

**Title: “Abolish Frontex: On the duty to rescue and the loss of life in the Mediterranean.”**

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‘At the bottom of the Atlantic ocean there is a rail road, made of human bones.  
black ivory, black ivory’

- Amiri Baraka

## INTRODUCTION

In 2015, after the drownings of 700 people in the Central Mediterranean route, the European Commission [promised measures to prevent such tragedies, including strengthening its search and rescue capacity](#). Less than a year after announcing the plans to ramp up search and rescue support, the EU decided to expand the tasks of Frontex, the European Border and Coast Guard Agency, to include providing ‘[technical and operational assistance in the support of search and rescue operations for persons in distress at sea](#)’. Besides being an obligation in International law, search and rescue is also a specific objective in Frontex’s operational plan. However, five years after that statement and regulation, the deaths and disappearances of people attempting to reach Europe via the Mediterranean continues to increase. In addition, past investigations, particularly in the Central Mediterranean route, have uncovered how [Frontex assets repeatedly fail to respond to emergency distress calls at sea and deliberately patrol in the wrong areas](#), even in total awareness of how these practices lead to an increase in fatalities at sea.

Standing in support of demands to abolish Frontex, **this essay aims to explore how Frontex and the growing securitisation of the duty to rescue contribute to a loss of life in the migration routes via the Mediterranean Sea**. The **first chapter** will explore the mission and mandate of Frontex as well as analyse the Agency’s exponential growth in recent years. In the **second chapter**, this essay will analyse the international legal frameworks that regulate sea rescue and duties and responsibilities at sea under international law. The **third** and last **chapter** will expose how Frontex fails to uphold the responsibilities previously laid out as well as to expose the lack of accountability for the Agency’s violations of international law.

## ON SECURITISATION AND THE GROWING ROLE OF FRONTEX IN THE MEDITERRANEAN SEA

For many years, people on the move have been risking their lives and dying while attempting to cross the Mediterranean sea towards Europe. However, the current tragedy at Europe's borders, reaching a deadly extreme at sea, is not a simple accident. As I will discuss in this chapter, the policies implemented by the European Union (EU) in an attempt to deter "unauthorized migration" have increased insecurity for migrants, forcing them to take increasingly dangerous routes or exposing them to increasing levels of violence during their journey. These policies are obtaining the right results from the EU's point of view: a reduced number of migrant crossings. However, [the death rate during these journeys is only increasing](#).

In 2005, the formerly-named European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union began operating. That same year, Frontex started its first sea operations, launching Operation Hera, a joint operation with Spain. This unprecedented naval operation listed European and African forces to patrol along West African coasts and [led to a sharp decrease in arrivals to the Spanish Canary Islands](#). The so-called Atlantic route is considered the most dangerous sea journey to Europe as people attempting it are an eight-day and 1,500km journey away from their destination. However, back in 2005, the Atlantic route [became the alternative to more common routes after an incident that caused the death of 14 people in the Morocco-Spain land borders earlier that year](#). Seen as a success in deterring crossings by sea, Operation Hera provided the model for the upcoming Frontex operations in the Mediterranean sea.

In October 2013, 366 people died in a shipwreck near the Italian island of Lampedusa, which led to the creation of an Italian rescue operation called Mare Nostrum. Even if the operation helped save over 150,000 lives, [the growing rhetoric that rescues encouraged migration led to the end of Mare Nostrum a year later](#). As a replacement, Frontex launched Operation Triton. However, the Agency changed the operation's focus, from search and rescue, to border control, and increased its surveillance mechanisms. The change in priorities came with actual consequences, as [Frontex decided to limit its area of operations and deliberately decided not to patrol in the areas where most of the shipwrecks occurred](#). Following that decision, [the overall death rate in the area increased by 30 per cent in the following years](#). Even more relevant, the Agency already had the knowledge of the deadly consequences of that decision,

[as stated in a Frontex internal report from August 2014.](#)

These joint operations at sea coordinated by Frontex are examples of a securitisation approach. Firstly, they are deployed to address so-called “security issues”, such as border control, and they do so by partnering up with entities that hold semi-military statutes in their countries of origin, such as the *Guardia Civil* in Spain or the *Guardia di Finanza* in Italy. Secondly, they are deployed in “crisis” situations and they have sophisticated methods of gathering intelligence prior to their deployment. Lastly, all persons in contact with the Agency are treated first and foremost as “illegal aliens”, which leads to situations in breach of international norms, as this essay will explore later.

