would be made public and laid before the Parliament. The Commissioner would have access to all relevant materials including closed materials and everyone had the duty to assist the Commissioner in accessing the relevant materials.[415]

Similarly, in the recent Centrüm för Rattvisa v Sweden decision, the ECtHR took account of an accumulation of available remedial mechanisms by different bodies to assess whether there was an effective remedy against the activities of intelligence and security services.[416] In so doing, it strengthened its approach that independent monitoring should be available alongside the possibility of legal redress that does not have to be sought from judicial bodies. The effectiveness of the remedy thus turns on the powers granted to the control body and its independence. There were two control bodies that the ECtHR considered in the dispute: an ex-ante control by Foreign Intelligence Court, which is a specialised court on authorising bulk interception orders as per Swedish law, and an ex-post control by the Foreign Intelligence Inspectorate. There was little dispute on the independence of the specialised court.[417] Much attention was paid to the secrecy of its proceedings and the procedures specified by law in authorising to conduct interception. These points of discussions are specific to issues arising around secret surveillance operations and will be excluded from our discussion. The key point here is the binding nature of the Court's decision (in consultation with a privacy protection representative) because the Court recognised this as an important safeguard implemented in law.[418]

It was further satisfied with the effectiveness of the ex-post control by the Inspectorate. Firstly, in the Court's view, this control body was independent because its board was presided by current or former judges and the members were appointed by the government for a four-year term among the candidates proposed by the party groups in Parliament.[419] Secondly, despite the fact that some of its opinions did not have legally binding effect, the Inspectorate had the power to render legally binding decisions to cease the collection of data relating to electronic communications or to destroy the collected data when it found an improper operation.[420] It further had the duty to report to the competent authorities at which point the rendering legally

[412] Ibid, On the question of the compatibility with the Article 13 requirements, the Court referred to its earlier findings on the specialised court in satisfying the conditions under the Article 8 right as part of the overall question on surveillance oversight. See: para 196.
[413] Ibid, para. 166.
[414] Ibid.
[415] Ibid.
[416] *Centrüm för Rättvisa v Sweden*, Appl. No. 35252/08 (25 May 2021).
[417] Ibid, para. 346.
[418] Ibid, para. 298.
[419] Ibid, para. 346.
[420] Ibid, para. 350.

binding decisions lies on issues concerning civil liability of the state or where there is an indication that a criminal offence may have been committed.[421] A point of contention, however, was raised with respect to the dual responsibility of the Inspectorate. On one hand, it was entrusted with the powers to monitor surveillance operations, which included authorising certain operational decisions. On the other hand, it was the designated body to which individual claims could be lodged. This dual role meant that the ex-post review body could be asked to assess its own activities as part of the individual claims process.[422] Even though the Inspectorate's activities were subject to audit, there had not been any audits concerning individuals' complaints.[423] Following from this finding, and the fact that the Inspectorate does not need to produce reasoned decisions to individual claims, the ECtHR found a violation with the Article 8 rights. Based on this violation finding, the ECtHR concluded that there was no separate issue in relation to the Article 13 right.[424]

The case-law of the ECtHR so far has involved circumstances where national security considerations had been at stake. Those considerations could have had an undeniable role in limiting individuals right to seek legal remedy through ordinary court proceedings. The ECtHR has particularly been vocal about the different standards for effective remedies required for secret surveillance operations since their efficacy depends on the secret nature of their proceedings.[425] Thus, the ECtHR has recognised that the remedies in this context can be 'as effective as they can be given the circumstances'.[426] Specifically in relation to the individual complaints against deportation that may expose the person to a real risk of a treatment in breach of the Article 3 right, the ECtHR has demanded a higher threshold than a remedy which is 'as effective as can be' and thus has insisted on an independent scrutiny of the individual circumstances for deportation that might lead to treatment contrary to the Article 3 right, without considering national security considerations surrounding the applicant's expulsion.[427] An ongoing monitoring of border screening proceedings that complements judicial remedies is thus an important condition to deter and investigate human rights violations.

CJEU Standards on the Independence of Bodies Controlling the Activities of Secret Surveillance and Retention of Personal Data

The CJEU has engaged with the discussion on the type of bodies required under EU law to control activities of law enforcement authorities and intelligence services in relation to the processing of personal data, starting with its Digital Rights Ireland decision. The legal challenge concerned the legality under EU law of an EU directive, the Data Retention Directive, which provided the minimum harmonisation rules for Member States on requiring electronic communication service providers by law to retain communications data of their users to allow the subsequent access by competent public authorities in the fight against terrorism

[421] Ibid, para. 350.
[422] Ibid, para. 359.
[423] Ibid, para. 360.
[424] Ibid, paras 375-377.
[425] *Klass and others v Germany*.
[426] Ibid, para. 69.
[427] *Chahal v the UK*, Appl. No. 22414/93 (15 November 1996), para. 150; *Al-Nashif v Bulgaria*, Appl. No. 50963/99 (20 June 2002).

and serious crime.[428] This decision, in which the CJEU declared the Directive invalid based on the rights to privacy (Article 7) and data protection (Article 8) enshrined in the Charter, has become the starting point for the legal limitations for surveillance operations including collection of personal data under EU law. According to the Court, one of the reasons for its final decision was that 'the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body'.[429]

In subsequent decisions, the CJEU re-stated its stance on establishing a monitoring body for surveillance operations including collection of personal data.[430] In some instances, the CJEU made a cross-over to the independent control in relation to the processing of personal data as required explicitly by the Charter.[431] We will consider this requirement in the below section on the principles of independence for data protection authorities under Article 8(3) of the Charter. The important point is the CJEU's insistence on the independence of the review body and its attributions to tasks and/or powers of that body. In Schrems II, where the CJEU considered the legality of a proposed EU-US data transfer framework that replaced its successor invoked previously in Schrems discussed below, the CJEU recognised the importance of Article 47 of the Charter in the protection of personal data as enshrined in the Charter. This finding allowed the CJEU to consider the compatibility with the Charter standards of a plan to establish an Ombudsperson, who would hear claims regarding the possible access for national security purposes by US intelligence agencies to the personal data transferred from the EU to the US. The Court was not satisfied that the Ombudsperson ensured the effective legal remedy requirements enshrined in Article 47 of the Charter based on two crucial grounds. Firstly, its so-called independence would be jeopardised by virtue of its reporting obligations to the Secretary of State and lack of guarantees against its dismissal or revocation.[432] Secondly, it could not adopt binding legal decisions.[433]

Even though the CJEU made these observations in Schrems II about a non-EU authority, it has reiterated similar points on the independence of review bodies and their powers in its following decisions concerning monitoring of activities of EU intelligence and security agencies. In its La Quadrature du Net decision, the CJEU demanded that intelligence and security agencies' authorisations for collection and automated analysis of personal data must be subjected to 'effective review, either by a court or by an independent administrative body whose decision is binding' to ensure that the legal requirements and safeguards are complied with.[434] In HK v Prokuratuur, the CJEU was asked to analyse the independence of an a priori control body under

[428] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238.
[429] Ibid, para. 62 [emphasis added].
[430] See for example: C-203/15 *Tele2 Sverige AB v Post –ochtelestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* ECLI:EU:C:2016:970, para. 120.
[431] Ibid, para. 123; Opinion 1/15 of the Court (Grand Chamber) ECLI:EU:C*:2017:*592, paras 228-231.
[432] C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems*, ECLI:EU:C:2020:559 (hereinafter '*Schrems II*'), para. 195.
[433] Ibid, para. 196.
[434] Ibid, para. 168 and para. 192 [emphasis is added].

EU law.[435] Under Estonian law, in the pre-trial criminal proceedings, the investigating authority had to seek authorisation from the public prosecutor to access communications data. But the public prosecutor also had several responsibilities during the pre-trial criminal proceedings including directing the proceedings and representing public prosecution. The main point of contention was then whether these responsibilities affected the independence of the public prosecutor as interpreted by the CJEU since its Digital Rights Ireland decision.

In answering the requirement of independence, the CJEU noted that 'one of the requirements for [that] prior review is that the court or body entrusted with carrying it out must have all the powers and provide all the guarantees necessary in order to reconcile the various interests and rights at issue'.[436] To strike a fair balance between various interests, an independent administrative body 'must have a status enabling it to act objectively and impartially when carrying out its duties and must, for that purpose, be free from any external influence'.[437] In the specific context of criminal proceedings, the requirement of independence entails that the authority entrusted with the prior review, first, must not be involved in the conduct of the criminal investigation in question and, second, has a neutral stance vis-à-vis the parties to the criminal proceedings.[438] The responsibilities entrusted upon the public prosecutor under Estonian law meant that it did not satisfy the complete independence requirement. Notably, the condition of being free from any external influence will resurface in the CJEU's findings on the independence of data protection authorities and more importantly the judiciary.

Conclusion

The case law of the ECtHR and the CJEU reveals that both courts have insisted on an independent body to control the activities of intelligence and security services. The ECtHR has been asked to assess the independence of non-judicial or quasi-judicial bodies. Several factors have been essential in determining whether these bodies maintained an independent status: the manner of appointment, the terms of office, and the impact of their dual responsibilities. The ECtHR has also considered the powers and tasks assigned to the bodies, especially whether they had the power to render legally binding decisions. These issues have instigated questions on the effectiveness of those bodies as remedial mechanisms. The insistence of the CJEU on independent 'review' bodies – as the Court refers to the control bodies, has been prevalent since its inaugural Digital Rights Ireland decision. The CJEU has further required that body to issue legally bindings decisions and emphasised that the body needs to have a neutral stance and be free from external influences. These two standards – impartiality and being free from external influences – will resurface when we analyse the case law on the independence of judicial bodies.

Principles Underlying the Independence of Data Protection Authorities Based on Article 8(3) of the EU Charter

[435] C-746/18, *H.K. v Prokuratuur*, ECLI:EU:C:2021:152.
[436] Ibid, para. 52.
[437] Ibid, para. 53.
[438] Ibid, para. 54

Control by data protection authorities on matters relating to processing of personal data is guaranteed under EU primary law, mainly under Article 8(3) of the Charter and Article 16 TFEU. These articles codify the existing framework for control as prescribed in the now-abolished Data Protection Directive (DPD)[439], and provide the basis for the control by data protection authorities under the General Data Protection Regulation (GDPR).[440] We do not aim to consider how the GDPR lays down the requirements of independence. But it is essential to consider the case-law of the CJEU that has mainly developed through infringements proceedings on the implementation of secondary law because, as we explore below, it reveals that the level of independence required from the authorities comes close to that of the judiciary.[441]

The DPD, which is now replaced by the GDPR, required EU Member States to establish a data protection authority in their jurisdiction to monitor the application of the Directive 'with complete independence in exercising the functions entrusted to them' as per its Article 28. The case-law of the CJEU on the principles underlying the independence of data protection authorities has emerged to address this 'complete independence' requirement. The case-law principally emerged from the infringement proceedings launched by the European Commission on the implementation of the DPD against Germany, Austria, and Hungary. In essence, the Commission argued that these Member States did not comply with the obligation that the data protection authority had to exercise their functions 'with complete independence'. As a result, the CJEU settled the criteria for 'complete independence' for the purpose of the DPD.

The subject of the dispute for the proceedings against Germany was that the data protection authority responsible for monitoring the data processing activities outside the public sector was subject to State scrutiny.[442] The European Commission, supported by the European Data Protection Supervisor (EDPS) argued that this state scrutiny jeopardised the 'complete independence' of the data protection authority as required under Article 28 of the DPD because the notion undermined the duty to be free from any external influences, directly or indirectly. Germany, on the other hand, argued that the notion of complete independence meant that the data protection authority should be independent from the bodies outside the public sector whose data processing activities they would be scrutinising to ensure that they would not be exposed to influence from that sector.[443] As the complete independence meant a detachment from the subject of scrutiny, subjecting the data protection authority to the state scrutiny would not mean that their independence would be jeopardised (as they would not be monitoring the data processing activities of the public sector) and that scrutiny was merely an administration's internal monitoring since the data protection authority was part of the administrative system.[444]

[439] Article 28, DPD.
[440] Articles 51-59, GDPR.
[441] Hielke Hijmans, 'Article 51. Supervisory authority' 863-872, 867 in: Christopher Kuner et. al. (eds) *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020).
[442] C-518/07, *Commission v Germany*, ECLI:EU:C:2010:125.
[443] *Commission v Germany*, para. 16.
[444] Ibid.

The CJEU rejected the Member State's claim by interpreting the requirement of 'complete independence' in light of the aims and objectives of the DPD. In the first place, it noted that the DPD did not define what is meant by that requirement and as per the literal rule, it considered the usual meaning of the words 'complete independence' to observe that 'in relation to a public body, the term 'independence' normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure'.[445] Thus, limiting the requirement of complete independence exclusively to the relationship between the supervisory body and supervisee was erroneous.[446]

After acknowledging that complete independence required being free from any – direct or indirect – external influences, in the second place, the Court interpreted this requirement in light of the overall objective of the DPD, which is to ensure protection of personal data of data subjects while maintaining the free flow of personal data. Especially in respect to the latter objective, the Court emphasised that free flow of personal data would be liable to interfere with the right to privacy as enshrined in Article 8 of the ECHR.[447] This meant that the data protection authorities were the guardians of individuals' fundamental rights.[448] By focusing on the overall objective of the DPD and considering the role of the data protection authorities in light of it, the Court emphasised that the independence of those authorities was important to ensure the 'effectiveness and reliability' of their supervision in relation to the compliance with the provisions on data processing that aimed at strengthening protection for individuals.[449] Based on this reasoning, the CJEU considered that 'when carrying out their duties, the supervisory authorities must act objectively and partially', which would encompass remaining free from (direct or indirect) influence from state or from the subjects of scrutiny.[450] In this way, the CJEU's reading comes close to its approach to impartiality of the judiciary as the independence of the supervisory authorities must ensure that the general public would not have suspicions regarding the impartiality of their decisions.[451]

Notably, the conditions on State scrutiny enabled potential political influence to be exerted upon the supervisory authorities. According to Germany, subjecting the supervisory authority to state surveillance was necessary to ensure that they would comply with the relevant national and EU laws and its purpose was not to oblige them potentially pursue a political objective inconsistent with the protection of individuals with respect to the processing of their personal data.[452] The CJEU was quick to reject this claim as there still existed a risk that being under the government control would mean that the supervisory authorities would exhibit 'a priori compliance' on the part of the authorities when scrutinising their decision making practices.[453]

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[445] Ibid, para. 18.
[446] Ibid, para. 19.
[447] Ibid, para. 21.
[448] Ibid, para. 22-14.
[449] Ibid, para. 25.
[450] Ibid,
[451] ['That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data.']. See: Ibid, para. 30.
[452] Ibid, para. 33.
[453] Ibid, para. 36.

