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## **DRAFT REPORT**

on a European Parliament recommendation concerning negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency (Frontex) in the Islamic Republic of Mauritania (2023/2087(INI))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Tineke Strik

Rapporteur for the opinion of the associated committee pursuant to Rule 57 of the Rules of Procedure

Jan-Christoph Oetjen, Committee on Foreign Affairs

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## PROPOSAL FOR A EUROPEAN PARLIAMENT RECOMMENDATION

### **concerning negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency (Frontex) in the Islamic Republic of Mauritania (2023/2087(INI))**

*The European Parliament,*

- having regard to Article 218 of the Treaty on the Functioning of the European Union (TFEU),
- having regard to the Universal Declaration of Human Rights of 1948,
- having regard to the Geneva Convention of 1951 and the additional protocol thereto,
- having regard to Chapter V, Regulation 33 of the United Nations Convention on the Law of the Sea on Distress Situations: Obligations and procedures,
- having regard to Chapter 5 of the International Convention on Maritime Search and Rescue (SAR Convention) on operating procedures,
- having regard to the International Convention for the Safety of Life at Sea,
- having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 3 September 1953,
- having regard to the Charter of Fundamental Rights of the European Union (‘the Charter’),
- having regard to the TFEU, and in particular points (b) and (d) of Article 77(2), point (c) of Article 79(2), and paragraphs (3) and (4) of Article 218 thereof,
- having regard to Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624<sup>1</sup>,
- having regard to the European Council conclusions of 9 February 2023,
- having regard to Council Decision (EU) 2022/1168 of 4 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency in the Islamic Republic of Mauritania<sup>2</sup>,
- having regard to the Commission communication of 21 December 2021 on the model Status Agreement as referred to in Regulation (EU) 2019/1896 of the European

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<sup>1</sup> OJ L 295, 14.11.2019, p. 1.

<sup>2</sup> OJ L 181, 7.7.2022, p. 18.

Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (COM(2021)0829),

- having regard to its resolution of 19 May 2021 on human rights protection and the EU external migration policy<sup>3</sup>,
  - having regard to the report of 14 July 2021 of the Committee on Civil Liberties, Justice and Home Affairs’ Frontex Scrutiny Working Group on the fact-finding investigation on Frontex concerning alleged fundamental rights violations and its recommendations,
  - having regard to Rules 114(4) and 54 of its Rules of Procedure,
  - having regard to the opinion of the Subcommittee on Human Rights of the Committee on Foreign Affairs,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A9-0000/2023),
- A. whereas, pursuant to Article 73(3) of Regulation 2019/1896, in circumstances requiring the deployment of border management teams from the standing corps to a third country where the members of the teams will exercise executive powers, a status agreement must be concluded by the Union with that third country on the basis of Article 218 TFEU;
- B. whereas, pursuant to Article 73(2) of Regulation 2019/1896, when cooperating with the authorities of third countries, the Agency shall act within the framework of the Union’s external action policy, including with regard to the protection of fundamental rights and personal data, the principle of non-refoulement, the prohibition of arbitrary detention and the prohibition of torture and inhumane or degrading treatment or punishment;
- C. whereas according to Regulation 2019/1896, in which the Commission recommends that the Council authorise it to negotiate a status agreement, it should assess the fundamental rights situation relevant to the areas covered by the status agreement; whereas such an assessment has not been performed yet;
- D. whereas, according to the Model Status Agreement:
- Frontex’s team members may, in general, only perform tasks and exercise powers in the territory of the third country under instructions from and in the presence of the border management authorities of that country, and must comply with the laws and regulations of the third country as well as applicable Union and international law; whereas the third country’s authorities must only issue instructions that are in compliance with the operational plan to the team members; whereas this is the only operational framework where EU personnel operate under third-state command;
  - Frontex’s team members enjoy immunity from the criminal jurisdiction of the

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<sup>3</sup> OJ C 15, 12.1.2022, p. 70.

third country under all circumstances, and must not be subject to any form of arrest or detention in the third country or by its authorities; whereas the waiver of immunity is at the discretion of the Executive Director or the home Member State, depending on the status of the team member;

- E. whereas Mauritania has no national legal asylum system in place; whereas the Office of the United Nations High Commissioner for Refugees (UNHCR) grants de facto protection with the issuance of refugee cards and certificates on the basis of a memorandum with the authorities; whereas people deemed ineligible for protection are structurally deported by the authorities without further procedure; whereas this has included deportations of people whose cases have not been assessed by the UNHCR; whereas Mauritania's current legal framework does not allow for effective protection of women and children, or of LGBTIQ+ persons; whereas same-sex activity is illegal in Mauritania;
  - F. whereas refugees and migrants in Mauritania continuously face systemic and serious human rights violations and ill treatment such as refoulement, arbitrary arrests and detention, (gender-based) violence, including cases of torture, exploitation, abusive detention conditions, extortion and theft, and abusive collective expulsions;
  - G. whereas Mauritania only formally abolished slavery in 1981, and was the last country in the world to do so; whereas slavery has only been criminalised since 2015; whereas the UN Special Rapporteur concluded in 2022 that the country had taken significant steps but the continued existence of slavery and slavery-like practices, including practices of forced labour, remains a concern and has an impact on both migrants and Mauritanian citizens;
1. Expresses its deep concern about the situation of fundamental rights in Mauritania, particularly for migrants and refugees, and considers that the deployment of Frontex executive powers in Mauritania entails a high risk of becoming complicit in serious and most likely persistent violations of fundamental rights or international protection obligations;
  2. Considers that if the Model Status Agreement falls short of addressing the above-mentioned concerns, this could lead to accountability gaps in the event of fundamental rights violations committed either by the third country's authorities and/or by Frontex's deployed personnel;
  3. Strongly urges the Commission and the Agency to:

