

Violence at the EU External Border:
***Locating the Legal and Operational Mechanisms Underpinning the ‘World’s Deadliest
Border Regime’***

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Abstract

This thesis is an investigation of the legal construction of the EU border as a site of violence. By looking at the EU regulations, Frontex operational documents, and testimonies of violence, the thesis identifies a set of mechanisms through which border violence is legitimised and made acceptable within the political and ideological framework of the EU. There are two main ways in which EU border violence is written in relation to the EU. On one hand, a significant proportion of accountability over border violence is ‘outsourced’ onto various non-EU actors through a set of legal and political mechanisms. On the other hand, a large part of the violent nature of the EU border regime is legitimised through legal and operational mechanisms that create a space for Frontex (as the centralised EU border agency) to engage in violent and brutal practices, both openly as well and covertly, during its operations.

I argue that instead of viewing the border violence as either structural or spectacular, the EU border can be understood as a ‘violent regime’. In other words, in this thesis I attempt to grasp the violent in everyday life while allowing the space for the spectacular/exceptional that occasionally requires heightened politicisation. Linking these arguments to an analysis of the details of the legal formulation of the EU external border and the politics of its maintenance, I argue that the violent happenings at the EU border are an integral part of its envisioned function; and thus constitute a site where the core dynamics of the project of Modern Europe manifest themselves with abhorrent brutality.

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“Violence challenges analytical focus because of its ubiquity and multifarious forms. We are longer embedded within an extant framework of meaning in which violence can claim virtuosity as an act to be identified and judged by itself—in the manner of the Homeric world. Violence today is embedded in a world of reasons. It must have or be given a rationale, even—often especially—when it is deemed to be senseless.” (Uday Mehta, *Violence*)

1.Introduction

In 2020, more than 1700 people were recorded as having died in an attempt to cross the external border of the EU. The real number is likely to be higher as most of the deaths occurred in the Mediterranean, where accurate count is almost impossible to reach and where a clear-cut identification of fatalities, or a verifiable cause of death and/or intent to migrate towards Europe is difficult to establish. Additionally, the year 2020 is not indicative of long-term developments given the impact of the pandemic. The initiative United Against Refugee Deaths estimates that over 44,000 people have died on the borders of the EU in the period 1993-2021¹. And again, the real number of casualties is likely to be significantly higher². In light of these numbers, many have come to label the external frontier of the EU ‘the world’s deadliest border’³. In addition to the fatalities, there are numerous cases of documented physical and sexual assault, thefts of personal belonging, humiliating and degrading treatment by the border enforcement agencies, as well as cases of brutality, torture, or ‘pushbacks’⁴. The happenings at the EU external border make the

¹ <http://unitedagainstreugeedeaths.eu/about-the-campaign/about-the-united-list-of-deaths/>

² Heller, Charles, and Antoine Pécoud. "Counting migrants' deaths at the border: From civil society counterstatistics to (inter) governmental recuperation." *American behavioral scientist* 64.4 (2020): 480-500. and Weber, Leanne. "Knowing-and-yet-not-knowing about European border deaths." *Australian Journal of Human Rights* 15.2 (2010): 35-57.

³ e.g. Albahari, Maurizio. *Crimes of peace: Mediterranean migrations at the world's deadliest border*. University of Pennsylvania Press, 2015. or Jones, Reece. *Violent borders: Refugees and the right to move*. Verso Books, 2016.

⁴ e.g. in the Western Balkans region the reporting of such incidents is done by the Border Violence Monitoring Network <https://www.borderviolence.eu/>

words of Achille Mbembe ring with a particular urgency when he writes that “the brutality of borders is now a fundamental given of our time”⁵.

While the specificity of border violence and its legal codification in the EU border regulations is the primary focus of the proposed thesis, the larger argument I wish to hint at in my analysis is about the integral role of violence in the political constitution of the European Union. Therefore, I am not directly interested in studying the border as an autonomous space/site, rather I wish to explore the function the EU border has in cementing certain narratives (that are not mere narratives but might be seen as reified into forces with observable historical agency) around and of the modern European project. Nor am I predominantly interested in the real or symbolic meaning of the border as an institution, rather my interest is in the relationship between the violence these border spaces bring about/necessitate and the legal construction of the EU border as ‘just another administrative project’. But my intention goes beyond a mere exposition of a contradiction between what Europe says it does and what it does in reality. That is, the contradiction between ‘peace’ as a fundamental value of the European project and the vast scope of violence that the project initiates, fosters, or sanctions. The identification of these contradictions, while politically potent, I believe, should open a space for a more rigorous and profound critique; one that attempts to analyse the way in which the notions of violence and peace in European context are constructed in a manner that allows for their uninterrupted cohabitation.

This thesis is an attempt to take a first step in the direction of such argumentation. By looking at the mechanisms through which border violence is legally codified, circumvented, obfuscated, or concealed, I hope to shed some light on the processes that underpin the eventual legitimacy (or acceptability) of the most violent border regime in the world. The fundamental move that allows for the development of such advanced mechanisms of legitimation is the relativisation of the definition of violence. That is, the first step towards making brutal violence at the EU border

⁵ Mbembe, Achille. *Necropolitics*. Duke University Press, 2019., p.3

acceptable is to question the very assertion that the violence is a problem in the first place. Or, as Mehta puts it, “by referring to something as violent we signal a kind of disproportionateness ... within an associated framework of significance. It is in this sense that what constitutes violence, or rather the judgement of something as violent, is always tied to a set of background assumptions, to a framework of legitimacy, or a rationale that gives it its normative and contextual gravity and meaning.”⁶

⁶ Mehta, Uday *Violence* politicalconcepts.org

2.Framing (Border) Violence

Violence is one of those concepts whose definition is elusive to say the least. If one attempts to ground the conceptualisation in the empirically observable, clearly definable and traceable one is at risk of overlooking the more benign, hidden, subterranean and subtle manifestations of violence. If, however, one keeps stretching the definition to include ever more varied sets of experiences and social situations, one risks the opposite - flattening the definition to the point of constructing outrageous equivalences. The task of critical theory in this regard, I would argue, is to approach the issue of violence with those two risks in mind. To attempt to grasp the violent in everyday life while allowing the space for the spectacular/exceptional that occasionally requires heightened politicisation.

In many ways, talking and theorising violence is about drawing lines. Lines between the structural and spectacular, between the mundane and the exceptional, between that which is acceptable and that which is not, between that which is legitimate and that which is unjust. Between that which is historical and changeable and that which is natural and incontestable. Each of these lines are political. And how they are drawn is what defines how violence is understood, instrumentalised, used -- but also seen and imagined.

When talking about violence perpetrated by state structures and sanctioned by a particular political constellation, the first difference one needs to reckon with is that, most famously formulated by Galtung⁷, between structural and direct violence. Taking the example of deaths to illustrate the difference, Galtung and Toivik argue that direct violence can be usually “measured in number of deaths” whereas with structural violence “a more appropriate measure would ... be the number of years lost”⁸. In their short piece the death by direct violence has a clearly identified ‘author’ and is a moment that can be understood in isolation. Death by structural violence, on the

⁷ Galtung, Johan. "Violence, peace, and peace research." *Journal of peace research* 6.3 (1969): 167-191.

⁸ Galtung, Johan, and Tord Höivik. "Structural and direct violence: A note on operationalization." *Journal of Peace research* 8.1 (1971): 73-76., 73

other hand, is a result of “illnesses and accidents as caused by the existing distribution of wealth and power”⁹. While it is easy, and perhaps politically meaningful, to draw the line between the direct and the structural when studying the state structures and the exercise of state’s power and authority over its internal territories, is it sensible to approach the study of border violence through the same lens?

I would argue here, and this is one of the foundational claims of this thesis, that the choice of categorisation of border violence is the fundamental political move in the establishment of a discursive regime that fosters the conditions of possibility for the perpetual existence of such violence. Therefore, the discussion about the applicability of the dichotomy between direct (or spectacular) and structural violence at the EU border is not about the analytical or conceptual clarity but about a line of politicisation. Following Laclau’s argument that demarcating a dividing line is a foundational political act of any field of contestation¹⁰, I want to show that the manner in which border violence is categorised plays a defining role in the processes of its politicisation. That is, how we conceptualise the space of the border and the violence that occurs within its jurisdictions impacts what is considered political and open to contestation and what is asserted as ‘natural’ and unchangeable. Here it means looking at how is violence written in the regulations pertaining to the EU external border, what is identified as a violent situation, and what does not get addressed at all.

Thinking about the process of categorising border violence in this way leads to a set of questions about the political and administrative interests advocating for a particular modality of politicisation of violence. Drawing of the line is not an innocent academic project but a political act with far-reaching implications. It matters, for example, whether drownings in the Mediterranean are constituted as a direct result of EU border politics or are categorised as an

⁹ *ibid*

¹⁰ Laclau, Ernesto. *On populist reason*. Verso, 2005.

outcome of hostile natural environment¹¹. If the former is the case then legal accountability needs to be established, with the latter, however, these deaths can be framed as ‘natural events’ or externalities and absolved of their status as legal transgressions¹².

For the purposes of the argument I limit my definition of violence to that which can be found in the legal archives, official reports, and collected testimonies from the victims (which in the case of border violence predominantly consists of people legally classified as migrants or refugees). That is cases of death, physical and psychological abuse, sexual assault, deportation, police operations, pushbacks, etc.. While fully acknowledging that limiting the conceptualisation of violence to those ‘empirically graspable and identifiable’ manifestations leaves out an array of tendencies, practices, and experiences that are equally violent, I believe that in order to develop the argument of this thesis in a sharp and concise manner, such limitation is justified. Following my empirical research, this thesis identifies two types of EU border violence in terms of its legal codification and mechanisms of justification, accountability, or obfuscation. The two are: outsourcing of accountability over problematised violence and constructing mechanisms of justification of ‘legitimate’ violence.

Outsourcing of accountability refers to the variety of channels and legal mechanisms through which responsibility over violence that is deemed as illegitimate is relegated to various non-EU actors such as third-states, criminal organisations, or migrants themselves. This type of border violence is identified as problematic by the EU, as antagonistic to the stated principles of the EU border administration and is exemplarily criminalised. The legal relationship between EU and the Libyan Coast Guard is one of the most prominent examples of this kind of outsourcing¹³. In this case border violence is not denied, neither is it legitimised. Rather, it is asserted as taking

¹¹ Schindel, Estela. "Death by 'nature': The European border regime and the spatial production of slow violence." *Environment and Planning C: Politics and Space* (2019): 2399654419884948.

¹² I will address the construction of accountability over border violence in a later chapter.

¹³ Bialasiewicz, Luiza. "Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean." *Geopolitics* 17.4 (2012): 843-866.

place outside of the jurisdiction of the EU and in contradiction to European values and practices. Or, as Gallardo and van Houtum concisely state “The EU sees no direct responsibility for itself”¹⁴.

The second type is violence that is acknowledged and constructed as legitimate/necessary. In the case of the EU external border, its management is increasingly centralised in the Frontex agency and is administered under the notion of “Integrated Border Management”. In practice this means that ever more violent interactions taking place at the external border are under the direct jurisdiction of the centralised EU agency. This violence can be understood as what Michael Neu calls ‘just liberal violence’ or what Isakjee et al. term ‘liberal violence at the EU border’. Neu argues that liberal states justify their violent practices (as well as violent practices taking place within liberal capitalism) by a threefold reduction of the operationalised conceptualisation of violence “the reduction of all violence to merely physical violence, the reduction of agency to merely reactive agency, and the reduction of the perspective taken on the world to a mere economism.” These reductions take place as a part of a larger move that establishes a set form of a violence that is justifiable and sanctioned within a liberal democratic political order. Furthermore, such reduction of violence shifts the attention from what is generally termed ‘structural’ violence and instead politicises individual instances of clearly identifiable (and delineated) violent moments/eruptions (I will address the theoretical aspects of this move in a greater detail elsewhere). Finally, reducing violence necessary for the proliferation of the current EU border regime to such clearly identifiable and empirically graspable form renders it an object that can be ‘administered’ and ‘managed’ through a set of predefined, pre-negotiated rules.