This mere risk that there could be a political influence over the supervisory authorities by subjecting them to general government control was enough to hinder their independence when performing their tasks.[454]

Lastly, Germany claimed that renouncing its well-established system of supervisory authority for data processing in non-public sector would be contrary the principle of democracy enshrined in the national constitutions and in the foundations of the EU that requires administration that is subject to government instructions to be accountable to its Parliament. The CJEU here noted that the principle of democracy does not preclude the existence of administrative bodies outside the classic hierarchical orders and more or less independence of government.[455] Indeed, those bodies would be subject to the scrutiny by competent courts as they exist in the German judicial system.[456] The DPD itself does not preclude the parliamentary influence because the management of the supervisory authorities may be appointed by the parliament or government (see however the subject of the second infringement proceeding where the managing member was a federal official and subject to scrutiny from its hierarchical superior) or the authorities may be obliged by national law to report their activities to the Parliament (see however the duty to inform the executive office 'all activities').[457] Thus, conferring a status to the supervisory authorities independent of the classic hierarchical administrative order does not preclude their democratic legitimacy.[458]

The second infringement process involved Austrian law designating an official of the Federal Chancellery as the data protection authority and integrating it to the general structure of the Federal Chancellery.[459] The law also provided a 'right to be informed' for the Federal Chancellor with regards to the activities of the data protection authority. Austria, as supported by Germany, refuted the claims on the basis that (i) the data protection authority constituted an 'independent court or tribunal' as required by Article 267 of the TFEU and Article 6 of the ECHR because it was a 'collegiate authority with judicial functions'; (ii) the managing member does not necessarily have to be an official of the Federal Chancellery because lawyers from the public administration would propose the member as per the internal rules, and the data protection authority could amend its internal rules to appoint its own managing member; (iii) the integration of the data protection authority with the departments of the Federal Chancellery was an organic result of the fact that all bodies of federal public administration come under a ministerial department as per budgetary law; (iv) the right to be informed was a prerequisite of ensuring a democratic link between autonomous bodies and Parliament.

A number of key points stand-out in the CJEU's findings on this topic. The first point is that the CJEU acknowledges the constitutional basis of the independence requirement in Article 8(3) of the Charter and Article 16 TFEU, strengthening the role of data protection authorities

[454] Ibid.
[455] *Commission v Germany*, para 42.
[456] Ibid.
[457] *Commission v Germany*, para. 45.
[458] *Commission v Germany*, para. 46.
[459] C-614/10, *Commission v Austria*, ECLI:EU:C:2012:631.

in protection of individuals with respect to processing of their personal data.[460] The second point is that it observed that the notion of 'complete independence' required in Article 28 of the DPD has an autonomous meaning independent of Article 267 TFEU, as it is based on the aims and scheme of the Directive.[461]

The third point is how the CJEU approached the reference in the legislation that the members of the data protection authority are 'independent and not bound by any instructions of any kind in the performance of their duties'. In a way, this would mean that no one would directly instruct the members in their decision making practices, but nonetheless it would not ensure that they remain free from any external influence, including indirect influence.[462] According to the Court, a risk of indirect influence remained as the managing member is a federal official and manages the day-to-day business of the supervising authority.[463] Even though the managing member does not have to be an official of the Federal Chancellery as per the Austrian legislation, the fact remained that there was a service-related link between the managing member and the federal authority to which that member belongs because the latter was still being supervised by their hierarchical superior in that authority.[464] Despite the statutory provision mentioned above designed to prevent the hierarchical superior to issue instructions in relation to their duties in monitoring compliance with data processing principles, the more extensive power of supervision including monitoring their working-hours, encouraging promoting, and distributing tasks based on their capacities would hinder the independence of the staff of the data protection authority.[465] According to the Court, this indicated another form of 'a priori compliance' on the part of the managing member.[466]

The fourth point is the integration of the supervisory authority within the government. On this point, the CJEU admitted that Member States do not have to give a separate budget to the supervisory authority, as is the case for the EDPS. While the supervisory authority can come under a specific ministry for reasons of budgetary law, Member States must ensure that so doing would not risk their complete independence (especially because the attribution of the necessary equipment and staff is explicitly mentioned in Article 28 in terms of establishing an independent supervisory authority).[467] On this point, the CJEU held that the Austrian legislation did not satisfy this criterion based on its observation on the monitoring of the members of the supervisory authorities who were federal officials by the Federal Chancellery.[468] Notably, the Austrian legislation allowed those members to work part-time while engaging with some other work, which in the view of the Court would carry the risk to impartiality that would question the authority's independence.[469] Lastly, on the right to be informed, the CJEU held that this right was entrusted to the Chancellor unconditionally and in

[460] Ibid, para. 36.
[461] Ibid, para. 40.
[462] Ibid, para. 42.
[463] Ibid, paras 45-46.
[464] Ibid, para. 48.
[465] Ibid, paras 49-50.
[466] Ibid, para. 51.
[467] Ibid, para. 58.
[468] Ibid, para. 59.
[469] Ibid, para. 61.

an expansive manner since it covered right to be informed on 'all aspects of the work' of the supervisory authority.[470]

The last infringement proceeding involved the Hungarian government's action to prematurely end the term of service of the head of the data protection authority as a result of the creation of a new data protection authority.[471] The CJEU's reasoning here rested on its observations in relation to the previous infringement proceedings, notably with emphasis on Article 8(3) of the Charter and Article 16 TFEU. The European Commission and the EDPS acknowledged that implementation of Article 28 of the DPD including the institutional structure of the supervisory authority and the duration of its services remained at the discretion of EU Member States.[472] However, once the terms of the service were set including its duration, the Member State cannot compel the authority to end their term except subject to the circumstances listed in the national legislation.[473] Thus, none of the circumstances listed in the Hungarian legislation on ending the term of the authority before its designated expiry date existed in the present dispute. Hungary argued that the legislation satisfied the operational independence of the supervisory authority, and the fact that the head of the authority had to vacate their position before the expiry of their term had no bearing on that.[474]

The CJEU's reasoning here rested on its observations in relation to the previous infringement proceedings, notably with emphasis on Article 8(3) of the Charter and Article 16 TFEU. Accordingly, the CJEU noted that if the supervisory authorities were to be compelled to vacate their positions before the expiry of their term and in contravention of the safeguards and conditions laid out in the national legislation, the potential threat of this premature termination would create a priori compliance on the part of the supervisory authority.[475] This would in turn create a suspicion on the objectiveness and impartiality of their decision making practices and thus hinder their independence that must be sustained in order to ensure the protection of individuals with respect to the processing of their personal data.[476]

Finally, the independence of data protection authorities has also been raised in connection to the right to an effective remedy enshrined in Article 47 of the Charter. In this context, the CJEU has substantiated further the high level of independence required from the authorities as effective remedial mechanisms. In this context, the CJEU's Schrems decision provides notable observations on considering the independence of authorities in light of Article 47 of the Charter.[477] The independence of the data protection authority in the Schrems decision was not the subject of dispute. Instead, the scope of powers of the authority was questioned before the court because the case in essence concerned the validity of a Commission decision declaring a data protection framework adequate to protect EU-originated data. US-based companies which have subscribed to that framework could receive the data and that transfer would be – in

[470] Ibid, para. 63.
[471] C-288/12, *Commission v Hungary*, ECLI:EU:C:2014:237.
[472] Ibid, para. 38.
[473] Ibid.
[474] Ibid, para. 42.
[475] Ibid, para. 54.
[476] Ibid, paras 53-54.
[477] C-362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650 (hereinafter '*Schrems'*).

principle – authorised under EU law. That said, the applicant in Schrems made a complaint to the Irish data protection authority overseeing the data transfer in that instance, that the relevant framework did not provide adequate protection as required by EU law. The question was then the powers of the Irish data protection authority to hear the claim since there was a Commission decision that was binding on all EU Member States that declared otherwise.

On this point, the CJEU relied once again on the Member States' obligation to establish supervisory authorities, with complete independence, to monitor compliance with the data protection rules in relation to the personal data processing operations as per Article 28 of the DPD, read in light of Article 8(3) of the Charter and Article 16 TFEU.[478] Guaranteeing this independence was necessary to provide the effective protection of individuals with respect to processing of their personal data and the data processing authorities were entrusted with certain non-exhaustive powers such as to request necessary information for the performance of their duties, impose a ban on processing of data, and engage in legal proceedings under the DPD to ensure that protection.[479] The power that was particularly relevant here was their power to hear claims lodge by any person concerning the processing of their personal data ('transfer' of personal data thus fall within those activities that can be subject of an individual complaint).[480] Thus, irrespective of a binding Commission decision, the data protection authority had the power to examine those claims with complete independence.[481] If they decide against the applicant's claim, that applicant can seek judicial remedy before national courts as per Article 47 of the Charter. If, on the other hand, the data protection authority decides that the applicant's claims are well founded, they should be able to engage legal proceedings.[482] EU Member States have the obligation to make the necessary legal arrangements in their national laws to enable the data protection authority to engage legal proceedings for that purpose as required under Article 28 of the DPD.[483]

In conclusion, the above case law reveals that the independence requirement is not limited to the detachment of control bodies from the authority which they are entrusted with the power to monitor (e.g. law enforcement, border police etc). They should be free from any external influence, which would include not being subject to 'state scrutiny'. In this way, a mere independence from 'law enforcement' may not be sufficient to ensure their independence if they would also be subject to scrutiny, for example, from the Ministry of Interior.

The requirement of independence imposes on control bodies a duty to remain free from direct influences in the performance of their tasks; i.e. a direct instruction from the government. It also requires an assessment on whether they remain free from indirect influences. On this point, the qualification of its members is an important element. If they are government officials, this might jeopardise their independence. Similarly, being supervised by government officials including in terms of their daily tasks, and being allowed to continue other work when they

[478] Ibid, para. 40.
[479] Ibid, para. 41-43.
[480] Ibid, para. 55.
[481] Ibid, para. 58.
[482] Ibid, para. 65.
[483] Ibid.

occupy a position in the supervisory authority would expose them to external influence, too. These issues would be considered as part of the existence of 'a priori compliance' on the part of the supervisory authority, jeopardising the objectiveness and impartiality of their decision-making practices as the general public would suspect potential political influence over their decisions.

The Right to an Independent Effective Investigation

It is now settled case law of the ECtHR that the obligation to protect the right to life in Article 2 ECHR and to protect individuals from conduct prohibited by Article 3 includes a procedural obligation for states to conduct a thorough and effective investigation where an individual raises an arguable claim with respect to breaches of Article 2 and 3 rights.[484] This obligation also requires states authorities to conduct investigations ex officio, in the absence of an individual complaint.[485] The obligation to conduct effective investigations that meet certain standards has also been raised in claims involving violations of Article 5 of the ECHR due to disappearances. An obligation to conduct an effective investigation against disappearances has been claimed and considered in connection with allegations of violations of Articles 2 and 3 of the ECHR.[486]

The core requirement for the investigation to be effective consists of a number of elements, one of which is that those who are responsible for conducting the investigation must be independent from those implicated in the events.[487] The requirement of independence and impartiality necessitates 'not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence'.[488] For example, in Ergi v Turkey, the ECtHR was not satisfied that the investigation was independent in practice because the prosecutor investigating a breach of Article 2 right relied heavily on the incident reports drawn by the gendarmes implicated in the death.[489] In Kolevi v Bulgaria, the ECtHR considered that as a result of the hierarchical structure of the prosecution system, the investigation conducted by a public prosecutor against the Chief Public Prosecutor implicated in the death had not been independent.[490] Where a police officer carried out an investigation of a death implicating other officers in the supervision of an independent administrative body, there must be sufficient safeguards in addition to that body because in practice the investigation was found to involve

[484] *Kolevi v Bulgaria*, Appl. No. 1108/02 (5 November 2009), para 191; *Boicenco v Moldova*, Appl. No. 41088/05 (11 July 2006), para. 121; *Armani da Silva v the UK*, Appl. No. 5878/08 (30 March 2016), para. 230. Note here that the ECtHR has established that the procedural obligations under Articles 2 and 3 ECHR have the same scope and meaning. See: *Assenov and others v Bulgaria*, Appl. No. 24760/94, (28 October 1998), para. 102.
[485] *Al-Skeini and others v the UK*, Appl. No. 55721/07 (7 July 2011), para. 163 [the case concerns claims relating to Article 2 of the ECHR]; 97 *Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*, Appl. No. 71156/01 (3 May 2007) [the case concerns claims relating to Article 3 of the ECHR].
[486] *Kurt v Turkey*, Appl. No. 24276/94 (5 December 1996), paras 122-124; *Taş v Turkey*, Appl. No. 24396/94, (14 November 2000), paras 81-87.
[487] *Najafli v Azerbaijan*, Appl. No. 2594/07 (2 October 2012), para. 46; *Rantsev v Cyprus and Russia*, Appl. No. 25965/04, (7 January 2010), para. 233.
[488] *Kolevi v Bulgaria*, Appl. No. 1108/02, (5 November 2009), para. 193; *Oleksiy Mykhaylovych Zakharkin v Ukraine*, Appl. No. 1727/04, (24 June 2010), para. 66.
[489] *Ergi v Turkey*, Appl. No. 23818/94, (20 May 1997).
[490] *Kolevi v Bulgaria*, paras 195-215.

officers connected with those under investigation.[491] Similarly, an investigation conducted by police officers from other departments than those of the officers implicated did not satisfy the requirement of independence.[492] Nor did the investigation of gendarmerie officers implicated in the death by provincial administrative council whose officials were under the authority of governor in charge of gendarmerie.[493]

The other element is that the investigation must be adequate in the sense that it must be capable of leading to the establishment of relevant facts and the identification and punishment of those responsible.[494] In this context, the investigating authority must take reasonable steps to secure evidence including eyewitness testimony and forensic evidence.[495] For example, in Hugh Jordan v UK, the absence of a power to compel suspects implicated in deaths to give testimony was found to impair the adequacy of the investigation.[496] The obligation to take necessary and available steps to secure evidence may involve obtaining evidence from other states.[497]

The ECtHR's case law on the right to effective investigation has particular significance in considering the scope and meaning of the same right in relation to claims of fundamental rights breaches under the Charter. The right to life is guaranteed in Article 2 of the Charter. As per Article 52(3) of the EU Charter, its scope and meaning are the same as Article 2 of the ECHR interpreted by the ECtHR. The procedural obligations to conduct effective investigations contained under Article 2 of the ECHR are relevant for the adequate protection of the right to life enshrined in the EU Charter.[498] Moreover, the prohibition of torture and inhuman and degrading treatment is guaranteed in Article 4 of the Charter, which corresponds to the right guaranteed in Article 3 of the ECHR. The case law of the ECtHR on the scope of the Article 3 right has been largely followed by the CJEU, especially in the AFSJ.[499] By analogy with the ECtHR case law on Article 3 of the ECHR, Article 4 of the Charter contains a procedural obligation to investigate allegations of torture, and inhuman and degrading treatment.[500]

In conclusion, the ECtHR standards on the right to an effective investigation for claims involving human rights violations advance the claim that hierarchical and/or institutional structure is insufficient to satisfy the independence of body investigating these violations. Its

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[491] *Hugh Jordan v the UK*, Appl. No. 24746/94, (4 May 2001), para. 120.
[492] *Ramsahai and others v the Netherlands*, Appl. No. 52391/99, (15 May 2007), para. 294-296; *Oleksiy Mykhaylovych Zakharkin v Ukraine*, Appl. No. 1727/04, (24 June 2010), para. 70.
[493] *Taş v Turkey*, para. 71.
[494] *Armani da Silva v the UK*, para. 233.
[495] Ibid, para. 233.
[496] *Hugh Jordan v the UK*, para. 127.
[497] *Rantsev v Cyprus and Russia*, para. 241.
[498] Tobias Lock, 'Article 2 CFR', 2101-2102, 2102 in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019); Elizabeth Wicks, 'Article 2 – Right to Life' 25-38, 38 in Steve Peers et. al. (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).
[499] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi (C-404/15) and Robert Căldăraru (C-659/15 PPU) v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198; Joined Cases C-411/10 and C-493/10, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.
[500] Manfred Nowak and Anne Charbord, 'Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' 61-100, 95 in Steve Peers et al (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014); Tobias Lock, 'Article 4 CFR', 2105-2106, 2105 in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019).

independent status in practice must be observed as well. On this point, the way the investigation is conducted may be relevant in determining the independence of the body in practice. Moreover, in relation to maintaining independence in practice, the ECtHR has emphasised the importance of safeguards against external influences, especially from the body implicated in the human rights abuse.

