

**FRONT****EX**



**EUROPEAN BORDER AND  
COAST GUARD AGENCY**

# Forced-Return Monitoring

## Background Reader

(Version September 2021)



Co-funded by the Asylum,  
Migration and Integration  
Fund of the European Union



**ICMPD**

International Centre for  
Migration Policy Development



# **Forced-Return Monitoring**

## **Background Reader**

**(Version September 2021)**

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## Abbreviations

<b>CAP</b>	Capability Programming Office (Frontex)
<b>CoC</b>	Code of Conduct
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>CRO</b>	Collecting Return Operation
<b>DCP</b>	Direct Contact Point in Return Matters
<b>EBCG Regulation</b>	European Border and Coast Guard Regulation
<b>EC</b>	European Commission
<b>ECRet Division</b>	European Centre for Returns Division
<b>EL</b>	Escort Leader
<b>EU</b>	European Union
<b>FAR</b>	Frontex Application for Returns
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>FRO</b>	Fundamental Rights Office (Frontex)
<b>Frontex</b>	European Border and Coast Guard Agency
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>IOM</b>	International Organization for Migration
<b>IRMA</b>	Integrated Return Management Application
<b>JRO</b>	Joint Return Operation
<b>MS</b>	Member State
<b>NGO</b>	Non-Governmental Organisation
<b>NRO</b>	National Return Operation
<b>OMS</b>	Organising Member State
<b>OPCAT</b>	Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>PMS</b>	Participating Member State
<b>RI</b>	Return Intervention
<b>RO</b>	Return Operation
<b>SQF</b>	Sectoral Qualifications Framework
<b>TCoR</b>	Third-country of Return
<b>TRU</b>	Training Unit (Frontex)



## Terms and Definitions

The terms and definitions below are taken from the Guide for Joint Return Operations by Air coordinated by Frontex (2016) and complemented by terms and definitions from Directive 2008/115/EC (Return Directive), the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018) and the European Border and Coast Guard Regulation (2019), unless another source is specifically indicated in the footnote. In addition, the following websites were consulted:

<https://www.coe.int/en/web/cpt/faqs#what-is-the-cpt> and  
<http://fra.europa.eu/en/about-fra>.

Acronym (if applicable)	Term	Definition
<b>AP</b>	<b>Advance party</b>	Representative(s) of the Organising Member State/Participating Member State who travel(s) either to the country/countries of return or to another Member State in order to make preparations for the realisation of a return operation.
	<b>Arrival phase</b>	Covers the period starting from arrival in the country of return and ending when the returnees are handed over to the national authority in the country of return.
<b>BUT</b>	<b>Back-up team</b>	A group of escorts – usually provided by the Organising Member State – acting as support to the escorts of both Organising Member State and Participating Member State(s) (i.e. assisting if necessary during violent incidents, or during lavatory procedures, etc.).
<b>BUT-L</b>	<b>Back-up team leader</b>	Leader of the back-up team.
	<b>Briefing</b>	A meeting organised before the in-flight phase, with all relevant participants, in particular the escort leaders, the back-up team leader, the monitor(s), doctors and the Frontex representative, in order to provide information about latest developments on the implementation of the return operation.

Acronym (if applicable)	Term	Definition
	<b>Coercive measures</b>	<ul style="list-style-type: none"> <li>- The use of coercive measures must be legal, necessary and proportional, not exceeding reasonable force, and with due respect to the returnee's rights, dignity and their physical integrity. The use of coercive measures takes appropriate account of the individual circumstances of each person, such as their vulnerable condition.</li> <li>- Coercive measures may be used only when strictly necessary on returnees who refuse or resist removal or in response to an immediate and serious risk of the returnee escaping, causing injury to themselves or to a third party, or causing damage to property.</li> <li>- Coercive measures likely to compromise or threaten the possibility of the returnees to breathe normally are prohibited. The relevant escort leader periodically reviews the continuing necessity and proportionality of deploying coercive measures, and particularly of applying means of restraint, when these are used for prolonged periods, based on a dynamic risk assessment.</li> <li>- The Organising Member State (OMS) and Frontex provide for a list of authorised restraints in the operational documents in advance of the Return Operation (RO) or Return Intervention (RI). Where applicable, this list must be distributed to the relevant Participating Member States (PMSs) prior to the RO or RI (see also further below: Implementation Plan). The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures under medical supervision to ensure flight security.</li> <li>- No PMS participants are required to use coercive measures not allowed under their national legislation even if those measures are accepted by the OMS and Frontex for that particular RO or RI (see also further below: Implementation Plan).</li> <li>- Returnees must not be threatened in order for them to board a means of transport. They must not be punished for not having done so without prejudice to sanctions provided for by applicable legislation.</li> </ul>

Acronym (if applicable)	Term	Definition
	<b>Chicago Convention</b>	The Convention on International Civil Aviation, known as the Chicago Convention, signed on 7 December 1944, in Chicago. It established the International Civil Aviation Organization (ICAO), a specialised UN agency charged with coordinating and regulating international air travel in the fields of safety, security, aviation environment protection and facilitation.
<b>CRO</b>	<b>Collecting return operation</b>	A return operation initiated by an Organising Member State, with aircraft and escorts provided by a country of return and returnees handed over to them by the Organising Member State/ Participating Member State on the territory of a Member State.
	<b>Common Guidelines</b>	Common Guidelines on security provisions for joint removals by air, which is annexed to Council Decision 2004/573/EC.
	<b>Council Decision 2004/573/EC</b>	The Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States of third-country nationals who are subjects of individual removal orders.
	<b>Council Directive 2003/110/EC</b>	Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.
<b>(T)CoR</b>	<b>(Third) Country of return</b>	<ul style="list-style-type: none"> <li>- The country of origin of the third-country national; or</li> <li>- A country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or</li> <li>- Another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.</li> </ul>
<b>CPT</b>	<b>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</b>	The CPT is a specialised independent monitoring body of the Council of Europe (CoE) <sup>1</sup> . It consists of independent, impartial experts such as lawyers, medical doctors, and specialists in prison or police matters. The CPT visits places of detention in the Member States of the Council of Europe to see how persons deprived of their liberty are treated. Examples of places of detention are: police stations, prisons, juvenile detention centres, immigration detention centres, psychiatric hospitals, or social care homes. They may also participate in and monitor forced-return operations.

<sup>1</sup>The Council of Europe (CoE) is an international organisation based in Strasbourg, which includes 47 member states, 27 of which are members of the European Union (EU). It was set up to promote democracy and protect human rights and the rule of law in Europe.

<b>Acronym (if applicable)</b>	<b>Term</b>	<b>Definition</b>
	<b>Debriefing</b>	A meeting organised during the return-flight phase, with all relevant participants, in particular the escort leaders, the back-up team leader, the monitor(s), and the Frontex representative, in order to assess the implementation of the return operation. If necessary, doctors should also participate.
	<b>Embarkation airport</b>	An airport where passengers from a national contingent embark on a return operation.
<b>EL</b>	<b>Escort leader</b>	Leader of the national escort team and responsible, within his/her team, for the adequate implementation of the return operation. He/she will be the highest authority/decision maker after the captain.
<b>EO</b>	<b>Escort officer</b>	The security personnel, including persons employed by a private contractor, responsible for accompanying the returnees, in particular during their transportation out of the Member State.
<b>FAR</b>	<b>Frontex Application for Return</b>	The FAR covers all return activities, from the expression of interest for pre-return activities and return (return operation) from a Member State in the rolling operational plan, up to the effective implementation of return operations.
<b>Frontex</b>	<b>European Border and Coast Guard Agency</b>	<p>European Border and Coast Guard Agency is the new name for the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004. Its activities are based on the European Border and Coast Guard Regulation No 2019/1896.</p> <p>The Agency ensures European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently. This includes addressing migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it.</p>

<b>Acronym (if applicable)</b>	<b>Term</b>	<b>Definition</b>
	<b>Fit-to-travel</b>	Refers to a returnee's medical condition (both physical and mental), which indicates that the person can undertake the journey safely.
	<b>Forced-return</b>	The obligatory return of an individual to the country of origin, transit, or third country (i.e. country of return), on the basis of an administrative or judicial act. <sup>2</sup>
<b>FRA</b>	<b>European Union Agency for Fundamental Rights</b>	The European Union established FRA to provide independent, evidence-based assistance and expertise on fundamental rights to EU institutions and Member States. FRA is an independent EU body, funded by the Union's budget.
	<b>Head of Operation</b>	The person appointed by the Organising Member State as having the overall responsibility for a joint return operation. Where no particular person is appointed, the escort leader of the Organising Member State is to be considered as the head of the joint return operation.
	<b>Hub</b>	An airport where Organising Member State/ Participating Member State passengers gather and embark on a joint return operation or collecting return operation and from where the airplane will transport all participants and returnees to the country of return.
<b>IP</b>	<b>Implementation Plan</b>	Prior to the implementation day of the return operation, Frontex draws up an Implementation Plan in cooperation with the Organising Member State and distributes it to the Participating Member State, as applicable. The Organising Member State and all Participating Member State escort leaders are responsible for informing each participant in his/her contingent about the content of the Implementation Plan, as well as the annexes, and for ensuring that they comply with the plan. This obligation is specified in each Implementation Plan.