Isakjee et al. build on Neu’s critique of liberal violence and focus more directly on the EU border regime. They argue that the “technologies and of concealment and displacement [at the EU border] amount to a form of ‘liberal violence’, marked by the obscuring of violent governance and the racial logics underpinning it”¹⁵. This obscuring is integral to a political project like the EU

¹⁴ Ferrer-Gallardo, Xavier, and H. J. van Houtum. "The deadly EU border control." (2014).p.299

¹⁵ Isakjee, Arshad, et al. "Liberal Violence and the Racial Borders of the European Union." *Antipode* 52.6 (2020): 1751-1773.; 1752

because “liberal societies would like to see themselves as peaceful and fair, [and thus,] the presence of violence must be disguised, displaced or rendered just”¹⁶. With regards to the issues discussed above about the limitations of the structural/direct violence dichotomy, Isakjee et al. identify what they term ‘de-racialised readings of migration governance’ which “take anti-migrant violence to be a technocratic result of the state’s governing practices with respect to citizenship, rather than structural exclusions with respect to race.”¹⁷ This ignorance of racial structures at the core of the EU border regimes is particularly problematic “as it is the very dehumanisation of the racialised subjects ... that allows them to be violently, and *illiberally* treated”¹⁸.

In light of this debate, how are these mechanisms of obfuscation, deracialisation, neutralisation, and administration legally constituted and how does the ‘Integrated Border Management’ operate in a manner that legitimises its violent means of reproduction and upkeep? Taking the Isakjee’s et al. argument that the EU border constitutes a violent regime, this thesis will investigate the mechanisms through which the violence necessitated by the Fortress Europe is made legally and politically acceptable and how these mechanisms contribute to further depoliticisation of border violence, thus making any meaningful contestation increasingly difficult.

The empirical part of the thesis consists of two main sections. The first section identifies main mechanisms through which accountability over border violence is ‘outsourced’ onto different actors before proceeding to discuss in detail the case of Frontex’s engagement in Hungary amidst the increased number of violent illegal pushbacks. The first section focuses mainly on how Frontex (and the EU as a centralised institution) constructs accountability over border violence in a particular manner, thus decoupling the issue of violent bordering practices from the institutional structures of the EU external border. The second section zooms in on the legal and operational structuring of Frontex with the aim to discern the patterns of legal construction of legitimising

¹⁶ *ibid.* 1755

¹⁷ *ibid.*, 1758

¹⁸ *ibid.*, 1757

discourses around deployment of violent bordering techniques. The argument of the second section, furthermore, brings in testimonies from victims of the violence at the EU border.

3.A Note on Methodology and Materials Studied

There are three types of materials that are analysed in the empirical part of the thesis; official document either published by Frontex or pertaining to the agency's functioning, internal documents of Frontex accessed under the 1049/2001 Regulation on freedom of information, and reports by NGOs and organisations reporting border violence and collecting testimonies from the victims of such violence. Each of the types serve a specific purpose in my analysis and were approached through a different lens.

The legal documents studied can be divided into two parts: the EU regulations on external borders and Frontex's own reports and publications. The EU regulations were accessed through the portal EurLex and Frontex's reports are publicly available on its website. In analysing these I was focusing predominantly on how the mechanisms for employment of force and legitimate violence are legally codified and framed. I was predominantly focusing on the ways in which the issue of violence and force is addressed in those and, conversely, what is left out from the formulation.

The internal documents of Frontex consist mainly of operational plans, internal and external communication of the agency's Executive Director, and Serious Incident Reports (SIRs). The agency is under the obligation to disclose these to any EU resident upon request made under the 1049/2001 Regulation. I have made a number of requests to Frontex for operational plans and SIRs, however, as of 10th of June 2021 I am still awaiting their reception. I was asked by the Frontex Transparency Office to clarify my requests multiple times, and after each clarification the deadline for the release of the documents was extended by 15 working days. Therefore, I was forced to ground my analysis in documents previously requested and published by other people. I have accessed those primarily through the platform asktheeu.org and the archive of the Hungarian Helsinki Committee. Nevertheless, this did not prove to be a limitation to my analysis, as my primary focus is not with a particular set of instances, but with patterns and tendencies within the

operational structure of Frontex which could be studied and identified in the documents I had access to.

Third set of documents are reports by the Border Violence Monitoring Network. These include individual reports of border violence based on verified testimonies of the victims as well as monthly violence reports. In addition to that, the main document used in the final version of this thesis is the Torture Report 2020, a document detailing and systematising recorded cases of torture and abuse at the EU border in Croatia and Greece. These testimonies and reports are approached with the intention to look for the traces of Frontex's engagement in the practices of violent border policing. They partially fill the gaps identified in the official documents in that they hint at that which is skillfully avoided in the Frontex publications; the actuality of the violence proliferated by the EU border regime.

In this thesis, I aimed to approach those documents as an archive of sorts, hoping to reconstruct the mechanisms through which violence is both legitimised as well as concealed in the legal and operational documentation pertaining to the EU external border. Looking not only at what is said and defined in those documents, but also at what is missing, neglected, or circumvented, I take my methodological inspiration from Ann Stoler. In *Along the Archival Grain* she "[attempts] to distinguish between what was 'unwritten' because it could go without saying and 'everyone knew it,' what was unwritten because it could not yet be articulated, and what was unwritten because it could not be said."¹⁹ In similar vein, in what follows I attempt to analyse the multiple modalities of 'unwritten-ness' of violence in the official documents around the EU border in order to understand the conditions of possibility that such unwriting creates for the violence and brutality of the EU border regime.

¹⁹ Stoler, Ann Laura. *Along the archival grain: Epistemic anxieties and colonial common sense*. Princeton University Press, 2010., 3

4. Establishing the Field: Frontex as a site of analysis

This project started with a much larger question about the relationship between the modern European project and the violence integral for its proliferation. In the process of theoretical formulation of my inquiry, I have limited my focus onto the institution of the EU external border. This was not done with the intention to exceptionalise the EU border. Rather, I decided to study the external border because, I believe, it is an institution where the tension at the core of the European project manifests in its most violent and spectacular manner. After the initial engagement with the empirical material and after having studied the legal constitution of the EU external border, I have identified a clear tendency towards a growing autonomy and authority of Frontex, the European Border and Coast Guard Agency. Therefore, in this thesis, I have limited my analysis to Frontex, as its growing importance and influence over the state of the EU external border suggest that it is an agency whose role will determine to ever-greater degree the violent politics/structures of bordering that are the subject of my inquiry.

Prior to the establishment of Frontex in 2004, and its gradual growth as an independent border agency, the individual member states were generally responsible for enforcing the border standards agreed upon in the Schengen Acquis. There were mechanisms for potential collaboration and channels for sharing some border management responsibilities, such as exchange of liaison officers or bi-lateral police cooperation agreements²⁰, however these were limited to situational need and were not mediated through a centralised agency. In the aftermath of the security discourses prompted by the 9/11 and due to the stated difficulty to maintain the levels of external border protection required (by the foundational dialectic of the Schengen Area) to safeguard the internal freedom of mobility, first calls for a 'European Corps of Border Guards' were formulated

²⁰ Commission of the European Communities, *Towards Integrated Management of the External Borders of the Member States of the European Union* 7.5.2001 (p.10)

in 2002²¹. Rather than an autonomous agency (such as the Frontex) these initial proposals advocated a development of mechanisms for more efficient collaboration and proposed to “establish an External borders practitioners common unit involving those responsible for border guard services in the Member States and, in a multidisciplinary spirit, the representatives of various services whose functions also contribute to security at external borders.”²²

It is important to note that in the communication cited here, the threat which the increased border collaboration ought to address is the potentiality of terrorism as a collateral effect of migration from certain countries. It is not the migration in itself that is the largest threat, but the possibility of terrorism that has been established through the conceptual linkages between the movement of people from predominantly Muslim countries and growing concerns over security and surveillance. In this regard, the establishment of Frontex can be seen as a radical leap towards a different discursive regime of risk and security; one that does not operationalise a ‘potentiality of terrorism’ but that approaches any ‘irregular’ migration as a threat on its own merit.

To reconstruct the history of Frontex here would be beyond the scope of the argument. Rather, for the purposes of understanding the mechanisms the agency deploys in order to legitimise its violent operations, a brief overview of Frontex’s current status and direction is more important. In 2005, the first full year of its operation, Frontex had a budget of app.6 million euros. In 2019, its budget reached 333 million and was further increased to 460 million in 2020²³. The current multiannual financial framework, negotiated in 2019, proposes “a total EU contribution of over €11 billion for the period 2021-2027 to finance setting up the standing corps, the purchase of new equipment and the performance of additional tasks”²⁴.

Having already started in 2021, the Frontex plans to use most of these funds to build up and maintain its own standing corps of 10.000 border guards which would assume the role of an

²¹ ibid

²² ibid.023

²³ <https://www.statista.com/statistics/973052/annual-budget-frontex-eu/>

²⁴ European Court of Auditors, *Audit Preview: Frontex* January 2020, p.9

EU border patrol - independently of national structures of border protection. The staff deployed through Frontex will be “fully empowered and will have received specific and targeted training to perform border control”²⁵. In short, the drastic increase of Frontex’s budget and its ongoing increase of operational staff point in a direction of ever growing militarisation of the EU external border and an unwavering commitment to the politics of forceful exclusion rather than humanitarian assistance on behalf of the EU. Or in the agency’s own words “Frontex will no longer be just a fire brigade riding that [sic] drives in with flashing lights when there’s an emergency at the borders. ... The standing corps will enable Frontex to continue its transformation from an EU agency to a law enforcement operational actor and partner.”²⁶ It also means that any structural analysis of the violence at the EU border must take the developments within Frontex extremely seriously, as the agency will play an ever-growing role in defining the future of the EU border regime and can be expected to grow even more exponentially in the years to come -- especially given the predicted increase in forced migration and displacement.

²⁵ Frontex Risk Analysis 2019, add page

²⁶ Frontex, *2020 in Brief*, published April 2021

5. Outsourcing of Accountability

“The externalisation of the European borders means extermination.
Extermination is the word that defines the historical mission of Europe.”
(Resignation letter from Franco ‘Bifo’ Berardi to DiEM25)

When people die, the deaths must be accounted for. Whatever one’s criticism thereof, the EU is a legal and political entity that operates on a set of principles that legitimise its existence and power. One of those principles is ‘administrative accountability’. That is, any transgression that takes place within the jurisdiction of the EU and its institutions must be legally accounted for. The adjective ‘administrative’ is important here, as it suggests that the accountability is not tied to any political vision or a particular set of values, but is a mere function of governance with the purpose of maintaining the internal cohesion of the institutional structure of the EU. By administrative accountability I mean the general trajectory in the development of the EU towards a progressive depoliticisation of many spheres of public life. That is a tendency to shift the authority over a particular field away from democratically elected bodies towards specific agencies and expert administrative bodies. I argue that the case of Frontex and the EU external border epitomises the shift in that the agency is gradually assuming ever-greater responsibility over the governance of the EU external border while the autonomy of the member-states and their elected governments is progressively diminished.

In the spirit of the famous Weberian definition of the state as the entity with the monopoly on violence that allows it to deploy force in ‘legitimate’ manner, the EU does not explicitly denounce any employment of violence in its border politics. Rather it develops a complex set of mechanisms that categorise this violence in such a manner that some parts of it can be reasonably justified through channels of justification that are in accordance with the larger political structure of the institution while others are ‘outsourced’ so that various different actors are identified as responsible for the violence. The violence that is acknowledged as a part of the institutional

structure of the EU is legitimised through various discourses that render it rational, justifiable, and indeed necessary given the circumstances of its occurrence. With the issue of border violence, these are predominantly rooted in the fundamental dialectics of the freedom/security at the heart of the Schengen Area where various tools such as risk assessment, state autonomy and territorial sovereignty are operationalised to neutralise the border violence and turn it into a question of effective administration, best practices, or liberal governance. An investigation of these will be the subject of the following section. Here, I will focus on the second part; violence that is decoupled from the structural functioning of the EU and accountability over which is delegated to other actors.

