

Analysis

Criticism of Frontex's operations at sea mounts

"I try to avoid giving the impression I'm somehow sneaking out of the responsibility"

Frontex's Executive Director on search and rescue at sea

On 11 October 2012, Frontex's Executive Director Ilka Laitinen was invited by the LIBE Committee to present a state of play report on the measures taken by the Agency in preparation for search and rescue operations.¹ The European Parliament's committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) had held €10m of Frontex's 2013 budget in reserve, until clear guarantees were given that practical steps were being taken by the Agency to improve search and rescue (SAR) operations involving migrants at sea. This hearing came in the context of SAR gaining growing prominence in the EU's border management strategy and even internationally. The newly established UN Working Group on the Smuggling of Migrants stated in June 2012 that:

"State parties [to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air] should prioritize the preservation of life and safety upon detection of a vessel used to smuggle migrants".²

Search and rescue in Europe: mounting criticism

Growing concern has been expressed by human rights groups and international institutions in the past few months at the death toll of migrants in the Mediterranean Sea. While the phenomenon of unseaworthy vessels sinking on their way to Europe is not new, the publication of new figures by the UNHCR - which estimates that about 1,500 people died in the Mediterranean in 2011 - was followed by a series of events which prompted the European states' reaction to what appears to be a failure to uphold international search and rescue standards.

In February 2012, Italy was found guilty by the European Court of Human Rights of breaching articles 3, 13 and article 4 Protocol 4 of the European Convention³ in the context of "push-back" operations in which migrants fleeing Libya by sea were forced back by Italian coast-guards.

In March 2012, the Parliamentary Assembly of the Council of Europe published a report apportioning responsibility regarding a shipwreck off the Libyan coast in March 2011 which resulted in the death of 63 people.⁴ The Council of Europe's rapporteur concluded there was a "collective failure of NATO,

¹ LIBE Committee, 11 October 2012, video of the session <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20121011-0900-COMMITTEE-LIBE>

² Report on the meeting of the Working group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012, CTOC/COP/WG.7/2012/6
http://www.unodc.org/documents/treaties/organized_crime/2012_CTOC_COP_WG7/CTOC_COP_WG7_2012_6/CTOC_COP_WG7_2012_6_E.pdf

³ European Court of Human Rights, *Hirsi Jamaa and others v Italy*, Application No. 27775/09, 23 February 2012
<http://www.statewatch.org/news/2012/feb/ecj-italy-libya-judgment.pdf>

⁴ Parliamentary Assembly of the Council of Europe, *Lives lost in the Mediterranean Sea: Who is responsible?*, Committee on Migration, Refugees and Displaced Persons Rapporteur: Ms Tineke STRIK, 29 March 2012
<http://www.statewatch.org/news/2012/apr/coe-med-report-2.pdf>

the United Nations and individual States” including France, Canada, the US, Italy, UK and Spain (Spain and the UK have failed to answer the rapporteur’s questions so far).⁵ Researchers from the Forensic Oceanography department at Goldsmiths University (UK) investigated the case in a 90-page report entitled “Left to Die”⁶ which stressed the failure of NATO and the states participating in the NATO operation in Libya to assist this particular vessel.

In June 2012, the EU Commissioner for Home Affairs Cecilia Malström, in reference to the uprisings in northern Africa, stated that "Europe failed to stand up for democracy, freedom and human rights" because it prioritised securing the border over supporting those who had fought for liberty and democracy.

In July 2012, the Boats4People initiative⁷ sailed from Italy to Tunisia, to raise awareness of the loss of lives at sea and the role of the EU’s border control policy in these tragedies. Travelling to the EU legally is extremely difficult if not impossible, and many embark on unseaworthy vessels as a result. The project also highlighted the EU’s failure to save lives at sea due to “the reluctance of European states to accept disembarkation, and all the legal responsibilities it implies for processing, reception, and assistance”.⁸

As a result of these events more attention seems to have been paid to the humanitarian aspect of border management and “saving more lives at sea”. However, the use of humanitarian discourse by the EU to legitimise border surveillance was viewed by some as the “EU’s cynical response to the Arab Spring”⁹, or deeply insufficient as in the case of Frontex’s Fundamental Rights Strategy.¹⁰

Search and rescue by Frontex

Laitinen’s presentation to the LIBE committee was delivered within a sensitive political context where SAR responsibilities are disputed by Member States¹¹, while the Agency has gained important operational powers in this field since the amendment of its mandate in 2011.