The Independence Requirement for Judicial Bodies

ECtHR Standards on the Right to an Independent Court

The right to a fair trial as enshrined in Article 6(1) requires cases to be heard by an 'independent and impartial tribunal established by law'. To fulfil the independence requirement, tribunals must be independent from the executive and also from the parties.[501] The ECtHR has recognised a number of elements in determining the independence of a tribunal. Accordingly, the ECtHR has considered 'the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures, and the question of whether the body presents an appearance of independence'.[502]

In relation to the manner of appointment, the ECtHR has observed that 'appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role'.[503] In Oleksandr Volkov v Ukraine, part-time working arrangements of non-judicial staff appointed by the executive, who comprised the majority of the court responsible for disciplining judges, raised an issue with their independent status since they were found to be hierarchically, materially and administratively dependent on their appointers.[504]

The question whether the members of tribunal receive pressure or instructions, which would jeopardise their independent status, relates partially to the 'appearance-of-independence' requirement.[505] On this point, the ECtHR has developed an objective test. Accordingly, it has held that 'in deciding whether in a given case there is a legitimate reason to fear that [appearance of independence and impartiality] are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified'.[506] In Sacilor Lormines v France, the ECtHR held that the applicant company had justified reasons to raise doubts on the independence of Administrative Court in a particular situation in which a senior member of the Court was appointed to the post of the Secretary General of the Ministry of Economic Affairs shortly after the deliberations by the Court, in which he sat, on the applicant company's appeal against the order issued to it by the Minister.[507]

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[501] *Ringeisen v Austria*, Appl. No. 2614/65, (16 July 1971).
[502] *Maktouf and Damjanovic v Bosnia and Herzegovina*, Appls Nos 2312/08 and 34179/08, (18 July 2013), para. 46. See also: *Fruni v Slovakia*, Appl. No. 8014/07, (21 June 2011), para. 141; *Ramos Nunes* de *Carvalho* e *Sá v Portugal*, Appls Nos 55391/13, 57728/13 and 74041/13, (6 November 2018), para. 144.
[503] *Maktouf and Damjanovic v Bosnia and Herzegovina*, para. 49.
[504] *Oleksandr Volkov v Ukraine*, Appl. No. 21722/11, (9 January 2013), para. 113 [the question was seen in terms of impartiality].
[505] *Sacilor Lormines v France*, Appl. No. 65411/01, (9 November 2006), para. 68.
[506] *Kleyn and others v the Netherlands*, Appls Nos 39343/98, 39651/98, 43147/98 and 46664/99), para. 194.
[507] *Sacilor Lormines v France*, para. 69.

That member 'could not have the appearance of neutrality vis-à-vis the applicant company' because his appointment to the Ministry, with whom the applicant company had a significant number of legal disputes, was already underway at the time when he sat in the bench in his legal capacity for that deliberation.[508]

This objective aspect of the independence requirement has direct links with the objective aspect of impartiality. In fact, the ECtHR has recognised a close connection between the requirement of independence and that of impartiality.[509] To satisfy the impartiality requirement, the tribunal must satisfy its objective and subjective aspects. As to the subjective impartiality, 'regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case'.[510] In relation to the objective impartiality, it must be considered whether 'the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality'.[511] While setting out two different aspects of impartiality in this way, the ECtHR has avoided drawing divisions between them because 'as the conduct of a judge may not only prompt objectively held misgivings as to his or her impartiality from the point of view of the external observer (the objective test) but may also go to the issue of his or her personal conviction (the subjective test)'.[512]

In general, the ECtHR has considered the impartially requirement when issues arise on the overlapping roles of members of tribunal.[513] Moreover, the ECtHR has also considered executives' influence over the outcome. In Sovtransavto v Ukraine, while civil proceedings in Ukraine before the Supreme Arbitration Tribunal against the applicant Russian company were pending, the President of Ukraine sent communications to the Tribunal calling for the defence of national interests, after having been prompted by other actors including a member of Parliament.[514] The ECtHR held that the intervention by the President was such that it raised reasonable concerns over the impartiality (and independence) of the Tribunal, irrespective of its influence over the outcome of the case.[515]

The ECtHR further stressed the scope of states' obligations in terms of ensuring independence of judicial bodies. In this regard, the judicial independence 'implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them'.[516] State's respect to judicial bodies has a corollary effect on public confidence in these bodies, and, more broadly, in the rule of law.[517] This means that there must be not only constitutional

[508] Ibid.
[509] *Oleksandr Volkov v Ukraine*, para. 107; *Incal v Turkey*, Appl. No. 22678/93, (9 June 1998), para. 65.
[510] *Ramos Nunes* de *Carvalho* e *Sá v Portugal*, para. 145.
[511] Ibid.
[512] *Oleksandr Volkov v Ukraine*, para. 105.
[513] *Sacilor v Lormines v France*.
[514] *Sovtransavto Holding v Ukraine*, Appl. No. 48553/99, (25 July 2002), paras 18-22.
[515] Ibid, para. 80.
[516] *Agrokompleks v Ukraine*, Appl. No. 23465/03, (25 July 2013), para. 136.
[517] Ibid.

safeguards of the independence and impartiality of the judicial bodies, but also effective incorporation of these safeguards into everyday administrative attitudes and practices.[518]

The ECtHR has recognised that judicial bodies should also be free from internal pressures. In Parlov-Tkalčić v Croatia, the ECtHR heard a complaint on the independence of a second-instance court due to a criminal complaint filed against the applicant seven years prior by the president of second-instance court, who had not sat in the civil proceedings against the applicant.[519] The ECtHR emphasised that:

'judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court'.[520]

It noted certain characteristics of the institutional structure that are of great value in determining the extent of the internal pressure. First, there must be safeguards against arbitrary exercise of administrative duties to influence the other judges or the composition of judicial panels by way of distributing cases to judges within court.[521] Moreover, there must be limits to the influence of the hierarchically superior judges over career advancements and discipline of their more junior colleagues.[522]

CJEU Standards on the Right to an Independent Court

The Obligation to Ensure Judicial Independence

The case-law of the CJEU on judicial independence has raised issues not only on the criteria in determining the independence of the judiciary, but also on Member States' obligation to ensure judicial independence under Article 19(1) TEU. The latter point mainly concerned the scope of the general obligation under Article 19(1) and whether the organisation of justice falls within that obligation. In essence, the CJEU considered that EU Member States have the obligation to establish effective legal protection 'in the fields covered by Union law' under Article 19 TEU and this effective legal protection can be observed by establishing independent courts or tribunals to ensure that everyone's right to effective legal remedy as enshrined in Article 47 of the Charter is guaranteed.[523] From thereon, the CJEU continues to observe the criteria to ensure the independence of courts/tribunals. For this reason, we will only focus on the CJEU's findings on the independence requirements, leaving aside its observations in relation to Article 19(1) TEU.

[518] Ibid.
[519] *Parlov-Tkalčić v Croatia,* Appl. No. 24810/06, (22 December 2009).
[520] Ibid, para. 86.
[521] Ibid, para. 89-90
[522] Ibid, para. 91-93.
[523] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras 55-56.

The key decision in this regard is Associação Sindical dos Juízes Portugueses (ASJP), where the CJEU laid the groundwork for considering Member States obligation to ensure judicial independence in light of Article 19(1) TEU in connection with Article 47 of the Charter.[524] The case concerned reducing the salaries of public sector workers in Portugal to reduce the budget deficit and meet the requirements to quality for EU financial assistance. This consequentially resulted in reduction of the salaries of judges. A claim was made that this salary reduction measure infringes the principle of judicial independence enshrined in Article 19 TEU and Article 47 of the Charter.

In this regard, the CJEU framed the issue in light of the external aspect of judicial independence. It observed that the court must 'exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.[525] Based on the external aspect of the independence requirement, the CJEU was not satisfied in ASJP that the salary reduction measures did impact the independence of the judges because they were general (as applied to all public sector workers) and temporary in nature.

In the proceedings relating to the judicial system in Poland, the CJEU added the internal aspect of judicial independence, which guarantees impartiality, to its external aspect. It specifically dealt with the issues with the guarantees against the removal from office, and disciplinary action. In Commission v Poland, the dispute concerned the law reducing the retirement age of the Supreme Court judges and subjecting the termination as well as the continuation of their term to be authorised by the Polish President and whether this law infringed Member States obligation under Article 19 TEU and Article 47 Charter.[526]

On the external aspect of the independence requirement, the CJEU noted that this aspect 'requires … certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office'.[527] It further emphasised the internal aspect of the independence requirement, which seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.[528] When read together, both aspects 'require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the

[524] Ibid.
[525] Ibid, para. 44.
[526] C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531. See also: Joined cases C-518/18, C-624/18, and C-625/18*, A. K. v Krajowa Rada Sądownictwa (C-585/18) and CP (C-624/18), DO (C-625/18) v Sąd Najwyższy,* ECLI:EU:C:2019:982 (hereinafter '*A.K.*').
[527] *Commission v Poland*, para. 75. See also: *A.K*., para. 123.
[528] Ibid, para. 73.

minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.[529]

On that note, the CJEU considered the rules on disciplinary actions against members of courts and their potential implications on the independence requirement:

'it is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary'.[530]

Moreover, the CJEU considered whether extending the terms of office of the serving judges would impede their independence requirement. It noted that, when opting for such an extension, Member States must ensure that 'the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence'.[531] If a State organ or the President is entrusted with the power to decide on the extension of terms of services, while this condition in and by itself does not undermine the independence requirement, Member States must ensure that the substantive conditions and procedural rules on that extension do not cast doubt for the general public in regards to the imperviousness of the judges to external factors and their neutrality.[532] The rules thus must 'be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned'.[533]

Based on this reasoning, the CJEU found that Polish law entrusting the power to extend the terms of office of serving judges to the President did not satisfy the independence requirements. First, no objective criteria in reaching the decision were laid out nor could the decision be challenged before courts.[534] Second, even though the National Council of the Judiciary was required to deliver an opinion to the President (a procedure that could have strengthened the objectiveness of the process), its opinion was not subject to a properly reasoned requirement.[535]

[529] Ibid, para. 74.
[530] Ibid, para. 77.
[531] Ibid, para. 110.
[532] Ibid, para. 111.
[533] Ibid, para. 112. See also: *A.K.,* para. 125.
[534] *Commission v Poland*, para. 115.
[535] Ibid, paras 116-118.

Similarly in the AK case, the CJEU was satisfied of the independence of the Disciplinary Chamber of Supreme Court. The main point of contention here was the fact that the members of the Chamber were appointed by the President. The CJEU rejected the argument that this method of appointment would hinder the independence of the Chamber on the condition that once they were appointed, they would be free from pressure or influence when carrying out their role.[536] In the CJEU's finding, the existence of substantive guarantees and procedural rules to ensure that the general public does not suspect the independence and impartiality of judges were the determining factors.[537]

As mentioned above, the CJEU developed the independence requirements in connection with Article 47 of the Charter. On this point, in the AK case, it examined the relationship between this Article and the ECHR. Thus, as per Article 52(3) of the Charter, the interpretation of its Article 47 must not fall below the standards and requirements enshrined in Article 6 and Article 13 of the ECHR.[538] In considering the independence requirement, the CJEU makes a connection with its observations on the judiciary remaining free from any external (including indirect) influence that may have effect on their decision making. In this way, it highlights that according to Article 6 ECHR, the mode of appointment of judges, their terms of office, and the existence of guarantees against outside pressures must be observed to determine the independence of judiciary, but also whether the general public has confidence in that judiciary.[539] Thus in terms of impartiality, regard must be paid to the behaviour and personal convictions of a particular judge, and to the composition of the system itself that may hinder the judges' impartiality.[540] On the whole, the perspective of the parties to the proceedings would be relevant, but the decisive factor is whether their fears in terms of impartiality of the judiciary can be justified.[541]

<u>European Arrest Warrant and Independence of Judiciary</u>

The CJEU has been asked to consider the question on the independence of a national court or tribunal in the execution of a European Arrest Warrant (EAW), notably, when the executing body questioned the independence of the issuing authority that might risk the requested person's enjoyment of right to a fair trial before an independent court under Article 6 of the ECHR and Article 47 of the Charter.[542] Thus, it has emphasised the common EU value of the rule of law and the mutual trust between Member States recognising that those EU values consequentially ensure judicial cooperation (and in the case of EAW, an execution of a warrant).[543] With references to common foundational values and the effective protection of EU legal order, the CJEU has considered the issue with regards to Article 19 TEU, as well.[544] In

[536] *A.K.*, para. 133.
[537] Ibid, para. 134.
[538] Ibid, para. 116-118.
[539] Ibid, para. 127.
[540] Ibid, para. 128.
[541] Ibid, para. 129.
[542] C-216/18 PPU, *LM*, ECLI:EU:C:2018:586; Joined Cases *C-354/20* and *C-412/20, L (C-354/20 PPU), P (C-412/20 PPU) (hereinafter 'L.M.'); Joined Cases* C-508/18 and C-82/19 PPU, *OG (C-508/18) and PI (C-82/19 PPU)*, ECLI:EU:C:2019:456 (hereinafter '*OG and PI*').
[543] *LM*
[544] Ibid, para. 50.

this way, there has been a cross-reference between its findings in relation to the execution of European Arrest Warrants where the independence of the issuing authority was questioned and those in relation to the judicial independence discussed above. Notably, for the notion of 'court or tribunal', the CJEU considered that in terms of powers to issue a European Arrest Warrant, the judicial authority that is entrusted with the power to issue such warrant includes any authority that participates in the administration of justice, which in that instance was the public prosecutor.[545] However, the more relevant question on the independence of the issuing authority was whether that authority satisfies the independence requirements because the public prosecutor issuing that warrant belongs to the hierarchical structure of the Ministry of Justice.[546]

The CJEU's observations on this point rested heavily on the particular features of European Arrest Warrant – that is created to enable the easy surrender of requested people while also safeguarding their fundamental rights.[547] It is the responsibility of the judicial authority issuing the EAW (following a national arrest warrant by an independent court/tribunal) to ensure the safeguarding of those rights. In this way, even where the issuing authority is not a court or a tribunal, but an authority participating in the administration of criminal justice, that authority must act independently when issuing the warrant.[548] This means that there must be 'statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive'.[549] Decisions issued by an authority other than a court or tribunal must also be subject to court proceedings that observe the full requirements of effective judicial protection.[550] In relation to the role of German Public Prosecutor to issue an arrest warrant, the CJEU concluded that the Ministry of Justice has an external power to issue instructions to the prosecutor in issuing an EAW, which would hinder its independent status.[551] This was the case despite the safeguards in German law to circumscribe when the Ministry can resort to that power, and the principle of legality whereby a manifestly unlawful instruction from the minister would not be followed because the conditions governing the exercise of that power were not specified.[552] Even though the subject of an EAW can challenge the prosecutor's decision to issue an EAW, the fact remained that German law permitted that decision of the prosecutor to be influenced by the minister, and thus a posteriori legal challenge did not protect the prosecutor from the risk of being instructed by the minister.[553]

Conclusion

[545] *OG and PI*, para. 50
[546] Ibid, para. 64.
[547] Ibid, paras 65-68.
[548] Ibid, para. 74.
[549] Ibid.
[550] Ibid, para. 76.
[551] Ibid.
[552] Ibid, para. 81.
[553] Ibid, paras 86-87.