### ***3.1 European Commission***

- a. include explicit safeguards allowing deployed officers to disregard orders issued by the third country's authorities that contradict the Agency's fundamental rights obligations that derive from EU and international law;
- b. review the current provision on immunity from criminal prosecution by national authorities for deployed officers, in line with the principle of proportionality and in order to safeguard the right to an effective remedy for the individuals concerned;

- c. enshrine sufficient internal and external mechanisms for non-EU individuals to direct complaints towards the Agency, in line with the recommendations of the EU Ombudsman;
- d. include provisions about the Mauritanian authorities respecting fundamental rights during operations, including sound options that will ensure accountability in the event of violations;
- e. perform *ex ante* fundamental rights impact assessments before engaging in negotiations with third countries on the conclusion of Status Agreements, in order to be able to fully consider the impact of potential cooperation and to negotiate the necessary safeguards;

### 3.2 Frontex

- a. formalise the role of the Fundamental Rights Officer (FRO) when deciding whether to launch a joint operation in the third country covered by the Status Agreement, and treat the FRO's opinion as binding;
- b. ensure that any operational plan establishing operations on the territory of Mauritania should:
  - i. enshrine a formal mechanism for persons (in)directly affected or acting in the public interest, including third country nationals, to address complaints to the Agency about actions of deployed staff in the third country, and include clear provisions on the follow-up and tools of enforcement after complaints are lodged;
  - ii. ensure a Frontex presence in critical areas where the apprehension of migrants is likely to take place, and envisage giving the FRO and Fundamental Rights Monitors full access to the operational area;
  - iii. work closely with the UNHCR during operations in Mauritania in order to guarantee the right to asylum;
- c. adopt guidelines on the mandatory waiving of immunity for deployed staff, specifying how requests from the third country authorities will be dealt with, as well as enshrining a strong role for the FRO; make the deployment of standing corps officers conditional on these guidelines;
- d. explore and establish mechanisms for persons potentially affected by the Agency's action on the territory of the third country to effectively seek remedy through external bodies, such as the Ombudsman, the Court of Justice of the European Union or a different entity;
- e. provide fundamental rights training to the authorities as a core component of executive operations in third countries, including with regard to SAR obligations, and work on the improvement of the asylum system;

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4. Instructs its President to forward this recommendation to the Council, the Commission, the European Border and Coast Guard Agency and to the Government of Mauritania.

## EXPLANATORY STATEMENT

The entry into force of Regulation 2019/1896 (the Regulation) significantly expanded the mandate of the European Border and Coast Guard Agency (Frontex), including its possibilities to work in third countries. The Regulation mandates the Agency with the possibility of deployment of staff for operational activities on the territory of a third country that does not share any common borders with an EU Member State, to the extent required for the fulfilment of its tasks that are defined in the Regulation.

In order to establish the legal framework to perform executive tasks on the territory of a third country, the conclusion of a so-called Status Agreement is required. This concerns an international agreement between the EU and the third country on the basis of Article 218 TFEU. Procedurally, the Council mandates the European Commission to negotiate such an agreement on behalf of the EU, while the latter is obliged per this article to keep the European Parliament fully and immediately informed at all stages of the procedure. As enshrined in Article 54(5) of Regulation (EU) 2019/1896, the European Commission will negotiate on the basis of the so-called ‘model status agreement’, laid down in communication COM(2021)829. When the negotiations are concluded, the European Parliament should be requested to vote on the agreement as negotiated and give its consent before it can enter into force.

On the 4th of July, Council Decision (EU) 2022/1168 authorised the Commission to negotiate a Status Agreement with the Islamic Republic of Mauritania on operational activities carried out by Frontex on the territory of Mauritania. This decision was accompanied by the negotiation directive, in which the Council expressed that it saw no specific reasons to derogate from the model Status Agreement, and the Commission should thus aim to preserve its essence during the negotiations. A simultaneous decision was taken to launch negotiations with the Republic of Senegal.

On the 9th of February 2023, the Council underlined its political support for the effort of externalising Frontex action by urging for the rapid conclusion of negotiations on new and revised Status Agreements in its conclusions, including with Senegal and Mauritania. The potential Status Agreement with Mauritania would mandate Frontex for the first time in its existence to perform an executive mandate on the territory of a third country that is not bordering an EU Member State, nor geographically located in Europe. This step would have fundamentally different implications compared to the actions performed under the current Status Agreements.