<sup>2</sup> EMN Glossary 2014, p.60.

Acronym (if applicable)	Term	Definition
		<p>The Implementation Plan includes a list of authorised restraints and equipment permitted during the return operation that was decided by the Organising Member State together with Frontex in accordance with its national legislation, international law and EU law, in particular the Charter of Fundamental Rights. However, no Participating Member State should use coercive measures that its legislation does not allow, even if those measures are accepted by the Organising Member State for that particular operation.</p>
		<p>The Implementation Plan has the following annexes available to all participants in the return operation: serious incident report template; code of conduct applicable to all persons Participating in Frontex operational activities; code of conduct for joint return operations coordinated by Frontex; complaint form for potential violations of fundamental rights; rules of the complaints mechanism; list of potential fundamental rights violations during operations.</p>
	<b>In-flight phase</b>	<p>Starts with the closure of the doors of the aircraft used for the removal and ends with the arrival at the final destination and the opening of the doors on arrival (country of return or, in the case of an unsuccessful return, back to the country of departure or, in the case of joint return operations, back to the hub), including the transit via another country.</p>

Acronym (if applicable)	Term	Definition
	<b>Illegal versus irregular migrant</b>	<p>Migrants and migration are often referred to as either irregular or illegal, sometimes interchangeably. However, language and terms carry certain meanings. In this regard, the term “illegal” carries a criminal connotation. Therefore, when referring to a person, “irregular” is preferred to “illegal”. Furthermore, migration flows are mixed and irregular migrants can therefore also be refugees and/or victims of trafficking. This perspective can also be observed in the fact that the Council of Europe distinguishes between illegal migration and irregular migrant. Based on the Resolution 1509 (2006) of the Council of Europe Parliamentary Assembly, illegal is preferred when referring to a status and process, and irregular is preferred when referring to a person.</p> <p>The term third-country national shall be used as a neutral term for any person who is not a citizen of the European Union within the meaning of Art. 20(1) of Treaty on the Functioning of the European Union (TFEU) and who is not a person enjoying the Union right to free movement, as defined in Art. 2(5) of the Schengen Borders Code.<sup>3</sup></p>
<b>IRMA</b>	<b>Integrated Return Management Application</b>	A common IT platform for all return stakeholders developed by DG-HOME in coordination with Frontex and Member States. The aim of IRMA is to facilitate the planning of return operations and to assist the Member States and Frontex in the gathering and sharing of operational information.
<b>JRO</b>	<b>Joint Return Operation by Air</b>	An operation aimed at the removal of irregularly present third-country nationals by air. The initiative for such an operation is to be taken by one Member State, which will invite the participation of others.
<b>MS</b>	<b>Member State</b>	A Member State of the European Union or a Country associated with the implementation, application and development of the Schengen <i>acquis</i> (Schengen Associated Country).
	<b>Monitor</b>	Refers to the person who observes a return operation in accordance with the effective monitoring system established by Member States pursuant to Article 8(6) of the Return Directive.

<sup>3</sup> EMN Glossary 2014, p. 283.

Acronym (if applicable)	Term	Definition
	<b>Monitoring</b>	“Monitoring” is a broad term describing the active collection, verification and immediate use of information to address human rights issues. Human rights monitoring includes gathering information about incidents, observing events, visiting sites, discussions with authorities to obtain information and to pursue remedies and other immediate follow-up (Office of the High Commissioner for Human Rights, United Nations). In this context, the return operation is observed, analysed and reported on whether it was conducted in a humane manner, respectful of the dignity of the person and in compliance with fundamental rights as enshrined in the EU Charter of Fundamental Rights and applicable international human rights law. The monitor of forced-return operations has no powers of intervention and thus should never intervene.
<b>OMS</b>	<b>Organising Member State(s)</b>	The Member State which is responsible for the organisation of a return operation.
	<b>Participant</b>	Any person, including escorts, monitors, interpreters and medical staff, taking part in a return operation, other than the returnee.
<b>PMS</b>	<b>Participating Member State(s)</b>	The Member State which participates in a joint return operation (or collecting return operation, if applicable) organised by the Organising Member State.
<b>PAX</b>	<b>Positional asphyxia (or postural asphyxia)</b>	This is a form of asphyxia which occurs when someone’s position prevents him/her from breathing adequately. A small but significant number of people die suddenly and without apparent reason during restraint by police, prison (corrections) officers, and health care staff. Positional asphyxia may be factor in some of these deaths.
	<b>Pre-departure phase</b>	In the Annex to Decision 2004/573/EC, this is defined as the period starting with transportation to the airport. It covers the period from leaving the (temporary) holding/detention facility until embarkation on the aircraft.
	<b>Removal</b>	The enforcement of the obligation to return, namely the physical transportation out of the Member State. <sup>4</sup>

<sup>4</sup> Article 3(5), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.



Acronym (if applicable)	Term	Definition
	<b>Return</b>	The process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to his or her country of origin, or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.
	<b>Return decision</b>	An administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return that respects Directive 2008/115/EC.
	<b>Return Directive</b>	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
	<b>Returnee</b>	An irregularly staying third-country national who is the subject of a return decision issued by a Member State.
	<b>Return-flight phase</b>	The period starting after the handover procedure in the country of return until arrival at the airport of departure (hub in the case of joint return operations).
<b>RO</b>	<b>Return operation</b>	An operation that is coordinated by the European Border and Coast Guard Agency (Frontex) with technical and operational reinforcement provided by one or more Member States under which returnees from one or more Member States are returned either on a forced or voluntary basis.
	<b>Risk assessment</b>	The Organising Member State and each Participating Member State carry out an individual risk assessment of returnees (based on factors such as previous behaviour and removal history). Such assessments should be used to determine the number of escorts and ground staff and the size of the back-up team in order to ensure security during all the return operation phases, as well as for the determination of the possible use of coercive measures.

<b>Acronym (if applicable)</b>	<b>Term</b>	<b>Definition</b>
	<b>Dynamic risk assessment</b>	An ongoing risk assessment (see risk assessment above).
	<b>Rolling operational plan</b>	A rolling forecast for a return operation drawn up by Frontex on the basis of Member States' needs for assistance or coordination in order to provide the requesting Member States with the necessary operational support.
	<b>Seating plan</b>	Distribution of seats on a specific type of an aircraft between all Member States taking part in a specific joint return operation.
TCN	<b>Third-country national</b>	Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of Treaty on the Functioning of the European Union (TFEU) and who is not a person enjoying the Union right to free movement, as defined in Art. 2(5) of the Schengen Borders Code.
	<b>Tokyo Convention</b>	The Convention on Offences and Certain Other Acts Committed on Board Aircraft, concluded in Tokyo on 14 September 1963, which entered into force on 4 December 1969.
	<b>Transit country</b>	A country via whose airport return operation passengers transit to connect to the next flight.
VD	<b>Voluntary departure</b>	In the context of the Union, the return acquis refers to voluntary compliance with an obligation to return to a third country. <sup>5</sup>
	<b>Voluntary return</b>	The assisted or independent return to the country of origin, transit, or third country, based on the free will of the returnee. <sup>6</sup>
	<b>Vulnerable persons</b>	Including minors, unaccompanied minors, persons with disabilities, elderly people, pregnant women, victims of human trafficking, single parents with young children, persons with medical conditions, and persons who have been subjected to torture, rape, or other serious forms of psychological, physical, or sexual violence.

<sup>5</sup> EU Return Handbook 2018, p.12.

<sup>6</sup> EMN Glossary 2017, p. 300.

# Introduction

This Background Reader was elaborated in the framework of the “Forced-Return Monitoring II” (FReM II) project and updated within the framework of the “Forced-Return Monitoring III” (FReM III) project. A team of experts from the European Border and Coast Guard Agency (Frontex), the European Union Agency for Fundamental Rights (FRA), the International Centre for Migration Policy Development (ICMPD) and experts in forced-return monitoring and carrying out forced-return operations as well as independent fundamental rights and training experts supported the elaboration. The FReM II and FReM III projects were co-funded by the Asylum, Migration and Integration Fund (AMIF) of the European Union (EU) and the 22 partner countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Sweden and Switzerland.