After insisting that coast guards deserved the “*highest possible respect*” for their hard work due to the difficult situations in which they operate, Laitinen reported the scale of sea rescue operations in Frontex’s activities.

According to its Executive Director, Frontex does not intercept migrants, limiting its interventions to detection, SAR and to escorting migrants to the safest port of embarkation. Push back operations

⁵ http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7855&L=2

⁶ “Left-To-Die Boat”, Charles Heller, Lorenzo Pezzani and Situ Studio, April 2012, p.78
http://www.fidh.org/IMG/pdf/rapport_expert_independant.pdf

⁷ <http://www.statewatch.org/news/2012/jul/01boats4people.htm>

⁸ Human Rights Watch, Hidden Emergency – Migrant deaths in the Mediterranean, 16 August 2012
<http://www.hrw.org/node/109445>

⁹ Ben Hayes & Mathias Vermeulen, Borderline: EU Border Surveillance Initiatives, an assessment of the costs and its impact on fundamental rights, 2012, http://www.boell.de/downloads/DRV_120523_BORDERLINE_-_Border_Surveillance.pdf

¹⁰ See Statewatch and Migreurop’s joint submission to the EU Ombudsman regarding Frontex’s Fundamental Rights Strategy, 27 September 2012 <http://www.statewatch.org/analyses/no-193-eu-ombs-inquiry-frontex-evidence.pdf>

¹¹ Human Rights Watch, Needless deaths in the Mediterranean, 16 August 2012
<http://www.hrw.org/news/2012/08/16/eu-needless-deaths-mediterranean>

are strictly forbidden and Laitinen emphasised that they “cannot take place”. However, he did not exclude the possibility that push backs occur outside of the scope of Frontex operations (where “push backs are not that apparent any more”).

In 2009, 23,000 people were rescued in SAR sea operations by Frontex, while 4,000 people have been rescued so far in 2012. The reduced figures correspond, in his opinion, to a general improvement of the situation and “less persons in distress”. People rescued at sea still represented 38% of detected irregular migrants in 2011, and 33% so far in 2012.

According to Laitinen, the large number of people rescued shows that search and rescue operations are not exceptional in the Agency’s activities. The high probability of a rescue during maritime operations is considered as “a starting point” rather than an exception and patrolling vessels and aircraft are equipped with blankets, food and water when it is anticipated that SAR operations may be conducted.

Practical steps undertaken by Frontex

The LIBE committee asked the Executive Director for concrete examples of steps taken to search and rescue for migrants in distress at sea. Green MEP, Judith Sargentini, pointed out that an estimated 1,500 people drowned in the Mediterranean in the first seven months of 2011 according to figures released by the UNHCR which suggests that the Agency’s practices were inadequate to prevent the loss of lives at sea, despite SAR being taken into account when preparing Frontex’s operations.

Laitinen recalled the 2011 context when the Agency had to withdraw from a large maritime area in the context of the NATO operation ‘Unified Protector’ in Libya (the Agency could not be operational in the war zone – see map).¹² He said this limited Frontex’s capacity to search for and rescue vessels, although this argument would apply only to search and rescue operations in and around Libyan waters, and would not apply to search and rescue operations between Tunisia and Europe. No less than seven joint operations were conducted in the Mediterranean in 2011,¹³ while half of the migrants who reached Italian shores in 2011 were Tunisians according to UNHCR’s estimates.¹⁴

Frontex has no mandate to search for or rescue migrants at sea as this remains a competence of Member States. The agency is in charge of coordinating cooperation between Member States, work which sometimes involves SAR operations. However, Frontex is not responsible for their conduct. Laitinen listed several measures taken by the Agency to promote “best practices” during sea operations:

- Training on SAR obligations for all crew members during maritime operations, in line with the International Maritime Organisation’s standards.
- Cooperation with other EU agencies to help gain a better picture of activities at sea and detect unseaworthy small vessels (cooperation with the European Maritime Safety Agency, the

