

ILPA SUBMISSIONS TO THE SELECT COMMITTEE ON THE EUROPEAN UNION SUB COMMITTEE F – FRONTEX INQUIRY SEPTEMBER 2007

1. ILPA welcomes this inquiry by the sub-committee into FRONTEX. ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA has provided written and oral evidence to the Select Committee on the European Union on many occasions. This response focuses on areas where ILPA considers it can be of most assistance to the Committee.

QUESTION: WHETHER THE INSTITUTIONAL AND LEGAL FRAMEWORK ENSURES ADEQUATE ACCOUNTABILITY OF FRONTEX

2. In ILPA's view the founding instrument of FRONTEX (Regulation 2007/2004/EC) is deficient in legal terms on two points:

- i) the legal obligations governing FRONTEX are uncertain;
- ii) the territorial remit of FRONTEX is uncertain.

The legal obligations governing FRONTEX are uncertain

3. FRONTEX is a first pillar agency. However, its role in such operational activities as the co-ordination of operations and the exchange of information makes it look much more like a third pillar agency such as EUROPOL or EUROJUST. Changes to the structure of decision-making in Title IV (including in the mandate for the Reform Treaty¹), may affect the extent of scrutiny of the activities of FRONTEX. There is reason to suppose that scrutiny will in any event be extremely weak.

4. Regulation 2007/2004/EC sets out that FRONTEX is a body of the Community and has legal personality². However, it treats FRONTEX as a management agency and makes scant reference to the legal framework for its work, including on such matters as the applicable law (including human rights law) and the jurisdiction of the European Court of Justice (ECJ) over the work of FRONTEX. It envisages FRONTEX setting up 'specialised branches in the Member States'³ but fails to indicate whether or not such branches would have separate legal personalities.

5. Article 10 of Regulation 2007/2004/EC states that the 'exercise of executive powers by the Agency's staff and the Member States' experts acting on the territory of another Member State shall be subject to the national law of that Member State.' No definition of 'executive powers' is provided and there is nothing further to indicate the legal obligations governing FRONTEX activities. By contrast Article 9 of Regulation 863/2007 on Rapid Border Intervention Teams provides that 'while performing the tasks and exercising the powers as referred to in Article 6(1), the members of the teams shall comply with Community law and the national law of the host Member State.'

6. This leaves open the question of obligations stemming from public international law. The Director of FRONTEX, in the context of questions about FRONTEX' role in returns, told

¹ Draft Treaty amending the Treaty on European Union & the Treaty establishing the European Community, 23 July 2007

² Council Regulation (EC) [2007/2004/ \(26.10.2004, OJ L 349/25.11.2004\)](#), Art 15(1).

³ Article 16(1). See also Preamble, Recital 13.

the House of Lords Select Committee that 'it is up to Member States' to check compliance with the European Convention on Human Rights'⁴. But who will guard the guardians?

7. See further our answer on how FRONTEX should develop in the future, below.

Territorial remit of FRONTEX

8. The territorial scope of FRONTEX action is unclear. Article 2 of Regulation 2007/2004 defines the tasks of FRONTEX. The list includes to:

- 'coordinate operational co-operation between Member States in the field of management of external borders'
- 'assist Member States in circumstances requiring increased technical and operational assistance at the external border.'

For this purpose, the notion of "external border" is defined by Article 1(4) of the Regulation, as now amended by Regulation 863/2007 on Rapid Border Intervention Teams, as 'the land and sea borders of the Member States and their airports and seaports, to which the provisions of Community law on the crossing of external borders by persons apply.'

9. Articles 2 and 1(4) together appear to mean that the activities of FRONTEX are limited to the territories and border of the Member States. That conclusion is not altered by the permission given to FRONTEX by Article 14 of Regulation 2007/2004 to co-operate with third countries. If this interpretation is correct, FRONTEX lacks legal authorisation to engage in activities - such as in the context of HERA II and HERA III - which concern activities on the high seas or on the territory (including the territorial sea) of other States.