From my empirical investigation of the recent cases of violence at the external border of the EU, I have identified four main levels of such ‘outsourcing’:

- onto non-EU actors
- onto individual EU member states
- onto criminal organisations and smugglers
- onto individuals, often migrants themselves

In what follows, I will briefly illustrate each of these and move onto analysing in greater detail the Frontex’s suspension of its Hungarian mission as a case of outsourcing of accountability over violent border policing practices. onto an individual member-state.

5.1. Onto non-EU actors

Over the past two decades, the EU has struck numerous deals with the so-called ‘countries of last departure’ -- that is, countries where people on the move depart for their journey to Europe from-- with the aim to manage migratory flows and reduce the overall number of people successfully reaching the EU territory. As Frontex states in one of its reports “multi- or bilateral agreements can alleviate migratory pressure on select border sections with almost immediate effect”²⁷. These include agreements with Morocco, Tunisia, or the infamous Turkey deal from 2015. But perhaps the agreement that has caused the most deaths and left thousands of people stranded and detained outside the EU territory is the Memorandum of Understanding between Italy and Libya that later developed into an official EU foreign policy. This partnership, although idiosyncratic in many respects, epitomises the general trajectory of outsourcing border responsibility onto non-EU countries. One of the aims of the memorandum is “to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea, through the provision of temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs”²⁸.

According to Itamar Mann, an international human rights lawyer, when the EU enters into legal relationship with countries like Libya over the issue of ‘irregular migration’, it is with the focus on “enabling the Libyan authorities to do the dirty job of intercepting people at sea and returning them to Libya. ... By doing so, they would argue that they have not breached international European law because they have never assumed control, and therefore exercised jurisdiction, over the people who have then been subjected to human rights violations [in Libya].”²⁹ These processes

²⁷ Frontex, Risk Analysis for 2020, p.18

²⁸ Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2017

²⁹ Reidy Eric, The legal battle to hold the EU to account for Libya migrant abuses. 10 August 2020, The New Humanitarian <https://www.thenewhumanitarian.org/analysis/2020/08/10/Libya-migrant-abuses-EU-legal-battle>

have been widely studied and the EU border politics is generally recognised as engaging in practices that constitute ‘outsourcing’ or ‘offshoring’³⁰.

5.2. Onto Criminal Groups

In the Frontex Risk Assessment 2020, we learn that it is estimated that in 2017 “criminal networks smuggling migrants to Italy by boat generated nearly USD 150 million” and that the leaders of the smugglers were predominantly Libyan and were “assisted by other smugglers who originated from the same country as the migrants”³¹. This discursive shift is significant as it reconstitutes the issue of migration into an issue of profitability of a criminal ring of smugglers³².

There is a double move here. On one hand the issue of migrant deaths and other types of suffering is explained through the criminality of the smugglers combined with the decision by migrants to rely on their services (framed as ‘increased demand’ in the Frontex report). This, quite obviously circumvents any structural, historical, or political explanations that would approach death and violence in a more critical way. On the other hand, it allows Frontex (and the EU) to present their work in a humanitarian light, as the saviours and protectors of the victims of the criminal smuggling rings. The ‘modus operandi’ that relies on smugglers using substandard boats “poses substantial risks to migrants’ and asylum seekers’ lives” and it is only through “[effective tackling of the] risky movements of irregular migrants and asylum seekers that [the EU] can ensure their safety.”³³. Indeed, to highlight the humanitarian undertones of the EU border policy vis-a-vis the criminality of the smugglers Frontex claims to have saved over half a million lives since 2016

³⁰ Liguori, Anna. *Migration law and the externalization of border controls: European state responsibility*. Routledge, 2019.; Bialasiewicz, Luiza. "Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean." *Geopolitics* 17.4 (2012): 843-866.; or Nakache, Delphine, and Jessica Losier. "The European Union immigration agreement with Libya: Out of sight, out of mind." *E-International Relations* 25 (2017).

³¹ Frontex, Risk Analysis for 2020. p.51

³² Horsti, Karina. "Humanitarian discourse legitimating migration control: FRONTEX public communication." *Migrations: interdisciplinary perspectives*. Springer, Vienna, 2012. 297-308.

³³ *ibid*

through its activities aimed at curbing the activity of ‘migrant smugglers’³⁴. Similarly to the agreements with the third countries, the construction of the smuggler as a criminal that poses the fundamental threat to the life of the migrants have been widely studied in the recent literature³⁵.

5.3. Onto Migrants themselves

On the 8th of November 2020, a rubber dinghy boat carrying people trying to reach Greece from Turkey capsized off the coast of Greek Island Samos. The boat ran out of fuel and crashed against the rocky coastline of the island. A 6-years old boy, travelling only with his father, was one of the victims of the tragedy. After the death of his only son, the Father--an Afghani national--was placed in police custody in Greece and is facing “charges of endangering his son’s life”³⁶. The prosecutors argue that the father is legally accountable for the death of the child and, if convicted, could face up to 10 years in a Greek prison. “The indictment accuses him of “leaving your ... child helpless”. It says the father allowed his son to board an unseaworthy boat in bad weather without wearing an appropriate lifejacket — although a photo in the case file of the boy’s body clearly shows him in a child’s lifejacket.”³⁷

This passage from the 2020 Risk Assessment by Frontex is worth quoting at large:

“Beyond the EU’s external borders it is generally not state actors that organise migration, but individual migrants acting within parameters setting living conditions and a framework of security, stability and freedom. As the individuals’ decisions to migrate are often rational choices made with incomplete information (for those who do in fact have a choice), the perception of costs and benefits are weighed.”³⁸

³⁴ European Council, Saving lives at sea and targeting criminal networks
<https://www.consilium.europa.eu/en/policies/migratory-pressures/saving-lives-at-sea/>

³⁵ Léonard, Sarah, and Christian Kaunert. "The securitisation of migration in the European Union: Frontex and its evolving security practices." *Journal of Ethnic and Migration Studies* (2020): 1-13.; Carrera, Sergio, Jennifer Allsopp, and Lina Vosyliūtė. "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism." *International journal of migration and border studies* 4.3 (2018): 236-276.

³⁶ Al Jazeera, ‘Refugee father charged with son’s death on journey to Greece’, 19.March 2021
<https://www.aljazeera.com/news/2021/3/19/refugee-father-charged-with-sons-death-on-journey-to-greece>

³⁷ *ibid*

³⁸ Frontex, Risk Analysis for 2020. p.16

There is an open acknowledgement that the migrant is acting voluntarily and deliberately when deciding to leave the place of their current dwelling and attempt to move to Europe. By constructing the migrant as a particular type of an individual autonomous subject that is in charge of their (his) own life decisions, the Frontex (the EU) sets the legal grounds for the situation like the one outlined above. Seeing the migrant not as someone who has been on the receiving end of a set of structural limitations and forces beyond individual reckoning, but as someone who has made a *choice* based on a set of available information -- however imperfect that choice might turn out to be at the end -- allows the EU to approach the individual migrant as a sovereign individual for the purposes of legal accountability. Of course, this construction of the migrant as a sovereign subject exists only within the coercive/repressive apparatus of the state. When it comes to state protection, this wholeness of the migrant subject no longer applies. What this implies is that if the act of crossing the Mediterranean is a result of a calculated decision of a rational agent, then it is the individual agent who bears responsibility for any potential mishaps that take place in the process -- even if they result in a death of one's child.

5.4. Onto individual EU member states: The Case of Violent Pushbacks in Hungary

Earlier this year, Frontex suspended its mission in Hungary on the basis of the country's continuous breach of human rights and EU regulations on the politics of the border and migration. The main point of contention was the increasing number of 'push-backs' executed by the Hungarian border police; more than 4000 thousand between December 2020 and January 2021. In the official statement explaining the move the Frontex spokespersons said that "By continuing to participate in border surveillance and border protection activities, Frontex risks being

complicit”³⁹. Building on the gap in the legal definition of the EU border and the violent politics it necessitates, Frontex was allowed to brand itself as the protector of migrant rights in the face of the violation perpetuated by a recalcitrant far-right national government. Positing that a country like Hungary acts in a total antagonism to the general tendencies in EU border politics opens up a space for discursive decoupling of federal bordering practices and ‘deviations’ on a local/regional/national level. With the case like Hungary, therefore, the fundamental functioning of the border is emancipated from any structural critique and the problem is framed as an eccentricity of a semi-authoritarian idiosyncratic leader.

This move, however, has come out of a years-long struggle over the accountability at the Hungarian border between Frontex, and various human and migrant rights organisations and dates back at least to 2016. In July 2016, after the closure of the so-called Balkan Corridor⁴⁰, an amendment to the Asylum Act and the Act on State Border was passed in the Hungarian parliament that allowed the country to ‘pushback’ migrants to Serbia from within the 8km from the Serbian border⁴¹. Later, in March 2017, a bill titled ‘On the amendment of certain acts related to increasing the strictness of procedures carried out in the areas of border management’ was passed in Hungary that extended the area for legitimate ‘pushbacks’ to the entirety of the country’s territory⁴². The bill further stipulates that “all third-country nationals found in Hungary will be ‘escorted’ to the external side of the border fence without being permitted to lodge an asylum application in Hungary”⁴³. The Frontex-deployed Fundamental Rights Officer (FRO) produced a report in response to these legislative changes and the thousands of reported violent pushbacks in their aftermath. The report identifies multiple breaches of the EU Charter of Fundamental Rights

³⁹ EU Observer, Frontex suspends operations in Hungary 27. January 2021
<https://euobserver.com/migration/150744>

⁴⁰ Abikova, Jana, and Wojciech Piotrowicz. "Shaping the Balkan corridor: Development and changes in the migration route 2015–16." *International Migration* (2021).

⁴¹ Hungarian Helsinki Committee, ‘Hungary: Latest amendments “legalise” extrajudicial push-back of asylum-seekers, in violation of EU and international law’, 5 July 2016

⁴² Hungarian Helsinki Committee. ‘Hungary: Government’s New Asylum Bill on Collective Push-backs and Automatic Detention’, 15 February 2017

⁴³ *ibid*

in the border policing practices in Hungary, such as the right to asylum, the prohibition of non-refoulement, the right to human dignity, and the right to life⁴⁴, among others (see Figure 1). The FRO concluded the report by recommending that Frontex “may wish to revise its support” in Hungary, otherwise “it is at risk by omission in respecting, protecting, and fulfilling the ... EU Charter of Fundamental Rights’ obligations.”⁴⁵

- The **8-km rule**, which allows Hungarian border guards to send migrants stopped within 8 km of the Serbian border directly back to Serbia without any registration or opportunity to apply for international protection, poses **serious risks to the right to asylum** (Art. 18); **the prohibition of non-refoulement** (Art. 19) as Serbia is not a safe country of asylum according to UNHCR; **and the prohibition against collective expulsions** (Art. 19).
- The **coercive tactics** (e.g., beatings, dog bites, pepper spraying) used to enforce the 8-km rule have led to incidents that **jeopardize the right to human dignity** (Art. 1); **the right to life** (Art. 2); **the right to the integrity of the person** (Art. 3); and **the prohibition of inhuman or degrading treatment** (Art. 4).
- Hungary’s **entry limit of 30 asylum-seekers per day** impedes **the right to asylum** (Art. 19) of those forced to wait in Serbia, in particular for **vulnerable groups** for whom no prioritization system exists. Moreover, the dire **humanitarian situation** on the Serbian side can negatively impact the **right to human dignity** (Art. 1) and **the rights of the child** (Art. 24).
- The **transit zone’s fast-track asylum procedures** may be placing **the right to asylum** (Art. 19) and **the right to effective remedy** (Art. 47) at risk.
- Hungary’s **legislation criminalizing irregular border crossings**, even if legal, might be de facto jeopardizing **the right to access asylum** (Art. 19) due to its weak due process safeguards for those in need of international protection, and **the rights of the child** (Art. 24) since no provisions are included for unaccompanied children nor on the appointment of a legal guardian to act in the best interests of the child.