¹² See map of the Unified Protector area of operations in Forensic Oceanography Report on the “Left-To-Die Boat”, Charles Heller, Lorenzo Pezzani and Situ Studio, April 2012, p.78
http://www.fidh.org/IMG/pdf/rapport_expert_independant.pdf

¹³ Frontex, 2011 General Report pp.41-42
http://www.statewatch.org/observatories_files/frontex_observatory/General_Report_2011.pdf

¹⁴ UNHCR, Mediterranean takes record as most deadly stretch of water for refugees and migrants in 2011, 31 January 2012 <http://www.unhcr.org/4f27e01f9.html>

European Fisheries Control Agency, and the European Satellite Agency), as well as being more efficient in identifying people in need of international protection (cooperation with the European Asylum Support Office).¹⁵

- The appointment of a Fundamental Rights Officer, Ms. Inmaculada Arnaez Fernandez - who will be in office as of 15 December 2012, and the establishment of the Consultative Forum on Fundamental Rights.
- Frontex's active participation in EUROSUR (the Agency will administer the borders surveillance system)¹⁶ to better detect unseaworthy vessels and "*strengthen capacity to save human lives*", especially through the development of:
 - o The Frontex Positioning System to follow the location of each asset (vessels, aircrafts) participating in Frontex operations (so they can be rapidly deployed for SAR if need be)
 - o The online Compatible Operational Image to be used for multiple purposes including SAR (no explanation was given on what this new technology entails)

Reaction capacity?

However, the practical implications of many of these measures remain unclear. The question asked by Socialist MEP Sylvie Guillaume regarding the operational competences of the Fundamental Rights Officer and whether she would be able to be involved during Frontex operations – e.g. to observe the conduct of maritime operations - was left unanswered.

Frontex did not give information either on the "compatible operational image", what data it would contain, what was meant by "online" (which authorities will be able to access it?), and how this "image" differs from the situational pictures available to authorities participating in EUROSUR.

While preparedness seems to be taken into account in the Agency's strategy (training, improved means to detect unseaworthy vessels), no real details were presented regarding the capacity to react. Some challenges were identified by the Executive Director: the lack of a common understanding amongst Member States of what "distress" meant and cooperation with third countries for which Laitinen considered that there was still "a lot of room for improvement" without clarifying further.

Nevertheless, the main issue, albeit briefly hinted at, remained unaddressed in his presentation: the lack of clarity as to which authority was responsible to render assistance to migrants at sea once they have been detected.

Who has the ultimate responsibility?

Whether these steps will make a difference in helping to save lives at sea will depend on whether the identification of unseaworthy vessels is followed by appropriate rescue measures. Although the European Union, and therefore its agencies, has no mandate to conduct SAR operations, "*Frontex feels that it has a responsibility to promote the best practices*".

¹⁵ All working arrangements signed by Frontex with third parties are available at

http://www.statewatch.org/observatories_files/frontex_observatory/official_pub.html#thirdorg

¹⁶ EUROSUR will be launched in 2013. It is intended to act as a "system of systems", centralising data collected by the already existing maritime surveillance systems in the Mediterranean and the Black Sea. Information will be accessible by a variety of public authorities including law enforcement authorities of EU member states, border guards, immigration liaison officers, and even third countries in some cases.

Yet, the SAR responsibilities described by Frontex's Executive Director appeared to be very unclear, as Laitinen distinguished between the legal and practical understanding of SAR obligations during maritime operations. To him, from a "*practitioner's*" point of view, the reality of SAR was concrete and there was an obligation on all vessels at sea, whether commercial or military.

"I try to avoid giving the impression I'm somehow sneaking out of responsibility", said the Executive Director, *"the lawyers have their views and the practitioners have their views. But the ultimate responsibility is very clear: it's always with the national competent authority of the MS"* which hosts the Frontex Joint Sea Operation.

According to Laitinen, the responsibility issue is thus exclusively that of the Member States, and it is up to them to ensure that SAR responsibilities are clearly established, which in many Member States, is not the case.¹⁷ In particular, responsibilities should be clarified, he said, between the International Coordination Centre of the country hosting the Frontex operation (which is in charge of coordinating the joint operations) and its Maritime SAR coordination centre; Laitinen believes that the host state's Maritime SAR coordination centre should be responsible for the conduct of SAR operations during Frontex's joint maritime operations.