10. The external sea, land and air borders of the EU are not subject to a coherent or common definition. The most important aspect of variation is the Schengen acquis, which provides for the abolition of intra-Member State border controls among certain Member States. From January 2008 this should include all the pre-2004 Member States, with the exceptions noted below, and the Member States that joined on 1 May 2004. It is not yet clear to us whether this will also include the two Member States that joined the EU on 1 January 2007.⁵ The exceptions are Denmark, which continues to apply the common internal border control-free area with the others via the Schengen Implementing Agreement and to apply the other aspects of the Schengen acquis; and Ireland and the UK, which do not participate in measures which are a development of the Schengen acquis except to the extent that agreement has been reached in the Council for their participation.⁶ A number of non-EU states participate fully in the Schengen acquis by virtue of agreements with the EU. Iceland and Norway participate fully and Switzerland is in the process of doing so. An agreement reached with Iceland and Norway permits those two countries to vote on measures that constitute the extension of the Schengen acquis. The governance of the external border is thus not exclusively within the hands of the Member States. Non-Member States are involved in Schengen while Ireland and the UK are not, and Denmark participates by way of an international agreement rather than EU law proper. Thus, the EU's external border runs through the internal market but embraces third countries. The control of the internal borders is unclear, with the continuing application of internal controls at only some of them. The controls at external borders are far from uniform, with some, such as those with Iceland and Norway, having no controls, while others are heavily controlled. Other developments such as enlargement change the nature of the external borders. As the internal borders are the subject of considerable fluidity, the definition of the external borders is also less than obvious.

⁴ House of Lords EU Select Committee Report, *Illegal Migrants: Proposals for a Common EU Returns Policy*, 32nd Report, Session 2005-06, HL Paper 166 (Q591).

⁵ 'Citizens without a Constitution, Borders without a State: EU Free Movement of Persons' in Baldaccini, Guild & Toner *Whose Freedom, Security and Justice?* EU Immigration & Asylum Law & Policy, Hart, Oxford 2007.

⁶ See Opinion A-G Trstenjak in *C-77-05 UK v Council*, 10 July 2007, discussed below.

11. The objective of FRONTEX to coordinate joint operations by Member States at the external sea, land and air borders is thus complicated insofar as the identification of those borders is not self-evident. How are FRONTEX and others to interpret its mandate?

12. When FRONTEX was established, its mission of coordination of joint operations by Member States at the external sea, land and air borders was not underpinned by any EU law clarifying how people should cross that border. EU Regulation 562/2006 (the 'Borders Code'), where these rules are set out, applied only from 13 October 2006. Thus FRONTEX was established to carry out a function about which there was little, if any, satisfactory legal clarity. Since the establishment of FRONTEX, Bulgaria and Romania have become Member States, changing the external border.

13. The definition of those persons who enjoy a presumption in favour of crossing the external border (and move freely within the internal borders of the Schengen area) is complicated. Article 2(15) of the Borders Code provides for a list of residence permits issued by the Member States that authorise stay or re-entry into the territory. Article 5(1) (b) provides that third country nationals holding a valid residence permit do not require visas to enter the Schengen area. Effectively, where a third country national holds a residence permit issued by a Member State there is a presumption that s/he should be admitted at any external border crossing. The list of residence permits (2006/C 247/01) includes, for example, more than 30 different documents issued by Germany and a similar number issued by France. For Finland, some documents are residence permits for the purposes of the list only if issued before or after specified dates. Each Member State in the Schengen system issues its residence documents in its own language and without translation. Nationals of the Member States have a right, only qualified on grounds of public policy, public security and public health, to cross an external or internal border of the EU's Internal Market, not just the Schengen area. Turkish nationals who qualify as workers and who have accrued rights under the EC Turkey Association Agreement and its subsidiary legislation also enjoy a right to continue to work and to residence and, by extension, to cross the external border to return to the Member State where they work and live.