The Background Reader at hand contains the relevant substantial information for the monitors of the Frontex pool for forced-return monitors (Pool) that was established on 7 January 2017 in line with Article 29 of Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard that was in force at that time. The Background Reader also serves the purpose of providing the trainers who implement the course for forced-return monitors with the relevant substantial information for the different training sessions. This course is part of a comprehensive training pathway designed for the monitors of the Pool and also includes a trainer’s manual as main tool for the trainers to implement the course.

The Background Reader is divided into four chapters, covering the following topics:

## **Chapter 1: Introduction to Return**

The first chapter introduces the main definitions related to return and forced-return monitoring, the relevant legal framework for return and related fundamental rights, the Frontex mandate in the different types of return, the different phases in forced-return operations, and the management of the pool of forced-return monitors.

## **Chapter 2: Fundamental Rights Applicable in Forced-Return Operations**

The second chapter introduces the fundamental rights applicable during a forced-return operation and their specific relevance in the different phases of a forced-return operation.

## **Chapter 3: Forced-Return Monitoring**

The third chapter covers the roles and responsibilities of monitors and details what the monitor should specifically observe in each separate phase of a forced-return operation. It also covers the roles and responsibilities of escorts during forced-return operations and the use of force, and means of restraint. Finally, it describes the possible impact monitoring can have on the monitor and related coping strategies.

## **Chapter 4: Drafting and Submitting a Monitoring Report**

This final chapter presents the main aspects that a monitor should know with regard to taking notes during a forced-return operation and writing the report following the operation.

The information in the Background Reader includes procedures related to forced-return by air, land and sea (aircraft, bus, train, ship). However, as the most common method of return, especially when conducted as joint return operations (JROs), is by air, examples made in the Background Reader mainly focus on air operations. Return by sea includes some specific features, which are not covered in the Background Reader. With regard to monitoring of air operations, it is important to mention that the scope of this Background Reader does not cover monitoring during commercial flights, i.e. normal passenger flights.

# Recommended Reading

## Council of Europe:

- 1950. European Convention on Human Rights
- 2005. Twenty Guidelines on Forced Return
- Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), substantive sections in the CPT's annual general reports

## European Union:

- 2004. Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004)
- 2008. Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally-staying, third-country nationals, Brussels, Belgium: Official Journal of the European Union
- 2012. Charter of Fundamental Rights of the European Union

## European Union Agency for Fundamental Rights (FRA):

- 2013. Fundamental Rights-Based Police Training. Module 4: The prohibition of Torture or Inhuman or Degrading Treatment and Punishment

## European Border and Coast Guard Agency (Frontex):

- Code of Conduct Applicable to all Persons Participating in Frontex Operational Activities
- Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex
- 2013. Fundamental Rights Training for Border Guards. Trainers Manual, Warsaw, Poland
- 2016. Guide for Joint Return Operations by Air, coordinated by Frontex
- 2018. Health and Safety Guidelines
- 2019. 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
- 2021. Frontex Fundamental Rights Strategy

**Other:**

- 2014. Office of the United Nations High Commissioner for Human Rights (OHCHR). Recommended Principles and Guidelines on Human Rights at International Borders

# **Chapter 1**

## **Introduction to Return**





# Chapter 1: Introduction to Return

The role of monitors is to observe and report on the forced-return of third-country nationals<sup>7</sup>. But before turning to the specific topic of forced-return and forced-return monitoring, it is important for monitors to be familiar with the overall context of return. Their forced-return monitoring mandate does not cover questioning the return decision taken by the relevant authorities. Nevertheless, it is paramount for them to have the relevant knowledge of the legal framework related to return and the procedures of the States and authorities organising the forced-return of third-country nationals.

This chapter introduces the main definitions related to return and forced-return monitoring (please also consult the Glossary of Terms and Definitions above), the relevant legal framework for return and related fundamental rights, the Frontex mandate in types of return, the different phases in forced-return operations, and the management of the pool of forced-return monitors.

## 1.2 Three different scenarios

People migrate for various reasons and under very different circumstances. States regulate entry as part of their migration management (e.g. visa requirements, bilateral agreements, etc.). In the framework of migration management, states therefore have the right to ask third-country nationals who do not fulfil, or no longer fulfil the conditions for entry, stay, or residence to leave their territory. Return can be voluntary or forced, assisted or spontaneous. A number of different types of return apply, with **forced-return** being applied as a measure of **last resort**. In the context of return, one normally differentiates between three main scenarios:

1. **Voluntary return** is the assisted or independent return to the country of origin, transit, or third country, based on the free will of the returnee.<sup>8</sup>
2. **Voluntary departure** in the context of the Union return *acquis* refers to the voluntary compliance with an obligation to return to a third country.<sup>9</sup> According to article 7(1) of the Return Directive (2008/115/EC), a return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days for leaving the territory of a given Member State. Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days:

<sup>7</sup> Migrants and migration are often referred to as either irregular or illegal, sometimes interchangeably. However, language and terms carry certain meanings. In this regard, the term “illegal” carries a criminal connotation. Therefore, when referring to a person, “irregular” is preferred to “illegal”. Furthermore, migration flows are mixed and irregular migrants can therefore also be refugees and/or victims of trafficking. This perspective can also be observed in the fact that the Council of Europe distinguishes between illegal migration and irregular migrant. Based on the Resolution 1509 (2006) of the Council of Europe Parliamentary Assembly, illegal is preferred when referring to a status and process, and irregular is preferred when referring to a person. In this Background Reader the term third-country national is used as a neutral term for any person who is not a citizen of the European Union within the meaning of Article 20(1) of TFEU and who is not a person enjoying the European Union right to free movement, as defined in Article 2(5) of the Schengen Borders Code (EMN Glossary 2014, p. 283).

<sup>8</sup> EMN Glossary 2014, p. 300.

<sup>9</sup> EU Return Handbook 2017, p.12.

- ♦ If there is a risk of absconding;
- ♦ If an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or
- ♦ If the person concerned poses a risk to public policy, public security, or national security.<sup>10</sup>

The term “voluntary departure” does not cover cases in which legally staying third-country nationals decide to go back to their home country based on their own decision. Such “truly” voluntary return falls outside the scope of the Return Directive, because it concerns legally staying third-country nationals.<sup>11</sup>

In this context it is also important to mention **assisted voluntary return**<sup>12</sup>, which is the voluntary return or voluntary departure supported by logistical, financial, and/or other material assistance.<sup>13</sup>

3. **Removal** means the enforcement of the obligation to return, namely the physical transportation out of the Member State.<sup>14</sup> In line with article 8(1) of the Return Directive, Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.<sup>15</sup>

### 1.3 Definition of forced-return

In the global context, **forced-return** (also referred to as compulsory return) can be defined as the obligatory return of an individual to the country of origin, transit, or third country (i.e. country of return), on the basis of an administrative or judicial act.<sup>16</sup>

The term “forced-return” is not specifically defined under EU law. The Return Directive speaks of “return” as a general term, which is defined in article 3(3) as the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to his or her country of origin; or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

<sup>10</sup> Article 7(4) of the Return Directive.

<sup>11</sup> EU Return Handbook 2017, p.12.

<sup>12</sup> Assisted voluntary return includes the assessment of the third-country national's willingness to return. Third-country nationals without papers and legal status, can also approach the State and/or NGOs and/or international organisations that offer assisted voluntary return programmes (e.g. IOM), and ask for support in returning. Assisted voluntary return programmes in general vary in terms of the assistance provided and the eligibility criteria applied. Assistance provided can include pre-departure counselling, training, assistance for business-start-up, food vouchers, emergency housing, education for children, etc. Most Member States provide the assistance as in-kind support and not cash support in order to avoid that such programmes become a pull factor.

<sup>13</sup> EMN Glossary 2014, p. 31.

<sup>14</sup> Article 3(5) of the Return Directive.

<sup>15</sup> Article 8(2) of the Return Directive.

<sup>16</sup> EMN Glossary 2014, p. 60.

It can be argued, that both voluntary departure and removal fall under forced-return as both terms refer to the return of illegally-staying third-country nationals that have received a return decision. It should, however, be kept in mind that when speaking about forced-return in the context of return operations, it usually refers to removal, i.e. the physical transportation out of a Member State. It is thus an organised operation and accompanied return of third-country nationals (and compulsory for those individuals) by a certain means of transport by air, land or sea to the country of origin or another country of return. Forced-return operations are organised by police and/or migration authorities for third-country nationals who are subject to an **individual return decision/removal order**, taken by a court or competent administrative body in a Member State, **after all legal procedures and possibilities have been exhausted**. Please see below for more specific information.

