UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council 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 (FRONTEX), COM(2010)61 final

1. Introduction

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter "Frontex" or "the Agency") was established in October 2004 by Council Regulation (EC) 2007/2004 (hereinafter "Frontex Regulation").[1] On 24 February 2010, the European Commission adopted a proposal to amend that Council Regulation (hereinafter the "Commission proposal").[2]

Frontex's main tasks are to coordinate cooperation and to assist Member States in the management of their external borders.[3] Under the Frontex Regulation at present, these tasks do not explicitly include the protection of fundamental rights including the right to asylum. However, the mandated activities of Frontex clearly impact on persons of concern to UNHCR, including asylum-seekers, refugees and persons otherwise in need of international protection.

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.[4] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, [5] whereas Article 35 of the Convention Relating to the Status of Refugees (hereinafter

---

[1] European Union: Council of the European Union, *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*, 26 October 2004, No 2007/2004, available at: http://www.frontex.europa.eu/gfx/frontex/files/frontex_regulation_en.pdf.

[2] European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 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 (FRONTEX)*, COM (2010) 61 final, 24 February 2010, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0061:FIN:EN:PDF.

[3] Frontex Regulation, Op. Cit., Article 2.

[4] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[5] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a), available at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

"1951 Refugee Convention")[6] and Article II of the 1967 Protocol relating to the Status of Refugees (hereinafter "1967 Protocol)[7] oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Refugee Convention and 1967 Protocol. UNHCR's supervisory responsibility extends to each EU Member State, all of whom are States Parties to these instruments. UNHCR's supervisory responsibility is also reflected in European Union law, including pursuant to Article 78 (1) of the Treaty of the Functioning of the European Union,[8] which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Refugee Convention. This role is reaffirmed in Declaration 17 to the Treaty of Amsterdam, which provides that "*consultations shall be established with the United Nations High Commissioner for Refugees…on matters relating to asylum policy*."[9]

In addition to refugees as defined by the 1951 Refugee Convention, persons of concern to UNHCR include people who are entitled to complementary or subsidiary forms of protection under other international and regional treaties. Asylum-seekers who have been denied access to an asylum procedure, or who have requested protection but whose claims have not been determined in a fair and effective asylum procedure, are included among UNHCR's persons of concern, as they may yet be found to need international protection once assessment of their claims is concluded.

Given the relevance of Frontex's work to UNHCR and its persons of concern, and Frontex's interest in benefiting from UNHCR's authority and expertise on international protection matters, the two organisations formally established a working arrangement in 2008 through an exchange of letters.[10] This was based on Article 13 of the Frontex Regulation providing that Frontex "*may cooperate with (…) the international organisations competent in matters covered by this Regulation in the framework of working arrangements* (…)."[11] UNHCR has consistently called for European asylum border and migration management policies and procedures to incorporate safeguards to guarantee that persons seeking international protection are identified and given access to EU territory, as well as to fair and effective asylum procedures. The working arrangement between UNHCR and Frontex is a positive step in that direction. Although Frontex does not have a protection mandate, its activities should nonetheless be carried

[6] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter "1951 Refugee Convention"), United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html.
[7] UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967 (hereinafter "1967 Protocol"), United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html.
[8] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF.
[9] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX :11997D/AFI/DCL/17:EN:HTML.
[10] Signed on 18 June 2008.
[11] Frontex Regulation, Op. Cit.

out consistently with the EU *acquis communautaire*, including its measures on asylum.[12] From this perspective, the working arrangement between Frontex and UNHCR aims to contribute to the establishment of a protection-sensitive EU integrated border management system, by providing for regular consultations, exchange of information, expertise and experience, and inputs into border officials' training, particularly on international human rights and refugee law. UNHCR therefore has a direct interest in and competence to advise Member States and EU institutions in relation to EU proposals that have an impact on international protection, including those related to Frontex.

As stated in its explanatory memorandum, the Commission proposal aims to reinforce Frontex through revision of its legal framework, and to address identified shortcomings specifically related to the Agency's operational and coordination capacity. In UNHCR's view, there is a need to ensure full respect of fundamental rights, including the right to seek asylum, in the context of Frontex activities. UNHCR believes that the provision to Frontex of continuous support, advice and guidance from expert organizations could help achieve this objective. UNHCR would thus advocate for changes in the Regulation's provisions which define the conditions for cooperation of Frontex with relevant stakeholders on matters including asylum and fundamental rights, to extend scope for such cooperation beyond capacity-building for border personnel, to encompass 'risk analysis' and other operational aspects of Frontex's work.