As of 2021, Frontex has [three active operations in the Mediterranean sea](#), aimed at securing EU borders, targeting migrant smugglers and rescuing migrants at risk. Operation Thermis replaced Triton in 2018, supporting Italy in border surveillance tasks and preventing foreign terrorists fighters from entering the EU. Regarding sea rescue, the website states that it ‘continues to be a key component of the operation’. Secondly, Operation Poseidon focuses on border surveillance in Greek waters - with no mention of rescue. The third and last Frontex active sea operation is Indalo, which covers the route between Morocco and Spain and it aims at assisting Spain with border surveillance and search and rescue. As seen, while Frontex’s mandate in the Mediterranean is not search and rescue, it has repeatedly stated its commitment to rescuing lives at sea. Not only that, but the increasing presence of Frontex assets at sea, from vessels to airplanes, comes hand in hand with the obligation to engage in rescue operations.

## **THE ENCOUNTER AT SEA AND THE DUTY TO RESCUE**

The duty to render assistance in distress cases at sea is one of the better established principles in international law of the sea, maritime law and international humanitarian law. Furthermore, the duty to rescue is enshrined in several international conventions, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1989 International Convention on Salvage (SALVAGE) and the 1979 International Convention on Maritime Search and Rescue (SAR). These rules are quite straight-forward: ‘[we should help a person in distress, especially if we can do so at little cost to ourselves](#)’. Nevertheless, there are still open discussions regarding the scope of the duty and the subjects bound by it.

The United Nations Convention on the Law of the Sea (UNCLOS) codified [the duty to rescue in Article 98](#). Today, it is generally accepted that Article 98(1) reflects customary international law. Moreover, it holds status in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) as a general principle of law. Article 98 states the following:

‘1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) **to render assistance to any person found at sea in danger of being lost;** (b) **to proceed with all possible speed to the rescue** of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [...] 2. **Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service** regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.’

The duty to render assistance applies without distinction of the legal status of the persons in distress, the nationality of the vessel nor the legality of the activities they were engaged in. However, in its application, people in distress can only be rescued by the solidarity and efforts undertaken by fellow seafarers. In October 2019, for example, while the Spanish *Guardia Civil* chased drug traffickers on a speedboat before the coast of Ceuta, [three of the agents fell into the water and were rescued by the drug traffickers, which ended up being detained and brought back to Spain](#). These events clearly exemplify the universal applicability of the duty to render assistance, without distinction.

Following an amendment in 2006, the SOLAS Convention, which has been adopted by the majority of member states of the International Maritime Organization (IMO), set an obligation to render assistance at sea ‘[regardless of the nationality or status of such persons or the circumstances in which they are found](#)’. The fact that those in distress are engaging in unlawful activity should not make a difference in benefiting from the right to be saved, nor the fact that those in distress are migrants. Incidentally, the duty to rescue has a close history with the protection of migrants at sea. During the late 1970s, over 80,000 people, widely known as ‘[boat people](#)’, fled the war in Vietnam by sea, and many drowned or were subjected to pirate attacks. This tragedy gave the final push towards the adoption of the SOLAS and the

SAR Conventions. Moreover, dating back to 1970, one of the first official partnerships of cooperation signed by the United Nations High Commissioner for Refugees (UNHCR) was with the International Maritime Organization (IMO).