#### 1.4 To whom may forced-return apply?

- ♦ Holders of an expired residence permit or visa;
- ♦ Holders of a withdrawn permit or visa;
- ♦ Rejected asylum seekers;
- ♦ Asylum applicants who have received a decision ending their right of stay as an asylum seeker;
- ♦ Persons subject to a refusal of entry at the border;
- ♦ Persons intercepted in connection with an irregular border crossing;
- ♦ Irregular migrants apprehended within the territory of the state concerned;
- ♦ Persons who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law.<sup>17</sup>

It is important to note that **asylum seekers whose claim is still being assessed and not yet decided upon** (including pending decisions on appeals), **are not returned**, based on the principle of **non-refoulement**. *Non-refoulement* is the key principle of international refugee law, which requires that **no State shall return a refugee to a country where his or her life or freedom may be endangered**. It also encompasses non-rejection at the border.

The principle of *non-refoulement* is embodied in Article 33 of the 1951 UN Convention Relating to the Status of Refugees and constitutes the legal basis for States' obligations to provide international protection to those in need of it. Article 33(1) reads as follows: "*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion*". Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the light of the jurisprudence of the European Court of Human Rights and Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, are also considered as bases for *non-refoulement* obligations.

<sup>17</sup> The Return Directive gives Member States in Article 2(2) the possibility not to apply the safeguards embodied in the directive to criminal law cases. The Article reads as follows: Member States may decide not to apply this Directive to third-country nationals who: [...] (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

## 1.5 The EU framework on forced-return

There are a number of documents one needs to be familiar with when dealing with issues related to return in general and forced-return in particular. The most relevant for forced-return monitors are:

- ♦ The Council Decision on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject of individual removal orders (2004);
- ♦ The Return Directive (2008);
- ♦ The Charter of Fundamental Rights of the European Union (2012);
- ♦ The Return Handbook (2017);
- ♦ The Guide for Joint Return Operations by Air, coordinated by Frontex (2016); and
- ♦ The European Border and Coast Guard Regulation (2019).

### 1.5.1 The Council Decision 2004/573/EC

The Council Decision 2004/573/EC on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject to individual removal orders, **lays down rules for the organisation of return flights** for third-country nationals who are the subject of removal orders. In particular, it concerns the **specific tasks of the authorities organising and participating in a joint return operation as well as their common tasks**. The Decision was adopted without the opinion of the European Parliament.

The Common Guidelines on security provisions, the health of returnees, the code of conduct for escorts and the use of coercive measures are set out in the annex to the Decision. Security provisions for joint removals by air concern five phases defined in the Decision: the pre-return phase, the pre-departure phase in departure or stopover airports, the in-flight procedure, the transit phase, and the arrival phase.<sup>18</sup>

### 1.5.2 The Return Directive (2008/115/EC)

The **principal legal act regulating return-related issues in the EU** is the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally-staying, third-country nationals – the so-called Return Directive. The Return Directive entered into force on 13 January 2009 and was required to be transposed into national legislation of Member States before 24 December 2010. The Return Directive binds 30 States, i.e. 27 EU

<sup>18</sup> Compare: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14165>. Please note that this background reader applies the phases relevant to forced-return monitoring as defined in Article 50(5) of Regulation (EU) 2019/1896 "Every return operation organised or coordinated by the Agency shall be monitored in accordance with Article 8(6) of Directive 2008/115/EC. The monitoring of forced-return operations shall be carried out by the forced-return monitor on the basis of objective and transparent criteria and shall cover the whole return operation from the pre-departure phase until the handover of the returnees in the third country of return." Accordingly, the following phases apply to forced-return monitoring: pre-departure phase, in-flight phase, arrival phase, and return-flight phase as also outlined in the Guide for Joint Return Operations by Air, coordinated by Frontex (2016).

Member States excluding Ireland, and including Switzerland, Norway, Iceland, and Liechtenstein. The Return Directive **aims at harmonising and supporting national efforts to better manage returns**.

### Key definitions

The Return Directive defines in Article 3 the following definitions relevant for return procedures:

- ♦ Illegal stay;
- ♦ Return;
- ♦ Return decision;
- ♦ Removal;
- ♦ Risk of absconding;<sup>19</sup>
- ♦ Voluntary departure; and
- ♦ Vulnerable persons.<sup>20</sup>

### Basic guarantees

The Return Directive furthermore provides basic guarantees which must be applied throughout the entire return process, namely:

- ♦ The best interest of the child;
- ♦ The right to family life;
- ♦ The state of health of the third-country national concerned; and
- ♦ The principle of *non-refoulement*.<sup>21</sup>

### Return procedures

The order in which the stages of the return procedure established by the Directive are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision. This **gradation goes from the measure which allows the person concerned the most liberty**, namely granting a period for their voluntary departure, **to measures**

<sup>19</sup> The existence of reasons in an **individual case** that are based on **objective criteria** defined by law to believe that a third-country national who is the subject of return procedures **may** abscond (Article 3(7)). Some examples of the **objective criteria** ("consideration should go beyond the mere fact of an illegal stay") are:

- No notification about the change of address during the period of voluntary departure;
- Previous evasion or non-compliance with alternatives to detention;
- Explicit statement not to comply with a return decision;
- Existing criminal record or previous expulsion as a criminal sanction; and
- Non-respect of an existing entry-ban, etc.

<sup>20</sup> Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence (Article 3(9)).

<sup>21</sup> Article 5 of the Return Directive.

**which restrict that liberty the most**, namely detention in a specialised facility; the principle of proportionality must be observed throughout these stages.<sup>22</sup>

Article 6(1) of the Return Directive sets the obligation to issue a return decision to any illegally-staying, third-country national. This means that there should not be any grey areas, i.e. there is an **obligation to either initiate return procedures or to grant a right to stay**. As already mentioned earlier, according to Article 7(1) of the Directive, Member States have to first grant a period of voluntary departure between seven and thirty days. However, according to Article 7(4) of the Directive exceptions to this rule can be made if there is a risk of absconding; if application for legal stay is dismissed as manifestly unfounded or fraudulent; or if there is a risk to public policy, public security, or national security. If a period of voluntary departure is not granted or if the third-country national does not comply with the decision to depart voluntarily, Member States can adopt removal decisions and thus enforce the return obligation by physical transportation out of the territory of the specific Member State. Should there be the **necessity to use force during the removal process**, this **needs to be done with the respect to the principle of proportionality**<sup>23</sup>. In Article 8(6) the Return Directive also provides the obligation for the Member States to provide for an **effective forced-return monitoring system**.

Removal has to be postponed if there is a risk of violation of the principle of *non-refoulement* or if remedies have suspensive effect. Furthermore, removal can be postponed if individual circumstances justify it. Examples of individual circumstances are the physical state or mental capacity of the concerned person; lack of transport capacity, or failure of the removal due to lack of identification.<sup>24</sup>

In Article 11, the Return Directive also foresees the imposition of **entry bans**. Such entry bans have to be imposed in cases where no voluntary departure period was granted or if the third-country national did not comply with the voluntary departure decision, i.e. did not leave within the time granted for voluntary departure. In all other cases the imposition of entry bans is optional. The maximum time-limit of the validity of entry bans must not exceed five years but in cases of a serious threat to public policy, public security, or national security Member States can impose entry bans going beyond the five year limit.<sup>25</sup>

### Procedural safeguards

In Chapter III, the Return Directive sets the following procedural safeguards:

- ◆ Right to be heard before issuing return-related decisions;
- ◆ Return-related decisions to be issued in written form and be reasoned (to be translated into an understandable language);
- ◆ Right to an effective remedy (which includes the requirement to suspend the execu-

<sup>22</sup> European Court of Justice, El Dridi, para. 41 (<http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0061&lang1=en&type=TXT&ancre=>).

<sup>23</sup> Article 8(4) of the Return Directive specifies: “Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.”

<sup>24</sup> Compare with Article 9 of the Return Directive.

<sup>25</sup> Compare with Article 11(2) of the Return Directive.

tion of the return decision in cases where Articles 2 and 3 of the European Convention on Human Rights (ECHR) are at stake);

- ♦ Right to legal advice, representation, and linguistic assistance.