UNHCR acknowledges the many positive references to fundamental rights and international protection in the Commission's proposal, and encourages the Council of the European Union and European Parliament to maintain these. At the same time UNHCR would like to offer some further observations on the Commission proposal, which are grouped under three main headings, namely: (1) reinforcing Frontex's legal framework to ensure the full respect of fundamental rights; (2) widening the work of Frontex on 'risk analysis'; and (3) enhancing the operational capacity of Frontex to support Member States, referring to the key objectives identified by the Commission proposal.[13] Two further sections address provisions concerning cooperation with third countries and return operations respectively. References to articles refer to those in the Commission proposal, unless otherwise stated.

[12] In addition to the many political declarations of the European Council, the European Union's commitment to the 1951 Refugee Convention and the principles of international refugee protection are affirmed in the Amsterdam Treaty which obliged Member States to adopt a set of legal measures on asylum that would harmonise their divergent national laws, and stated that such measures must be "in accordance with the Geneva Convention of 1951 and other relevant Treaties". The Charter of Fundamental Rights, which has become European primary law following the entrance into force of the Lisbon Treaty, further states that "the right to asylum shall be guaranteed with due respect for the rules of the (1951) Convention (Art. 18), and reaffirms the principle of *non-refoulement* (Art. 19). The principles established on the basis of the 1951 Refugee Convention thus form central elements of the *acquis communautaire* on asylum.

[13] European Commission, *Commission responds to calls for stronger EU border management agency*, Press release of 24 February 2010, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/184&type=HTML&aged=0&language=EN&guiLanguage=en.

2. Reinforcing the legal framework to ensure full respect of fundamental rights during Frontex activities (Article 1, paragraph 1)[14]

In addition to the Frontex Regulation itself, a number of EU texts comprise the legal framework governing Frontex. These include the Schengen Borders Code,[15] Regulation (EC) No 863/2007 establishing a Mechanism for the Creation of Rapid Border Intervention Teams (hereinafter "Rabit Regulation"),[16] and the Council Decision containing Guidelines on Surveillance and Interception at Sea (hereinafter the "Sea Guidelines").[17] All of these instruments make explicit reference to obligations of the European Union and the Member States obligations as regards international protection, *non-refoulement*, and fundamental rights as principles that should guide action in the field of border management,[18] including when implementing EU border management policy under the aegis of Frontex. In addition, Article 51 of the Charter on Fundamental Rights provides that institutions and bodies of the European Union should "respect the rights, observe the principles and promote the application" of the rights included in the Charter.[19] Frontex is therefore also bound by the rights included in the Charter on Fundamental Rights, including its Article 18 on the right to asylum and Article 19 reiterating the principle of *non-refoulement*.

The European Commission seeks to clarify this important principle in its proposed amendments to Frontex Regulation, by adding that that the Agency must act in accordance with international protection obligations and in full respect of fundamental rights.[20]

UNHCR welcomes this proposal and confirmation of the commitment to protection obligations. However, the main challenge remains their implementation. Respect for fundamental rights, and in particular obligations as regards international protection and *non-refoulement*, can only be ensured if operating procedures and plans reflect those

[14] Commission proposal, Op.cit., Article 1, paragraph 1, proposing to replace Article 1, paragraph 2 of the Frontex Regulation.
[15] European Union, *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)*, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF.
[16] 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 guest officers*, available at: http://www.frontex.europa.eu/gfx/frontex/files/rabit_regulation-863-2007.pdf.
[17] European Union, *Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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*, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:111:0020:0026:EN:PDF.
[18] See Schengen Border Code, Op. Cit., Recital 20, Article 3(b) and article 13(1); Rabit Regulation Recital 17 and Article 2; Sea Guidelines Recital 3 and Recital 10.
[19] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at : http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[20] Commission proposal, Op. Cit., Article 1, paragraph 1.

obligations in practical, clear guidance to border personnel, including those at land, sea and air borders, as well as sea captains and crews. Border personnel should be given the means, in terms of knowledge and skills, to identify and respond effectively to people seeking asylum, in recognition of the fact that allowing people into Europe for the purpose of seeking protection is part of their responsibilities.