Figure 1: Excerpt from FRO report on Hungary source: HHC

The Article 46(4) of the regulation currently in force (2019/1896) states that:

“The executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.”⁴⁶

⁴⁴ Frontex, FRO Observations, Situation and the Hungarian-Serbian Border 2016, 14.10.2016., p.6

⁴⁵ Ibid p.7

⁴⁶ EU regulation 2019/1896, article 46(4).

The Executive Director (ED), therefore, has the power and obligation to interfere in an operation should they believe that fundamental rights have been violated. At the time when the first report of the FRO was brought into the attention of the ED the position was occupied by Fabrice Leggeri who is still the ED in 2021. It is documented that in addition to the recommendations made through internal mechanisms within Frontex, he received a number of official complaints and recommendations from external organisations; most famously the Hungarian Helsinki Committee (HHC) who, in a letter from October 2016, urged him to “to investigate the above allegations of abuse, ... to make public its findings and to ensure that FRONTEX and FRONTEX-operations play an active role in preventing and investigating the widespread violence at the Serbian-Hungarian border.”⁴⁷ Furthermore, the so-called Consultative Forum consisting of a number of EU agencies and legal bodies have issued a recommendation to the executive director of Frontex to “immediately take action pursuant to article 25(4) of Regulation (EU) 2016/1624 and suspend operational activities and the Hungarian-Serbian border”⁴⁸. Therefore, it is safe to conclude that at the end of 2016, Leggeri had at his disposal not only a recommendation from the agency’s FRO, but had the access to well-documented and verified reports of fundamental rights abuses within the Frontex operation in Hungary⁴⁹.

In his letter responding to the HHC complaint Leggeri asserts that “should there be violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist in relation to operations assisted by Frontex, a procedure allows for a withdrawing of financing of a joint operation, and/or suspending or terminating, in whole or in part of such activity”⁵⁰. Few months later in February 2017, however, in a letter responding to the

⁴⁷ Letter from HHC to Frontex ED, ‘Re: Ill-treatment of migrants at Hungary’s southern border’, 17 October 2016

⁴⁸ ‘Recommendation by the Consultative Forum to the Executive Director and the Management Board of the European Border and Coast Guard Agency (Frontex), 10 November 2016.’ it is important to note that three member institutions of the Consultative Forum have abstained from signing the recommendation -- the Council of Europe, The European Asylum Support Office, and the EU Agency for Fundamental Rights -- requiring further investigation of the ‘alleged’ violations before their signature.

⁴⁹ These were further substantiated by a number of so-called Serious Incident Reports that are filed when a breach of protocol and fundamental rights have been observed.

⁵⁰ Letter from ED Leggeri to HHC “Situation at Hungary’s Southern border”. 21. October. 2016

recommendations of the Consultative Forum, Leggeri took a more defensive approach when he refused to suspend the Hungarian mission. He uses three main arguments to justify his decision. Firstly he asserts that “under the framework of the operational activities coordinated by Frontex at the Hungarian-Serbian border, only one situation concerning an allegation of a migrant claiming mistreatment by the Hungarian police was reported. In this single case, the investigation by the Hungarian authorities was closed upon conclusion that there were no signs of an offense against the law.”⁵¹ Secondly he writes that “the alleged infringements of the international legal framework regarding the protection of migrant’s [sic] fundamental rights are not confirmed and, therefore, they cannot be considered establishing a sufficient reason to suspend the operational activities”⁵². Finally, Leggeri is “of the opinion that the presence of members of the [Frontex staff] in the Hungarian-Serbian border can actively contribute to minimize any possible risk of a misuse of force, as well as to provide an objective and reliable source of information on all the circumstances on the ground”⁵³.

The response of Frontex’s Executive Director is relevant here as it demonstrates a number of moves Frontex deploys in challenging the allegations of its involvement in illegal and brutal treatment of migrants as well as calls for its greater accountability over the happenings during its operations.

Firstly, by asserting that the violations were *actually* committed by the Hungarian police acting outside the jurisdiction of Frontex a gap is created that allows for decoupling of the activities of *individual* states’ border policing and the Frontex as a federal agency⁵⁴. The field of accountability is thus restricted to the small number of personnel involved in the particular instance of violation.

⁵¹ Letter from ED Leggeri to the Consultative Forum “Recommendation on Frontex activities at the Hungarian-Serbian border”. 1. February 2017

⁵² *ibid*

⁵³ *ibid*

⁵⁴ This assertion, however, proves to also be factually incorrect as there is at least one report of a Frontex officer being involved in a ‘Serious Incident’ in the time period referred to here. In this case a Finnish Frontex dog handler is reported to have released an unmuzzled dog on a migrant woman in a forest in the southern Hungarian border region. The woman suffered serious injuries as a result of the attack and required medical attention in its aftermath. The case will be discussed in greater detail in the following chapter. (Frontex - Serious Incident Report N445 - 2016)

When the violation is reduced to a *momentary deviation* by an individual officer or unit, the solution is to investigate the alleged breach and establish whether the law and/or procedural regulations were broken. If the investigation (which in this case is within the jurisdiction of the member-state) concludes that the incident constituted a legal violation, then punitive measures can be applied to the guilty party, e.g. the officer or a unit. Framing and addressing reported violations in this manner shifts the entirety of legal responsibility on the member-state and the individual/unit involved in the incident. This legal maneuvering is made possible by the principle of shared responsibility which states that “The European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management ... Member States shall retain primary responsibility for the management of their sections of the external borders.”⁵⁵

This move precludes any potential challenge to the structural causes of the violations, and emancipates the EU border regime and Frontex from any significant legal or political charge. Furthermore, it isolates the instances where violations occurred by framing them as exceptions, thus shifting the critique away from structural questions about legitimacy and brutality of the EU border regime towards a preoccupation with the behaviour of individual ‘bad apples’ within the border police force. This is not a mere discursive strategy, but was incorporated into operational directives for Frontex officers in Hungary who were “specifically advised that escorting migrants to transit zones was to be “exclusively performed by Hungarian authorities”⁵⁶. A human rights lawyer Lydia Gall states “that the conspicuous absence of Frontex officers during the final stage of detention and pushbacks showed the agency was trying to disassociate itself from any legal violations or rights abuses during expulsions.”⁵⁷

⁵⁵ Regulation 2019/1896, Article 7

⁵⁶ Apostolis Fotiadis, ‘FRONTEX’S HISTORY OF HANDLING ABUSE EVIDENCE DOGS BALKAN EXPANSION’, Balkan Insight, 6 February 2020

⁵⁷ *ibid*

Secondly, by challenging the legitimacy of the complaints about fundamental rights violations, Frontex is shifting the terms of the discourse away from consideration of the actuality of the violence involved in border policing towards legal consideration over what constitutes a ‘legitimate’ complaint and what is the exact line between the rights that can be violated in the processes of border protection and those that cannot. In other words, the primary concern of Frontex is not that the bordering practices result in situations that lead to a number of reported violations of fundamental rights, but rather with how these ‘alleged’ violations can be disproven by framing the situation through mechanisms for legitimising excessive violence. In this response Leggeri betrays that the priority of Frontex is not to launch a serious investigation into the well-documented pattern of brutal pushbacks of migrants from Hungary but rather to isolate individual reported instances and challenge them on the grounds that they are not sufficiently confirmed. Incidentally, a number of EU agencies used the same rationale for their decision not to sign the above-mentioned recommendation to Frontex (see footnote 17). Similarly to the tendency described in the previous paragraph, here also Frontex depoliticises the border structure while hyper-politicising individual incidents. That is, through focusing on the issue of legal validity and sustainability of individual complaints the political discourse surrounding violent border policing is framed in terms of a struggle between an individual and the police over establishing a ‘true’ account of an event rather than on the generally known facts about the more than 19,000 violent and illegal pushbacks that took place under the Frontex watch in Hungary in 2016⁵⁸.

Having established a distance between the violations taking place in Hungary and the Frontex operations, Leggeri can make the third and final argument for legitimisation of a Frontex mission amidst serious violations of fundamental rights; that the presence of Frontex is, contrary to the general sentiment of its critics, actually beneficial to the reduction of violations in border

⁵⁸ Hungarian Helsinki Committee, ‘Hungary: Key Asylum Figures as of 1 January 2017’,

policing in Hungary. The argument that Frontex actually plays a crucial role in safeguarding the rights of the people on the move is not exclusive to this particular situation; it runs through the entirety of the agency's publications and statements. In the Regulation, the responsibility of Frontex in protecting the fundamental rights is continually asserted, when almost every chapter opens with an iteration of the following phrase "The Agency shall contribute to the continuous and uniform application of Union law, including the Union acquis on fundamental rights, in particular the Charter of Fundamental Rights of the European Union ('the Charter'), at external borders."⁵⁹ Similarly, in the annual Risk Assessment Reports published by Frontex, there is a discernible emphasis on Frontex's 'humanitarian' and 'rescue' activities. In the 2019 report, for example, a whole chapter is dedicated to the agency's commitment to fundamental rights reiterating the duty to "specific ... protection of children and vulnerable persons"⁶⁰. These are complemented by suggestive images of Frontex agents saving people from overcrowded boats, providing water and medicine, and rescuing and caring for (racialised) children (see Figure 2).

On the background of the vast legal and ideological underpinning of the assertion of Frontex's role in protecting the migrants at risk and safeguarding their fundamental rights, Leggeri's response to the recommendation to suspend the Hungarian mission does not come as a surprise. It builds on the discursive structure that identifies Frontex (and the EU external border) as a teleological institution that is working towards an objective of 'non-violent', legitimate border regime. In this narrative, it is the recalcitrant national agents that fail to act in accordance with the principles stated in the border regulations. Therefore, Frontex is able to present itself as the agency that has the executive power to oversee the border policing activities of individual states and can, eventually, prevent violations of fundamental rights and regulations from taking place. This assertion operationalises the previously established gap between the federal agency and individual

⁵⁹ 2019/1986 Regulation, Article 5(4)

⁶⁰ Frontex Risk Analysis for 2020, p.49 (of course, the construction of vulnerability as a condition for qualifying for the 'protection' of Frontex is important here see. Stachowitsch, Saskia, and Julia Sachseder. "The gendered and racialized politics of risk analysis. The case of Frontex." *Critical studies on security* 7.2 (2019): 107-123.)

member-states' border practices. However, as shown in the previous paragraph, another possibility is that this gap allows Frontex to delegate the 'dirty work' to the national border patrols while maintaining the illusion of commitment to fundamental rights⁶¹.



Figure 2: Frontex officers handling a migrant child. Source: Frontex Risk Assessment Report 2020

In December 2020, the European Court of Justice concluded the long-trial between European Commission and Hungary about the above discussed issue of the violations of fundamental rights by the Hungarian border police. The court judged that:

“Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals. In particular, restricting access to the international protection procedure, unlawfully detaining applicants for that protection in transit zones and moving illegally staying third-country nationals to a border area, without observing the guarantees surrounding a return procedure, constitute infringements of EU law.”⁶²

⁶¹ Of course, a further analysis is required to scrutinise the construction of the category of ‘fundamental rights’ in the EU border regime discourses.