### Detention and detention conditions

In Chapter IV, the Return Directive specifies the conditions of detention for the purpose of removal. According to the Directive any **detention shall be for as short a period as possible** and only maintained as long as removal arrangements are in progress and executed with due diligence. Maximum length of detention is six months, but it may be prolonged by a further twelve months in accordance with national law (i.e. 18 months in total) if there is a lack of cooperation by the third-country national concerned or if there are delays in obtaining the necessary documentation from countries of origin or transit. Unless other sufficient but less coercive measures can be applied effectively in a specific case, pre-removal detention is justified for third-country nationals who are subject to return procedures in order to prepare the return and/or carry out the removal process only when:

- ♦ There is a risk of absconding; or
- ♦ The third-country national concerned avoids or hampers the preparation of return or the removal process.<sup>26</sup>

According to Article 17(1) of the Return Directive, **detention of unaccompanied minors and families with minors** can be applied **only as a measure of last resort** and for the **shortest appropriate period of time**. Furthermore, detention in **specialised facilities** is a rule. Families must be granted separate accommodation with adequate privacy (derogation in emergency situations is possible – see Article 18 of the Return Directive) and special facilities for unaccompanied minors must be provided. Detained third-country nationals must also be protected from aggressive or inappropriate behaviour of other third-country nationals or detainees. In addition, in the case of impossibility of detention in specialised facilities, third-country nationals must be separated from ordinary prisoners. Furthermore, third-country nationals in detention must be able to contact legal representatives, family members, and competent consular authorities. Particular attention must be paid to the situation of vulnerable persons. The provision of leisure activities and education for minors is essential. There is also an obligation to provide emergency health care and essential treatment of illness. Access for relevant NGOs and International Organisations to detention facilities must be guaranteed upon authorisation.<sup>27</sup>

### 1.5.3 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the EU brings together in a single document **the fundamental rights protected in the EU**. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, the Charter has become **legally binding on the EU** with the entry into force of the Treaty of Lisbon, in December 2009.

<sup>26</sup> Compare with Article 15(1) of the Return Directive.

<sup>27</sup> Compare with Article 16 (conditions of detention) of the Return Directive.

The Charter includes all the rights found in the case law of the Court of Justice of the EU; the rights and freedoms enshrined in the European Convention on Human Rights; other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. It also includes so-called 'third generation' fundamental rights, such as data protection; guarantees on bioethics; and transparent administration. The **provisions** of the Charter are **addressed to the institutions and bodies of the EU** with due regard for the principle of subsidiarity<sup>28</sup>; and the **national authorities only when they are implementing EU law**.<sup>29</sup>

#### 1.5.4 The Return Handbook

The Return Handbook to be used by Member States' competent authorities when carrying out return related tasks aims to provide **guidance** relating to the performance of duties of **national authorities** competent in **carrying out return-related tasks**, including police, border guards, migration authorities, staff of detention facilities, and monitoring bodies. The Handbook is **not legally binding**, but provides practical commentary and guidance on the implementation of each article of the Return Directive, including examples, extracts from human rights standards, and references to relevant European Court of Justice (ECJ) judgements.

The Handbook provides information highly relevant for forced-return monitors. The following chapters of the Handbook are of specific relevance:

- ♦ Chapter 7 – Removal;
- ♦ Chapter 8 – Forced-Return Monitoring;
- ♦ Chapter 9 – Postponement of Removal;
- ♦ Chapter 10 – Return of Unaccompanied Minors (UAMs); and
- ♦ Chapter 12 – Procedural Safeguards.

#### 1.5.5 Guide for Joint Return Operations by Air, coordinated by Frontex

The purpose of the Guide for Joint Return Operations by Air, coordinated by Frontex published in May 2016 is to provide **operational guidance for Frontex coordinated Joint Return Operations** (JROs) by air in order to standardise procedures and to simplify the organisation of JROs. The document was developed and updated<sup>30</sup> pursuant to Article 2(2) of the CoC for JROs<sup>31</sup> and is a tool to provide support to the authorities responsible for the organisation of JROs.

28 The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at an EU level is justified in light of the possibilities available at national, regional, or local level. (<http://eur-lex.europa.eu/summary/glossary/subsidiarity.html?locale=en>).

29 [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) (visited on 03/01/2018). The Charter applies when EU countries adopt or apply a national law implementing an EU directive or when their authorities apply an EU regulation directly. In cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions they have ratified ([http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) (visited on 03/01/2018)).

30 The original title was "Best Practices for the Removal of Illegally Present Third-country Nationals".

31 Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018).



The Guide does not replace, or alter in any way, the Council Decision 2004/573/EC. It does however, complement the Decision by providing a **practical and experience-based approach**. Moreover, it does not create any new legally binding obligations of Member States, but **collects good practices** relating to the performance of the duties of national authorities competent to carry out return-related tasks in the framework of JROs coordinated by Frontex. Frontex is currently elaborating a separate guide for collecting return operations (CROs).<sup>32</sup>

### 1.5.6 The European Border and Coast Guard Regulation

The 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 entered into force on 4 December 2020. The Regulation established “a European Border and Coast Guard to ensure European integrated border management at the external borders with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy.”<sup>33</sup>

The following articles are of specific importance for forced-return monitors:

- Article 50 - Return operations;
- Article 51 - Pool of forced-return monitors;
- Article 52 - Return teams;
- Article 53 - Return interventions;
- Article 62 - Training;
- Article 80 - Protection of fundamental rights and a fundamental rights strategy;
- Article 81 - Code of conduct;
- Article 83 - Accreditation document; and
- Article 111 - Complaints mechanism.

**Article 50 (return operations)** of Regulation (EU) 2019/1896 deals with the operational aspects of return operations and their fundamental rights compliance. In this regard, the Regulation states in Article 50(5) that “[e]very return operation organised or coordinated by the Agency shall be monitored in accordance with Article 8(6) of Directive 2008/115/EC [...] by the forced-return monitor on the basis of objective and transparent criteria and shall cover the whole return operation from the pre-departure phase until the handover of the returnees in the third country of return.”

With the exception of collecting return operations (CRO), where the physical presence of a monitor is mandatory<sup>34</sup>, Regulation (EU) 2019/1896 does not clearly specify the obligation

<sup>32</sup> Frontex Guide to JROs, p. 9.

<sup>33</sup> Article 1 (subject matter) of the EBCG Regulation.

<sup>34</sup> In line with Article 50(3) of Regulation (EU) 2019/1896 “[...] At least one Member State representative, and one forced-return monitor from the pool established under Article 51 or from the monitoring system of the participating Member State, shall be present throughout the entire return operation until arrival at the third country of return.”

to physically monitor all forced-return operations. However, Frontex advises physical monitoring of all forced-return operations by charter flights to safeguard their compliance with fundamental rights.

Article 50(5) of Regulation (EU) 2019/1896 also specifies that the “[...] forced-return monitor shall **submit a report** on each forced-return operation to the executive director, the fundamental rights officer and to the competent national authorities of all the Member States involved in the given operation. If necessary, **appropriate follow-up shall be ensured** by the executive director and competent national authorities respectively”.

**Article 51 (pool of forced-return monitors)** of Regulation (EU) 2019/1896 is specifically relevant to the establishment of the Pool; Article 51(1) requires Frontex “[...] after taking due account of the opinion of the fundamental rights officer, [to] **constitute a pool of forced-return monitors from competent bodies of the Member States** who carry out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC and who have been trained in accordance with Article 62 of this Regulation.” Regulation (EU) 2019/1896 specifies in Article 51(2) that the “Member States shall be responsible for contributing [monitors] to the pool by nominating forced-return monitors corresponding to the defined profile.” The pool of forced-return monitors was already constituted by 7 January 2017, as required by Article 29 of Regulation (EU) 2016/1624 in force at the time<sup>35</sup>.

In addition to clearly stating the responsibility to develop specific training tools, including specific training in the protection of children and other persons in a vulnerable situation, **Article 62 (training)** of Regulation (EU) 2019/1896 **foresees obligatory training relevant to their tasks and powers for all persons involved in Frontex activities, including for forced-return monitors.**

**Article 80 (protection of fundamental rights and a fundamental rights strategy)** of Regulation (EU) 2019/1896 shall guarantee the protection of fundamental rights in the performance of Frontex’ tasks; it specifically highlights the **principle of non-refoulement**. In line with Article 80(2) “[...] the European Border and Coast Guard shall ensure that no person, in contravention of the principle of non-refoulement, be forced to disembark in, forced to enter, or conducted to a country, or be otherwise handed over or returned to the authorities of a country where there is, *inter alia*, a serious risk that he or she would be subjected to the death penalty, torture, persecution, or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a risk of expulsion, removal, extradition or return to another country in contravention of the principle of non-refoulement.”