There is a close alignment between the ECtHR and the CJEU on judicial independence, particularly because the latter has made explicit references to the case law of the former when setting out the standards of independence for judicial bodies. Particularly, the CJEU's findings on the external aspect of judicial independence comes close to the ECtHR iterations of independent status due to a number of factors including guarantees against outside pressures. The internal aspect of the judicial independence, thus, resonates with the ECtHR's observations on the appearance of independence as well as the legitimate doubts on the independence and impartiality of the body.

Moreover, the CJEU's findings on judicial independence resonate with its observations on the principles of independence for data protection authorities. With respect to the external aspect of judicial independence, the case law of the CJEU comes close to overall findings on the operational independence of data protection authorities in that they must not be subject to hierarchical constraints or subordination from any other body and free from any obligation to take instructions. Because the above cases concerned tribunals/courts in the general structure of the judiciary system, there was little doubt in terms of their place in the general hierarchical order, while this was an issue in considering the independence of data protection authorities because in certain cases they were integrated within the general administrative branch and/or their members had dual roles.

Compared to the rules on the appointment of data protection authorities, which were established by way of implementation of EU law that contained certain specific criteria that must be observed in creating those bodies, the CJEU case law on judicial independence is more specific in terms of the existence of rules on the appointment of the judges etc. On that basis, to ensure independence of the monitoring body, there must be substantive guarantees and procedural rules on the appointment of its members, their terms of office, their dismissals from the position, and any disciplinary actions against them. Those rules must ensure that the general public do not doubt the independence and impartiality of the monitoring body. This would thus involve a consideration whether removal and/or dismissal from office or the disciplinary regime could be used as a system of political control, and there must be sufficient guarantees to prevent that control. For example, the effective legal remedies under Article 47 of the Charter must be observed for decision on disciplinary actions. Similarly, if there is a consultative body on the appointment of members of the monitoring body, the independence and impartiality of that independent body must be determined in order to ensure that the consultation process does not hinder the independence and impartiality of the monitoring body.

With respect to the CJEU case law on questions concerning the implementation of EAW due to doubts as to the independence of issuing body, the Court has reiterated the importance of internal and external aspects of the judicial independence. The simple fact that there are legal safeguards concerning how the executive – or any other hierarchical superior of the body – may exercise powers to instruct the body to issue decisions affecting the fundamental rights of an individual does not mean that independence requirements of that body are satisfied. An overall assessment of the institutional framework and statutory rules are taken into account to ensure that the body remains free from being subject to directions or influences on a specific

case by the executive. Similarly, the fact that individuals can challenge the decision of the body before the courts is essential for the effective legal remedy, but this does not solely address the risks of the body issuing the decision to be exposed to influences from the executive when issuing that decision.

General Conclusions

This section examined the elements of independence of monitoring bodies to investigate the actions of Member States' border police and Frontex as the essential requirement to ensure the principle of co-operation to achieve solidarity in the context of external border control policies as per Article 80 TFEU. Independence is important to build that mutual trust in sustaining the co-operation and in turn solidarity among national bodies (e.g., national ombudsmen offices, and national human rights institutions), and EU bodies (e.g., European Ombudsman) in effectively preventing, deterring, and investigating human rights violations at EU external borders by Member States border police and Frontex.

There is a line of cases from four different fields, through which both the ECtHR and the CJEU have considered the independence requirement for different review and/or remedial bodies. The first field in this context is the independence of judicial bodies, but as we explored the independence question has not been limited to this field. Both courts have been asked to consider the independence of non-judicial or quasi-judicial administrative bodies and they have read the standard of independence for these bodies aligned closely with the standard of judicial independence. Through the case-law of both courts and the close relationship between them in interpreting the requirement of independence in certain fields, we can distil a number of elements of independence that must be observed by bodies monitoring the actions of Member states border police and Frontex.

First, the monitoring body must be not only at arm's length from the body's actions of which it is tasked with monitoring, but be protected from any external pressures and/or influences. For this purpose, there must be sufficient safeguards in law to ensure that they are not vulnerable to indirect influences. These safeguards relate to the status of the members of a monitoring body, the manner of their appointment, the rules specifying the disciplinary procedures and their dismissal. They also ensure that the general public does not doubt the neutral stance of monitoring body vis-à-vis parties implicated in an alleged human rights abuse. For example, if members of a monitoring body are government officials or officials from the body implicated in actions involving human rights abuses, this would raise a priori compliance with the investigated body on the part of the monitoring body and would jeopardise its independence. The similar issue with a priori compliance would arise where members of monitoring body are supervised by government officials or by officials that supervise the investigated body.

That said, the existence of these legal safeguards does not automatically mean that a monitoring body is free from any external pressures. If there are circumstances that would raise questions on its independence in practice, a monitoring body may not be deemed independent for the purposes of fundamental rights standards. The powers of a monitoring body and tasks assigned

to it to investigate the actions of authorities implicated in alleged human rights abuses could be a determining factor in this regard. The extent to which a monitoring body has the requisite powers to investigate these actions is particularly intertwined with the right to an effective investigation of people who had been subjected to these actions. For this reason, the monitoring body must be able to issue decisions where human rights abuses are implicated,[554] or must have the requisite powers to collect evidence related to these abuses and refer it to competent authorities to be used in criminal proceedings.

[554] In the ECtHR case law, this extends to legal binding decisions.

5. The problem of impunity regarding use of force at borders

One of the issues which is particularly concerning regarding force exercised by EU border police on persons seeking to cross the EU external border is the extent to which that force is legitimate.[555] Public officials of course are entitled to use force where it is reasonable and so long as they are lawfully exercising their powers.[556] But many images and reports, widely diffused in highly reputable media worldwide, regarding the use of force at EU borders by border police against would be migrants raise serious concerns about the necessity and legality of the force used. On 13 October 2021, the British Home Secretary called for border police to be given immunity over refugee deaths occurring in the context of push-backs and has introduced a new provision in a bill currently before Parliament with this objective.[557] Already legal experts have condemned the proposal as neither consistent with national law nor the UK's international obligations. However, that a European interior minister should suggest such action indicates both how pervasive the use of forced in in border policing and how reluctant at least one Council of Europe state is that the risk of prosecution should not be an impediment to that use of force even when illegal and resulting in death. Later in the same month (October 2021) a criminal court in Italy found guilty of the criminal offence of failure to rescue an ship captain who rescued migrants at sea but handed them over to the Libyan authorities for debarkation (see Appendix 4).[558]

As one Council of Europe body has stressed '[t]he best possible guarantee against ill-treatment is for its use to be unequivocally rejected by police officers themselves'.[559] This is particularly relevant to use of force in border policing operations where use of force at some border crossing places appears to have become endemic. In our interviews, a number of NGO experts stated that while there may be many border crossing places in their country, the places where there are systematic complaints about border policing violence are limited to a small number and often associated with some specific teams of police. Yet, all efforts to end the apparent immunity of these teams have been thwarted first by a blanket denial by the authorities themselves that the violence occurred and secondly by the reluctance of prosecutorial authorities to investigate complaints even where well documented with photographic and video testimony. A clear comparison is evident here with actions of police in some Council of Europe states inside the borders.[560] But the lack of independent monitors is even more problematic in the case of use of force in border control operations as the remoteness of the places where it takes place and the unsociable hours of the incidents as well as the reluctance of border police

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[555] Kleinig, John. 'Legitimate and illegitimate uses of police force.' *Criminal justice ethics* 33.2 (2014): 83-103; McBride, Jeremy. *Human rights and criminal procedure: The case law of the European Court of Human Rights*. Council of Europe, 2018.

[556] Council of Europe https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[557] https://www.theguardian.com/uk-news/2021/oct/13/uk-border-force-could-be-given-immunity-over-refugee-deaths [accessed 14 October 2021].

[558] N. Scavo, *Sentenza. Migranti consegnati ai libici, prima condanna in Italia per un comandante*, published in Avvenire.it, October 14, 2021.

[559] Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008 CPT/Inf (2010) 3 at paragraph 16.

[560] CommDH (2004) 3, 'Report of the Commissioner for Human Rights on the visit to Latvia, 5-8 October 2003', paragraphs 10-13 at paragraph 13: 'In a country where, in civil society, there are serious concerns about the conduct of some members of the police it is particularly hard to understand how no cases can have been brought direct before the courts.'

to give permission to monitors to be present are endemic. As an OSCE/ODIHR report states regarding 'the importance of accountability in relation to monitoring mechanisms […] it is essential that such mechanisms provide for monitoring reports to lead to action, redress and positive change, including through links to prosecutorial agencies and judicial processes'.[561]

In this section we will examine the issue of force carried out by border police against migrants seeking to cross borders irregularly. We will test an example of border violence against the rules established by the ECtHR regarding the legitimate use of force by state authorities reported in the media to understand the problem and how it should be addressed. Our focus in this section, as in the others, is the role of independent monitoring in ensuring human rights compliant border controls. As in the other sections, we will not develop on the right to leave a country (any country) or the prohibition on non-refoulement (which constitutes the right to enter a country and which has already been covered in the introduction).

The Case Study

According to a range of press reports, on the night of 21-22 September 2021 French police in Dunkirk, France, fired rubber bullets at migrants allegedly to stop them from trying to cross the Channel in a rubber dingy in the direction of the UK.[562] According to these reports, two Iranian Kurds were struck by the bullets and were taken to hospital following the shooting – one with a fractured leg and the other with a broken hand. Further, the articles state that an Iranian Kurd calling himself Mohammed recalled what he saw of the shooting. He said: 'There were eight of us holding the boat near the beach. We were getting ready to launch it for 40 people who wanted to cross to your country [the UK]. Then three or four police arrived in one vehicle. One policeman shot Juanro Rasuli at point blank range. I can't remember how many times they fired the rubber bullets. When the police saw us, they shouted stop, we stopped and they still shot us. Then we ran away as best we could'. The newspaper has in its possession a video of the shooting taken by the migrants corroborating the story and showing Mr Rasuli lying on the ground with his leg bleeding (the video can be accessed online via the newspaper's website). The other shot man shows his injured hand to the camera. A voice says in Kurdish: 'You can see the police laughing at us'.[563] Again, according to one of the newspapers which ran the story, the shooting happened in darkness, in poor weather conditions at Dunkirk at 2 am. The two injured men were taken to the local hospital where they are being treated for their wounds. According to one report, the French police authorities have opened an internal investigation into the event.

The newspapers which reported on the incident concurred that this event marked major escalation of tension on the beaches as French gendarmerie [acting in their capacity as border

[561] OSCE/ODIHR *Border Police Monitoring ain the OSCE Region: Upholding a Human Rights Approach to Migration* 13 April 2021, Meeting Report.

[562] https://www.standard.co.uk/news/world/french-police-shoot-migrants-dunkirk-b958449.html; https://www.mirror.co.uk/news/world-news/french-police-open-fire-migrants-25121920; https://www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html; [accessed 3 October 2021].

[563] https://www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html [accessed 3 October 2021].

police] carry out night patrols seeking to prevent people leaving France irregularly with an apparent destination: the UK. According to the Anglo-French Sandhurst Agreement 2018,[564] the UK agreed to pay the French authorities £54 million (Euro 63 million) to patrol the French beaches to prevent irregular departures. According to the British press, the UK Home Secretary is threatening to withhold the payment if the number of irregular arrivals from France does not diminish.[565]

This account raises many difficult issues regarding border violence which are by no means particular to the French border police but rather widely reported in the Western Balkans,[566] Italy,[567] Greece,[568] and North Eastern Europe[569] including at the Hungarian Serbian border.[570] First, the activity which the border police sought to stop constituted neither a threat to the life of the police nor of anyone else and did not, apparently, involve violence other than that of the border police. The approach of the French border police indicates a shoot-first-ask-questions-later modus operandi. Secondly, assuming the press reports are correct, the migrants complied with the French police demand that they stop but were shot at anyway. Thirdly, the shooting seems to have been fairly indiscriminate and with little regard to the damage which might be (and ultimately was) caused. Fourthly, the bullets used (rubber) are widely acknowledged to be potentially lethal and their use is prohibited in many Council of Europe countries.[571] Fifthly, assuming the reports are correct and the documentary evidence is reliable, the statement of one of the victims that the French border police then laughed at the men after they had been shot is deeply concerning, an indication of the dehumanisation of the migrants in the minds of the police.

The Standards

There are a substantial number of authoritative standards for use of force consistent with European human rights obligations. Both the Council of Europe and the OSCE/ODIHR have produced extensive guidelines for law enforcement authorities regarding the use of force in policing, including in the context of border operations. The Council of Europe published an authoritative handbook on the European Convention on Human Rights and Policing in 2013,[572] which takes as a starting place the caselaw of the ECtHR on use of force in policing and provides very detailed guidance on what is and what is not consistent with human rights law. We will return to this shortly. The OSCE/ODIHR recently produced a report on Border Police Monitoring in the OSCE Region: A Discussion of the need and basis for human rights

[564] https://www.gov.uk/government/news/uk-and-france-sign-action-plan-to-tackle-small-boat-crossings [accessed 3 October 2021].
[565] https://www.standard.co.uk/news/world/french-police-shoot-migrants-dunkirk-b958449.html [accessed 3 October 2021].
[566] Network, Border Violence Monitoring. 'The Black Book of Pushbacks.' *Vol. II: https://documentcloud. adobe. com/link/track* (2020).
[567] Campesi, Giuseppe. 'Italy and the militarisation of euro-mediterranean border control policies.' *Contemporary Boat Migration. Data, Geopolitics and Discourses* (2018): 51-74.
[568] Howden, Daniel, A. Fotiadis, and Z. Campbell. 'Revealed: the great European refugee scandal.' *The Guardian* 12 (2020).
[569] https://www.euronews.com/2021/09/30/poland-carried-out-migrant-push-back-at-belarus-border-amnesty-says [accessed 3 October 2021].
[570] CPT report on periodic visit to Hungary in November 2018 and the response of the Hungarian authorities.
[571] https://www.statewatch.org/media/documents/news/2017/oct/germany-parl-researxh-situation-report-on-use-rubber-ammunitio-%20in-%20Europe.pdf [accessed 5 October 2021].
[572] https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf [accessed 3 October 2021].

monitoring of border police practices.[573] This report focuses on border operations and how they can be carried out with full respect for human rights. We will reference to this report below.