⁶² Case C-808/18 European Commission v. Hungary, 17.12.2020

(<https://curia.europa.eu/juris/document/document.jsf?text=&docid=235738&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=10138560>)

Following the verdict, Frontex temporarily suspended its mission to Hungary on the basis of its potential complicity in the illegal practices of the Hungarian border police. In light of this chapter, this move can be seen as concluding the process of decoupling the structural nature of the EU external border (embodied and epitomised by Frontex) from the deviations allegedly taking place within the jurisdictions of individual member-states. While the suspension of the mission has been branded by Frontex as a progressive move suggesting that the agency is serious about its commitment to fundamental rights⁶³. Contrary to that, I posit that the verdict of the ECJ and the subsequent reaction of Frontex point towards further depoliticisation of the agency and an expanded legal space for ‘outsourcing’ of the accountability over the brutal nature of the EU border regime onto smaller institutional actors. These mechanisms attempt to obfuscate the obvious *sine qua non* defining the EU external borders; that without the border regime that is constructed to keep people out, the violations discussed here would not have occurred in the first place.

⁶³ for example in the statement cited above about complicity

6. Constructing the Legitimacy of Frontex Violence

“Germany, France says they don’t need refugees, and the European Union don’t want refugees, therefore I will beat you, go back motherfucker (sic).” (Torture Report 2020, p.22)

As demonstrated in the previous chapter, there are a number of legal and operational mechanisms designed to emancipate Frontex (and the EU at large) from assuming responsibility over a large amount of the violence at the EU external border. These mechanisms, nevertheless, do not account for everything that takes place in the processes of border management. After all, Frontex is *the* agency “tasked to ensure safe and well-functioning external borders providing security”⁶⁴ and its operational autonomy and field of jurisdiction are continually expanding. Therefore, it can be assumed as a starting point of the analysis here, that a lot of border violence takes place within the operational autonomy of Frontex and can be causally linked to the agency’s practices⁶⁵. In the following chapter, I will look specifically at deployment of violent means by Frontex, the methods of legitimisation of such violence, and the efforts of the agency to downplay its *inherently* violent operational structures.

The premise of my argument is simple. Frontex is an institution whose operations result in a lot of violence; both direct and indirect. While accountability over some of this violence can be partly delegated to a third-party (as discussed in the previous chapter), Frontex itself (as the unique agency tasked with the oversight of the happenings at the EU external border) must employ mechanisms that add a further layer of legitimacy to the violent EU border regime. In these mechanisms the use of coercive force is legally codified in the regulations on the agency’s structuring and functioning.

The General Principles Governing the Use of Force and Weapons by Frontex states that “the use of force and weapons by statutory staff deployed as members of the teams shall comply

⁶⁴ <https://frontex.europa.eu/about-frontex/our-mission/>

⁶⁵ This is well monitored and studied, e.g. de Vries, Leonie Ansems, and Elspeth Guild. "Seeking refuge in Europe: spaces of transit and the violence of migration management." *Journal of Ethnic and Migration Studies* 45.12 (2019): 2156-2166.; Heller, Charles, and Chris Jones. "Eurosur: saving lives or reinforcing deadly borders?." *Statewatch Journal* 23.3-4 (2014): 9-12

with the principles of necessity, proportionality and precaution”⁶⁶. These three principles are important as they frame the entirety of legally sanctioned violence in border policing. Each of these principles operationalises a set of notions that then function as legitimizing principles for use of violent border policing methods.

According to the principle of necessity “the use of force ... shall be *exceptional* and shall only take place in where it is strictly necessary to ensure the performance of Agency’s duties or in self defence”⁶⁷. The principle further states that “the use of force or coercive measures shall never be *arbitrary* or *abusive*”⁶⁸.

The principle of proportionality rules that “statutory staff deployed as members of the teams shall act in proportion to the seriousness of the situation and the *legitimate objective* to be achieved”⁶⁹, and the principle “shall guide both the nature of the force used ... as well as the extent of the force applied”⁷⁰.

The ‘duty of precaution’ states that the Frontex officers “shall fully respect and aim to preserve human life and human dignity”⁷¹. This principle includes “a general obligation ... to give clear warnings of [the officers’] use of force, unless giving such warning would unduly place the members of the teams at risk or would create a risk of death or serious harm to others, or *would be clearly inappropriate or ineffective in the particular circumstances*.”⁷²

Framed in this manner, the operational violence of Frontex is presented as exceptional and limited to clearly defined set of rules and circumstances. The violence is discursively delineated in a manner that does not deny the use of violent and coercive means in the processes of border policing, but that constructs a structure of legitimation of this violence through a set of mediations

⁶⁶ Regulation 2019/1896, Annex V

⁶⁷ *ibid*, Annex V/1 (emphasis added)

⁶⁸ *ibid* (emphasis added)

⁶⁹ *ibid*(emphasis added)

⁷⁰ *ibid*

⁷¹ *ibid*

⁷² *ibid* (emphasis added)

and mechanisms; e.g. necessity, proportionality, and precaution. These principles are built around a set of assumptions and categories which, I wish to argue, obfuscate, neutralise, and normalise Frontex's violent practices. I have italicised those terms and phrases in the citations above, and will move to elaborate on their relevance and functionality in the following paragraphs.

Exceptionality

The first identifiable move in the principles related to use of force is the establishment of its exceptionality. While the commitment of Frontex to fundamental rights, protection of people's lives and generally non-confrontational nature of its operations is asserted throughout the regulation⁷³, the entirety of the regulation's concern with the use of force is concentrated in the short Annex V. The decision not to include a discussion on the legitimacy of violence in the policing of the external EU border in the main body of the regulation can be read as a political one. Coupled with the assertion that any force used in Frontex operation must *by definition* be exceptional, this relative lack of space given to the consideration over the violent methods and use of force necessary for the upkeep of the external border in its current *modus operandi* constructs an image of the agency that seems miles far from the recorded violence taking place within its jurisdiction on a quotidian basis. In other words, Frontex⁷⁴ is depicted as an administrative institution with a set of tasks that *under normal circumstances* do not require a deployment of force. Subsequently, the use of force is made to appear as something external to the *normal* functioning of Frontex and is subject to a specific set of rules and regulations which are decoupled from the

⁷³ To pick a section at random "EUROSUR should considerably improve the operational and technical ability of the Agency and the Member States to detect such small vessels and to improve the reaction capability of the Member States, thereby contributing to reducing the loss of lives of migrants, including in the framework of search and rescue operations." Article 35 of the 2019/1896 Regulation

⁷⁴ In light of the considerable expansion of Frontex's field of authority and its operational autonomy in the studied regulation, the activities of Frontex and its principles can be understood as encompassing the EU external border as an institution. Therefore, in this section, Frontex and the EU external border are taken to represent the same institution and set of practices.

rules and regulations pertaining to the agency as such; this move is further highlighted by the exclusion of discussion on force from the main body of the text.

The establishment of exceptionality of the use of force in Frontex's operations, however, does more than merely asserts an ontological incompatibility between the EU border regime and violent practices. In addition to that, it moves the question of the use of force from structural considerations over the nature of the institution of the EU border towards an equation of legitimation which can be quantified and answered through a set of predefined mechanisms. I will turn to these mechanisms in a later section.

Legitimate Objective, Arbitrariness, and Abuse

The dictionary definition of arbitrariness states that it is “the quality of being based on chance rather than being planned or based on reason”⁷⁵, while to do something in an abusive matter means “to use something for the wrong purpose in a way that is harmful or morally wrong”⁷⁶, whereas to be legitimate is to be either “allowed by law” or “reasonable and acceptable”⁷⁷. These definitions suggest that in order for the ‘use of force’ to fall within the category of legitimate, it must be mediated by mechanisms of rationalisation that construct it as the only ‘reasonable’ outcome of a given situation.

Therefore, when the regulation specifies that the use of force by Frontex must be conducted with the legitimate objective in mind and must not be arbitrary and abusive it relies on a set of already existing legal framework as well as on a particular idea of what the ‘common sense’⁷⁸ understanding of border management is. In other words, to be able to judge whether a particular instance of a ‘use of force’ in border protection was legitimate and not arbitrary, there has to be a structure that defines what constitutes those categories. In border management in general, and

⁷⁵ <https://dictionary.cambridge.org/dictionary/english/arbitrariness>

⁷⁶ <https://dictionary.cambridge.org/dictionary/english/abuse>

⁷⁷ <https://dictionary.cambridge.org/dictionary/english/legitimate>

⁷⁸ in the sense of something that is understood implicitly without the need to be clearly stated

Frontex in particular, an integral feature of this structure is ‘risk analysis and vulnerability assessment’.

6.1 Risk Analysis and Vulnerability Assessment

The Article 29 of the 2019 regulation tasks “The Agency [to] monitor migratory flows towards the Union, and within the Union in terms of migratory trends, volume and routes, and other trends or possible challenges at the external borders and with regard to return. ... For that purpose, the Agency shall ... establish a common integrated risk analysis model”⁷⁹. Furthermore,

The aim of the vulnerability assessment is for the Agency: to assess the capacity and readiness of Member States to face present and upcoming challenges at the external borders; to identify, especially for those Member States facing specific and disproportionate challenges, possible immediate consequences at the external borders and subsequent consequences on the functioning of the Schengen area; to assess their capacity to contribute to the standing corps and to the technical equipment pool, including the rapid reaction equipment pool; and to assess the hosting capacity of Member States with regard to support from the European Border and Coast Guard.⁸⁰

The mechanism described in these articles is known as CIRAM (the Common Integrated Border Risk Assessment Mechanism) and was developed by Frontex to produce precisely the kind of assessments that are later operationalised in the processes of designing and legitimisation of the agency’s operations at the EU border. CIRAM is centrally preoccupied with studying ‘risk’ and ‘threat’ at the EU border where

“risk is defined as the magnitude and likelihood of a threat occurring at the external borders, given the measures in place at the borders and within the EU, which will impact on the EU internal security, on the security of the external borders, on the optimal flow of regular passengers or which will have humanitarian consequences. ... and a threat is defined as a force or pressure acting on the external borders. It is to be characterised by its magnitude and likelihood”⁸¹.

⁷⁹ 2019/1986 Article 29(1)

⁸⁰ 2019/1986 Article 32(4)

⁸¹ Frontex, ‘Common Integrated Risk Analysis Model: Summary Booklet’, 2013

In CIRAM reports risk and threat are categorised based on their levels (see Figures 3 and 4) and the findings reached through these models serve as a basis for an “attribution of impact levels to external border sections”⁸². There are three standard impact levels (low, medium, and high) which are defined in an absurdly tautological and vague manner: “low (medium, high) impact level [are to be attributed] where the incidents related to illegal immigration or cross-border crime occurring at the relevant border section have an insignificant (moderate, significant) impact on border security”⁸³. In addition to these three standard impact level, there is something called ‘critical impact level’ which is attributed to situations “where the Agency's risk analysis shows that incidents related to illegal immigration or cross-border crime occurring at the relevant external border section have a decisive impact on border security to such an extent that they risk jeopardising the functioning of the Schengen area”⁸⁴.

The regulation stipulates that each of the impact levels requires a different level of engagement and, following the logic of proportionality, each of the levels requires a deployment of a different degree of legitimate force. So that while the low impact level necessitates only “regular border control”, the high impact level calls for “reinforced border control measures”, and the critical impact level authorises the executive director of Frontex to issue case-specific (binding) recommendations⁸⁵. Coming back to the legal codification of the ‘use of force’ in Frontex operations, the claim to legitimacy of deployment of violence is dependent on the impact level the given operation is responding to. Similarly, arbitrariness and abuse are relational categories responding to the level of risk and scale of threat Frontex claims to be responding to. As Stachowitsch and Sachseder argue in their analysis of Frontex risk assessment mechanisms “The assessment of risks and vulnerabilities often precedes, accompanies, and follows security operations and thereby shapes how security is defined and enforced and how operations are

⁸² 2019/1986 Article 34

⁸³ 2019/1986 Article 34 (1)

⁸⁴ 2019/1986 Article 34(2)

⁸⁵ 2019/1986 Article 35 (1)

conducted in terms of resources, practices, infrastructures, actors, technologies, and legitimizations.”⁸⁶

Therefore, the legal basis for deployment of force in border operations is constructed around two fundamental notions; that of exceptionality and of legitimacy. Frontex, and the EU border regime, relies on the philosophical-ideological foundation of the Weberian-Schmittian state that contains legislative mechanisms for operationalising exceptionality and legitimisation of violence.