UNHCR works closely with Member States, Frontex and other stakeholders, primarily through capacity-building initiatives, including at national level and regionally through the Rabit pools; and through a Liaison Office in Warsaw, tasked to work with Frontex and help ensure that the Agency receives all the advice and support it needs from UNHCR to contribute to building protection-sensitive border management systems. UNHCR is ready to expand its cooperation with Frontex, by helping to ensure that joint operations respect the human rights and refugee protection principles that are part of the EU border management legal framework. UNHCR could provide such further support through input to operational plans, analysis or ad hoc guidelines, where these would help personnel dealing with asylum-seekers, or in other advisory, monitoring or related capacities.

The legal framework for Frontex's activities has been complemented by the Sea Guidelines. UNHCR welcomes the fact that these Guidelines restate Member States' *non-refoulement* obligations, and define specific standards to ensure disembarkation in a safe place of persons intercepted or rescued at sea. Although the Council Decision is not a legally binding text, it does represent the most detailed instrument adopted thus far at EU level on the disembarkation question, and UNHCR welcomes its positive references to important international protection and Law of the Sea principles. UNHCR notes that the European Parliament is challenging the validity of the Sea Guidelines before the European Court of Justice, whilst inviting the Court to preserve the effects of the measure until a new legislative act has been adopted.[21] UNHCR understands that the European Parliament is contesting the procedure for the adoption of the Sea Guidelines, but not their content. UNHCR notes that during debate on the Sea Guidelines, several Members of European Parliament supported the protection guarantees contained in the Sea Guidelines while deploring their inclusion in a non legally-binding Annex; and called for these provisions to be included in the revision of Frontex Regulation. UNHCR considers that inserting a reference to the standards set out in the Sea Guidelines in the Frontex Regulation would contribute to bringing legal clarity and certainty to the rules applicable to Frontex-coordinated sea operations regarding interception, rescue at sea and disembarkation.

It is also foreseen that Frontex develops a Code of Conduct to guide the removal of illegally present third-country nationals.[22] UNHCR welcomes this proposal, but calls for

[21] Official Journal of the European Union, C246/34, 11 September 2010, Action brought on 14 July 2010, European Parliament v Council of the European Union (Case C-355/10), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:246:0034:0035:EN:PDF.

[22] Commission proposal, Op. Cit., Article 1, paragraph 12, proposing to replace Article 9 of the Frontex Regulation.

a Code of Conduct to be developed and applied to all joint operations, and not merely for returns.

Recommendation: UNHCR welcomes the Commission's efforts better to define the legal framework within which Frontex is mandated to operate, and supports the Commission's proposal to introduce in Article 1 (2) of the Frontex Regulation a clear requirement for Frontex to comply with obligations related to access to international protection and fundamental rights. UNHCR would support a further reference to the need *inter alia* for practical guidelines on the identification and referral of persons who may need international protection, which could be developed in cooperation with expert organizations.

UNHCR suggests that when recalling international protection obligations in Article 1(2) of the Frontex Regulation, reference is also made to the standards contained in the Sea Guidelines in order to bring further legal clarity to the principles of *non-refoulement* in the context of Frontex-coordinated sea operations, and to rules on interception and rescue at sea and disembarkation.

UNHCR welcomes the introduction of a requirement on Frontex to develop a Code of Conduct to apply to operations concerning the removal of illegally- present third country nationals. UNHCR however recommends that a Code of Conduct and independent monitoring mechanisms be developed to apply to Frontex personnel and pooled border guards involved in <u>all</u> joint operations and pilot projects.

3. Risk Analysis (Article 1, paragraph 6)[23]

According to the Frontex Regulation, the development of "risk analysis" is a core task of Frontex.[24] "Risk analysis" is the term used by Frontex and national authorities to refer to information on migratory flows. As a matter of principle, however, UNHCR wishes to note that people seeking protection do not necessarily represent a "risk" or threat to the European Union. Rather, they are seeking protection from threats including persecution or serious harm. Subject to this, it is noted that in Frontex's terminology, "risk analysis" on the one hand provides a basis for the operational cooperation in joint operations; and on the other hand, supports Member States in their own border management activities at the Union's external frontiers. The Commission proposes to widen the scope of Frontex's work related to risk analysis to encompass the evaluation of the capacity of Member States to face threats and pressure at external borders.[25] An obligation for Member States to provide the necessary information regarding threats at the external borders is introduced as a corollary.[26]

[23] Commission proposal, Op. Cit., Article 1, paragraph 6, proposing to replace Article 4 of the Frontex Regulation.
[24] Frontex Regulation, Op. Cit., Article 2 (1)(c).
[25] Commission proposal, Op. Cit., Article 1 paragraph 2(a)(i)(c).
[26] Commission proposal, Op. Cit., Article 1 paragraph 6.