The same article also emphasises that Frontex shall take into account the special needs and address them within its mandate of: children, unaccompanied minors, persons with disabilities, victims of trafficking in human beings, persons in need of medical assistance, persons in need of international protection, persons in distress at sea, and other persons in a particularly vulnerable situation. Specifically, Frontex has to pay particular attention to **children’s rights** and ensure that the **best interests of the child** are respected.<sup>36</sup>

**Article 81 (code of conduct)** of Regulation (EU) 2019/1896 covers the **codes of conduct**:

- ◆ The Code of Conduct for all persons participating in Frontex activities applies to all bor-

<sup>35</sup> Article 29 of Regulation (EU) 2016/1624 was then replaced by Article 51 of Regulation (EU) 2019/1896.

<sup>36</sup> Article 80(3).

der control operations coordinated by the Agency and all persons participating in the activities of the Agency. The code of conduct lays down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights with particular focus on vulnerable persons, including children, unaccompanied minors and other persons in a vulnerable situation, as well as on persons seeking international protection.<sup>37</sup>

- The Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex complements the provisions of the Code of Conduct for all persons participating in Frontex activities. It applies during all return operations and return interventions coordinated or organised by the Agency. That code of conduct describes common standardised procedures to simplify the organisation of return operations and return interventions, and shall assure return in a humane manner and with full respect for fundamental rights, in particular the principles of human dignity, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security and the right to the protection of personal data and non-discrimination.<sup>38</sup> This code of conduct also includes provisions related to forced-return monitoring.

**Article 83 (accreditation document)** of Regulation (EU) 2019/1896 regulates the issuance of accreditation documents to the members of the teams for the purpose of identifying them and as proof of the holder's rights to perform their tasks. The accreditation documents have to be returned to Frontex at the end of a return operation, intervention or any other Frontex activity/operation.<sup>39</sup>

**Article 111 (complaints mechanism)** of Regulation (EU) 2019/1896 establishes an independent and effective **complaints mechanism to monitor and ensure respect for fundamental rights in all Frontex activities**. Any person who is directly affected by the actions or failure to act on the part of staff involved in a Frontex activity and who considers himself or herself to have been the subject of a breach of his or her fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint in writing to the Agency. The Fundamental Rights Officer is responsible for handling complaints received by Frontex in accordance with the right to good administration<sup>40</sup>.

## 2. Frontex' Mandate in Forced-Return Operations

As outlined on the Frontex website ([www.frontex.europa.eu](http://www.frontex.europa.eu)) the European Border and Coast Guard Agency (Frontex), promotes, coordinates and develops European border management in line with the EU Charter of Fundamental Rights and the concept of Integrated Border Management.

To help identify migratory patterns as well as trends in cross-border criminal activities, Frontex analyses data related to the situation at and beyond EU's external borders. It monitors the sit-

<sup>37</sup> Article 81(1).

<sup>38</sup> Article 81(2).

<sup>39</sup> When a Frontex representative participates in a forced-return operation, they provide the monitor with the accreditation card. When no Frontex representative is present during the pre-departure or in-flight phase, the person responsible in the host MS prints out the accreditation card, puts it in a plastic badge holder, and hands it to the monitor who is being deployed. Frontex uploads the accreditation cards in PDF for the MSs in the FAR.

<sup>40</sup> Any further information on the complaints mechanism is available at: <https://frontex.europa.eu/accountability/complaints-mechanism/>

uation at the borders and helps border authorities to share information with Member States. The Agency also carries out vulnerability assessments to evaluate the capacity and readiness of each Member State to face challenges at its external borders, including migratory pressure.

Frontex coordinates and organises joint operations and rapid border interventions to assist Member States at the external borders, including in humanitarian emergencies and rescue at sea. The Agency deploys European Border and Coast Guard teams, including a pool of at least 1,500 border guards and other relevant staff to be deployed in rapid interventions. The members of the rapid reaction pool must be provided by Member States upon request by the Agency. It also deploys vessels, aircraft, vehicles and other technical equipment provided by Member States in its operations. In addition, Frontex may carry out operations on the territory of non-EU countries neighbouring at least one Member State, in case of migratory pressure at a non-EU country's border.

Frontex supports Member States with screening, debriefing, identification and fingerprinting of migrants. Officers deployed by the Agency refer and provide initial information to people who need, or wish to apply for, international protection, cooperating with the European Asylum Support Office (EASO) and national authorities. It is the national authorities, not Frontex, who decide which person is entitled to international protection.

The Agency assists EU Member States in forced returns of people who have exhausted all legal avenues to legitimise their stay within the EU. This help includes obtaining travel documents for the returnees by working closely with consular authorities of the relevant non-EU countries. It can also organise voluntary departures of nationals of non-EU countries who were issued return decisions by Member State authorities. Frontex also organises return operations on its own initiative and "collecting return operations", where returnees are returned with escort officers and transportation provided by their countries of origin.

Frontex supports the cooperation between law enforcement authorities, EU agencies and customs at sea borders. Vessels and aircraft deployed in its operations also collect and share information relevant to fisheries control, detection of pollution and compliance with maritime regulations. The Agency works closely with European Fisheries Control Agency (EFCA) and European Maritime Safety Agency (EMSA) to implement multipurpose operations. In these operations, vessels and aircraft deployed for border surveillance can also be used for fishing and environmental monitoring.

Frontex focuses on preventing smuggling, human trafficking and terrorism as well as many other cross-border crimes. It shares any relevant intelligence gathered during its operations with relevant national authorities and Europol.

The Agency is the centre of expertise in the area of border control. It develops training curricula and specialised courses in a variety of areas to guarantee the highest levels of professional knowledge among border guards across Europe. It also supports search and rescue operations that arise during border surveillance operations at sea.

All the Agency's tasks are listed in Article 10 of Regulation 2019/1896.

Based on Article 50 of Regulation 2019/1896 "[w]ithout entering into the merits of return decisions, which remain the sole responsibility of the Member States, the Agency shall provide Member States with technical and operational assistance and shall ensure the coordination or the organisation of return operations, including through the chartering of aircraft for the purpose of such operations and organising

*returns on scheduled flights or by other means of transport. The Agency may, on its own initiative and with the agreement of the Member State concerned, coordinate or organise return operations."*

According to Article 50(2) of the EBCG Regulation, Member States "[...]shall inform the Agency of their indicative planning as regards the number of returnees and the third countries of return, both with respect to relevant national return operations, and of their needs for assistance or coordination by the Agency." Member States needs are included in a Rolling Operational Plan through the Frontex Application for Returns (FAR). The country of return, i.e. the country to which the third-country nationals will be returned, and the country returning are in contact in order to settle all logistical and administrative matters before the return operation can take place, i.e. the country of return has to agree to the admission of the returnees planned to be returned.

### 3. Types of Forced-Return Operations

In line with Article 2(27) of Regulation (EU) 2019/1896 "return operation' means an operation that is organised or coordinated by the European Border and Coast Guard Agency and involves technical and operational reinforcement provided to one or more Member States under which returnees from one or more Member States are returned, either on a forced or voluntary basis, irrespective of the means of transport". There are three types of return operations: **National Return Operation (NRO)**, a **Joint Return Operation (JRO)**, or a **Collecting Return Operation (CRO)**.

All different types may include one or several countries of return. In case of several countries of return, there are several in-flight and arrival phases.

- ♦ **NROs** are organised and carried out by only one Member State and can have one or several destinations.
- ♦ **JROs** include one Organising Member State (OMS) and additional Participating Member States (PMS) – at least one OMS and one PMS cooperate.
- ♦ **CROs** are organised by one OMS, with possible participation of other PMSs, with aircraft and forced-return escorts provided by the country of return.

In case of JROs and CROs the different national contingents could either fly (national feeder) to a common hub, changing to a single aircraft and proceeding to one or more country/ies of return. En route to a specific country of return, the chartered flight may also land in another Member State to pick up other returnees and escorts located there (stopover).<sup>41</sup>

During chartered forced-return operations coordinated or organised by Frontex (NROs, JROs and CROs), escorts accompany individuals being returned.<sup>42</sup> When a return operation is being organised (including NROs, JROs, and CROs), the country or countries of return selected for that particular return operation depends on the number of nationals from that country waiting to be returned, the travel documents available and the conditions applied by the

<sup>41</sup> In practice, JROs normally only stop once as they tend to be quite long.