⁸⁶ Stachowitsch, Saskia, and Julia Sachseder. "The gendered and racialized politics of risk analysis. The case of Frontex." *Critical studies on security* 7.2 (2019): 107-123., p.107

Example of three risk levels

Level of risk	Description
Low	Acceptable risk. The impact can be dealt with, and the vulnerability is acceptable, but the threats must be monitored to discover changes that could increase the risk level.
Medium	Tolerable risk, but the impact is not easily dealt with given current capacity in place. A small increase of the magnitude of the threat could jeopardise the effectiveness of the response. The development of the threat must be monitored on a regular basis, with consideration to whether necessary measures have to be implemented.
High	Not acceptable risk. The impacts cannot be dealt with adequately with the given capacities and before risk reducing treatment has been implemented.

Figure 3 Source: CIRAM Handbook

Example of qualitative estimates of level of vulnerability for different aspects of vulnerability

Level	Border permeability	Operational capacities and legal responses	Pull factors: High unemployment rate, large communities in Member States, perceived easy fraudulent access to international protection and social welfare benefits
Very High Vulnerability	Terrain or natural conditions of the external borders are exploited by the threat	No competencies or legal responses are available to address this threat	All these factors present
High Vulnerability	Terrain or natural conditions of the external borders are favourable to this threat	A very limited number of competencies or legal responses are available to address this threat	Several factors present
Medium Vulnerability	Terrain or natural conditions do not condition the development of this threat	A moderate number of competencies or legal responses are available to address this threat	One of these factors present
Low Vulnerability	Terrain or natural conditions prevent the development of this threat	Sufficient numbers of competencies or legal responses are available to address this threat	None of these factors present

Figure 4: Source: CIRAM Handbook

6.2. Operational Plans

In the previous section, I attempted to show the legal and analytical mechanisms through which Frontex justifies the deployment of violence in its operations. While the mechanisms appear to be legally impeccable, from a critical analytical standpoint they amount to little beyond tautological repetitions of synonymous terms and phrases. What exactly does it mean that medium impact level means that there is a moderate challenge to the border? And, subsequently, what does it mean to deploy appropriate border control measures? And, furthermore, what are the measures available in the first place and how is the categorisation of acceptable (legitimate) violence constructed, substantiated, and justified? These are the questions that the regulation does not answer. Or rather, these are the questions the regulation skilfully circumvents by framing the issue in such a circular and self-justifying manner.

In what follows I will turn to the so-called operational plans which are the basis for Frontex border operations. These plans are a result of the mechanisms of risk analysis and vulnerability assessment described above and contain a detailed analysis of the situation and a design of a proposed operation. I focus here on the Frontex operation Minerva. The operation Minerva takes place on the border between Morocco and Spain with a particular focus on the Spanish enclaves on the African continent, Ceuta and Melilla. The two biggest stated aims of the operations are prevention of drug trafficking and migrant smuggling--among other minor preoccupations (see. Figure 5).



Figure 5: Main Aims of Operation Minerva; source: Operational Plan Minerva 2014

The operational plans for Frontex operations are, in theory, publicly available under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001. One can make a request to the Frontex Transparency Office and the agency is bound by the regulation to respond to the request within 15 working days; either by granting access or providing a substantial justification for refusing to do so. I have requested the latest available operational plans for Minerva twice; once from my personal email and the second time through the asktheeu⁸⁷ platform. Over two months after the submission of my first request I have not received the requested documents, instead, the office repeatedly asked me for clarification of my request; a procedure that extends the deadline by further 15 days. Therefore, in this section I am relying on operational plans requested and published on the AskTheEU portal earlier. Unfortunately, the latest available operational plans for Minerva I could access were from 2014. In their response to my request Frontex justified its inability to disclose more recent operational plans by stating that they share too much in common with the current plans in force and their disclosure would jeopardise the ongoing operation. Frontex relies on the Article 4(1) of the regulation that grants the power to refuse access to a document to an institution if “disclosure would undermine the protection of the public interest as

⁸⁷ asktheeu.org

regards: public security; defence and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State.”⁸⁸

However, even the disclosed 2014 plan is heavily redacted by Frontex. In the description of the general situation requiring a Frontex intervention it is stated that “Minerva was planned to tackle irregular migration of persons using regular ferry connections to the EU”⁸⁹. Moving a paragraph below, the whole section that describes the details of the situation and *presumably* refers to the risk analysis conducted before the operation is redacted with the justification that “disclosing this information publicly will disturb the effectiveness of Frontex operations”⁹⁰ (see Figure 6). Again, in the section focusing on the description of operational activities of Frontex only general statements are available such as “providing support to Spanish authorities by enhancing border checks at the designated border points”⁹¹, while the sections that actually describe the particular tactics and tools deployed are redacted (see Figure 7).



Figure 6: Redacted OP Minerva

⁸⁸ 1049/2001 Article 4(1)(a)

⁸⁹ Frontex, Operational Plan Minerva, 2014, p.5

⁹⁰ Minerva 2014, 6

⁹¹ Minerva 2014, 7

4. OPERATIONAL CONCEPT

The activities during the operation include deployment of technical and human resources in order to:

- Provide support to Spanish authorities by enhancing border checks at designated border crossing points by deploying Advanced-Level Document Officers and Dog Teams, particularly:

carry [REDACTED]

- Support debriefing activities in order to collect information for risk analysis purposes;
- Share experiences and exchange expertise as well as to constantly update knowledge on the illegal migration trends in order to adopt countermeasures to tackle the phenomena;
- Collect and assess information in order to improve the detection of human smuggling and

Commented [A3]: The non-disclosed parts contain detailed information regarding the modus operandi of law enforcement officials when performing border control. Disclosing such information would expose the working methods applied in ongoing and future operations, thus obstructing them and the efforts made by the EU and its Member States to counter and prevent cross-border crime and unauthorized border crossings. If this were to happen, public security would be affected. In light of the above, the text is not disclosed pursuant to the exception laid down in the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 relating to the protection of the public interest as regards public security.

Figure 7: Redacted OP Minerva

The main body of the operational plan is more of a political document whose main goal is to briefly summarise the structure of the operation. Therefore, each plan contains an annex where the situation is elaborated in greater detail and where more technical and strategic particularities of the operation are discussed. For the purposes of the analysis here, the most relevant sections of the annex are ‘outlook’ and ‘recommendations’. In light of the mechanisms discussed in the first half of the chapter, ‘outlook’ contains discussion of the results of risk analysis and vulnerability assessment and a detailed description of the situation; supposedly with a note on why the situation described requires Frontex operation. ‘Recommendations’ presumably contains the details of the recommended action and a description of proposed strategies and tools. Both of these sections-- as well as the infographics detailing the chain of command and responsibility, allocation of resources, and operational areas--are completely censored with the justification relying on the above stated exception to the freedom of information stating that “their disclosure would ... harm the course of future operations and facilitate irregular migration”⁹². (See Figures 8-10)

⁹² Frontex redaction notes on the disclosed version of the Operation Plan Minerva 2014

5. Outlook

The JO EPN Minerva, as stated at point 2 above - Background- was established to support the Spanish authorities in managing passenger flows during the summer.

- The number of exiting passengers is an indicator which can be used to gauge the magnitude of passenger numbers on entry, with a 2/3 week delay.

Commented [A7]: The marked parts contain detailed information on the analytical findings and information on the modus operandi of migrants trying to cross the external border irregularly. Their disclosure would be tantamount to releasing pieces of intelligence gathered by law enforcement officials and thus harm the course of future operations and facilitate irregular migration. In light of the above the text is not disclosed pursuant to the exception laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001 relating to the protection of the public interest as regards public security.

Figure 8: Redacted OP Minerva

6. Recommendations

Also, experts with training and experience in second-line interviewing and with proper language skills would be beneficial in future EPN Minerva operations.

Commented [A8]: The blanked out parts contain detailed information regarding the recommended modus operandi of law enforcement officials. Its disclosure would expose the work of law enforcement officials to tackle irregular migration and harm the course of future and ongoing operations, and thus facilitate irregular migration. Therefore, public security will be affected. In light of the above, the text is not disclosed pursuant to the exception laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001 relating to the protection of the public interest as regards public security.

Figure 9 Redacted OP Minerva

ANNEX 4 - OPERATIONAL AREA



Commented [A9]: The non-disclosed text and image contain information regarding the Border Control Points at which the joint operation took place. Ongoing operations tend to cover similar operational areas as the operations of preceding years in the same geographical area. In this regard, disclosing the Border Control Points names, would be tantamount to disclosing the current operational areas. The result of this will only be to hamper the course of the ongoing operations, by depriving them of any strategy and element of surprise during border surveillance, ultimately obstructing their purpose to counter and prevent cross-border crime as well as prevent unauthorized border crossings. In this light, the disclosure of such information would undermine the protection of the public interest as regards public security. In the sense of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

Figure 10: Redacted OP Minerva

This pattern of censoring the particularities of the operation while publishing only the more generic information contained in the operation plans is not limited to operation Minerva. A brief search through the published plans for other operations such as Indalo, Triton, or Poseidon reveals a similar trend. In line with the regulation and the directive on the use of force, there is an elaboration on the relationship between risk analysis, situational outlook, and the necessity for Frontex intervention in the plans. However, given the restricted available data, it is difficult to ascertain the extent to which these mechanisms are employed in the design of the operation. We do not know what equipment and what kind of force each operation authorises, in fact, we do not even know what ‘impact level’ is assigned to what part of the operation. All the information that would shed light onto the application of the mechanisms stipulated in the regulation is redacted, leaving only endless variations of the tautological repetition of empty phrases about risk and response accessible to the public.

The one other set of documents which can offer a possible insight to the processes of justification and codification of force and violence utilised in Frontex operations are the agency’s codes of conduct. These are general rules for “all persons participating in Frontex activities”⁹³ that should, in theory, constitute a basis of acceptable behaviour of Frontex staff. The Code of Conduct is a document that was first published in 2011 and some argue that its incorporation into the organisational structures of Frontex operations “is a reflection of the growing awareness of human rights and humanitarian values on the operational level”⁹⁴. The code of conduct is revised periodically and the most recent document was produced in 2016. Similarly to the regulations on the use of force discussed above the code focuses on “preventing abuse of any kind to those they come into contact with”⁹⁵ and guards against an “improper use of a position of influence, power or authority”⁹⁶. With regard to the use of violence it states that:

⁹³ Frontex, ‘Code of Conduct for all persons participating in Frontex activities’, 2016

⁹⁴ Aas, Katja Franko, and Helene OI Gundhus. "Policing humanitarian borderlands: Frontex, human rights and the precariousness of life." *British journal of criminology* 55.1 (2015): 1-18.; 4

⁹⁵ Frontex, Code of Conduct

⁹⁶ *ibid*

The use of force, and in particular of weapons, must be as a last resort and not exceed the minimum degree necessitated by the circumstances. It has to be proportionate for the performance of duties or in legitimate self-defence or in legitimate defence of other persons and must be in strict compliance with the relevant guarantees provided for in national, Union and international law⁹⁷.