14. While FRONTEX is established for the purpose of co-ordination, nonetheless as an EU agency it must comply with EU law. Although it was established before the Borders Code was adopted, following the adoption of the Code it is incumbent on FRONTEX to ensure that in the context of its co-ordination activities, the Member States that carry the operational responsibilities, faithfully and fully comply with EU law including the Borders Code.⁷

15. While the measures adopted in Title IV EC, including the Borders Code, contain many references to the 1951 UN Convention relating to the Status of Refugees and its 1967 protocol (see for instance article 3(b)), there is no information on how, in co-ordinating external border activities, FRONTEX is to achieve this. The information available on projects FRONTEX has co-ordinated (for example HERA I, II and III)⁸ gives no adequate account of how the principle of *non-refoulement* has been observed. UNHCR has expressed concern about the respect for refugee protection in FRONTEX' activities.⁹ EU texts refer to Member

⁷ '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 Goudappel, *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* Asser Press, The Hague, 2006, pp 45 – 72.

⁸ S Carrera *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands* CEPS, Brussels, March 2007.

⁹ "UNHCR and FRONTEX have begun discussions on cooperation, as foreseen in Regulation 2007/2004/EC and proposed by the Commission in its Communication on Reinforcing Management of the EU's Southern Maritime Borders, COM(2006)733. UNHCR is willing to collaborate with FRONTEX to ensure that personnel deployed on joint operations are trained in principles of international law and refugee protection. Guidance would appear also to be needed on how respect for

States' obligations under the Refugee Convention, but in operations the EU institutions and agencies seem leave it to Member States to sort out how to resolve the tensions between international obligations and the EU ones.. The result may too often be a responsibility gap – the EU institutions and agencies deny responsibility because they do not have an obvious operational role, the Member States' institutions and agencies deny responsibility because they are bound to carry out faithfully their obligations in EU law.

(Lack of) accountability – the Management Board

16. Because FRONTEX is an agency there is limited opportunity for scrutiny of its activities and thus limited accountability¹⁰. Prior to the creation of FRONTEX, ILPA had voiced similar concerns about the Strategic Committee for Immigration, Frontiers and Asylum (SCIFA), its lack of transparency, and the secrecy about its activities and the lack of democratic control of those activities.¹¹ The status and work of FRONTEX, and its activities, must be understood in the context of the Hague Programme¹² which views the establishment of secure borders as necessary not only in the context of preventing illegal immigration to the European Union, but also as part of counter-terrorism activities. The exceptions to normal levels of scrutiny, accountability and constraints, for example on the retention and sharing of information, that are seen in the context of Counter-Terrorism measures, can be expected to be prayed in justification of lack of scrutiny of FRONTEX.

17. As an Agency the work of FRONTEX is coordinated by a Management Board, made up of representatives of participating Member States and of the Commission¹³ consisting of one representative per participating Member State plus two representatives from the Commission¹⁴ and a representation of associated Schengen States. The Management Board approves FRONTEX's annual work programme and appoint its Executive Director– these requires a three quarters majority vote. Decisions, on a case-by-case basis, to allow the UK and Ireland to participate in FRONTEX activities require an absolute majority vote. A Management Board is a weak method of scrutiny and for accountability at the best of times, but is particularly weak in the context of FRONTEX. The Annual Report of the Management Board is to be made public¹⁵. In addition, an annual work programme must be sent to the Council and Commission¹⁶ and an independent external evaluation of the Agency must be commissioned within the first three years of its operation.¹⁷ None of these amount to mechanisms for accountability, and they offer precious little opportunity for scrutiny, in particular for prospective scrutiny of FRONTEX' work.

(Lack of) accountability – accountability to Member States

18. Individual States have a measure of control over the activities of FRONTEX. They must consent to joint operations and pilot projects¹⁸. In addition, Members of the

international refugee law can be ensured in carrying out border operations. See UNHCR's Recommendations for Portugal's European Union Presidency July – December 2007, 24 July 2007.

¹⁰ See Dehousse, R., 'Regulation by networks in the European Community: the Role of European Agencies' (1997) 4 *Journal of European Public Policy* 2, 246-261.