Following the case law of the ECtHR on use of force by police (including at borders), the first requirement is that police respect and protect human dignity and uphold the rights of all persons. This requirement is also contained in the SBC Article 7(1).[574] The right to dignity has been considered by the CJEU in the migration context where it has been held to be justiciable. The actions of state authorities in migration contexts must be consistent with the right to dignity of the individual which includes a prohibition on actions which denigrate the individual.[575] Applying the human dignity requirement to the case study, the alleged action of the border police to laugh at the plight and suffering which they had themselves caused to the people seeking to move is clearly inconsistent with the right to respect for human dignity.

Police may be required to exercise force in the course of their duties, specifically, to arrest a violent person, to protect themselves and/or others or to prevent a crime.[576] However, any use of force by police must be the minimum necessary to achieve the specified objective, applied lawfully and must be accounted for. These are three separate requirements all of which need to be fulfilled. Lethal or potentially lethal force is lawful only where such use is absolutely necessary for the protection of life. The 'absolutely necessary' requirement is subject to a strict proportionality test. Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) ECHR are the core sources of limitations on police use of force. These rules are as relevant in border operations as in policing activities within the state. Indeed, it can be argued that they are even more important as people seeking to cross borders are not per se criminals and certainly not per se violent criminals. In the case study, assuming that the press reports are accurate, where the would-be migrants ceased all action to put the dingy in the water when the French border police called for them to stop would mean that any force exercised thereafter would be of questionable legality. There is no necessity of force where the people have already complied with the request of the border police and no proportionality as the would-be migrants did not constitute a threat to the police or themselves. In such circumstances the use of force becomes punitive rather than necessary to protect the life of an individual and proportionate to the risk at hand. It fulfils neither the test of absolute necessity nor the strict proportionality test.

Lethal or potentially lethal force may only be used for a lawful purpose and the only lawful purpose which can justify this is where it is absolutely necessary to protect the life of a person

[573] https://www.osce.org/odihr/486020 [accessed 3 October 2021].
[574] 'Border polices shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons.' Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) *OJ L 77, 23.3.2016, p. 1–52.*
[575] C-148/13 *ABC* ECLI:EU:C:2014:2406 'In relation, in the third place, to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter.'(para 65)
[576] Council of Europe supra p 24.

(irrespective of whether this is the person using the force or someone else).[577] Thus, in the case study, the firing of rubber bullets, a known potentially lethal use of force, to stop people carrying a dingy to the water when they had already stopped in any event, does not appear to fulfil the requirement. Further, this use of force is disproportionate to the activity being carried out which does not constitute an immediate threat to the life of a person.[578] Should someone seek to argue that crossing the Channel at night in a dingy is a potentially dangerous activity which may result in the loss of life, this is insufficient as a justification for the use of potentially lethal force on land. It is neither immediate nor obviously life threatening as many people cross that body of water in similar conditions. Further the use of force cannot be justified on the ground that the border police were seeking to prevent the crime of leaving France without permission. Such a crime does not present, in the circumstances, an act which puts at risk the life of any individual; indeed it is an administrative crime and is not even accompanied by the justification that the individual is fleeing to evade prosecution for some other crime. The reification of irregular border crossing into a criminal activity is an unfortunate legislative choice which has been promoted by the EU.[579] It cannot, however, transform irregular border crossing from a normally peaceful and non-violent action into a crime of violence so serious as to justify border police use of violence against the perpetrators.

Responsibility for human rights violations in use of force by border police extends beyond the police who carry out the force to include also those who planned and controlled it.[580] Police must not use tactical options which make the use of lethal force inevitable or highly likely. There must be adequate and effective safeguards against arbitrariness and abuse of force.[581] None of these requirements appear to have been met in the case study above. There is however, the difficult issue of the potential liability of the UK authorities on whose behalf the French border police appear or are alleged to have been carrying out the use of force. There is much academic interest in what is currently known as anti-impunity[582] whereby the failure to respect human rights obligations is re-framed as evidence of the commission of criminal actions (in particular international crimes under the statute of the International Criminal Court).[583] While it may be that there is certain complicity of the UK authorities in containment measures carried out by the French border police, that use of force is an inherent part of the plan is beyond the scope of this investigation.

Potentially deadly force can never be used where the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent crime.[584] Again this requirement does not appear to have been respected in the case study. The rules governing use of force

[577] Council of Europe supra p 24.
[578] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) [1995]
[579] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence *OJ L 328, 5.12.2002, p. 17–18.*
[580] Council of Europe supra p 24.
[581] *Makaratzis v Greece* 20 December 2004.
[582] Engle, Karen. 'Anti-impunity and the turn to criminal law in human rights.' *Cornell L. Rev.* 100 (2014): 1069; Mann, Itamar. 'The new impunity: Border violence as crime.' *University of Pennsylvania Journal of International Law* 42 (2020).
[583] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 5 October 2021]
[584] *Nachova v Bulgaria* 6 July 2005.

apply in all situations even where there are rapidly unfolding and dangerous situations, internal political stability or other public emergency, these arguments cannot justify a departure from the standards.[585] According to the press reports, in the case study, there was no evidence of a rapidly unfolding dangerous situation such as the ECtHR has considered in respect of the use of forced by police in its caselaw.[586] The fact that some persons seek to leave France was certainly neither a threat to internal political stability of France nor a public emergency of any kind. Further, there is no indication that this was a rapidly unfolding dangerous situation such as the ECtHR had in mind when it considered this ground of potential justification of the use of force.[587]

This leads to the question of an investigation, first internal but also necessarily by an independent monitor (see section 4 on the duty of an investigation). The duty on border police to make and retain accurate records of every incident of use of force is a key requirement necessary to establishing the legitimacy of the violence itself. Transparency in the form of publication of both internal reports and those of the independent monitors is also an inherent part of an Article 3 ECHR compliant investigation.

The Council of Europe guidelines recommend that five questions be posed by officers who have used lethal force:

- Was the use of force in accordance with the law;
- Was the amount of force used proportionate in the circumstances;
- Were other options considered, if so what;
- Why were the other options discarded;
- Was the method of applying force in accordance with police procedures and training.

The necessity to keep records when lethal or potentially lethal force is used is a high priority for ECtHR compliant police action. In the investigation into the circumstances set out in the case study, these questions will be of great importance. However, for any investigation to be effective, there must be a willingness on the part of the investigators to examine all of the circumstances and to be fully independent of the police they are investigating (see above section 4). All too often, these investigations are carried out internally with a bias in favour of the account given by the border police who carried out the use of force.

Additionally, the OSCE/ODIHR report[588] complements the Council of Europe's Guidelines regarding use of force. Here it is emphasised that any use of force in the context of border security and migration management must be exceptional, necessary and proportionate to the

[585] *Gorovenky and Bulgara v Ukraine* 12 January 2012.
[586] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) [1995]
[587] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) [1995]
[588] OSCE/ODIHR *Border Police Monitoring ain the OSCE Region: Upholding a Human Rights Approach to Migration* 13 April 2021, Meeting Report.

specific threat.[589] All police must seek to minimize damage and injury and respect and preserve life. The Report recognises that policing actions affecting irregular migrants at borders can include 'interception, apprehension, screening, identification, referral, capture, pushbacks,[590] frisking and body searches, as well as the use of physical restraint'.[591] However, it recognises that for border policing to be lawful, accountable, non-arbitrary and non-discriminatory it needs to be implemented in full respect for human rights, refugee and humanitarian law and in line with procedural safeguards prescribed in international and national law.

The standards applicable to police carrying out border control activities are clear. They are well spelt out both by the Council of Europe and the OSCE/ODIHR in their work. The guidelines of these two bodies are carefully referenced in accordance with the decisions of the ECtHR. The standards applicable to border policing are the same as for policing within the state. There is no particular derogation possible under European human rights law to differentiate between use of force within the state and at the border. In the border control context, the only lawful exception to these rules on policing is in the context of war or armed conflict.[592] Yet, as we have heard, and as press reports indicate, there seems to be a chasm between the law and practice in many Member States. The question then is how to bridge that gulf and bring the use of force in border policing into line with the rules of use of force in all other peacetime situations.

Monitoring as part of the solution

The problem with the European standards on use of force in border policing is not that they are inadequate for the purposes but rather that compliance by border police with them is questionable in some parts of Europe. There are a number of specific issues which arise in the border situation which render those people who encounter border police use of force particularly vulnerable. The first is that complaints, where made by migrants, are too often simply disregarded by border authorities which deny the validity of all evidence of the incident (see above section 2). Even where there are photos, video and other forensic evidence which corroborates the incident, border authorities choose to deny any wrongdoing and refuse even to engage with that evidence.[593] Further, in interviews which we carried out with various authorities for the main report, we heard that some border police systematically destroy migrants' mobile phones before subjecting them to force (both violence and unlawful push-backs). This destruction of personal property appears to be intended to impede the recording of their actions.[594] As regards the investigation of border police allegedly unlawful use of force

[589] OSCE/ODHR report supra, p 6.
[590] Though the consistency of pushbacks with international human rights law is highly contested in Europe.
[591] Ibid p 6.
[592] Sassòli, Marco. 'Ius Ad Bellum and Ius in Bello the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?.' *International law and armed conflict: Exploring the faultlines*. Brill Nijhoff, 2007. 241-264.
[593] https://www.front-lex.eu/wp-content/uploads/2021/06/The-First-Legal-Action-v.-Frontex-the-Full-Document.pdf [accessed 4 October 2021].
[594] The confiscation by border police of personal effects (including identity documents) which are not returned to the migrant is also highlighted in the ECtHR judgment *Hirsi Jamaa* paragraphs 11 and 104 *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: https://www.refworld.org/cases,ECHR,4f4507942.html [accessed 12 October 2021]

within the context of Frontex coordinated operations, only once, where the CJEU found that there were fundamental rights violations in respect of Hungarian border controls, did Frontex withdraw from that operation.[595] All other allegations have been met with blanket rejection irrespective of the strength of the evidence.[596] It seems only validation of fundamental rights abuses by the EU's highest court can stop Frontex from participating in operations where unlawful border violence is taking place.

The second obstacle is the victims' status as potentially an irregular migrant. As such, even though the full panoply of international human rights law applies to them, in particular as regards the limitations on use of force by police, migrants in these precarious situations are too often unable to access their rights.[597] Without access to lawyers, the assistance by NGOs and social workers, or facilitation of communication through interpreters, these people find it almost impossible to access their rights. This is recognised in the OSCE/ODIHR report.[598] It recommends that just as detention or forced returns where monitoring is already an established practice in many states, border police operations ought to be subject to examination by independent monitors with the view to preventing human rights violations and where they are alleged, investigating them.

Thirdly, without independent monitoring, practices and identification of systemic deficiencies is not possible. But the remoteness of locations where border police operations are typically carried out makes it extremely difficult to carry out effective monitoring without the consent and co-operation of law enforcement. Additionally, access and permission is often need for observers and monitors which may or may not be granted, and may or may not even be covered by rules. In the case study, the unsocial hours of the border police activity is also a consideration. Unless independent monitors are made aware of the operation, they will not be on the spot at the relevant time, for instance 2 am on a beach outside Dunkirk.

Migrants' capacity to make complaints against police use of force is hindered by the fact that most migrants encounter police violence when they are seeking to move from one place to another, most frequently when trying to cross international borders. According to a number of experts interviewed for the main study, migrants often prefer to suffer border police violence without making complaint out of fear of reprisals if they do and in hopes that on their next attempt they will succeed to cross the border and thus escape the border police. Examples where migrants have been able to make complaints which resulted in criminal prosecutions and convictions of border police have mainly been by minors who because of their status are non-expellable.[599] Two cases from France are exemplary. Two minors were apprehended crossing the Italian-French border irregularly. The French border police who stopped them menaced them and exercised force on them ending with the stealing of their money. Subsequently the

[595] https://www.europarl.europa.eu/doceo/document/E-9-2021-001120_EN.html [accessed 4 October 2021].
[596] There is one exception where the Frontex Director General admitted to the European Parliament LIBE Committee's Frontex Scrutiny Working Group that there appeared to be a problem see section 2.
[597] Guild, Elspeth, Stefanie Grant, and Cornelis A. Groenendijk, eds. *Human rights of migrants in the 21st century*. Routledge, 2017.
[598] Ibid p 7.
[599] https://www.lemonde.fr/societe/article/2020/07/30/deux-policiers-condamnes-pour-violences-sur-un-migrant-et-detournement-de-fonds_6047759_3224.html [accessed 3 October 2021].

minors encountered another police authority to which they complained about the theft and violence. The crimes committed against minors included violence and theft of a substantial sum of money (€600 from one and €200 from another). The facts make most uncomfortable reading as the actions of the border police so resemble extortion with all the hallmarks of a sense of entitlement on the part of the person extorting the money. The two responsible border police were prosecuted and convicted.

Another case of prosecution of border police for border violence, also from France, again involves a minor, once again protected by law against expulsion.[600] Adults are not so lucky and fear their expulsion if they make complaints. Another issue which migrants have which mitigates against complaints is the cross-border nature of their activities. In interviews for the main study, we were told that migrants who suffered violence at the hands of border police in Hungary were pushed back to Serbia where it was virtually impossible for them to make complaints against the Hungarian border police. Only the persistence of NGOs in assisting some of them has resulted in some complaints against border police use of force to Hungarian prosecutors. Unfortunately, the prosecutors have not investigated the complaints further, notwithstanding substantial documentary evidence of the violence. Instead, the Hungarian government has chosen to criminalise the activities of NGOs assisting migrants (a state response not limited to Hungary).[601]

The particular problem of the sea borders and use of force: prosecution for failure to rescue and kidnapping

The exercise of border violence on migrants is not limited to encounters between border police and persons irregularly crossing the so called green borders. It also includes the issue of failure to rescue and kidnapping, a matter which has been the focus of a number of prosecutions in Italy (see Appendix 3 below).