Risk analysis, research and follow-up research activities carried out by Frontex by virtue of the Frontex Regulation are important priorities for the Member States, which are seeking information to help develop responses to irregular migratory movements and external border challenges. As this work can be sensitive, the subject-matter, initial data and outcomes of such analysis and research are not always publicly available. Nevertheless, UNHCR believes that the work of Frontex in this domain would benefit from further contributions from expert organizations. Many non-governmental and international organizations possess impressive analytical and information-gathering resources and abilities, including on migratory flows and on the situations in countries and regions of origin and transit. These actors could contribute to the quality and accuracy of Frontex "risk analysis", and consequently to the effectiveness of operational activity, including as regards respect for fundamental rights.

Recommendation: UNHCR recommends that a specific mention of contributions from expert organizations be inserted into the new Article 4 of the Frontex Regulation. UNHCR also recommends that Article 4 introduce an obligation for Frontex to share with concerned expert organizations the outcomes of analyses and research to which they have contributed.

4. Enhancing the operational capacity of FRONTEX to support Member States

Coordination of operational cooperation between Member States in managing their external borders is named first among Frontex's tasks, in Articles 2 (1) (a) and 3 of the Frontex Regulation. Frontex has to date performed its coordinating role for a significant number of joint operations. Nevertheless, in its evaluation of Frontex,[27] the European Commission has underlined that the lack of adequate resources and insufficient coordination among national authorities have limited operational cooperation through Frontex. This finding has also been confirmed by independent actors including in the External Evaluation Report of the independent consultancy COWI.[28]

Through the proposed amendments referred to below, the Commission aims to enhance Frontex's capabilities and make it more responsive to challenges at the EU's external borders. UNHCR acknowledges this objective, but considers that the reinforcement of Frontex and resulting improvements in coordination of border management should not hinder observance of the fundamental right to seek and enjoy asylum in the EU. Movements towards the EU are increasingly mixed in character, bringing together in the same flows people in need of international protection as well as those travelling for other reasons. In this context, UNHCR highlights the need for border management strategies to

[27] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on the Evaluation and Future Development of the Frontex Agency, COM(2008) 67 final, 13 February 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0067:FIN:EN:PDF.

[28] COWI (Consultancy within Engineering, Environmental Science and Economics), *Frontex External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Final Report*, January 2009, available at: http://www.frontex.europa.eu/specific_documents/other/.

be "protection-sensitive", and incorporate safeguards to ensure that people seeking international protection will be referred to procedures in which their claims can effectively be heard and adjudicated. Similarly, UNHCR emphasises that the role and responsibilities of Frontex must be designed and implemented in full consistency with international protection obligations which are integral to the EU *acquis*.

UNHCR welcomes the many positive references to refugee law, particularly to the *non-refoulement* principle, throughout the revision proposal, but would wish to make the following additional recommendations:

4.1 Revised mechanisms for compulsory contributions of equipment and human resources from Member States (Article 1 paragraphs 4, 5 and 8)[29]

At present, Frontex can only use equipment or "assets" which are made available, on a voluntary basis, by the Member States.[30] The Commission proposal foresees mechanisms for Frontex to benefit from compulsory contributions by Member States of equipment on a temporary basis, combined with the permanent acquisition or leasing by Frontex of its own assets.[31] The Commission also suggests a new system to ensure the availability of more qualified human resources for joint operations, entrusting Frontex with the possibility to determine the profiles and the overall number of border guards that Member States are to make available for the Frontex Joint Support Teams (FJST).[32] With Frontex as a potentially stronger and more operational Agency, UNHCR considers it would be important to ensure that it has capacity and expertise to undertake activities that require knowledge of asylum obligations. For this purpose, selected Frontex personnel could be given specialised training on international protection and related issues, to enable them to develop particular expertise on the subject to assist and support border personnel taking part in Frontex-coordinated operations. It would not be the task of such specialist Frontex officers, nor any border personnel taking part in operations, to deal with asylum claims or determine international protection needs, which remains exclusively within the responsibility and powers of national asylum authorities. However, such expertise could assist in the planning and execution of Frontex activities in more protection-sensitive ways.