¹¹ ILPA Evidence to House of Lords Select Committee on the European Union, *Proposals for a European Border Guard*, 29th Report, Session 2002-03, HL Paper 133, reproduced therein.

¹² The Hague Programme: strengthening freedom, security and justice in the European Union, European Council [2005] OJ C53/1, 3 March 2005

¹³ Article 21. The UK and Ireland will be invited to attend meetings, see Article 23(4).

¹⁴ Article 21(1).

¹⁵ Article 20(2)(b). To be forwarded by 15 06 of the year following its adoption to European Parliament, Council, Commission, Economic and Social Committee and Court of Auditors

¹⁶ Article 20(2)(c). This report is to be sent by 30 September each year.

¹⁷ Article 33.

¹⁸ Council Regulation [2007/2004/EC Art 3\(1\)](#)

Management Board representing a Member State must vote to approve specific activities to be carried out at the external border of that State¹⁹. However, this provision is more about protecting State sovereignty than providing scrutiny of FRONTEX's own activities.²⁰ The provisions in the Regulation should be read in the light of the agreement reached between Member States reflected in Protocol 21 to the Treaty establishing a Constitution for Europe,²¹ which provides that the provisions of the Treaty will be without prejudice to Member States' competencies to conclude agreements with third countries, subject only to those agreements respecting EU law and international agreements. Again, the question is: who guards the guardians? If there were increased safeguards, scrutiny and accountability of FRONTEX, it is arguable that this would merely increase the likelihood that member States would go it alone, under bilateral or other agreements with third countries.

Extent of FRONTEX' competencies – operations

19. It is a mark of the weakness of the mechanisms for scrutiny and accountability of FRONTEX that it has so far proved impossible to determine FRONTEX' competencies, their extent and legal basis, and the extent to which FRONTEX will have an operational role.

20. The title of Regulation 2007/2004/EC refers to the 'management of operational co-operation'. The question of whether FRONTEX will have a role in operations has been left very unclear²², as is demonstrated by the summary of its activities on the EUROPA website:

*'FRONTEX coordinates operational cooperation between Member States in the field of management of external borders; assists Member States in the training of national border guards, including the establishment of common training standards; carries out risk analyses; follows up the development of research relevant for the control and surveillance of external borders; assists Member States in circumstances requiring increased technical and operational assistance at external borders; and provides Member States with the necessary support in organising joint return operations.'*²³

21. The view that FRONTEX and teams operating under it will have a role in operations is reinforced by the proposals to amend Regulation 2007/2004/EC to allow for the creation and deployment of Rapid Border Intervention Teams (known, rather unfortunately, as RABITS).²⁴ RABITS would be able to carry out surveillance activities at the border²⁵. Border guards from other EU Member States, are entrusted with a series of wide-ranging tasks of border checks, but also border surveillance, including prevention (Arts 7 and 8). This proposal will perhaps receive more scrutiny than the regulation establishing FRONTEX, because the European Parliament will have a role in passing the amending legislation. Operational activities also appear to be envisaged under Art 9 of 2007/2004/EC, which relates to the role of FRONTEX in return operations.²⁶

¹⁹ Art 20(3).

²⁰ See also Art 2(2), protecting Member States' entitlement to cooperate other than through FRONTEX. Without clarity on the competencies of FRONTEX itself, the sphere of action preserved for Member States and their obligations to report such action to FRONTEX under Article 2(2) are unclear.

²¹ [2004] OJ C 310, 16 December 2004

²² The original proposal for such an agency COM (2003) 323 final, calls for the creation of a 'much more operational body' but see House of Lords Select Committee on the European Union, *Illegal Migrants: Proposals for a Common EU Returns Policy*, 32nd Report, Session 2005-06, HL Paper 166 (Q581) evidence of Mr Laitinen, Director of FRONTEX.

²³ http://europa.eu/agencies/community_agencies/FRONTEX/index_en.htm, accessed 07 09 2007.

²⁴ *Commission proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending the Border Agency Regulation* (COM (2006) 401 final, Brussels, 19 July 2006, Art 12.

