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Systemic unaccountability at the EU's external border

Missed opportunities of the European Ombudsman's decision on Frontex's SAR role and obligations in the Aegean region

On 20 October 2023, I Have Rights, Legal Centre Lesvos, and de:border // migration justice collective submitted a Joint Contribution to the [European Ombudsman's own-initiative strategic inquiry](#) concerning the role of the European Border and Coast Guard Agency (Frontex) in the context of search and rescue (SAR) operations. In our contribution, we presented evidence on systemic summary expulsions and other patterns of border violence in the Aegean region, as well as on Frontex's malpractice and lack of accountability. The submission is part of our ongoing efforts, together with other organisations, to contest, counter and seek accountability for serious patterns of border violence in the context of Frontex and Greek authorities' joint border control operations in the Aegean sea, including the systemic breaches of EU and international law that they entail.

We welcome the European Ombudsman's (EO) inquiry and its decision and conclusions, published on 28 February 2024. In particular, we welcome the finding that "despite Frontex having search and rescue obligations it is clear that it primarily provides a search or surveillance function and not a rescue function," upholding the structural deficiency in Frontex' operations in the Aegean.

We regret, however, that the EO's decision fails to make the finding that Frontex is in violation of its obligation to withdraw from Greece under Article 46 of Regulation (EU) 2019/1896, due to the apparent failure of Frontex to meet its SAR obligations, combined with fundamental rights violations in the Aegean, which were documented by Frontex's Fundamental Rights Office (FRO). Despite this, the Ombudsman's conclusions only request that Frontex publicly clarify the reasoning for (or against) the decision to terminate operations in the Aegean under Article 46.

Non-cooperation, structural deficiency, and Frontex's SAR obligations

The Ombudsperson's conclusions seem to suggest that the most significant obstacle to the fulfilment of Member States' and Frontex's SAR duties – respectively under international and EU law – lies in the lack of a clear and specific operational framework on search and rescue, and in the dependence of EU agencies such as Frontex on Member States' cooperation for their ability to fulfil these duties. This is despite the emphasis by the Ombudsperson's decision on Frontex's standalone obligations under the EU Charter of Fundamental Rights to take all necessary measures within its capacity to protect the right to life, and its expanded mandate to this effect under the most recent version of the Agency's constitutive regulation. These include, as the Ombudsperson's decision affirms, the obligations to spot boats in distress, maintain surveillance throughout emergency situations, and perform a complementary coordinating SAR role.

Taking the Pylos shipwreck as an example, the EO's report itself recognises that Frontex took no further measures to respond to the emergency situation beyond reporting it to the relevant Rescue Coordination Centre (RCC) and offering support. This falls short of Frontex obligations under EU law to take "all appropriate measures to ensure the safety of the persons concerned" while awaiting instructions by the RCC.¹ The lack of instructions in Frontex's operational plan for such situations – in which the RCC does not respond, or Frontex has other persistent concerns with the Member State's compliance with fundamental rights – demonstrates a structural deficiency that, however, does not absolve Frontex of its SAR obligations under EU law.

The Ombudsperson's found that current "plans and procedures risk Frontex's ability to act independently in order to fulfil its fundamental rights obligations" (para 55). It further upholds that during maritime emergencies, Frontex often fails to act beyond informing the RCC, despite the Agency's SAR coordination obligations and duty to maintain surveillance without interruption.² Frontex's present incapacity to fulfil its rescue responsibilities when spotting of boats in distress - resulting, in most cases, from the withdrawal of its naval assets (replaced by aerial assets) - is part of a persistent unwillingness to implement a longstanding need for systemic reform of its infrastructure and operational approach and capabilities.

We, therefore, respectfully disagree with the Ombudsperson's conclusion that Frontex has not breached any of the relevant rules and procedures in the course of its response to the maritime emergency that resulted in the Pylos shipwreck.

¹ Regulation 656/2014.

² Regulation (EU) 2016/1624.

Systemic pushbacks and unaccountability

The EO's decision and conclusions should have situated the two shipwrecks of Crotona and Pylos in the wider context of Frontex's involvement in Greece's long-standing systemic breaches of fundamental rights and EU law, including the systemic practice of violent summary expulsions (pushbacks) in the Aegean sea and islands, ongoing since at least 2020.

Given the serious nature of the allegations made against Frontex concerning its enabling role and complicity in pushbacks over the last years, the kind of "organisation-wide reflection" found necessary by the Ombudsperson is long overdue. The EO should have taken issue with the Agency's persistent denial and obstruction of systemic accountability that examines the inter-institutional dynamics between Frontex, Member States' authorities, and the European Commission in relation to upholding fundamental rights obligations and other EU law.