European sea borders present particular problems as regards the effective monitoring of the use of force by border police. First, while monitoring can be complicated and require the assistance of the border police in respect of land borders, it is even more difficult as regards sea borders where normally monitoring bodies do not have their own vessels to carry out the activity. If the monitoring body is not represented on the vessels of the border police, then their monitoring activities are primarily dependent on access to satellite and other technologies to determine what is actually happening at sea and reports from media, NGOs and the testimony persons who allege that unlawful use of force has occurred. Here the use of services like those of bodies like Forensic Architecture,[602] techniques in spatial and architectural analysis, open-source investigation, digital modelling, and immersive technologies, as well as documentary research,

600 https://www.lefigaro.fr/flash-actu/arrestation-illegale-et-violente-prison-ferme-pour-des-policiers-a-marseille-20200507#:~:text=Deux%20policiers%20ont%20%C3%A9t%C3%A9%20condamn%C3%A9s,d'un%20contr%C3%B4le%20de%20confinement. [accessed 3 October 2021]

601 Ćuća, Ana, and Boldizsár Nagy. 'Criminalisation of Humanitarian Assistance: An Analysis of Italy, Hungary and Croatia.' (2019).

602 https://forensic-architecture.org/about/agency [accessed 11 October 2021].

situated interviews, and academic collaboration to establish the facts of a specific event may be indispensable.

Because of the obstacles as regards monitoring of use of force by border police at sea, the example of Italian efforts by prosecutorial services to investigate and prosecute failure to rescue and kidnapping, both crimes at the national level may be useful. All of these prosecutions have taken place after the fact, when prosecutors seek to establish the facts and criminal responsibility for loss of life or confinement of migrants on boats. Italian state monitoring bodies beyond the prosecutors do not appear to have played a role; rather most information which is available about these prosecutions is available only from open-sources, mainly media. All of the prosecutions have arisen in respect of specific border police failures, either on account of disputes about search and rescue responsibilities with another state (Malta) or the so-called closed ports policy of the Italian authorities according to which ships carrying people rescued at sea were prohibited from carrying out disembarkation in Italian ports. It seems that the main criminal prosecutions have been for failure to provide assistance at sea or, in the case of the closed ports policy, kidnapping (the consequence of preventing disembarkation resulting in the blockage of people on ships). As a consequence of the nature of the offence which directly results from state policy, instead of specific border police being subject to prosecution the main criminal proceedings have been against the political figures responsible for the policies. A number of the prosecutions are still outstanding, some have been authorised to proceed. Because of the status of those accused, authorisation from Italian Parliamentary bodies (the Senate) has been required but has been forthcoming in more than one case.

Partly because of the difficulties in carrying out effective monitoring of border police at sea borders, the search for responsibility for loss of or serious risk to life of migrants and refugees at sea has, in the Italian example, turned to criminal prosecutions of the architects of the policies which have led to the crisis. Consequently, the issue has become highly politicised with potentially very serious consequences for (former) politicians. While this may be a salutary example for political leaders who put into effect policies which prevent successful rescue at sea, it results in a very high politics within the state which has substantial costs for political authority. If effective monitoring of border police in sea operations were possible by a state authority to ensure full human rights compliance at least the lower level compliance problems could be diminished.

Monitoring by whom?

There is no silver bullet regarding the monitoring of border police activities. From our interviews, it is apparent that multiple actors are needed and overlap should be encouraged, not avoided, in monitoring border police. There is an obvious protection gap at present which urgently needs to be closed. A single administrative body without cross border networking with equivalent bodies across borders will not succeed for the reasons set out above. At the moment, the main actors in monitoring border police use of force are NGOs and the media (with outstanding but isolated examples of monitoring action by administrative authorities). The missing actor is state authorities charged with upholding human rights – Ombudspersons, NHRIs and NPMs (see below).

Just as border policing is a state action, so too monitoring must be included as an activity of a public authority. While NGO and media activity and monitoring has been critical to the revelation of human rights violations in European border policing and is likely to be an important component in the future as well, there needs to be effective and independent monitoring by a body which is a state authority. There are many reasons for this, not simply the weight of authority of the monitoring body in respect of the border police, but also the stature of the monitoring body in the public sphere, access to Parliament on a privileged basis and the exercise of powers which are state prerogatives. We have already discussed the issue of independence in the previous section which is a prerequisite for effective and legitimate monitoring bodies to achieve their purposes. But in addition to independence, they need to have the authority of being, also, state bodies, a status which provides them with protection from many of the problems which beleaguer NGOs in this field, not least criminalisation of their activities. There are generally three kinds of state authority which are currently carrying out border monitoring: Ombudspersons, NHRIs and NPMs. First there are ombudspersons whose mandate may include this activity (such as in Croatia).[603]

The European Ombudsman has a wide mandate which includes investigation of Frontex activities but this is not mirrored by the mandates of all ombudspersons at the Member State level. This could be remedied by the inclusion of a mandatory competence of national ombudspersons in the EU Ombudsperson regulation[604] and a role for such a body in the Schengen evaluation mechanism.[605] The European Ombudsman's office has established a European Network of Ombudsmen which is mainly focused on sharing information about EU law and best practice.[606] But it has not (or not yet) evolved into a coordinated border monitoring network. But this would be possible through a minor amendment to the Ombudsman Regulation to provide for this.[607] Secondly, there are national human rights institutions which frequently have mandates sufficient to cover the monitoring of border police activities. These NHRIs also have a European regional body, ENNHRI which aims to enhance human rights across the continent.[608] It has published an extensive report on the human rights of migrants at borders.[609] As mentioned in section 4, the use of Article 111(4) Frontex Regulation[610] which presupposes a framework of responsible human rights bodies at the national level to receive and investigate border violence complaints which come to the FRO but are not within his

[603] Strik, Tineke. 'Mechanisms to prevent pushbacks.' *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union*. Routledge, 2020. 234-258.
[604] 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.*
[605] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen *OJ L 295, 6.11.2013, p. 27–37*
[606] https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en [accessed 6 October 2021].
[607] 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*
[608] https://ennhri.org/ [accessed 6 October 2021].
[609] https://ennhri.org/wp-content/uploads/2021/09/The-human-rights-of-migrants-at-borders_Regional-report.pdf [accessed 6 October 2021].
[610] 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 PE/33/2019/REV/1 *OJ L 295, 14.11.2019, p. 1–131*

competence, to develop an EU wide network of NHRIs (or others) seems logical. This is also made necessary as the FRO does not fulfil the EU legal requirement of independence in any event. Thus complaints of border violence must be investigated by competent independent authorities with a system to overcome the obstacles of cross border cooperation. Since July 2019, ENNHRI has supported NHRIs to promote and protect the rights of migrants at borders – a major focus of its work. Under the Paris Principles (see annexe3) the UN Human Rights Office is responsible for assessment of the standards set in the Paris Principles and acts as the Secretariat of the International Coordinating Committee of National Institutions for the promotion and protection of Human Rights and its Sub-Committee on Accreditation (see further in the Feasibility Study section 2).[611]

A third type of monitoring body is the National Preventive Mechanism established under the Optional Protocol of the UN Convention against Torture, Inhuman and Degrading Treatment and Punishment. These are established as independent state authorities with a primary concern to prevent acts contrary to the convention. NPMs have been very active in many Member States in the monitoring places of detention of migrants and expulsion action with a focus on the prevention of human rights violations. This system of monitoring is particular important to border violence. The legal authority of NPMs, mandated by a UN convention provides them with a clear and specific mandate authorised by signatory states through an international treaty. Thus any interference for the independence of NPMs is also a breach of the treaty obligation of the state.

The three types of state monitors are not exclusive and it is not uncommon that the same body is appointed to carry out more than one role, possibly all three. The differences and their importance among the options is set out in the main report to which this is an annex. Suffice it to note here that all of these bodies are created by the state and enjoy the privileges of being state bodies. Nonetheless, one of the constant concerns regarding these body's ability and capacity to undertake border monitoring is their independence.

Finally, the issue of transparency is key to successful monitoring of use of force by border police irrespective of the institution carrying out the monitoring. Regular, complete and detailed public reports need to be published so that the public is aware of what is happening.

Relationship with Prosecutors, NGOs and the Press

In some countries, ombudspersons and NHRI have a legal obligation to notify the local prosecutor whenever in the conduct of their mandate they uncover or come across crimes (eg Spain). For the purposes of combating border violence which may constitute criminal acts this is very important. At the same time, in some of the interviews which we conducted for the main study, we were told that prosecutors are not always eager to investigate border police's use of force even in circumstances where there is good quality evidence presented to them. Yet, other

[611] See OHCHR status report: https://www.ohchr.org/Documents/Countries/NHRI/StatusAccreditationChartNHRIs.pdf [accessed 12 October 2021].

experts whom we interviewed, indicated that when there is a successful prosecution of border police in respect of crimes against migrants this has a calming effect on their colleagues. Incidents of use of force against migrants at borders following a successful prosecution of a border police officer for such a crime apparently drops. This brings to mind the comment referred to in section 1, by a senior retired border police officer.[612] The need for monitors (whether ombudspersons, NHRIs or NPMs) to have lines of communication with prosecutors and the requirement that prosecutors give priority to crimes reported by ombudspersons, NHRIs or NPMs is evident. This cannot happen without encouragement both political and legislative.

Many of the complaints of unlawful use of force by border police against migrants are facilitated by NGOs. NGOs are often among the most active parts of civil society seeking to protect migrants from harm. Successful state monitoring bodies need to have good relationships with NGOs which are carrying out this work but always with the proviso that NGOs do not share the same state responsibilities as state bodies. The differentiation between official monitoring bodies and NGOs must be maintained notwithstanding the need for them to work together. Similarly, press reporters are often among the first to disseminate information about unlawful use of force by border police. In the case study at the start, it was through the media that the details of the incident came to light. Again, as in the case of NGOs, it is critical that official monitoring bodies have good relations with those members of the press who have specialised in the subject but always in the knowledge that the interests of the two, while they may converge in some areas, will also diverge in others. Both are required to have the highest standards of independence but their roles are different and that difference must be respected.

Conclusions

There are a range of problems regarding identifying and investigating the unlawful use of force by border police at EU external borders. One the one hand there are multiple press and NGOs reports which raised very serious issues, on the other hand there is the almost unanimous denial by national border police and Frontex officials that any unlawful use of force has occurred. In order to resolve this extremely problematic conundrum, effective and independent monitoring by state authorities is a prerequisite. The establishment of the facts and the collection of evidence is necessary. However, while monitoring and the establishing of the facts is critical, it needs also to be accompanied by effective law enforcement where criminal action is revealed. This requires the engagement of the prosecutorial services of states which have a responsibility to investigate criminal activity and where the evidence is sufficient to pursue criminal prosecutions.

Cooperation between independent monitoring bodies and prosecutors is an important part of identifying, and where established, diminishing unlawful use of force by border police through the use of criminal prosecution. The official status of both authorities is an important asset to effective cooperation.

[612] Border police are affected by 'a culture where certain unlawful behaviour is normalised because everybody engages in it, especially if the behaviour is implicitly condoned by politicians'.

6. Recommendations towards the way forward

In this part of the report, we have examined the legal issues of allegations of unlawful use of force by border police at the EU external borders. After identifying the central human rights framework of border crossing, we have done this in four substantive sections: (1) the problem of border violence, Frontex and the creation of the FRO as a solution seeking to answer the question why this body has not been sufficiently effective; (2) the EU legislator's response to growing concerns regarding border violence and the role of Frontex including the question whether the inflation of references to and obligations regarding the protection of fundamental rights in the Frontex regulation have had an impact on practices on the ground and where are the faults in the legal framework of EU external border control which hamper effectiveness of fundamental rights protection; (3) the requirements of independence for monitoring bodies (and redress bodies, courts and tribunals and where they overlap) from the caselaw of the two courts, the CJEU and the ECtHR; (4) the problem of unlawful use of force and impunity, how have prosecutors in EU states dealt with the issue and the role of monitors in ensuring the timely and effective investigation of allegedly criminal action.

Finally, here we provide some suggestions about the way forward as regards the legal issues. First, we consider that the Frontex regulation establishing the purpose of the agency and its powers needs to be tightly linked to the correct application of the SBC, which is currently not the case. Frontex itself should have a duty to ensure the correct application of the SBC which is EU law on how the external border is crossed and by whom, with the appropriate exceptions for EU citizens and their family members and for those seeking international protection.[613] Of particular importance, as our research has revealed, is the establishment of facts. If Frontex were also responsible for ensuring that national border guards carry out external border action consistently with the SBC (ie if a third country national is refused admission that they have provided notification in writing and information about the right to appeal) among the more difficult issues of use of force could be reduced by the border police's duties to complete specific administrative actions: the paperwork and the paper trail. We recognise that not all EU Member States are also Schengen states, but those which are involuntarily outside the Schengen area abide by the SBC rules, and the one state which is voluntarily out (Ireland) is not a source, at the moment of allegations of unlawful use of force by border police at its external borders. Also, the duty, contained in the SBC that border police must respect the dignity of all persons (including non-discrimination on enumerated grounds), needs to be a Frontex duty not only as regards its own force, but as regards all operations in which it is involved including the behaviour of national border police. A specific Frontex duty to ensure SBC compliance should include a reporting obligation to Ombudspersons, NHRIs or NPMs regarding any action by national border guards which is inconsistent with their SBC fundamental rights obligations.

[613] Article 3 SBC.

Secondly, the muddle between the SBC and the Surveillance regulation (evidenced by the Commission's opinion 03/03/2021)[614] needs to be resolved in favour of legality at the external border as required and contained in the SBC. Maritime operations must not be a black box equivalent as regards human rights obligations and respect for EU fundamental rights. Further, all Schengen evaluation must include monitors from the national ombudsperson's office, NHRI or NPM (see section 5) with specific responsibility to ensure human rights and fundamental rights compliance in external border controls.

Thirdly, monitoring of state coercive action, such as external border control, is a state obligation which cannot be delegated exclusively to non-state actors. While NGOs and the media have been particularly engaged with human rights and fundamental rights compliance at EU external borders leading to revelations which have shifted political and public opinion regarding the legitimacy of the current situation, the active engagement of state agencies of monitoring, that is ombudspersons, NHRIs and NPMs, have been less present barring some exceptional examples. The cross border support of these exceptionally active state bodies in border control actions of other state bodies has not been facilitated by the national remit of most authorities. Yet, the need for sustained support across EU borders to ensure that effective monitoring takes place has never been greater. This is only possible within the conditions of solidarity and Article 80 TFEU.

Only where monitoring bodies have confidence in the independence of their homologues across the EU, can the necessary support and effectiveness be ensured. While some border police may claim that internal monitoring is sufficient to ensure fundamental rights compliance, the caselaw of the ECtHR and CJEU indicates that the essential elements of independence require a separation from the structure of the agency which is being monitored itself. While internal control mechanisms are necessary, not least to facilitate those working inside the agencies to have a proper venue through which to make their concerns about fundamental and human rights compliance known internally, this is insufficient to ensure effective independent monitoring. Such internal mechanisms like the FRO, must be complemented by other institutions which fulfil the ECtHR and CJEU requirements of independence to be responsible in the field. As discussed in section 5, in light of the seriousness of the problem, more than one monitoring body may need to be competent bearing in mind the complexity of monitoring in order to cover both control of fundamental rights in the planning stage of operations as well as on the ground and inclusive of full investigations after the fact where questions arise regarding actions. The human rights at issue are among those in respect of which no exception can ever be justified (or only in extremis) – the right to life (Article 2 ECHR), the prohibition on torture, human and degrading treatment or punishment (Article 3 ECHR) not to mention the qualified right to liberty (Article 5 ECHR). In comparison with the standards established by the two European courts in respect of the right to privacy (Article 8 ECHR) which is a qualified right where state may interfere with the right so long as they have a justification established in law and compatible with Article 8, the prohibition on torture, inhuman and degrading treatment or punishment is absolute. The monitoring obligation is thus enhanced as regards the risk of state

[614] 'The nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations at the Union's external borders'.

failure to respect these rights in the framework of political sensitive areas. The argument that EU external border control is somehow insulated against the duty of delivery of these human rights and fundamental rights obligations is badly misplaced.