As with the other documents analysed here, the guidelines operationalise the same set of categories such as legitimacy, proportionality, arbitrariness, and abuse. Furthermore, the code relies on the notion of vulnerability to identify groups of people who are singled out, exceptionalised, and afforded higher-level of protection. For example, the code of conduct “aims to promote general values intended to guarantee the principles of the rule of law and respect for fundamental rights with particular focus on vulnerable persons” and Frontex officers are required to “conduct themselves with tact and compassion towards vulnerable persons or indeed any persons they come into contact with”⁹⁸, whereas:

“The term ‘vulnerable persons’ may include women, children (unaccompanied or with family members), persons with disabilities, the elderly, victims of torture or trauma, persons susceptible to exploitation and victims of exploitation or trafficking in human beings.”⁹⁹

Through this selective construction of vulnerability a particular demographic order is imposed onto the migrants that come in contact with Frontex staff. Stachowitsch and Sachseder argue that the gendered and racialised underpinning of the category of vulnerability as used in Frontex’s Risk Analysis “allow Western authorities to present themselves as saviors of racialized women and children” where “those who are feminized are portrayed as legitimate victims requiring saving, others, who are hyper-masculinized, are constructed as chaos to Europe’s order”¹⁰⁰. In short, by identifying a group of ‘vulnerable people’ a hierarchy of protection is established that implicitly (but not unintentionally) excludes the majority of the migrants.

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ Code of Conduct

¹⁰⁰ Stachowitsch, Saskia, and Julia Sachseder. "The gendered and racialized politics of risk analysis. The case of Frontex." *Critical studies on security* 7.2 (2019): 107-123, p. 114

In the Frontex Risk Assessment Reports, this distinction between vulnerable peoples and migrants who are a ‘threat’ is made more clearly, albeit in a rather self-contradicting manner. The most recent report asserts that “the overall demographics of migrants in 2019 show an increase in the share of vulnerable groups, including a slight growth in the share of women and children.”¹⁰¹ while also claiming that “according to the demographics of the migrants involved, those who are detected attempting to enter clandestinely (a risky *modus operandi*) are 97% male”¹⁰². Similarly, as a further illustration of the importance of the category of vulnerable people in the process of crafting principles of legitimate use of force, in the regulation 2019/1896, the term ‘vulnerable person’ is used 13 times, whereas the term ‘refugee’ which is significantly broader in its legal meaning appears only 5 times.

There is a discernible pattern in the documents analysed here (and many others produced by Frontex or related to the external EU border) of highlighting the protection extended to the demographically insignificant category of ‘vulnerable people’ as opposed to description of practices deployed in dealing with the significantly larger group of ‘irregular migrants’ who constitute the risk. The repetition of infographics that show the number of people Frontex allegedly saved during its operations further underlines this tendency (see figure 11). The figure 11, for example, shows a cumulative number of migrants at risk allegedly saved during Frontex operations between 2015-2021. Likewise, throughout the Frontex Risk Assessment Reports similar statistics are repeated throughout the document; while there is no equivalent statistics or infographic showing the number of people who died at the EU border. This strategy of shifting the focus from the deadly nature of the EU border towards Frontex’s ‘humanitarian’ commitment to saving the lives of migrants is further employed in the agency’s communication on social media. On its facebook page, every comment that highlights Frontex’s role in the border violence and death of migrants is responded to by the agency with an iteration of the following statement: “In any potential search and rescue,

¹⁰¹ Frontex Risk Assessment for 2020, p.8

¹⁰² *ibid*, p.9

the priority for Frontex is to save lives. Since 2015, Frontex helped to save more than 350,000 lives at sea, and contributed to the arrest of hundreds of smugglers, cooperating closely with national law enforcement and justice authorities.”¹⁰³

Infographic - Lives saved in EU Mediterranean operations (2015-2021)

541 605 lives saved and **18 540** fatalities in the Mediterranean since 2015. Data up to April 2021.

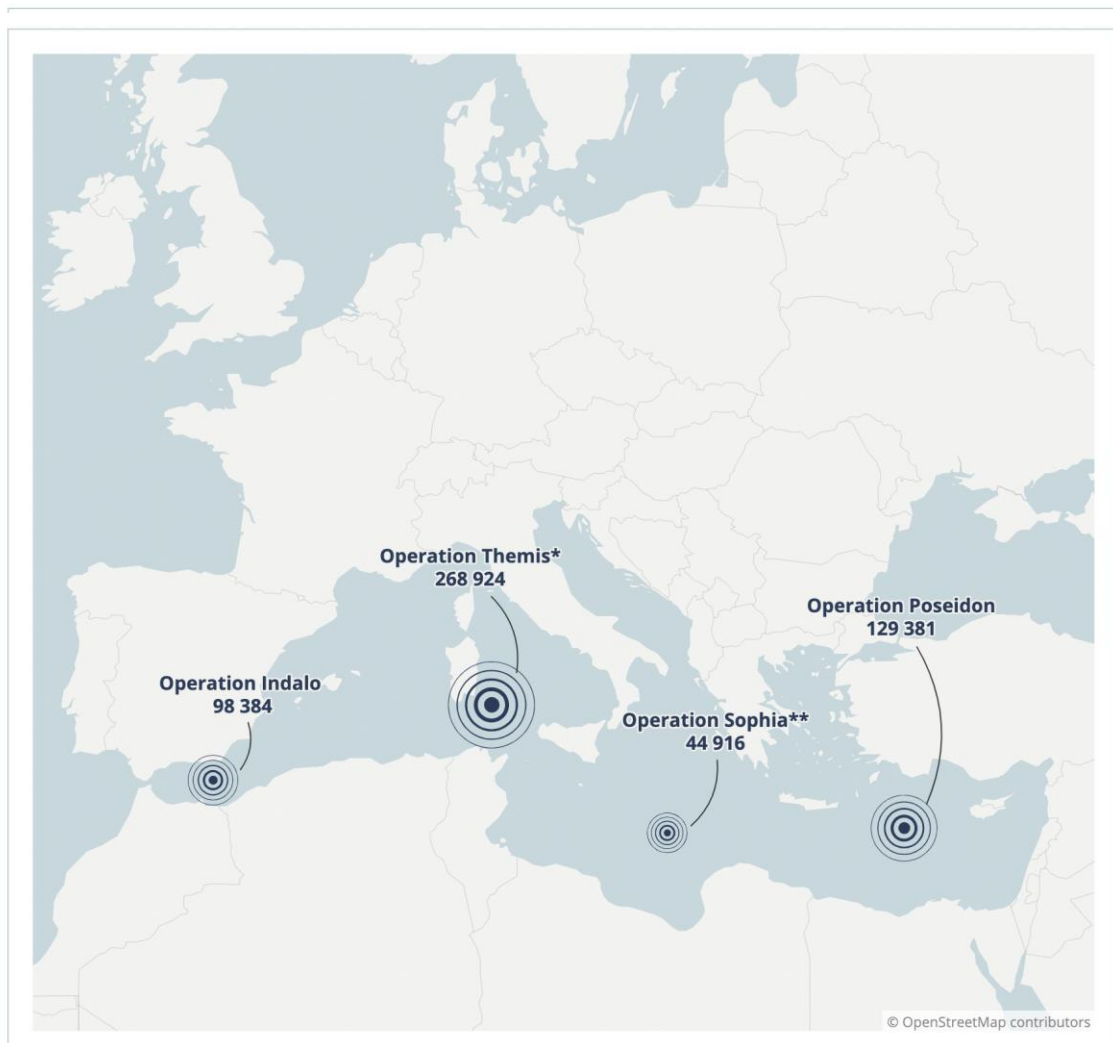


Figure 11 Source: Council of Europe website

¹⁰³ Comment by Frontex on Facebook responding to a person highlighting Frontex’s involvement in violent pushbacks

6.3 Tracing violence in Frontex activities

In the Frontex documents analysed in this section, there is a general tendency to highlight the agency's commitment to fundamental rights, protection of vulnerable groups of people and use of legitimate force. Following Trouillot's assertion that "the ultimate mark of power may be its invisibility"¹⁰⁴, it might be interesting to approach these reports and regulations as historical documents and focus for a moment on that which is not explicitly acknowledged and written. Or, following Ann Stoler, to see these legal archives as "condensed sites of epistemological and political anxiety rather than as skewed and biased sources"¹⁰⁵. In this case it means that rather than viewing the regulations, operational plans, codes of conducts, and risk assessment as manifestations of intentional omissions of certain aspects of the bordering practices, I propose to see those 'omissions' as expressions of a particular type of political power that requires operationalisation of certain notions and categories for its legitimisation. That is, I posit that the violence is not written-out of these documents in an act of crude censorship (after all the border violence is well-documented and publicly known). Instead, as I hope to argue in the following section, the missing presence of border violence in those documents can be seen as a part of an ideological-discursive structure of the administrative governance of the EU border that renders certain preoccupations incompatible with its legal constitution; such as direct engagement with the issues of border violence.

The first step that needs to be taken in this analysis is to ascertain the presence of violence and deployment of violent practices by the Frontex in its operations. This task is not easy given that, as shown in the previous chapter, Frontex deploys various mechanisms that obfuscate its responsibility over border violence. However, in my research, I came across a number of reported moments that hint at Frontex's *active* engagement in violent (and brutal) practices. The ones I will

¹⁰⁴ Trouillot, Michel-Rolph. *Silencing the past: Power and the production of history*. Beacon Press, 1995.; xxiii

¹⁰⁵ Stoler, Ann Laura. *Along the archival grain: Epistemic anxieties and colonial common sense*. Princeton University Press, 2010.; p.20

analyse in the following section come from Frontex's internal 'Serious Incident Reports (SIRs)', and from the testimonies collected by the Border Violence Monitoring Network in their recently published Torture Report 2020. There are numerous other well-documented cases of border violence deployed by border forces, such as the killing of Muhammad Gulzar by the Greek Coast Guard, these, however, do not contain evidence of direct involvement of Frontex agents. Therefore, in order to make the point forcefully, I will limit my engagement to the situations where Frontex engagement can be ascertained beyond reasonable doubt. That is, however, not to say that deployment of violent means by Frontex is something exceptional.

The SIRs are an internal mechanism developed by Frontex to monitor violations of fundamental rights and other legal obligations during its operations. Any officer "who has reason to believe a provision of the code or fundamental rights was violated, [is obliged] to report this immediately to Frontex" where "the established procedure for dealing with such situations includes fact collection, assessment and final report"¹⁰⁶. Similarly, to the operation plans, these can be requested under the 1049/2001 regulation and Frontex has the obligation to disclose them¹⁰⁷. There are hundreds of SIRs filed every year from almost all countries with active Frontex presence. Following the focus set in the previous chapter, I will take Hungary in 2016 as an example.

There are 4 disclosed SIRs in the time period. Most of them concern observations of violations by Hungarian police force and therefore are outside of Frontex's jurisdiction. One SIR, however, reports an incident involving a Frontex-deployed dog patrol team from Finland. A female, who was in a group of four migrants, was reportedly bitten by an unmuzzled patrol dog in the forest around the southern border of Hungary. The incident took place in the early hours of the morning and the assaulted woman was in need of immediate medical attention in the aftermath. The report states that the dog reacted to the person suddenly appearing from the bushes "by biting

¹⁰⁶ <https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-at-frontex/>

¹⁰⁷ Given the time frame of this thesis and my relatively belated discovery of the SIRs, I was unable to request the most recent SIRs available. Therefore, I am relying on documents requested and subsequently published by other researchers through platforms such as fragdenstaat.de and asktheeu.org

which is natural defense reaction for service dogs [sic]”. As a further justification of the incident the report claims that “due to long leash, darkness and very limited vision, dog handler didn’t manage to see person before the dog [sic]”¹⁰⁸(see figure 12 for full report).