A key development from the partnership between UNHCR and the IMO was the development of a leaflet titled '[Rescue at sea: A guide to principles and practice as applied to migrants and refugees](#)', co-authored jointly with the International Chamber of Shipping (ICS). The leaflet gives a definition of what they understand as a distress situation that should trigger the duty to render assistance: "SAR activities should be initiated wherever there are indications that a vessel or the conditions of the people on board do not allow for safe travel, creating a risk that people may perish at sea. Relevant factors include overcrowding, poor conditions of the vessel, or lack of necessary equipment and expertise". This definition was an important attempt to harmonize the different interpretations of distress and an attempt by UNHCR to shape the existing legal norms. Later, in 2014, UNHCR, IMO, the International Organization for Migration (IOM), the United Nations Office on Drugs and Crime (UNODC) and the Office of the High Commissioner for Human Rights (OHCHR) published a [joint statement](#) highlighting that "the time-honored tradition of rescue at sea enshrined in international law is in jeopardy" and that "these obligations apply regardless of the migration status of the persons in distress at sea".

Even if UNCLOS relates only to State responsibility, the duty to render assistance is applicable to both, States and ship masters, as well as to military, public and private vessels. The only exception, or limitation, of the application of the duty to rescue is if it cannot be carried out "[without serious danger to the ship, the crew or the passengers](#)". This limitation can also be found in [Article 24\(2\)\(b\) of the Draft Articles on State Responsibility](#), which highlights the impossibility to invoke the duty to rescue if the "act in question is likely to create a comparable or greater peril". In other words, the duty to rescue is to be revoked if an attempt to rescue would endanger the lives of a greater number of persons, or might go against the interest of the international community as a whole.

Despite the customary understanding of the duty to rescue, the resistance to assist migrants at sea has led to thousands of deaths in the Mediterranean. Sadly, even if no distinction in the applicable law is made, both States and ship masters tend to be [less willing to proceed to alleviate a distress situation when the people at risk are migrants and refugees](#). Only from the

period of 2014-2020, [over 21,000 migrants have lost their lives attempting the crossing via the Mediterranean sea](#). Fascinatingly, the duty to render assistance at sea is even recognized in times of war, where enemies must be rescued and bodies must be protected.

### **AVOIDING THE ENCOUNTER: LOSS OF LIFE AND ACCOUNTABILITY**

To excuse the failure in rendering assistance at sea, policymakers, lawyers and civil society actors tend to [attribute it to the imperfection of international law, and insist on efforts to strengthen the reinforcement of the already existing duties](#). However, this might be insufficient to address indifference and the omission of rescue at sea. From the EU's perspective, rescuing migrants at sea is understood as opposed to their goal of deterring unauthorized migration, as those rescued will seek to, among others, submit asylum applications or decide to stay in the territory. The role of Frontex, therefore, is contradictory in its nature, by being tasked with the enforcement of borders together with saving lives at sea. How is Frontex navigating this contradiction?

#### **Avoiding the encounter**

The fact that Frontex in 2014 decided to not patrol in areas where most rescues had happened, was only the beginning of Frontex's main strategy: to actively work to avoid triggering the duty to rescue for its assets. In order to achieve this, [Frontex has replaced ships with planes and surveillance drones flying over Libyan waters, the images of which are live-streamed in their Warsaw headquarters](#). Unlike naval vessels, drones do not have an obligation to be equipped to carry out rescue activities. Only in 2019, [the death rate for people rose from 2 per cent to a historical average of 14 per cent](#). In other words, 567 people out of 8,362 attempting the crossing died at sea that year. However, trusting the death counts of official sources is hard [as many shipwrecks are invisibilised in the Mediterranean graveyard](#). In the words of Deanna Dadusc and Maurice Stierl '[together with human bodies, this immense sea also hides the violence of European authorities, who choose to let people drown](#)'.