²⁵ COM (2006) 401, Arts 7 and 8.

²⁶ See the Explanatory Memorandum submitted by the Home Office to the House of Lords Select Committee on the European Union for their report *op. cit.*

Data Protection

22. Particular attention should be given to whether the institutional and legal framework ensures accountability of FRONTEX on matters of data protection. There is no Data Protection framework for FRONTEX. Article 11 of Regulation 2007/2004/EC is very much an enabling provision and does not spell out constraints. These disappeared during the drafting process – the Commission’s original draft limited cooperation with EUROPOL to the sharing of strategic information, not of a personal nature. Articles 13 and 14 provide for co-operation with EUROPOL and other international organisations and merely require that arrangements for this are in accordance with the relevant provisions of the Treaty.²⁷ This must be considered in the context of proposals to ensure increased ‘interoperability’ between different European Union information systems and databases, such as the Schengen Information System II (SIS II), EURODAC and the Visa Information Service (VIS).²⁸ This is very much linked with the question of whether FRONTEX has an operational role. If it is seen merely as coordinating and managing the activities of States, this is likely to reduce the questions asked about its own access to, and use of, an increasingly sophisticated database.

QUESTION: DOES THE AG’S OPINION IN THE CASE CHALLENGING THE UK’S EXCLUSION FROM FRONTEX AFFECT THE UK’S CURRENT POSITION?

23. The UK has challenged the Council’s refusal to allow the UK to opt into the Biometric Passports²⁹ and Frontex³⁰ regulations. The dispute raises a key interpretative question concerning the Schengen Protocol. The respective mechanisms for opting into measures under Title IV of the EC Treaty, on the one hand, and Schengen measures, on the other, differ. The United Kingdom and Ireland may opt in to measures under Title IV of the EC Treaty as of right. In contrast, their opting in to measures that form part of the Schengen *acquis* must be approved by the Council unanimously, in accordance with Article 4 of the Schengen Protocol.³¹ The dispute has immediate wider relevance, for example in relation to the UK’s access to immigration aspects of the Schengen Information System and future Visa Information System. The Council and Commission argue that for the UK to access this information, it would have to opt in to the entire body of related Schengen measures.³²

24. Pursuant to Article 4, the Council in 2000 approved the UK’s opt in to various Schengen measures on illegal immigration, policing and criminal law.³³ However, where

²⁷ The first FRONTEX Annual Report states that so far the Agency prepared a contribution to Europol’s first Organised Crime Threat Assessment. *FRONTEX General Report for the year 2005*, Council document 10438/06, Brussels, 13 June 2006 which describes work with EUROPOL.

²⁸ See e.g. the European Council *Declaration on combating terrorism* 25 March 2004 and see the European Commission Communication COM (2006) 402 final, 19 July 2006 on the fight against illegal immigration., which makes extensive reference to FRONTEX. See also Levi, M and DS Wall, ‘Technologies, Security and Privacy in the post-9/11 European Information Society’ (2004) 31/2 *Journal of Law and Society*, 194.

²⁹ Council Regulation 2252/2004 of 13 December 2004 on standards for security measures and biometrics in passports and travel documents issued by Member States ((2004) OJ L 385/1).

³⁰ Council Regulation 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 ((2004) OJ L 349/1).

³¹ Art 4 of the Protocol Integrating the Schengen Acquis into the Framework of the European Union: ‘Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen *acquis*, may at any time request to take part in some or all of the provisions of this *acquis*. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.’

³² See S Peers, *Statewatch Analysis: EU Reform Treaty Analysis no 4: British and Irish opt outs from EU Justice and Home Affairs (JHA) law*, 16 August 2007, p 6.