Lastly, while EU measures to enhance external border control have been substantially enhanced (the creation of the Frontex standing force) comparative measures to enhance cross border monitoring of human rights and fundamental rights obligations have not been adopted. As fundamental rights' compliant border controls are necessarily cross-border, either intra-EU or extra, facilitating monitoring necessarily extends beyond the purely internal situation of any Member State. There is clearly an EU competence and interest in ensuring that there is coherence between the operation of EU external border controls and that of their monitoring. This makes it incumbent on the EU to ensure enhanced cross border monitoring and control.

Appendix 1: Section 3

7. Fundamental Rights References in the Regulations Governing Frontex

Regulation	References to Fundamental Rights
Council Regulation (EC) No 2007/2004 establishing the former European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union[615] (OJ L 349, 25.11.2004) (repealed)	Paragraph 22 – 'This Regulation respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union'
Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guests officers (OJ L 251, 16.9.2016) (repealed)	Article 2 – 'This Regulation shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.'

[615] This has been renamed the European Border and Coast Guard Agency (Frontex).

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008)	Paragraph 2 – 'The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.' Paragraph 17 – 'Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.' Paragraph 24 – 'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.'
Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 304, 22.11.2011) (repealed)	Paragraph 9 – 'The mandate of the Agency should therefore be revised in order to strengthen in particular its operational capabilities while ensuring that all measures taken are proportionate to the objectives pursued, are effective and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement.' Paragraph 16 – 'The incident reporting scheme should be used by the Agency to transmit to the relevant national public authorities and to its Management Board ('the Management Board') any information concerning credible allegations of breaches of, in particular, Regulation (EC) No 2007/2004 or the Schengen Borders Code established by Regulation (EC) No 562/2006 of the European Parliament and of the Council(5), including fundamental rights, during joint operations, pilot projects or rapid interventions.' Paragraph 18 – 'The Agency should provide training, including on fundamental rights, access to international protection and access to

	asylum procedures, at European level, for instructors of the national border polices of Member States and additional training and seminars related to control and surveillance at the external borders and removal of third-country nationals illegally present in the Member States for officers of the competent national services. The Agency may organise training activities, including an exchange programme, in cooperation with Member States on their territory. Member States should integrate the results of the Agency's work in that perspective in the national training programmes of their border polices.' Paragraph 20 – 'In most Member States, the operational aspects of the return of third-country nationals illegally present in the Member States fall within the competence of the authorities responsible for controlling the external borders. As there is a clear added value in performing those tasks at Union level, the Agency should, in full compliance with the return policy of the Union, accordingly ensure the coordination or the organisation of joint return operations of Member States and identify best practices on the acquisition of travel documents, and define a code of conduct to be followed during the removal of third-country nationals illegally present on the territories of the Member States. No Union financial means should be made available for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').' Paragraph 21 – 'For the purpose of fulfilling its mission and to the extent required for the accomplishment of its tasks, the Agency may cooperate with Europol, the European Asylum Support Office, the European Union Agency for Fundamental Rights and other Union agencies and bodies, the competent authorities of third countries and the international organisations competent in matters covered by Regulation (EC) No 2007/2004 within the framework of working arrangements concluded in accordance with the relevant provisions of the Treaty on the Functioning of the European Union ('TFEU'). The Agency should facilitate operational cooperation between Member States and third countries within the framework of the external relations policy of the Union.'

	Paragraph 22 – 'Cooperation with third countries regarding matters covered by Regulation (EC) No 2007/2004 is increasingly important. To establish a solid cooperation model with relevant third countries, the Agency should be able to launch and finance projects of technical assistance and to deploy liaison officers in third countries in cooperation with the competent authorities of those countries. The Agency should be able to invite observers from third countries to participate in its activities, after having provided the necessary training. Establishing cooperation with third countries is also relevant with regard to promoting Union standards of border management, including respect for fundamental rights and human dignity.' Paragraph 29 – 'This Regulation respects the fundamental rights and observes the principles recognised in particular by the TFEU and the Charter of Fundamental Rights, notably the right to human dignity, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the right to protection of personal data, the right to asylum, the principle of non-refoulement, the principle of non-discrimination, the rights of the child, and the right to an effective remedy. This Regulation should be applied by the Member States in accordance with those rights and principles. Any use of force should be in accordance with the national law of the host Member State, including the principles of necessity and proportionality.' Paragraph 30 – 'The implementation of this Regulation should not affect the rights or obligations of Member States under the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue or the Geneva Convention Relating to the Status of Refugees.'
Regulation (EU) 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing	Article 2(4) – 'Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation. They shall give priority to the special needs of children, unaccompanied minors, victims of human

the European Border Surveillance System (Eurosur) (OJ L 295, 6.11.2013)	trafficking, persons in need of urgent medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation'
Regulation (EU) 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 (OJ L 189, 27.6.2014)	Preamble paragraph 5 – 'Cooperation with neighbouring third countries is crucial to prevent unauthorised border crossings, to counter cross-border criminality and to avoid loss of life at sea. In accordance with Regulation (EC) No 2007/2004 and insofar as full respect for the fundamental rights of migrants is ensured, the Agency may cooperate with the competent authorities of third countries, in particular as regards risk analysis and training, and should facilitate operational cooperation between Member States and third countries. When cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards at least equivalent to those set by Union law.' Preamble paragraph 8 – 'During border surveillance operations at sea, Member States should respect their respective obligations under international law, in particular the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the United Nations Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child and other relevant international instruments.' Preamble paragraph 9 – 'When coordinating border surveillance operations at sea, the Agency should fulfil its tasks in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), and relevant international law, in particular that referred to in recital 8.'

	Preamble paragraph 10 – ‘In accordance with Regulation (EC) No 562/2006 of the European Parliament and of the Council (5) and general principles of Union law, any measure taken in the course of a surveillance operation should be proportionate to the objectives pursued, non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement. Member States and the Agency are bound by the provisions of the asylum acquis, and in particular of Directive 2013/32/EU of the European Parliament and of the Council (6) with regard to applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of Member States.’ Preamble paragraph 15 – ‘The obligation to render assistance to persons found in distress should be fulfilled by Member States in accordance with the applicable provisions of international instruments governing search and rescue situations and in accordance with requirements concerning the protection of fundamental rights. This Regulation should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation is conducted in such a way that the persons rescued can be delivered to a place of safety.’ Preamble paragraph 19 – ‘This Regulation respects the fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty on European Union (TEU) and by the Charter, in particular respect for human dignity, the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of trafficking in human beings, the right to liberty and security, the right to the protection of personal data, the right to asylum and to protection against removal and expulsion, the principles of non-refoulement and non-discrimination, the right to an effective remedy and the rights of the child. This Regulation should be applied by Member States and the Agency in accordance with those rights and principles.’

	Article 2(12) – ‘‘place of safety’ means a location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors’ next destination or final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement’ Article 4 – ‘Protection of fundamental rights and the principle of non-refoulement’ Article 4(8) – ‘Border polices and other staff participating in a sea operation shall be trained with regard to relevant provisions of fundamental rights, refugee law and the international legal regime of search and rescue in accordance with the second paragraph of Article 5 of Regulation (EC) No 2007/2004.’ Article 9(1) – ‘Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.’ Article 10(1) – ‘The operational plan shall contain, in accordance with international law and respect for fundamental rights, at least the following modalities for the disembarkation of the persons intercepted or rescued in a sea operation: (a) in the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(1), (2) or (6) or in Article 8(1) or (2), disembarkation shall take place in the coastal Member State, without prejudice to point (b) of Article 6(2);

	(b) in the case of interception on the high seas as laid down in Article 7, disembarkation may take place in the third country from which the vessel is assumed to have departed. If that is not possible, disembarkation shall take place in the host Member State; (c) in the case of search and rescue situations as laid down in Article 9 and without prejudice to the responsibility of the Rescue Coordination Centre, the host Member State and the participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify a place of safety and, when the responsible Rescue Coordination Centre designates such a place of safety, they shall ensure that disembarkation of the rescued persons is carried out rapidly and effectively.' Article 13(2) – 'The report shall include a description of the procedures put in place by the Agency to apply this Regulation during sea operations and information on the application of this Regulation in practice, including detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place.' Ensures that '[s]ea operations should be carried out in a way that, in all instances, ensures the safety of the persons intercepted or rescued, the safety of the units that take part in the sea operation in question and the safety of third parties'.[616]
Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016)	Regulation (EU) 2019/1896 points to this regulation and notes that for its effective implementation, 'common minimum standards for external border surveillance should be developed. To that end, the Agency should be able to contribute to the development of common minimum standards in line with the respective competences of the Member States and the Commission. Those common minimum standards should be developed taking into account the type of borders, the impact levels attributed by the Agency to each external border section and other factors such as geographical particularities. When developing those common minimum standards, possible

[616] The 2019 Regulation, Preamble (20).

	limitations deriving from national law should be taken into account.'[617]
Regulation (EU) 2016/1624 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 (OJ L 251, 16.9.2016) (repealed)	102 references to 'fundamental rights' Preamble (2), (14), (27), (34), (40), (46), (47), (48), (49), (50). Article 1 Article 6(3) Article 12(3)(e) Article 16(3)(d), (i), (m) Article 18(4)(a), (5) Article 21(4), (5) Article 22(3)(b) Article 25(4) Article 26 Article 27(1) Article 28(3), (4), (6), (7), (8) Article 29(1) Article 34(1), (4) Article 35(1), (2), (3) Article 36(1), (2), (4), (5) Article 40(2) Article 52(1), (4) Article 54(1), (2), (4)

[617] The 2019 Regulation, Preamble (18).

	Article 55(3) Article 61 Article 62(2)(y) Article 68(2) Article 70(1), (2), (3), (5) Article 71(1), (2), (3) Article 72(1), (2), (3), (4), (6), (7), (8), (9), (10), (11)
Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019)	231 references to 'fundamental rights' Preamble (1), (24), (42), (50), (55), (78), (81), (88), (91), (103), (104) Article 1 Article 2(19) Article 3(1)(e) and (2) Article 5(4) Article 7(3) Article 10(1)(e), (s), (w), (ad) Article 31(3)(e), (f) Article 38(3)(d), (i), (l), (n) Article 40(4)(a) and (5) Article 43(4), (5) Article 44(3)(b), (d) Article 46(4), (5) Article 47

	Article 48(1), 48(1)(c) Article 50(2), (3), (4), (5), (6), (7) Article 51(1), (2) Article 55(3), (4), (5), (6) Article 60(3)(f) Article 62(1), (2), (5), (6) Article 68(5) Article 69(2) Article 71(2) Article 72(3) Article 73(2), (3), (7) Article 76(2) Article 77(3) Article 78(3) Article 80(1), (4) Article 81(1), (2), (3) Article 82(3), (5) Article 86(2) Article 89(5) Article 99 Article 100(2)(z), (aa) Article 102(3) Article 104(6) Article 106(2), (4)(m) Article 108(1), (2), (3), (5)

	Article 109(1), (2)(a), (b), (c), (i), (j), (3)(a)-(e), (4), (5), (6), (7) Article 110(1), (2), (3), (4), (5), (6), (7) Article 111(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) AnnexeV(3)(b), (4)

Appendix 3: Section 5: Italy toward Border Violence against Migrants

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1. Introductory Remarks

For several years, the Mediterranean Sea has been the scene of some of the most tragic acts of violence perpetrated against migrants.

The rejection of migrants from reaching the Mediterranean borders and the responsibilities deriving from omissive conducts on behalf of the public authorities had a strong media resonance, but often the response of the legal and justice system has been 'weak' in those very few cases that made their way before Courts.

The aim of the research is to analyse the public and known cases decided by Italian judges on violence against migrants once approached Italian borders and to outline their most relevant features. In order to trace a common denominator that brings together all the examined cases, it should be highlighted that the violent conducts at stake mostly emerge following omissive behaviours or behaviours put in place only with extreme delay with a direct and negative impact on the life and conditions of migrants.[618] In other words, it can be said that it is the untimeliness of the rescue operations undertaken by the Italian authorities that stands behind of border violence.

A methodological preamble is also necessary. In carrying out the research, it was extremely difficult to find and gather official and, even, unofficial sources (such as judgment, orders, decrees), which are quite often not in the public domain. As a consequence, for the most part, the phenomenon under consideration has been largely investigated by way of an indirect knowledge of ongoing and exhausted proceedings before courts covered by the media. There exist, in fact, several inquiries and newspapers articles on the subject in question and some of the information reported below will be largely based on cases as they are described and covered by the media. In order to delve into this topic, the research has therefore collected, selected and

[618] For more scientific insights on the subject see M. D'AMICO – C. CATTANEO (edited by), *I diritti annegati,* Franco Angeli, 2015. More precisely, the essays of M. D'AMICO*, Introduzione. I morti senza nome del Mediterraneo: profili multidisciplinari. Il punto di vista del giurista,* 11-17. Moreover, see also M. D'AMICO, *L'Europa dei diritti: tra 'aperture' e 'chiusure'*, in *Setenta años de Constitución Italiana y cuarenta años de Constitución Española*, A. PÉREZ MIRAS - G.M. TERUEL LOZANO - E.C. RAFFIOTTA – M.P. IADICICCO (edited by), Agencia estatal boletín oficial del estado centro de estudios políticos y constitucionales, Madrid, 2020. With regards to double discrimantion of migrant women, cf. M. D'AMICO, *Una parità ambigia,* Raffaello Cortina, 2020, p. 301-308. Lastly, see also C. SICCARDI, I *diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo*, ESI, 2021.

examined more than twenty articles, that will be included in the list of sources put in end of the research.