The replacement of naval assets with surveillance drones showcases Frontex's commitment to border management at the expense of people dying at sea. It also showcases a commitment to avoiding any encounters that would trigger the duty to render assistance. In addition, Frontex's approach to migrants deaths at sea comes in a [framing of the route as dangerous, rather than a consequence of their lack of action and operational commitment to rescuing](#)

[lives](#). As such, the sea itself is responsible for those deaths. Death is a natural outcome of a personal decision rather than the consequence of securitisation and border control policies. On the one hand, the sea has been portrayed as an [apolitical space to which migrants succumb to](#), and, on the other hand, Frontex appropriates the space for search and rescue. [“Restricting individual, independent, and spontaneous rescue allows state authorities \(along with their accredited actors\) to become the sole interface for securitized populations and to enforce a specific form of conduct”](#). This exposes a logic in which racialised lives can be exposed to political violence while erasing any responsibility for the perpetrator. The approach of portraying the sea as the main danger [was used to justify practices that exposed Black people to death during transatlantic slave journeys](#). However, people on the move do not die at sea because it is unmanageable, but because several strategies, including Frontex sea operations, have turned this space into an agent, while complying with the primary objective of limiting unauthorized migration by sea.

Over time, by continuing with the Frontex approach of (avoiding) rendering assistance at sea to people on the move, the duty to rescue faces the risk of becoming a privilege reserved for some human beings and being seen as an [‘optional act of charity’](#) for others - mostly racialised lives. This is dangerous because duties are owned while charity comes with considerations of convenience and financial results: a purely utilitarian approach. Last but not least, these practices also create new norms and normalities that justify indifference and inaction in the face of human suffering and death, as seen almost daily in the Mediterranean. A world in which it is the norm to distinguish between worthy and charitable lives is, thus, a world that undermines the [‘universality of humanitarian norms and even the notion of humanity’](#).

### **On Accountability**

As an EU Agency, [Frontex has the responsibility of, among others, guaranteeing the right to seek asylum as well as protecting persons from collective expulsions and refoulement](#), as outlined in the EU Charter of Fundamental Rights. In addition, [Frontex’s founding Regulation](#) outlines its commitment to compliance with, *inter alia*, UNCLOS, the SOLAS Convention and the SAR Convention. More specifically, the Regulation also places an obligation to conduct ‘search and rescue operations for persons in distress at sea launched and carried out in accordance [...] international law, taking place in situations which may arise during border surveillance operations at sea’. Furthermore, the Regulation commits to using

intelligence in order to ‘detect such small vessels [unseaworthy vessels transporting migrants] 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.’ Lastly, [the failure to respect the duty to rescue is considered a crime act in most EU Member States](#).

Nevertheless, even when evidence is being presented, holding Frontex accountability is increasingly difficult. There are mainly two main problems in accessing justice against Frontex within the existing accountability mechanisms. Firstly, Frontex’s exclusive participation in joint operations with EU Member States allows for blame-shifting and locating responsibility exclusively on the Member State. Last but not least, [individuals do not have a remedy system that allows them to challenge Frontex’s wrongdoings](#). Still, even if there is a way, taking into consideration the amount of proceedings currently open against Frontex, it would seem quite far-fetched to think it would materialize in abolishing the Agency all together, as [EU Member States have already agreed on a budget for the Agency of €11.3 billion for the years 2021–2027](#). However, out of all those proceedings, none comprises Frontex’s violation of the duty to rescue.

## CONCLUSION

This essay has outlined how Frontex and the growing securitisation of the duty to rescue contribute to a loss of life in the migration routes via the Mediterranean Sea. Since the inception of Frontex, [multiple actors have been investigating and gathering evidence that showcases the incompatibility of Frontex’s mandate with the respect for international norms and fundamental rights, as well as on how the Agency benefits from its structural impunity](#). The increase of power given to Frontex by quickly increasing its budget and autonomy, while failing to provide an adequate accountability system, has exponentially increased the violence it exerts over people on the move.

The demands to abolish Frontex are part of an intersectional and worldwide social movement that seeks to end the global apartheid imposed by Western countries that hold the monopoly on free movement, as well as to link calls to defund or abolish the police, and similar institutions, symbols of systemic racism. After watching the [EU’s foreign affairs chief Josep Borrell stating how ‘shocked’ and ‘appalled’ he was by the murder of George Floyd in Minneapolis](#), I cannot help but wonder, how many thousands of drownings of black and

brown lives will it take for the EU to put an end to Frontex? Actions taken (and omitted) by the Agency might be almost invisible to the public eye but they are no less violent.

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