Indeed, there has been a [complete lack of enforcement action](#) through relevant EU institutions and processes. As de:borde and Legal Centre Lesvos, together with other organisations, have argued in the context of a [pending complaint before the EO](#) against the Commission's funding of Greek border operations, given the systemic breaches of EU law in that context, the Commission has failed to comply with its role and obligations as 'guardian of the treaties'; in particular through its supervisory and advisory roles and powers on Frontex's Management Board, and its unconditional renewal of Frontex's budget.

Frontex's deficient fundamental rights monitoring

The EO noted that Frontex's FRO has failed to effectively monitor the protection of fundamental rights due to structural deficiencies concerning its involvement in maritime emergencies. These gaps in fundamental rights protection have persisted for some 20 years since Frontex's founding (and despite the many amendments made to the Frontex regulation).

Despite this, the EO's has not situated its findings on the FRO's role in the context of these broader structural deficiencies. Critically, these also include Frontex' non-cooperation with civil society organisations - as demonstrated in the failure of Frontex's Serious Incident Reports (SIR) and fundamental rights monitoring to account for the extensive documentation and analysis of patterns of pushback operations by independent investigators and civil society actors.

Out of the 38 SIRs filed in the operational areas of Lesvos and Samos from September 2020 to September 2023, obtained by I Have Rights through a Freedom of Information request, 32 (84%) referred to incidents which involved persons attempting to reach Greece with 19 (50%) using the term "pushback". Of the 19 pushback reports, the FRO concluded that a

fundamental rights violation had occurred in only two cases, despite the fact that in 10 of the 19 reports that use the phrase “pushback”, the FRO described the allegations as “credible” or “plausible”. Yet, only in two instances it was “establish[ed] beyond doubt” that Greek authorities, or “individuals acting in concert and coordination with the Greek authorities” had conducted violent pushbacks.³ Both reports found that the Greek authorities had misreported facts which contributed to “hiding this reality”, referring to the pushback.⁴ In fact, in 10 (52%) pushback reports the Fundamental Rights Monitor states that the Greek authorities either did not record the incident, refused to share relevant information with the FRO, or were otherwise uncooperative with the investigation.

Member State non-cooperation beyond Frontex

Frontex and other EU institutions have persistently failed to take enforcement action in response to Member State authorities' non-cooperation with the FRO.

The EO has acknowledged the ‘difficulties’ faced by the European Commission in receiving updates on the Greek Naval court’s ongoing investigation into the Pylos shipwreck, and on the failure of the Hellenic Coast Guard to conduct its own investigation into the incident. Yet, despite the FRO’s own assessment of the Greek authorities’ fundamental rights violations and the [FRO’s recommendation that Frontex temporarily suspends operations in Greece under Article 46 in June 2023](#), the EO did not reach the logical conclusion that Frontex’s Executive Director is in breach of its obligations to withdraw Frontex from its operations in Greece.

The current operational infrastructure at the EU’s external border enables Frontex, Member States, and other relevant actors to deflect and evade responsibility, resulting in the normalisation of the mass and structural violence against migrants and large-scale loss of life in the context of SAR operations.

This reality of systemic unaccountability extends beyond Frontex and SAR actors. As I Have Rights argues in a pending complaint against the European Agency for Asylum (EUAA) before the EO, EUAA caseworkers have routinely failed to record and appropriately respond to cases of asylum applicants who have detailed their experiences of pushbacks at Greece’s borders.

Enabling Frontex’s impunity

Given the absence of clear guidelines on how to react to maritime emergencies, the systematic lack of cooperation with Member States’ authorities, and the systemic deficiencies of Frontex’s fundamental rights monitoring mechanisms, the lack of

³ SIR 11023/2023

⁴ SIR 12070/2023

accountability for responses to maritime emergencies is not an isolated, incident-specific failure, but rather an inevitable consequence of structural unaccountability.

Despite it being clear that Frontex is neither able nor willing to act in line with its SAR obligations, and given the EO's wide-ranging findings and recommendations, it is regrettable that it did not see a justification for further inquiries or recommendations at this time.

The EO aptly concludes that there is a lack of a "single accountability mechanism that could independently investigate all related issues, including the role of the Greek authorities, the role of Frontex, and the role of any other relevant institution, such as the European Commission". The legal struggles by groups like ourselves to seek accountability for the complex, multifactorial reality of state violence through limited and fragmented means support this finding.

Given this reality of systemic unaccountability for the mass and structural forms of violence perpetrated against migrants in the Aegean region the EO is both legally mandated and responsible for investigating relevant EU institutions - such as Frontex and the European Commission - for maladministration. The EO should have taken further actions to hold these EU institutions to account.