³³ Council Decision 2000/365/EC 29 May 2000 concerning the request of the United Kingdom of Great Britain and Ireland to take part in some of the provisions of the Schengen *acquis* (OJ 200 L 131, p. 43)

measures build on the Schengen *acquis*, Article 5 of the Protocol appears at first reading to allow Ireland and the United Kingdom to participate without such approval.³⁴ On the basis of this reading the UK argued that the Schengen Council acted illegally when it refused to allow the UK to participate in the impugned regulations. It advocated a narrow conception of the scope of Article 4, being those measures that are ‘integral’ to Schengen, while Article 5 should be read broadly, encompassing all ‘Schengen-related’ measures.³⁵

25. When Advocate General Trstenjak gave his opinion³⁶ in July, he supported the Council and Commission’s interpretation, that Article 5 is subject to Article 4, and so participation in Schengen building measures is only permissible if the United Kingdom (or Ireland) has, pursuant to Article 4 of the Protocol, already sought and obtained the approval of the other member states for participating in those parts of the *acquis* on which the subsequent regulations are based. This interpretation (the ‘subordination thesis’) was also supported by the Commission, on the basis that it was necessary to preserve the integrity of the Schengen *acquis*, and avoid a ‘patchwork of cooperation and of obligations.’³⁷

26. The AG noted of the UK’s selective participation ‘Legal writers describe the United Kingdom’s position as appearing to involve a total rejection of the free movement of persons without checks at internal borders, accompanied nonetheless by a wish to cooperate in the repressive part of the legal regime governing free movement.’³⁸ He noted that Article 5, in granting a right to participate, would in effect allow the UK or Ireland ‘to slow down or even completely block the adoption of any Schengen measure.’³⁹ However, it granted a right to participate ‘narrower than at first sight’⁴⁰, allowing the UK (or Ireland) to participate in some Schengen measures which were not subject to a prior authorisation from the Council under Article 4, but only if the measures were capable of being applied ‘autonomously’.⁴¹ He opined that both regulations were not amenable to autonomous application, given the links between external border control, passport control and the abolition of internal borders.⁴²

While notionally this reasoning leaves open the space for the independent application of Article 5 should a Schengen building measure be deemed autonomous, he also explicitly referred to the subordination thesis as ‘correct.’⁴³ That the Advocate General supports the view of the Council and Commission is of no immediate relevance because the European Court of Justice is not bound to follow this opinion.

QUESTION: HOW THE AGENCY’S ROLE SHOULD DEVELOP IN THE FUTURE

³⁴ Article 5 of the Protocol Integrating the Schengen Acquis into the Framework of the European Union provides, insofar as relevant, as follows:

‘1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties...where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part, the authorisation referred to in Article [11] of the Treaty establishing the European Community or Article [40] of the Treaty on European Union shall be deemed to have been granted to the Members States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question..’

³⁵ Opinion, para 44.

³⁶ Case C-77/05 *United Kingdom v Council* (‘Border Agency Regulation’) and Case C-137/05 *United Kingdom v Council* (‘Passports Regulation’), Opinion 10 July 2007.

³⁷ Opinion, para 71.

³⁸ Opinion, para 94

³⁹ Opinion, para 96

⁴⁰ Opinion, para 99.

⁴¹ Opinion, paras 97 and 101.

⁴² Opinion, paras 102 – 105.

⁴³ Opinion, para 105.

27. In ILPA's view, FRONTEX itself should be governed by a clause similar to Article 9 of Regulation 863/2007, providing that while exercising its powers and performing its task, FRONTEX shall comply with community law and the national law of the host member State.

28. ILPA also favours the amendment of the list of obligations applicable to FRONTEX and RABITs, to include those which stem from public international law. This category would include both customary principles, and treaty-based obligations for which there is a large consensus among member states. Many public international law principles anyway bind the EC/ EU and its institutions⁴⁴. An express provision would avoid any doubt as to the applicability to the EC/ EU of international obligations binding upon the Member States.

29. The following principles of public international law in particular ought to bind FRONTEX. In each case, they are binding on all or most member states, and there has been at least some recognition given to the principles at the EC/ EU level.

30. *Assistance in cases of distress.* It is an established customary law principle that a state must ensure that both its own vessels and those under its flag should give assistance to this SHIPS ?? in distress at sea. The obligation is codified in Article 98 of the UN Convention on the Law of the Sea 1982 (UNCLOS), to which the European Community and all 27 Member States are party and in Regulation 10(a) of Chapter V of the International Convention for the Safety of Life at Sea 1974 (SOLAS), to which all 27 member states are party.