<sup>42</sup> A returnee can also be forcibly returned by scheduled flight (i.e. normal passenger flights with an airline to a scheduled destination carrying other passengers), and in most of these cases the returnee is accompanied by escorts, if they are being forcibly returned. In certain cases, however, if the returnee is cooperative, does not oppose the return and a risk assessment has been carried out, they might only be accompanied to the aircraft by the escorts who then wait until the aircraft departs. In some cases, the authorities in the country of return will come to the gate when the aircraft arrives to pick the person up; in other cases, the person will just disembark the aircraft on their own.

country of return regarding the return of nationals. Such conditions may include whether the country of return accepts charter flights, readmission agreements or the ability of the country of return to receive the returnees. The ability to resolve practical arrangements and co-operation between the Member State(s) carrying out the return operation and the country/countries of return will determine the success or otherwise of the return operation.

According to Council of the European Union Decision 2004/573/EC, and the Common Guidelines on security provisions for joint removals by air attached to the decision, further endorsed in Article 8(5) of Directive 2008/115/EC, one organising Member State (OMS) is responsible for organising joint removals by air. Frontex provides the necessary assistance and, either at the request of a Member State, or on the basis of its own proposal, coordinates and jointly organises the operations.

In return operations coordinated by Frontex, the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, applies to all participants of the operation. This code of conduct (CoC) outlines the general principles related to the respect for fundamental rights, cooperation with returnees, and standards for the use of coercive measures, as well as related to the organisation of the removal and effective forced-return monitoring. In this regard and pursuant to the Article 15(2) of the CoC, Member States taking part in a return are required to ensure that they have an effective forced-return monitoring system in place. In return operations coordinated by Frontex, the OMS tells Frontex in advance about the planned return operation. All operational information is included in the Frontex Application for Returns (FAR)<sup>43</sup> where the OMS, PMS and Frontex interact in real time during the organisation of the return operation.

### 3.1 National Return Operations - NROs

National Return Operations (NRO) to return third-country nationals who are subject to individual return decisions issued by the respective Member State (taken by a court or competent administrative body of the Member State) to a country of return, are organised and carried out via charter flight by the respective Member State in coordination with Frontex and the country of return. The Member State organises the national escorts and all the necessary support staff who will be on the flight. This also includes medical personnel and interpreter(s), if required. In addition, the Member State arranges for the participation of forced-return monitor(s) who can also be requested from the Pool. Prior to departure, the authorities of the Member State are required to carry out a medical examination of a returnee, where they are known to have a medical condition or where medical treatment is required. This is subject to the returnee's agreement. Individuals can only be returned if they are considered by a doctor to be fit to travel. The processing of medical information related to the returnee must be carried out in line with relevant data protection legislation regarding use of personal data.

### 3.2 Joint Return Operations - JROs

Joint Return Operations (JRO) are those that are organised when third-country nationals who are subject to individual return decisions made by a court or competent administrative body of a Member State, are returned from different Member States using a chartered aircraft. Therefore, JROs involve more than one Member State and returnees from more than one Member State. Usually, one Member State organises the JRO (referred to as the Organis-

<sup>43</sup> FAR is an online tool to coordinate the organisation of forced-return operations and is accessible only to Frontex and return-enforcing institutions in MSs. FAR is part of the Integrated Return Management Application (IRMA).

ing Member State, OMS) and other States participate (referred to as the Participating Member States (PMS)).

The OMS organises, prepares and manages the return operation and ensures that a medical doctor/and or nurse and interpreter(s) is present, if required. During a JRO, the escort leader of the OMS is the head of the operation. They have the final say regarding the implementation of the operation. However, everyone on board the aircraft, including the head of the operation, escorts, Frontex personnel, etc., has to follow the orders of the pilot in command (PIC), who has the ultimate say in situations that might endanger the flight. In some countries, a representative from the national authorities responsible for the return is also on the flight to support the administrative handover process in the country of return. In the case of a JRO coordinated by Frontex, a member of the European Centre for Returns Division (ECRet Division) might participate as coordinator and observer in the JRO ensuring, among other tasks, that it is carried out in accordance with the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex.

In JROs, the returnees, accompanied by escorts of the respective PMS, normally travel from their country of departure to where the hub of the forced-return operation is located in the OMS. This part of the journey, i.e. from the country of departure to the hub, is also referred to as the national feeder. Once they arrive at the hub of the return operation, the returnees and escorts from all the PMS board the main chartered aircraft being used to transport returnees to the country(ies) of return. En route to a specific country of return, the chartered flight may also land in another Member State to pick up other returnees and escorts located there (stopover).<sup>44</sup>

In a JRO, only returnees who are considered by a doctor to be fit to travel may be removed from the country and the OMS must refuse to allow the removal of a person who is not fit to travel. Where a returnee is known to have a medical condition or where medical treatment is needed, the authorities of the Member State are required to carry out a medical examination, subject to the returnee's agreement. All PMS have to inform the OMS in advance about any medical condition a returnee has which would need special care and attention. The processing of any medical information related to the returnee must be carried out in line with relevant data protection legislation regarding use of personal data.<sup>45</sup>

From the beginning of a JRO and throughout its duration, those involved in the return operation from the OMS and PMS, including medical staff and interpreters should communicate and cooperate respectfully with returnees. Throughout the entire return operation, individual, ongoing and dynamic risk assessment of the returnees based on factors such as previous behaviour and removal history should be taken into account. The use of coercive measures may be used only when strictly necessary on returnees who refuse or resist removal, or in response to an immediate and serious risk of the returnee escaping, causing injury to themselves or to a third party, or causing damage to property.<sup>46</sup> The use of coercive measures must be proportional, must not exceed reasonable force, and must be carried out with due respect for the returnee's rights, dignity, and physical integrity.<sup>47</sup>

<sup>44</sup> In practice, JROs normally only stop once as they tend to be quite long.

<sup>45</sup> Article 8 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>46</sup> Article 7(2) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>47</sup> Article 7(1) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.



The safety of everyone in the JRO, including all the participants, returnees, as well as the crew is paramount. If a returnee's resistance to being removed puts the possibility of being able to carry out the operation safely at risk, the escort leader from the OMS can suspend it and send the returnees back to the appropriate holding facility. The details are set out in Article 4(3)<sup>48</sup> of the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex and are covered in more detail in Chapter 7 on the use of force and means of restraint. However, it is important to note that, as long as the safety of the returnees and other participants is guaranteed, the operation will continue, even if the returnee is resisting removal. Force and/or means of restraint may be used in such a situation in order to enforce the return, while respecting the fundamental rights of the individual.

### 3.3 Collecting Return Operations – CROs

A Collecting Return Operation (CRO) coordinated by Frontex is a return operation initiated by an OMS for which the aircraft and forced-return escorts are provided by a third-country of return (TCoR) and where the returnees are handed over to the escorts of a third-country of return by the OMS/PMS on the territory of a Member State. As with the other types of return operations, the purpose of a CRO coordinated by Frontex is to remove third-country nationals who are subject to individual return decisions issued by the respective Member State(s) from the territory of one or more Member States to their respective country of origin or third country of return.

TCoRs subject to CROs need to fulfil the following specific requirements and conditions:

- ♦ The escorts of the third country of return need to be trained by Frontex according to the standards set at EU level prior to their participation in a CRO coordinated by Frontex;
- ♦ All participants need to ensure full compliance with the Charter of Fundamental Rights, including respect and dignity for all persons during the entire operation, with the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex and the Frontex General Code of Conduct;
- ♦ The Guide for Joint Return Operations by Air coordinated by Frontex shall apply, especially in the aspects related to fundamental rights and use of force and means of restraint.

Although during a CRO the technical and administrative handover of returnees as well as handover of the personal belongings and luggage takes place on the territory of a Member State before the flight departs, according to Article 50(3) of Regulation (EU) 2019/1896, the forced-return operation still needs to be monitored during the flight until the plane arrives in the third country of return<sup>49</sup>. Specifically, Article 50(3) of Regulation (EU) 2019/1896 spec-

<sup>48</sup> Article 46(4) of Regulation 2019/1896 states that “[t]he 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.”

<sup>49</sup> Third country monitors on board a CRO coordinated by Frontex are an additional safeguard for fundamental rights compliance and for follow-up of possible incidents involving third country of return escorts on the flight. However, their mandate is entirely national and therefore, it is not sufficient to only have a third-country monitor on board the CRO. As a result, monitoring from the pool or the national monitoring system must be ensured. Monitors shall exchange information with the third country monitor, in particular if a returnee is considered vulnerable or there are security considerations.