Search and rescue: the lack of clarity in Frontex's mandate

The chain of responsibility for search and rescue operations was quite clear in Laitinen's understanding. In the absence of European coast guards and a mandate for the European Union to authorise EU-led SAR operations, the role of Frontex should remain that of coordinator, promoting good practices with no direct responsibility for how migrants are treated once detected and escorted to the safest embarkation point.

So why give Frontex increased funding for operations for which the Agency has apparently no mandate, and which eventually fall under the Member states' responsibility? This confusion was reflected in the debate that followed Laitinen's presentation, for example when Green MEP Ska Keller asked whether Frontex was the best agency to deal with search and rescue.

The Commission highlighted that the EU has no direct competence in SAR. Yet, since the amendment of Frontex's Regulation, and pursuant to Article 3(1), the Agency can "initiate and carry out joint operations".

One may therefore consider that the Agency could be held responsible, at least in part, for the way SAR operations are carried out in the context of operations it initiated and when search and rescue was anticipated in the operational plan.

If the question asked by ALDE MEP Jan Mulder on the "ultimate responsibility" during joint operations was understood by Laitinen, doubts remain as to what would apply in a joint operation initiated by the Agency, especially considering its legal obligations under international law (Frontex is

¹⁷ Ibid at 10

bound by the International Convention for the Safety of Life at Sea, SOLAS, as highlighted by the Agency itself).¹⁸

Frontex's new mandate does not specify whether a joint operation initiated and carried out by Frontex will require that a host state takes responsibility for its conduct, or if the Agency can be held responsible for it. This scenario would be feasible, given the Agency's increased autonomy under which it can lease or purchase its own equipment (Article 7 of Frontex's mandate).

Moreover, on 5 September 2012, the Court of Justice of the European Union annulled Council Decision 2010/252 supplementing the Schengen Borders Code during Frontex sea operations.¹⁹ Nevertheless, this decision, which provides guidelines for search, rescue, disembarkation and interception of migrants at sea, will remain in force until a new text is adopted and Decision 2010/252 remains enforceable by Frontex, as confirmed by Laitinen during his presentation to the LIBE Committee. In view of the Agency's new mandate which extends the Agency's role from that of a coordinator to that of both a coordinator and a leader of joint operations, the remaining applicability of Council Decision 2010/252 raises a number of liability related questions which remain unaddressed.

Finally, in the eventuality of Council Decision 2010/252 being replaced by another decision that removes SAR responsibilities, Frontex will still be able to initiate joint operations and, in the near future, administer EUROSUR. The Agency will be in charge of establishing the European Situational Picture and the Pre-Frontier Intelligence Picture based on the National Situational Pictures composed by Member States. In particular:

"The Agency may use on its own initiative the surveillance tools referred to in paragraph 2 for collecting information which is relevant for the common pre-frontier intelligence picture" (article 12(5)).²⁰

This will give Frontex the possibility to be up-to-date about the situation in the "pre-frontier" area, i.e. to anticipate situations where search or rescue operations may be required at sea. As stated by the Meijers Committee:

"[T]he aim of the Eurosur proposal to increase situational awareness also means that there is an increased responsibility under international refugee law and the Search and Rescue regime based on the International Convention on Maritime Search and Rescue".²¹

¹⁸ Frontex's reply to the EU Ombudsman on its fundamental rights strategy, 17 May 2012
http://www.statewatch.org/observatories_files/frontex_observatory/EUOmbudsmanMarch2012-FrontexInquiry.pdf

¹⁹ Court of Justice of the European Union, Annulment of Council Decision 2010/252 supplementing the Schengen Borders Code during surveillance operations coordinated by Frontex at the sea external borders, 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>

²⁰ Council of the EU, Presidency, Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), 15085/12, 19 October 2012
<http://www.statewatch.org/news/2012/oct/eu-council-position-on-eurosur-15085-12.pdf>

²¹ Meijers Committee, Note on the proposal for a Regulation establishing the European Border Surveillance

Frontex's new mandate as well as its role in EUROSUR may, in light of the Meijers Committee's analysis, require a greater responsibility than the Agency seems prepared to accept.

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