The current signatory countries to Frontex Status Agreements share the ambition to become part of the EU on the short term, meaning that they are in the process of aligning their legal frameworks with the EU acquis - including on fundamental rights. Moreover, all are parties to the Council of Europe, thus bound to the European Convention of Human Rights. Opposed to Mauritania, these countries are bound by frameworks that help safeguarding EU fundamental rights standards to a certain extent.

In light of the significant implications and precedent created by the conclusion of a Frontex Status Agreement with a non-European third country, the European Parliament decided to initiate a more extensive procedure during the negotiation process of the Status Agreement, apart from the - fairly limited - consent procedure. The Committee on Civil Liberties, Justice



and Home Affairs - which is responsible for the scrutiny of Frontex - took the decision to draw this own initiative report, already during the negotiation stage, with a view to provide recommendations to the Commission regarding the negotiation process. The human rights committee (DROI) will issue an opinion on the report, given the external nature of the Status Agreement and human rights dimension.

Procedurally, the Rapporteur has convened two Shadow Rapporteur meetings, in which key stakeholders were invited to present their views on the matter. In a first meeting, the European Commission - as the negotiating entity - took part, as well as two researchers with an expertise in human rights and international law. During the second meeting, the Executive Director of Frontex, and a representative from the Fundamental Rights Officer took part. The Mauritanian authorities were also invited, but did not participate.

### **Position and findings of the Rapporteur**

The draft report outlines several aspects of the model Status Agreement which could potentially create accountability gaps in the event of a conclusion with Mauritania on this basis. The Rapporteur is of the opinion that the provisions related to immunity in the model agreement are excessively broad, posing a significant risk of fostering impunity. The fact that members of the standing corps cannot be prosecuted in their home member states is an additional element that contributes to the impunity. While the Executive Director would have the possibility to waive the immunity of individual staff under the model status agreement, the Rapporteur believes this procedure is inadequate as a substitute for judicial prosecution, as this procedure should be performed by an independent, external body to safeguard impartiality and neutrality of proceedings.

Furthermore, the Rapporteur is of the opinion that immunity in essence should be granted only with utmost caution and proportionality, considering its large implications for sovereignty of a country and possibilities for this country to hold individuals to account for actions committed on its territory. The Rapporteur considers that, immunity is unnecessary and disproportionate when it comes to carrying out border management tasks. The fact that the model agreement foresees officers to carry service weapons and use force underline the importance of ensuring sound accountability mechanisms.

Moreover, the model agreement foresees a command structure in which Mauritanian officers will give instructions to deployed Frontex staff. This creates a legal gap that raises uncertainty regarding the Agency's legal accountability for the actions performed by its staff under joint operations, given that the Agency wouldn't exercise effective control over deployed staff members. This is especially problematic given the different legal frameworks that the Mauritanian authorities and Frontex are bound by. The Rapporteur considers this question to be insufficiently addressed by the Commission and Frontex during the procedure.

Another shortcoming of the model agreement relates to the limited external possibilities to submit complaints, especially since non-EU citizens do not have the possibility to submit complaints at the EU Ombudsman, and the limited jurisdiction of the Court of Justice of the European Union (CJEU) over external action. Consequently, the Agency and the Commission explore how to expand these possibilities, possibly with the involvement of the Fundamental Rights Agency (FRA) and EU Ombudsman.

Against that backdrop, the Rapporteur recommends the European Commission to seriously address the aforementioned shortcomings during the negotiations before seeking the consent of the European Parliament for the Status Agreement. Further, the Rapporteur recommends the Commission to conduct an ex ante fundamental rights impact assessment without further delay, in order to take into account the findings of this assessment. This should be followed by an independent monitoring by the Commission in case of the actual cooperation on the basis of the Status Agreement, in line with the Parliament recommendation in its report on ‘Human rights protection and the EU external migration policy’, as adopted in May 2021.

Apart from the legal shortcomings, the Rapporteur identified the fundamental rights situation in Mauritania to be a concern in the event of Frontex deployment on its territory. In absence of a legal asylum system, the United High Commissioner for Refugees (UNHCR) determines asylum eligibility. However, individuals not considered eligible for asylum are deported to Mali and Senegal by the authorities without further procedure. Further, there are practical problems related to the access of UNHCR to apprehended persons, which creates a risk of people in need of protection being deported. Migrants and refugees further face a number of other issues, related to serious human rights violations and ill treatment such as refoulement, arbitrary arrests, torture, detention, (gender-based) violence, exploitation and the application of Sharia-mandated penalties that are illegal in the EU. Frontex operations in Mauritania, and under the command structures of the Mauritanian authorities therefore pose a significant risk of deployed staff getting implicated in these violations.

The Rapporteur recommends that Frontex thoroughly considers the Parliament’s recommendations and closely cooperates with the Fundamental Rights Officer (FRO) to address the issues identified in the report and ensure that it complies with its fundamental rights related obligations. The Rapporteur also strongly invites the Agency and FRO to seriously assess the feasibility of the performance of an executive mandate by Frontex on the territory of Mauritania while fully living up to its fundamental rights obligations enshrined by Union law.