[29] Commission proposal, Op. Cit., Article 1, paragraph 4 repalcing Article 3 of the Frontex Regulation; Article 1 paragraph 5 inserting new Articles 3a and 3b to the Frontex Regulation ; Article 1, paragraph 8 replacing Article 7 of the Frontex Regulation.
[30] Frontex Regulation, Op. Cit., Article 7.
[31] Commission proposal, Op.Cit., Article 1, paragraph 8.
[32] Commission proposal, Op. Cit., Article 1, paragraph 5, proposing the insertion of a new Article 3b in the Frontex Regulation.

Recommendation: UNHCR recommends the establishment within Frontex of an "expert" unit specially trained on asylum and international protection, which could be deployed to joint operations to assist with the identification and referral to responsible asylum authorities of people seeking of international protection. Alternatively, this unit could also be staffed through the secondment of national experts on a semi-permanent basis, or through the establishment of a roster of experts.

As a further alternative option, an obligation could also be included under Article 3b (1) for the Management Board of Frontex to call, where appropriate, for personnel with special expertise on asylum when determining the profiles and numbers of border guards that Member States are to make available for the FJST. It would be understood that such personnel would not be responsible for dealing with asylum claims, but for referral of asylum-seekers to competent authorities.

4.2 Training of border guards on fundamental rights (Article 1 paragraphs 3, 5 and 7)[33]

The development of common curricula and the provision of training to national border guards is another key task of Frontex.[34] Work towards common standards and content for training seems essential for progress towards harmonized practices along the European Union's external borders. In its proposal, the European Commission places a great deal of emphasis on the fact that Frontex's capacity-building activities - encompassing the two components of developing training materials and delivering effective training - should also touch upon fundamental rights and access to international protection.[35] It also creates an obligation for Member States to introduce into the training of their national border guards the Common Core Curricula developed by Frontex.[36] Additionally, significant elements in the Commission proposal include a requirement that all border guards as well as Frontex staff must receive, prior to their deployment to joint operations, training in relevant EU and international law, including fundamental rights and access to international protection;[37] and an obligation for national border guards who are part of the Frontex pooled resources to perform their duties in full respect of fundamental rights and human dignity.[38]

UNHCR shares the view that work towards common standards should aim at establishing EU entry systems that are fully compliant with Member States' international and EU protection obligations. UNHCR therefore welcomes the positive references to fundamental rights as regards capacity-building initiatives and the effective discharge of border guards' duties in the Commission proposal. The Executive Committee of UNHCR has emphasised the need for specialised training, including on responding to persons

[33] Commission proposal, Op. cit., Article 1, paragraph 3, amending Article 2 of the Frontex Regulation; Article 1, paragraph 5, inserting a new Article 3b ; and Article 1, paragraph 7, amending Article 5 of the Frontex Regulation.
[34] Frontex Regulation , Op. Cit., Article 2 paragraph 1(b).
[35] Commission proposal, Op. Cit., Article 1, paragraph 7.
[36] Commission proposal, Op. Cit., Article 1, paragraph 7.
[37] Commission proposal, Op. Cit., Article 1, paragraph 3 (b).
[38] Commission proposal, Op. Cit., Article 1, paragraph 5.

asking for asylum, to be incorporated into relevant curricula.[39] Provision of training materials for officials involved in interception was also highlighted as a priority in UNHCR's "Agenda for Protection", which was endorsed by the UN General Assembly in 2002.[40]

UNHCR has made capacity-building of border officials a main area of its cooperation with Frontex, engaging in particular in the delivery of training for the pooled resources personnel who could potentially be mobilized for emergency response (the Rabit teams). UNHCR has also contributed to the update of the Common Core Curriculum for border personnel, particularly as regards refugee law and international protection. It has also provided input to the content of the Common mid-level Curriculum. Through these initiatives UNHCR has sought to add a protection perspective to the work of border guards, although it remains difficult to evaluate the impact of this effort, as information on operational activities at the borders, especially at sea, remains limited.

UNHCR is prepared to strengthen its cooperation with Frontex on capacity-building. UNHCR can provide advice on the structure and content of training programmes, training techniques, development of resource materials, and other issues. While its expertise in training on international refugee law and protection is well-known, UNHCR could assist with input extending beyond this area, potentially with regard to procedural issues, the identification and handling of vulnerable people and methods for identifying those seeking international protection, to name but a few. UNHCR could also identify and bring in other competent actors with experience and expert knowledge.