31. *Search and rescue.* The Search and Rescue Convention of 1979 (SAR) requires participating coastal states to maintain search and rescue facilities, engage in search and rescue operations, and co-operate with other states in doing both. SAR has been ratified by 24 EU member states, and the three exceptions (Austria, Czech Republic and Slovakia) are landlocked states. While the EC/ EU is not itself a party to the SAR Convention, the Council of Ministers adopted a recommendation in 1983 calling on all member states to ratify it, including because that would improve safety in the Community's coastal area⁴⁵.

32. *Freedom of the high seas.* The customary law of the sea recognises the freedom of the high seas for all vessels flying a state flag. This principle is codified in Article 87 of UNCLOS (above). In the immigration context, the Protocol against the Smuggling of Migrants by Land, Sea and Air of 2000 must also be taken into account. This allows for government vessels to intercept other vessels which they have reasonable grounds to suspect are engaged in the smuggling of migrants by sea. It is however a pre-condition to interception that the vessel either has no effective flag, or that the permission of the flag state for interception has been obtained. The Smuggling Protocol has been ratified by 22 member states. (The exceptions are Austria, the Czech Republic, Greece, Ireland and Luxembourg.) It has also been ratified by the EC, on the basis of its competence over external borders⁴⁶.

33. *Non-refoulement:* It is generally agreed that Article 3 of the European Convention on Human Rights prohibits action at sea or in another state's territory which risk the return of an individual to a place where they are at risk of torture or inhuman or degrading treatment. There is also support for the view that, under the Geneva Convention on the Status of Refugees, a state must take responsibility for the asylum application where (i) a vessel of that state has intercepted or rescued an individual who wishes to seek asylum, and (ii) the

⁴⁴ See e.g. the statements in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para 9 and Case C-162/96 *Racke* [1998] ECR I-3655, para 45.

⁴⁵ Council Recommendation of 25 July 1983, [1983] OJ 237/34.

⁴⁶ Council Decision 2006/67/EC [2006] OJ L 262/34.

alternative(s) risk direct or indirect return to the state of alleged persecution⁴⁷. All Member States are bound by Article 3 ECHR and the Geneva Convention. These have also been recognised at the EC/ EU level: the principle in Article 3 ECHR is covered by the general statement in Article 6(2) EU, and is recognised specifically in Article 4 of the Charter of Fundamental Rights, while the Geneva Convention is referred to expressly in Article 63(1) EC, and the right to seek asylum is set out in Article 18 of the Charter of Fundamental Rights.

34. In ILPA's view, it is desirable that these public international law principles be clearly binding on FRONTEX. If that were done, it would ensure that the principles governed both its own activities and also those of member states when participating in FRONTEX operations.

35. The mandate of FRONTEX should be clarified to place the correct application of EU law, in particular the Borders Code, at the heart. Simply ensuring that the issue of appeal forms and information to every person refused admission at the external border as required by the Borders Code would be an excellent addition to the rule of law in the EU to which FRONTEX should address itself. Co-ordinating the full and effective application of the Member States' obligation of *non-refoulement* in respect of refugees is another task that FRONTEX ought to undertake as a matter of priority. Member States remain responsible for the correct application of EU and international law in control of the EU's external frontiers. FRONTEX should have a role in ensuring that Member States correctly carry out those duties and should refer to the Commission any breaches that might found the Commission's commencing enforcement proceedings against the failing Member State. The legitimacy of the EU's external border depends on the proper implementation by the relevant Member States of their international human rights obligations. FRONTEX, as the EU's Agency responsible for co-ordinating these activities must place these obligations at the heart of its activities.

Immigration Law Practitioners Association

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⁴⁷ On both the ECHR and the Refugee Convention, see European Commission, Study on the International Law Instruments in relation to Illegal Immigration by Sea, SEC (2007) 691, Annex, section 4.1.2.