2. The Libra Case: The Delay in the Rescuing process and its Legal Consequences

2.1. The Circumstances of the Case: Dum Romae Consulitur Saguntum Expugnatur [619]

A few days before the launch of the 'Mare Nostrum' operation, 268 migrants (including around 60 children) passed away in a shipwreck that occurred around 60 miles off the Italian coast.[620]

The vessel departed on the night of October 11 (2013), from Zuwara, Libya, carrying over 400 refugees, mainly Syrians and Palestinians. During the trip, the vessel was hit by a boat flying a Berber flag and as a result it was flooded. Many were injured and the boat was almost 113 km far from the Italian island of Lampedusa and almost 218 km far from Malta. Due to this event, M. J., one of the people onboard, called the Italian emergency number at sea around 11.00 a.m. and he described what was happening. After this first contact with, several others calls were made from the boat to the Italian Maritime Rescue Coordination Center (Imrcc) which explained to M. J. that they were in the Maltese Search and Rescue (SAR) zone. Then, the Armed Forces of Malta was called as well. In the early afternoon, several information exchanges took place between Italian and Maltese authorities, in order to establish who would have to intervene.[621] This caused a considerable delay in the rescue effort. Moreover, the Italian authorities also expressly ordered an Italian navy ship Libra not to intervene, which was only an hour away from the vessel. At 5 p.m. the vessel sank, and only a few moments later both authorities came in the approximate positions of the boat's sinking, rescuing 200 people, while more than 260 drowned. Following the incident, on 17 May 2017, the former Minister of Defence, Roberta Pinotti, was questioned by MP Giulio Marcon, and in in her response she defended the position of the Italian naval and maritime authorities.[622]

2.2. The Trial

After the tragic events of 11th October 2013, investigations were launched at the Public Prosecutor's Office in Rome. Seven people were under investigation: officers and petty officers of the Italian Navy and Coast Guard. At the end of the investigation, the Public Prosecutor's Office asked for the case to be dismissed, but the Judge for Preliminary Investigations objected on the grounds that three of the seven suspects needed to continue the proceedings. More precisely, they were the head of the Italian coast guard operations room, the equivalent for the navy and the Libra's commander.[623]

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[619] T. LIVIO, *Storie*, XXI, 7, 1.
[620] Cf. S. BISSARO – S. CARNOVALI – M. GRASSI – C. SICCARDI, I diritti dei migranti scomparsi ed i loro familiari: profili di diritto interno e sovranazionale, in M. D'AMICO – C. CATTANEO (edited by), *I diritti annegati,* Franco Angeli, 2015, p. 35 ff.
[621] The video investigation conducted by F. GATTI, published in *Espresso*, reports with precision all the conversations that took place that day. In particular, see *La legge del mare: così la Marina ha lasciato affondare il barcone dei bambini*, June 5, 2017.
[622] F. GATTI, *Naufragio dei bambini, Pinotti risponde al Parlamento ma è smentita dai magistrati*, published in L'Espresso, May 18, 2017.
[623] By looking at the legislative provisions on sea rescue activities, we can find in the Italian Navigation Code (Royal Decree no. 327 of 1942) articles nos. 69 (rescue of ships in distress and shipwrecked persons), 489 (duty of assistance), 490 (duty of rescue), and 1158 (failure to assist ships or persons in distress).

Subsequently, the proceedings were interrupted for about two years due to a request for re-statement of the charges at the Court of Cassation, after which the Judge of the Preliminary Hearing indicted the head of Italian coast guard operations room and the equivalent for the navy on charges of manslaughter (art. 589 of the Italian Criminal Code) and dereliction of duty (art. 328, paragraph 1 of the Italian Criminal Code). In December 2019, the trial against the two defendants mentioned above began, and the trial at first instance has not yet been concluded. Simultaneously, three relatives of the victims appealed to the UN Human Rights Committee invoking the responsibility of the Italian State for the violation of Articles 6 (right to life) and 2, paragraph 2 (right to an effective remedy) of the International Covenant on Civil and Political Rights.

The Committee ruled on the case on 27th January and confirmed Italy's responsibility. On the one hand, the State did not take all the possible measures to rescue the people on the ship, promptly which resulted in many deaths. On the other hand, despite having initiated criminal proceedings to establish the responsibilities of the authorities involved, a final verdict has still not been reached seven years after the incident.[624]

3. The Impact of the so-called 'Closed Ports' Policy on Border Violence against Migrant

The other cases in which the judicial authority intervened to ascertain the responsibility for acts of violence against migrants involves the Minister of the Internal Affairs. All the cases that will be analysed below stem from the precise political choice of former Minister Matteo Salvini to significantly hinder migration flows. And within this context, on numerous occasions, Minister Salvini decided to 'close' the ports, thus not allowing ships that had rescued migrants shipwrecked in the Mediterranean Sea to disembark on Italian territory.[625]

It is necessary to mention a very peculiar procedural aspect concerning the acts for which a Minister can be brought before the court. Article 96 of the Italian Constitution states that: '[t]he President of the Council of Ministers and the Ministers, even if they resign from office, are subject to normal justice for crimes committed in the exercise of their duties, provided authorization is given by the Senate of the Republic or the Chamber of Deputies, in accordance with the norms established by Constitutional Law'. More precisely, the constitutional law regulating the matter is Law no. 1 of 1989, which provides for two preliminary stages before starting the trial. The first takes place before the Tribunal of Ministers, which investigates the alleged offence committed by the Minister in the exercise of his functions. At the end of the investigation, this court can decide whether to dismiss the charges or request authorization from Parliament. Only in the latter case does the second phase begin, which is the most delicate one because - as we shall see - it is always very unpredictable.

3.1. The Alan Kurdi case

[624] See pt. 8.1 and following.

[625] For an in-depth analysis on this issue see C. SICCARDI, *I diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo*, ESI, 2021, p. 174 ff.

The case stemmed from the rescue operation of approximately 64 migrants by the NGO Sea Eye, which had taken on its ship, the German-flagged Alan Kurdi. The rescue took place on 3 April 2019 in the Libyan SAR zone and subsequently the captain of the Alan Kurdi requested the Italian authorities to be assigned a place of safety (POS). This request was rejected, and the boat remained offshore for more than 10 days. After that, the ship was accepted in Malta and after landing the migrants were redistributed to Germany, Portugal, Luxembourg and France. Following the incident, the Agrigento Public Prosecutor's Office launched an investigation, which had been initiated following a complaint lodged with the same Public Prosecutor's Office. The case was then forwarded to the Court of Ministers in Rome, which decided to close the case. The charges were: dereliction of duty (art. 328, paragraph 1 of the Italian Criminal Code), abuse of office (art. 323 of the Italian Criminal Code) and failure to provide assistance at sea (art. 1113 of the Italian Naval Code), and among the suspects, there was also his Chief of Staff.

According to the Tribunal, the State is obliged to indicate a place of safety in cases where it 'directly carries out a rescue operation in its own SAR zone or in the SAR zone of other States with its own means or in any case assumes the coordination of such operations'. However, there is no such obligation when search and rescue operations are 'carried out autonomously by ships belonging to humanitarian organizations present in the stretches of sea known to be crossed by migrant boats'. In fact, such vessels, according to the Tribunal of Ministers, 'once the rescue has been carried out, choose autonomously the route to be followed and the country to which to turn for the indication of a POS',[626] i.e., outside any coordination by the SAR country where the rescue took place or by the countries of neighboring SAR areas.[627] As reported in the press, the outcome of the judgment was a source of joy for the Minister of the Interior, who stated: 'Every now and then some good news Finally a court recognises that blocking unauthorized landings is not a crime. [...] I am curious to see what the other prosecutors will decide at this point and once I am back in government I will do the same things again'.[628]

3.2. The Diciotti and Gregoretti cases

The instant cases deserve to be treated together because they are very similar not only with reference to the circumstances surrounding the facts, but also with regard to the issues that arose during the proceedings aimed at ascertaining the ministerial offence by the Tribunal of Ministries.

The first concerns the fact that the two ships that carried out the rescue belonged to the Italian Navy, so this operation were not conducted by NGOs (on the contrary, see Alan Kurdi case, supra §3.1., and Open Arms case, infra §3.3.).

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[626] Tribunal of Minister of Rome, decree no. 6 of 2019 of November 21, 2019. My translation

[627] See S. ZIRULIA – F. DE VITTOR, *Il caso della nave Alan Kurdi: profili di diritto penale e internazionale in punto di omessa assegnazione di un porto sicuro*, online on the website *Sistema Penale*.

[628] *Migranti: archiviata l'inchiesta su Salvini per la nave Alan Kurdi*, published in La Stampa.it, November 22, 2019. My translation

In short on the facts:[629] On 16 August 2018, the Italian Coast Guard ship Diciotti rescued 190 people in international waters off the island of Malta. The Italian authorities had already become aware of the vessel a few days earlier, but they expected the Maltese authorities to intervene, precisely because this boat was located in the Maltese SAR area. However, for reasons that need not be investigated here, the rescue operation was carried out by the Italian Navy through the Diciotti ship. Following the rescue operations, only those few people who were in a very precarious condition (they were about 13) were urgently transferred, while all the other people were taken to Catania, where the Diciotti ship arrived a few days later. Once the boat arrived near the coast of Catania, it received an order from the Minister of Internal Affairs not to land the migrants. It was only six days later that the people on the ship disembarked. This behavior of Minister Salvini was investigated by the Public Prosecutor's Office of Agrigento, and the case was subsequently forwarded to the Tribunals of Ministers of Palermo, which charged the Minister with aggravated kidnapping. However, in the case in question, the territorial jurisdiction lay with the Tribunal of Ministries of Catania, to which the case returns and which confirms the charges and on 23 January 2019 forwards the request for authorization to the Presidency of the Senate of the Republic. Parliament, however, did not authorize the judge, so all charges were dropped.

Gregoretti's case occurred about a year after the Diciotti affair (on 25 July 2019). Off the coast of Lampedusa, the Gregoretti ship picked up 50 migrants who had been rescued by the fishing boat Accursio Giarratano, and another 91 rescued instead by a 'Guardia di Finanza' patrol boat. Again, both operations took place in Maltese waters. At that point, the Gregoretti headed for Lampedusa, where six people in imminent danger were disembarked, while the other 135 remained on board after the ban on disembarkation imposed by Minister Salvini. A few days later, 15 minors were disembarked and an inspection inside the boat was arranged for the following day in order to verify the real sanitary conditions. Authorisation for disembarkation did not come until 31 July 2019, and in particular, the Minister stated that he had only granted authorisation after ensuring that once disembarkation had taken place the migrants would be redistributed. In addition, with reference to the actions of Minister Salvini, investigations were launched by the District Prosecutor's Office of Catania and subsequently, the Catania Court of Ministers deemed it appropriate to proceed with the request to the Senate of the Republic. The reason explaining this different solution on cases that are really very similar to each other is to be found in the fact that between the two deliberations in September 2019 the Government changed, and in the new formation of government the Ministry of Internal Affairs was no longer held by Salvini.[630]

On 11st February, the Senate approved the authorisation and the trial against Salvini is currently still pending. In conclusion, the peculiar aspect of these two cases concerns the fact that the Tribunal of Ministers of Catania excluded the indication of the POS from the list of unquestionable political acts, qualifying it rather as an administrative act motivated by political

[629] A. FONDERI, *Le differenze tra il caso Gregoretti e il caso Diciotti*, published in Wired.it, January 21, 2020.

[630] See, T. F. GIUPPONI, *La responsabilità penale dei ministri alla stregua dei principi costituzionali e nella prassi. Legittima prerogativa o illegittimo privilegio?,* in *Diritto, Immigrazione e Cittadinanza Review,* no. 2 of 2021.

reasons and therefore 'justifiable, insofar as such positions are harmed and judicial protection is invoked'.[631]

3.3. The Open Arms case

The Spanish-flagged ship Open Arms rescues 124 people in two separate operations. On 2 August 2019, the Italian authorities are asked for a place of safety, where to disembark. However, a new legislative provision, introduced at the instigation of Minister Salvini (art. 11, paragraph 1-ter, of the Legislative Decree no. 286 of 1998) prevents the non-military ship from entering Italian waters. After a few days, the NGO's lawyers appealed to the Administrative Court, requesting a precautionary suspension of the landing ban. The Regional Administrative Court of Lazio upheld the NGO's appeal and suspended the ban on entering Italian waters.[632] However, Open Arms did not receive an indication of where to land. Later, a new complaint was filed with the Agrigento Public Prosecutor's Office for the omission of official acts and other crimes. In the meantime, The people on board were in considerable distress (for example, some migrants were transferred because of their poor physical condition, others threw themselves into the water in protest). Finally, on 20th August, the public prosecutor of Agrigento, Luigi Patronaggio, boarded the Open Arms and decided to order the disembarkation and emergency preventive seizure of the ship. Subsequently, the Public Prosecutor's Office started an investigation against Salvini, who was charged with kidnapping and omission of official acts. The latter charge was due to the fact that he, as Minister of Internal Affairs, had not followed up on the decision of the Administrative Court. He was then questioned by the Palermo Tribunal of Ministers, which decided not to dismiss the charges and applied to the Senate of the Republic for authorization to begin proceedings. On 30 July, the Senate finally granted the authorization, and the former Minister for Internal Affairs was also subjected to criminal proceedings (which are still pending).

4. Concluding Observations

In the final stage of this report, on 14 October 2021, the Italian press[633] reported that for the first time in Europe a verdict of guilty has been reached in a case of border violence against migrants.The Tribunal of Naples has condemned to one year of imprisonment the captain of the ship Assso 28, which is a tugboat of the company Augusta operating on behalf of the company Mellitah Oil & Gas.

The facts covered by the judgment of the Tribunal of Naples are related to the rescue of 101 migrants carried out by the ship's crew on 30 July 2018, following which the migrants were returned to Libya.

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631 C. SICCARDI, *I diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo*, ESI, 2021, p. 184 ff.
632 Ammnistrative Tribunal of Rome, order no. 05479 of 2019, August 14, 2019.
633 N. SCAVO, *Sentenza. Migranti consegnati ai libici, prima condanna in Italia per un comandante*, published in Avvenire.it, October 14, 2021.

The motivations for this landmark decision will be published in a few months, but the press articles[634] that announced the news report that the main reason that led to this outcome concerns the idea that Libya is not considered a 'safe port' for disembarkation and therefore handing over migrants rescued at sea to Libyan authorities is a crime.

Although this decision can certainly be credited with having broken the 'wall of impunity' for cases of border violence against migrants, it remains an isolated decision. And this leads to consider still valid the conclusions reached before learning of this judgment.

More precisely, in light of the case-law analysis, the research confirms the preliminary argument, in that the response of justice has been 'weak' and, above all, slow, violating migrants' right to access to justice.

An example of this trend comes from all the cases analysed that are still pending before the courts. This is the case of the tragic events that took place on October the 11th, 2013, that was behind the UN Human Rights Committee's recent observations, that highlighted that the claimants' right to effective judicial remedies has been severely violated.

In addition, cases related to the Minister of Internal Affairs show as very similar cases might have very different outcomes, since the Parliament possesses full discretion in deciding whether granting the authorization to the Judge to proceed with the Minister's trial.

In a nutshell, small steps have been taken compared to past times in tackling border violence against migrants, but there is still a long way to go to fully have the rights of all the migrants affected truly safeguarded under the law.

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[634] See also *Migranti, condannato il comandante della Asso 28: consegnò 101 persone alla guardia costiera libica. È la prima volta in Europa*, published in IlFattoQuotidiano.it, October 14, 2021, and *Ship captain sentenced to prison for returning migrants to Libya,* published in Infomigrants.it, October 15, 2021.

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