Recommendation: UNHCR supports the inclusion under Article 2 of the Frontex Regulation of a new paragraph 1(a) referring to "*fundamental rights and access to international protection*"[41] as training subjects for all personnel involved in operational activities coordinated by Frontex. It recommends that a reference to "*expert organizations, including on fundamental rights and international protection*" be made under Article 5 referring to potential partners of Frontex in updating and developing common core curricula and other training materials.

UNHCR also welcomes the proposed obligation for the members of the Frontex Joint Support Teams to discharge their duties "*in full respect of fundamental rights and human dignity*", introduced in new Article 3b (4). However, it is also suggested that the right to seek asylum be specifically mentioned as one of the fundamental rights which should fully be respected. The first sentence of the proposed new Article 3b, paragraph 4,[42] could read as follows: "*in full respect of fundamental rights, **including the right to seek asylum,** and human dignity*."

[39] UNHCR Executive Committee, *Conclusion on Protection Safeguards in Interception Measures*, 10 October 2003, No. 97 (LIV) - 2003, point (a) (viii), available at: http://www.unhcr.org/refworld/docid/3f93b2894.html.
[40] UN High Commissioner for Refugees, *Agenda for Protection*, October 2003, Third edition, available at: http://www.unhcr.org/refworld/docid/4714a1bf2.html.
[41] Commission proposal, Op. Cit., Article 1, paragraph 3(c).
[42] Commission proposal, Op. Cit., Article 1, paragraph 5.

4.3 A co-leading role for Frontex in the implementation of joint operations (Article 1 paragraph 4)[43]

The Commission proposal suggests that Frontex would be able to co-lead joint operations with Member States, to ensure that those are more efficiently coordinated, implemented and evaluated. An obligation is introduced to draw up an operational plan for all operations, to be agreed upon by Frontex and Member States prior to their commencement, in which rules of engagement and evaluation and incident reporting mechanisms are clearly defined.[44] Frontex would also be given a possibility to terminate operations if the conditions are no longer fulfilled.[45]

UNHCR generally welcomes these provisions in order to ensure that all joint operations are effectively prepared and coordinated, thus increasing the prospects of respect in practice for the fundamental rights of persons apprehended during joint operations. However, UNHCR considers that the violation of fundamental rights and international protection obligations should be one of the conditions based on which Frontex could terminate joint operations. Such violations should also be included in matters to be addressed through the incident reporting mechanism. Moreover, while introducing a limit of 60 days following the end of a joint operation for submitting an evaluation report, the Commission proposal implies that the evaluation of joint operations and pilot projects remains with Frontex.[46] UNHCR believes that the revised Regulation should make it mandatory that Frontex-coordinated operations are independently observed, including potentially by bodies or organizations with which Frontex has general or specific cooperation arrangements.

UNHCR could contribute to such evaluations, based on its authority and experience in border monitoring as it impacts on asylum-seekers. Monitoring of activities affecting people who may require international protection falls within UNHCR's supervisory responsibility under Article 35 of the 1951 Refugee Convention. UNHCR could also assist in identifying and supervising appropriate other partners. UNHCR already has in place well-functioning border monitoring agreements with several EU countries in Central Europe, the terms of reference of which may be of relevance in considering the parameters of potential cooperation with Frontex.[47]

---

[43] Commission proposal, Op. Cit., Article 1, paragraph 4, replacing Article 3 of the Frontex Regulation; and Article 1, paragraph 5, inserting new Article 3a in the Frontex Regulation.
[44] Commission proposal, Op. Cit., Article 1, paragraph 5.
[45] Commission proposal, Op. Cit., Article 1, paragraph 4.
[46] Commission proposal, Op. Cit., Article 1, paragraph 4 replacing Article 3(4) of the Frontex Regulation.
[47] Tripartite agreement in Bulgaria, available at:
http://www.unhcr-budapest.org/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_REG/Tripartite_MoU-FinalSigned14.04.2010ENG.pdf;
Tripartite agreement in Hungary, available at:
http://www.unhcr-budapest.org/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_REG/HUNTripartiteENG.pdf;
Tripartite agreement in Poland, available at:
http://www.unhcr-budapest.org/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_REG/POL_MoU_ENG.pdf;
Tripartite agreement in Slovenia, available at:

UNHCR strongly believes that effective access to protection depends significantly on the ability of border personnel to identify persons seeking international protection, and to ensure that such persons are referred to the competent national asylum authorities. The operational plan for each joint operation should indicate clear guidance and appropriate mechanisms for the identification and referral of persons who may be in need of international protection, with particular attention those belonging to particular vulnerable groups.