Few immediate questions arise that question the incident; both as it happened and as it was reported. How long was the leash so that it allowed the dog to wander so far away from the handler’s field of vision? Was the dog on the leash in the first place? Why was the patrol dog unmuzzled during an operation where intercepting ‘irregular migrants’ was the objective and therefore an interaction between the dog and the migrants could be anticipated? How ‘immediate’ was the command to release by the handler, given that the assaulted woman suffered at least two injuries on different parts of her body? Why did the dog need to defend itself when there is no mention of aggressive or violent behaviour on the side of the injured woman? And most importantly, how likely is it for a person in hiding to ‘suddenly jump out of the bushes’ right in front of a border patrol dog? These are the questions that could only be answered if a direct testimony of the victim were recorded. Unfortunately, in this particular case no such testimony exists. The report was dismissed and no disciplinary (or legal) action took place as the “case was accidental and ... service dog was used according to HUN legislation. [sic]”¹⁰⁹

Fact of the case

The FIN Patrol team was patrolling in Röske with dog from GPS coordinates N46199457 E20.016912 to N46.191355 E20.027350. At 04:00 HRS they got information from the HUN Police that four irregular migrants have entered illegally in the HUN territory near the border sign F 40. Team went to the spot and dog handler, one member of team and HUN Police started to find tracks with the dog. Patrol found track and dog started tracing. At 04:30 HRS track went to the place with tight forest and bushes (GPS coordinates N46.220725 E20.125058.) Suddenly a person jumped out from bushes. The dog reacted by biting which is natural defense reaction for service dogs. The dog handler immediately commanded to release. Due to long leash, darkness and very limited vision, dog handler didn’t manage to see person before the dog. One arm and one leg of MNG woman was bitten by the patrol dog. The team gave first aid to the injured irregular migrant right after the incident.

Figure 12 Serious Incident Report 445 - 2016

¹⁰⁸ Frontex Serious Incident Report - SIR 445-2016

¹⁰⁹ SIR 445-2016

The Torture Report 2020 is a publication by the Border Violence Monitoring Network. This report is the first of its kind and responds to “the mass proliferation of torture during the pushback process.” and “increase in both frequency and choreography of abuse”¹¹⁰ by border guards. The report asserts that “in-land European states are knowingly exposing people-on-the-move to ill-treatment and torture”¹¹¹. The data compiled in the report are collected through testimonies by people who suffered abuse and torture during their interaction with border police in the studied countries (Croatia and Greece) and the veracity and accuracy of the testimonies is guaranteed by adherence to “strict internal guidelines” and “to increase the credibility of this information, BVMN field volunteers aim to collect testimonies of pushbacks and violence within the closest possible time to the actual event.”¹¹²

While most of the reported cases of torture and abuse are linked to violations committed by national police and thus are not directly attributable to Frontex operations, there are numerous indications throughout the report of situations where a Frontex staff was either present or immediately involved in the violent practices. In an incident that took place on 30 July 2020 in a Greek village, Orestiada “officers were physically violent with [a group of detained migrants] and beat them with metal batons, including women and children. They deprived everyone of food and water. Nobody was given a chance to ask for asylum.”¹¹³ According to a testimony by three of the migrants, “The officers, four clad in army-color [sic] uniforms and one in a black uniform, all wore balaclava masks and spoke in foreign languages other than Greek (English, Spanish, Portuguese).”¹¹⁴ Here, the observation of the multiple languages spoken by the officers suggests that a Frontex unit was present during the incident.

¹¹⁰ Torture Report, 4

¹¹¹ *ibid* 4

¹¹² *ibid* 5

¹¹³ *ibid* 27

¹¹⁴ *ibid* 27

In another reported incident a man living in Athens and holding a valid asylum applicant card was detained after a random document check and escorted to the border area with Turkey. There “he was beaten ... with metal sticks as well as being shot multiple times with an Electric Discharge Weapon, before being forced to hand over all his remaining documents as well as his money to the officers.”¹¹⁵ In his testimony after being illegally pushed back to Turkey, leaving his wife and children in Athens, he claimed that “One of the officers reportedly was wearing black clothes with Greek writing and an EU flag and a Greek flag on the shoulder.”¹¹⁶ This suggests, beyond reasonable doubt, that at least one Frontex officers was actively involved in the abuse and torture during the reported incident. It can be ascertained that the individual described here was a Frontex officer and not a regular member of Greek border police by the presence of Greek and EU flag on the shoulder of their uniform. The official design (see Figure 13) of a Frontex uniform includes a country specific insignia on the shoulder underneath which an armband with an EU flag is worn.

¹¹⁵ *ibid* 30

¹¹⁶ *ibid* 30



Figure 13: Image of a Frontex uniform; source: www.frontex.europa.eu

The third incident where a presence of a Frontex staff can be ascertained took place on the 31st of August 2020. Three men were apprehended by a group of police officers wearing blue uniforms with Greek flags while attempting to take a bus after crossing the border from Turkey. The men were placed in detention where “one of the officers took [the respondent] by his feet and dragged him across the floor, another burned him with his cigarette” after which the men were placed in a room where “men, women and children were all standing around completely naked”¹¹⁷. While being detained in the room, “when he looked outside through this window, he saw four cars with German license plates (they described the EU flag and D on the license plate).”¹¹⁸ According to the visuals from Frontex operations in Greece, we know that vehicles provided by various EU member states are used during the operations (see Figures 14 and 15). Therefore, it is reasonable to conclude that the vehicles observed by the respondent were part of a Frontex operation. This, together with the Greek flags on the officers’ uniforms, suggests a presence of a Frontex unit at the site of the reported torture and abuse.

¹¹⁷ Torture Report 31

¹¹⁸ *ibid* 31



*Figure 14: Hungarian and Romanian Frontex officers photographed with their vehicles during a mission in Greece (2.6.2021)
source: Frontex Facebook page*



Figure 15: A vehicle during an operation in Greece - although the country of origin is not possible to establish from this angle, the licence plate does not follow the Greek template which includes three letters and four digits. The license plate here contains two letters and five digits. source: frontex.europa.eu

The three incidents outlined above are only the ones where a presence of Frontex officers at the site of a reported torture and abuse can be asserted using the evidence in the report. Throughout the document (and in the numerous reports of border violence conducted by BVMN) there are numerous instances where Frontex staff appears to be present and involved in clear violations of multiple regulations, laws, and human rights and is deploying force that is far from the use outlined in the Frontex Code of Conduct:

“The use of force, and in particular of weapons, must be as a last resort and not exceed the minimum degree necessitated by the circumstances. It has to be proportionate for the performance of duties or in legitimate self-defence or in legitimate defence of other persons and must be in strict compliance with the relevant guarantees provided for in national, Union and international law.”¹¹⁹

6.4. Linking the structural and the spectacular in Frontex archive

How do these ‘incidents’ relate to the legal structure of Frontex operation and EU external border administration discussed above? I argue that the instances described in the Torture Report are not isolated incidents that should be treated as individual transgressions conducted by agents acting outside of the legal framework of the border regime. The frequency and regularity of those ‘incidents’ as they are reported in the Torture Report suggest that acts of brutality and torture play an integral role in the proliferation of the EU border regime. Thus, I posit that it is these acts of brutality and spectacular physical violence that constitute the *unwritten* in the regulations and official documentations. When the regulation asserts, as discussed above, that ‘high impact’ situation requires ‘enforced border control mechanisms’ and ‘appropriate measures’, these are never concretely specified. Rather, a logic of circular argumentation and tautology is deployed as a tool for legitimisation of more radical practices of bordering.

Of course, I am not arguing that the regulation is intentionally sanctioning brutality at the border. Rather, I would suggest that the apparent vagueness and a lack of clear demarcation of

¹¹⁹ Frontex, Code of Conduct

legally acceptable use of force during the border operations (together with a well functioning mechanism for addressing any and all transgression) constitute a primary condition of possibility for the reported ‘incidents’. The discursive construction of the external border and of the mechanisms that legitimise and deploy a particular set of responses to identified threats, as shown in the analysis of the risk assessment tools and the border regulation, relies on a degree of ambiguity in its formulations.

Therefore when ‘incidents’ of violence and brutality are deployed as tools of border protection, there is no clear legal provision in the regulation for their clear categorisation within the legislatively envisioned project of bordering. Instead, they are at best exceptionalised as transgressions and at worst their veracity is challenged (see Leggeri’s letter in the previous chapter) and they are dismissed as ‘not having occurred’. It is less that these ‘instances’ of brutality and torture take place ‘against the law’, and more that they occur within a space that the law and regulation fails to properly address. The only way these ‘instances’ can be comprehended within the legal structure of Frontex and the EU external border is as violations of fundamental rights; a category that is in itself relative and contributes to the very exceptionalisation of such ‘instances’ that is being criticised here.

Approaching the regulations, Frontex reports and documents, and testimonies of victims of border violence as an archive of the EU external border, in this chapter I attempted to show the structural linkages between the legal landscape of the border and the spectacularised moments of violence taking place within its jurisdiction on an everyday basis. Arguably, one of the successes of the current EU border regime is its ability to decouple its legal structure from the actuality of the border violence. In other words, the success lies in the construction of the ideal-type EU border which is codified in the regulation and operationalised through Frontex mechanisms, assessments, and reports. Any deviation from this ‘ideal-type’ is not framed as a structural feature of the functioning of the border but as a mere transgression that can be overcome by ever-stricter adherence to the legal framework governing the border. This, of course, hides the obvious: that

the proliferation of the EU border regime is existentially dependent on these acts of brutality and violence. And that rather than moving towards a less violent border regime, it is more likely that--with the expanding authority of Frontex and with the predicted increase in migration in the coming years in mind--more and more of these methods will be used in the maintenance of the EU external border in its current (or desirable) form.

7. Conclusion

“It is deeply symptomatic that our Western societies which display such sensitivity to different forms of harassment are at the same time able to mobilise a multitude of mechanisms destined to render us insensitive to the most brutal forms of violence – often, paradoxically, in the very form of humanitarian sympathy with the victims.” (Slavoj Žižek, *Violence: Six Sideways Reflections*)

At a very fundamental level, the inquiry that constituted this thesis was driven by a rather naive question: How is it that the violence taking place everyday at the EU external border is a relatively accepted reality within the modern European project? How is it that with all the reported deaths and even more instances of injuries, physical and sexual assault, or torture, the institution of the EU external border is allowed to proliferate, and even grow, within the context of the EU’s apparent commitment to peaceful governance and humanitarianism? The answer to this question consists of three interrelated sets of inquiries. Theoretically, it requires an investigation of the ideological-philosophical underpinnings of the political project of Modern Europe. Historically, it requires an investigation of the colonial origins of the European structures of governance, and of the relations between racial hierarchies, geography, and exclusion. Anthropologically, it requires an investigation of the legal, discursive, and political construction of the institution of the EU border and the ways in which this construction relates to the actuality of the border regime in its everyday reproduction. Acknowledging the importance of the former two, this thesis attempted to tackle the last one.

Approaching the body of legal, methodological, and operational documents that constitute the EU external border and its everyday proliferation as an archive and reading it alongside personal communications and testimonies of border violence, in this thesis I hoped to, at least partly, construct a picture of the mechanisms that make possible the legitimisation of brutal violence and deaths taking place at the border. This thesis, however, is far from an exhaustive treatment of the subject. It is merely a first step in what needs to be a long process of studying the deeply entangled relations and connections between the legal and political space of the Modern

Europe and the ever-growing intensity of violence, exclusion, oppression, and brutality that characterises its quotidian reproduction. In this, the border is not an exception or an idiosyncrasy. It is a site that, at the current moment, best epitomises the brutal dynamics at the core of the European project. The brutal dynamics that, as this thesis hopes to demonstrate, are legitimised and concealed by a complex apparatus of legal and ideological mechanisms deployed by the EU and its various agencies.

Throughout the process of formulating and writing this thesis, the words of Franco ‘Bifo’ Berardi were continually present at the back of my mind: “Peaceful Europe is an oxymoron, as Europe is the core of war, racism and aggressiveness. We have trusted that Europe could overcome its history of violence, but now it’s time to acknowledge the truth: Europe is nothing but nationalism, colonialism, capitalism and fascism.”¹²⁰

¹²⁰ Resignation letter from Franco ‘Bifo’ Berardi to DiEM25

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