Recommendation: UNHCR recommends the inclusion of "*Violations of fundamental rights and international protection obligations*" amongst the conditions upon which Frontex may terminate joint operations and pilot projects under Article 3 (1).

UNHCR considers that the revised Frontex Regulation should clearly state that "*violations of fundamental rights and international protection obligations*" are to be reported on in the incident reporting mechanism. This reporting could be carried out by the specially-trained personnel in expert units referred to in section 4.1 above, with the support as appropriate of expert organizations participating in the execution of the joint operation in an advisory capacity.

UNHCR recommends that Article 3 (4) of the revised Frontex Regulation makes it mandatory that fundamental rights and asylum aspects of Frontex-coordinated joint operations are independently monitored and evaluated by expert bodies and organizations based on existing cooperation agreements or on ad hoc arrangements made prior to the commencement of the joint operation.

UNHCR recommends inclusion of a new indent in the proposed Article 3a (1): "***(j) specific measures as needed to ensure respect for fundamental rights and international protection, also developed in cooperation with expert organisations***".

http://www.unhcr-budapest.org/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_REG/SVNTripartiteEng.pdf;
Tripartite agreement in Romania, available at:
http://www.unhcr-budapest.org/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_REG/ROMTripartiteENG.pdf.

5. Empowering Frontex vis-à-vis third countries (Article 1, paragraph 16)[48]

The Commission proposal also aims to ensure better cooperation between Frontex and third countries on border management, which is part of the so-called "four-tier access control model", one of the elements of the European Integrated Border Management system.[49]

UNHCR supports engagement between EU institutions and third countries, in particular where it can lead to positive improvements in respect for fundamental rights, including asylum and international protection; and where it is undertaken in full co-ownership and is directed at addressing real needs in the third country. Engagement with third countries must remain complementary to, and not be seen as a substitute for, provision of protection in the Member States. Such cooperation, including where Frontex is involved, cannot justify increased barriers to access to the EU, or lower standards of protection in the Union.

UNHCR welcomes the proposal in the proposed Article 14 (4) to encourage Frontex's cooperation with international organizations. However, to enable Frontex to take advantage of the skills of a wider set of organizations, the wording should be broadened. Article 13 would also appear to be the more appropriate location for this provision.

Proposed amendments include granting Frontex a possibility to finance (also via EU funding) and implement technical assistance projects in third countries. Based on the Commission proposal, Frontex may also deploy liaison officers to contribute to the prevention of and fight against "illegal" immigration and the return of "illegal" migrants, but only to those third countries in which border management practices respect "minimum human rights standards."[50] UNHCR would suggest a strengthening of the wording to omit "minimum" standards, and refer more broadly to fundamental rights and international protection obligations.

UNHCR welcomes the introduction in Article 14 (2) of the requirement for respect for human rights by the third country concerned, as a prerequisite for deployment of Frontex liaison officers, and the definition of the tasks of liaison officers under new Article 14 (3). UNHCR would suggest strengthening these references by limiting deployment of liaison officers to third countries which respect fundamental rights and international protection obligations and by making training for liaison officers on fundamental rights and international protection compulsory.

---

[48] Commission proposal, Op. Cit., Article 1, paragraph 16 replacing Article 14 of the Frontex Regulation.

[49] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Preparing The Next Steps In Border Management In The European Union*, COM(2008) 69 final, 13 February 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0069:FIN:EN:PDF.

[50] Commission proposal, Op. Cit., Article 1, paragraph 16, on a new Article 14(2) to the Frontex Regulation.

Recommendation: UNHCR welcomes the Commission proposal in Article 14 (4) of the Frontex Regulation[51] which foresees a possibility for Frontex to invite, in addition to representatives of third countries, EU agencies and international organizations to participate in its risk analysis, joint operations and capacity-building activities. UNHCR suggests that a specific reference to "expert organizations" is made as well.

Regarding the deployment of Frontex Liaison Officers, UNHCR recommends that the words "*minimum human rights standards*" in the revised Article 14 (2) be replaced by "*fundamental rights and international protection obligations*". Similarly, when defining the tasks of liaison officers in Article 14 (3), the words "*and international protection obligations*" should be added after "fundamental rights". Further, UNHCR would recommend inclusion in the revised Regulation of a provision making training on fundamental rights and international refugee law compulsory for liaison officers prior to their deployment to third countries.

UNHCR also believes that it would be more appropriate to move the last two sentences of paragraph 4 from Article 14 to the new Article 13, which is specifically devoted to cooperation with EU agencies and bodies and international organizations.

6. A coordinating role for Frontex in implementing joint return operations (Article 1, paragraph 12)[52]

The Commission proposal would empower Frontex to coordinate Member States' cooperation in returning third-country nationals illegally present in the EU, and to assist them through financing or co-financing joint return operations with grants from its own budget, or from the EU Return Fund.

UNHCR recognizes the right of EU Member States to return people who, after a fair, full and effective examination of their claim, are found not to be in need of international protection. UNHCR calls for Frontex involvement in return operations to be made fully consistent with rules in the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter "Return Directive")[53], including its Article 1 stating that return of illegally staying third country nationals should be in accordance with refugee protection and human rights obligations and Article 5 on the respect for the principle of *non-refoulement*. UNHCR recalls that returns are most likely to be sustainable if they are voluntary; and if they are implemented in a way which provides prospects for effective reintegration. Article 7 of the Return Directive thus provides for an appropriate period of time to be granted in order to promote voluntary compliance with removal orders.

[51] Commission proposal, Op. Cit., Article 1, paragraph 16.
[52] Commission proposal, Op. Cit., Article 1, paragraph 12 replacing article 9 of the Frontex Regulation.
[53] European Union, *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*, 16 December 2008, 2008/115/EC, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF.

It is also foreseen in Article 9 that Frontex develops a Code of Conduct to guide the removal of illegally present third-country nationals. UNHCR welcomes this proposal, but calls for a Code of Conduct to be developed and applied to all joint operations, and not merely for returns (see section 2 above).

In addition, UNHCR is concerned by the role which has been given to interpreters in some joint operations, notably in assessing nationalities of apprehended persons. UNHCR recalls that assessment of nationality, like the assessment of protection needs, can only be carried out by qualified and trained personnel which, in the case of asylum-seekers, must be working in the context of asylum processes with the requisite procedural safeguards. UNHCR therefore considers that the tasks of interpreters involved in joint operations should be strictly limited.

The establishment of an independent system for monitoring of enforced return operations, including through a reporting mechanism, is another important aspect of the Commission's proposal.[54] UNHCR suggests that the monitoring system could be further strengthened by making its report publicly available.

Recommendation: UNHCR recommends that the strengthened involvement of Frontex in coordinating return operations be implemented consistently with principles set out under the Returns Directive, in particular in promoting voluntary compliance with removal orders over enforced returns.

UNHCR welcomes the introduction of a requirement for Frontex to develop a Code of Conduct for the removal of illegally present third country nationals, and the establishment of an independent monitoring system for enforced returns. However, UNHCR recommends that a Code of Conduct for Frontex personnel and pooled border guards as well as independent monitoring mechanisms be developed and applied more broadly to <u>all</u> joint operations and pilot projects (see recommendations under section 2, above).

Frontex should also be required to clarify the role and powers of interpreters utilised in the context of joint operations. A code of conduct to govern interpreters' activities should be foreseen.

UNHCR believes that the annual reporting referred to in Article 9 (3) should be made publicly available.

[54] Commission proposal, Op. Cit., Article 1, paragraph 12, replacing Article 9 of the Frontex Regulation.

7. Conclusion

UNHCR acknowledges the importance that EU Member States and institutions attach to effective, coordinated border management. The proposal for revision of the Frontex Regulation reflects their desire to strengthen the Agency's ability to contribute further to activities which can achieve this aim.

UNHCR welcomes the numerous elements in the proposal which underline the importance of fundamental rights, and which would strengthen the ability and obligation of Frontex to ensure that respect for such rights is an integral part of EU border management. Access to protection in the EU in future will only be possible if stronger provisions on access to asylum are included in binding form in the EU's *acquis* on borders, and more protection-sensitive border management approaches are developed to put them into practice. UNHCR calls on the Council and Parliament to ensure that the revised Frontex Regulation contains key provisions necessary to help Frontex and those working with it to ensure better protection for fundamental rights, including refugee protection, at the frontiers of the Union.

UNHCR
October 2010