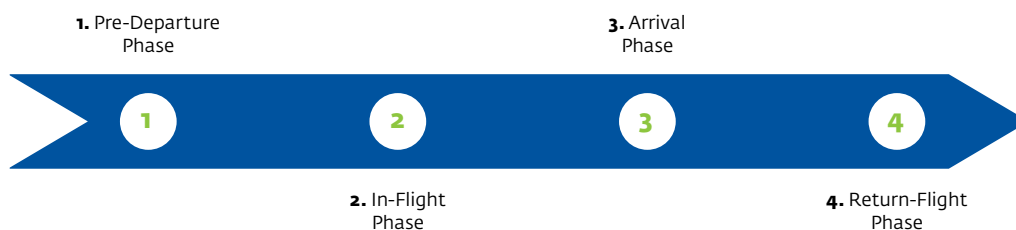
ifies that “[...] [a]t least one Member State representative, and one forced-return monitor from the pool established under Article 51 or from the monitoring system of the participating Member State, shall be present throughout the entire return operation until arrival at the third country of return.” Therefore, the monitor is mandated to observe whether the entire CRO is conducted in compliance with fundamental rights. In this regard, Article 50(3) of Regulation (EU) 2019/1896 specifies that “[...] [t]he participating Member States and the Agency shall ensure that the respect for fundamental rights, the principle of non-refoulement, the proportionate use of means of constraints and the dignity of the returnee are guaranteed during the entire return operation”. Monitoring ends once the flight arrives in the country of return, as the handover of returnees to the national authorities already took place on EU territory.<sup>50</sup>

#### 4. Phases in a forced-return operation

Return operations are divided into different phases based on the Council Decision 2004/573/EC and the 2016 Guide for Joint Return Operations by Air coordinated by Frontex. Forced-return monitoring in the framework of the pool of force-return monitors covers the following phases:

1. Pre-departure phase;
2. In-flight phase;
3. Arrival phase; and
4. Return-flight phase.

Pre-removal detention and pre-return are not within the remit of the monitors of the pool of forced-return monitors. It is important to mention that in case of several countries of return, there are several in-flight and arrival phases. Furthermore, when PMSs are “picked up” by the OMS charter instead of gathering at a hub, there can also be more than one in-flight phase, the “pick-up” is then conducted during a so-called stopover.

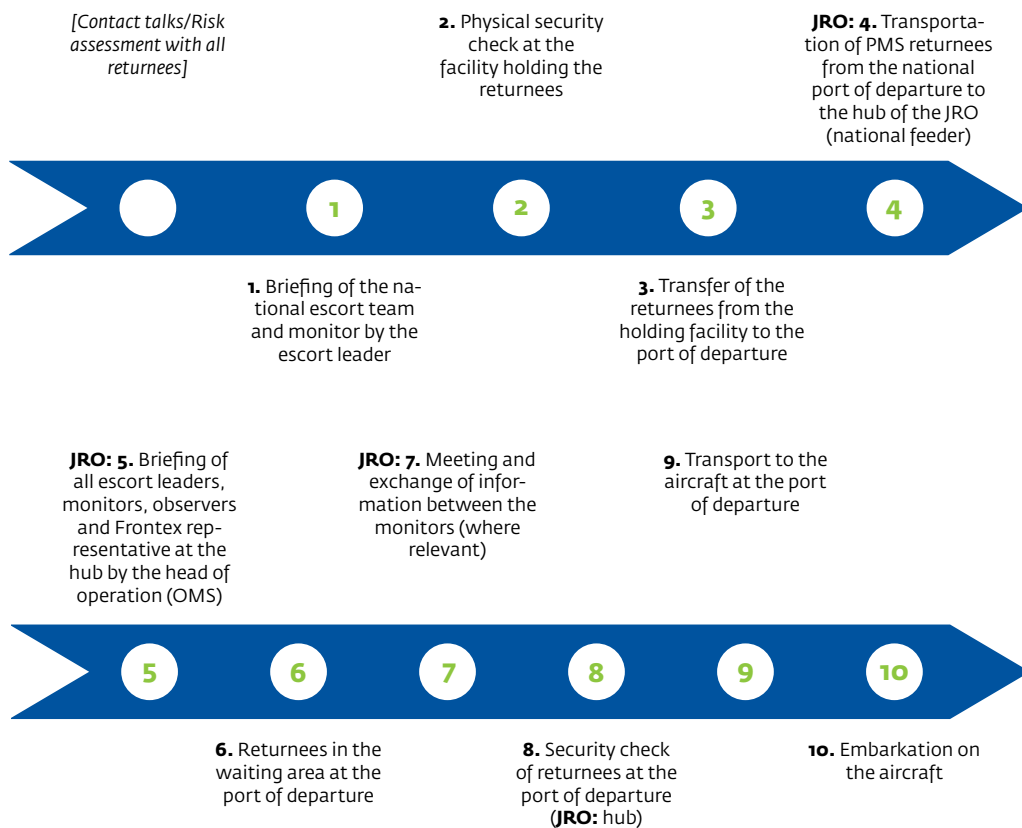


In the arrows below, the steps within the different phases are indicated.

<sup>50</sup> The escort leader and escorts of the third country of return are trained by Frontex and understand the monitor’s role and mandate. The monitor’s report of a CRO should cover the relevant phases of a forced-return operation including the in-flight phase and disembarkation in the third country of return.

## Pre-Departure Phase

The pre-departure phase covers the period from leaving the (temporary) holding facility until embarkation on the aircraft. In this phase, the physical security check (body search) of the returnee(s) is conducted, the escort team is briefed and the returnee may stay in a holding/ waiting/detention facility at the place of embarkation. The pre-departure phase ends after embarkation on the aircraft.<sup>51</sup>



## In-Flight Phase

The in-flight phase begins once every passenger has boarded the aircraft and the door of the plane door has been closed. It ends with the arrival at the final destination, i.e. the country of return or, in the case of an unsuccessful return, back to the country of departure, including transit via another country.

<sup>51</sup> With JROs, this phase begins at the hub, meaning that returnees escort teams and monitors from the PMS have already completed all phases of pre-departure, in-flight (or on board a bus/ train) up to the arrival at the hub of the JRO, where the procedures start anew when they join the JRO.

1. Transportation of returnees on flight to the country of return



2. Stopover - if applicable, e.g. to collect other returnees (with their escorts) and /or in a country of return for some returnees (if the operation includes several countries of return). **In case of a stopover, the in-flight phase applies again.**

### Arrival Phase

The arrival phase covers the period starting from arrival at the country of return, and ends when the returnees are handed over to the national authorities in the country of return, or in the case of an unsuccessful return, with the handover to the authorities back at the country of departure.

1. Arrival by aircraft in the country of return

3. Overnight stay - if applicable



2. Handover of returnees to the authorities in the country of return

### Return-Flight Phase

The return-flight phase covers the period starting after the handover procedure in the country of return until arrival at the airport of departure (hub in the case of JROs).

1. Return to the country of departure (JRO: hub)

3. Handover of unaccepted returnees to the authorities back in the country of departure (JRO: hub) - if applicable



2. Debriefing during the return leg (in the case of unaccepted returnees, debriefing with the monitor may take place upon arrival in the country of departure)

#### 4.1 Collecting Return Operations (CRO) – Main Phases

CROs are initiated by an OMS, in which the escorts and the main chartered flight are provided by a country of return and where returnees are handed over to the escorts of the country of return by the OMS/PMS on the territory of a Member State. CROs only include the pre-departure phase and one or several in-flight phases. The handover of the returnees to the authorities of the country of return has already been done during the pre-departure phase.

Where there are several countries of return, there are several in-flight phases.

##### **Advance party from the TCoR:**

In a CRO, the advance party consists of representatives from the authorities of the third-country of return (TCoR) who travel to the OMS territory, and/or to the main hub of embarkation in the EU, the day before the operation in order for the OMS and/or PMS to fulfil the roles and responsibilities listed below. An advance party should consist of not more than three people, one of whom may also be a doctor. It is highly recommended that an advance party be organised for a CRO to help finalise the details of the operation and ensure its success.

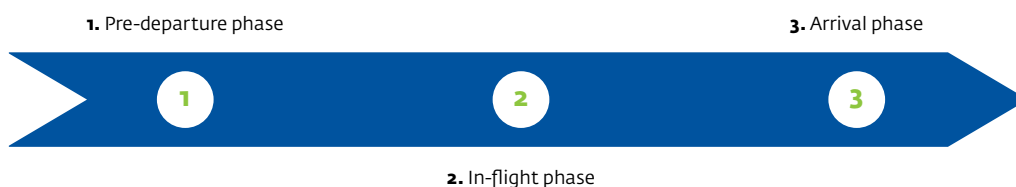
##### **Roles and responsibilities:**

**The OMS and/or the PMS that is hosting the advance party from the TCoR has the following roles and responsibilities during the organisation and implementation of CROs:**

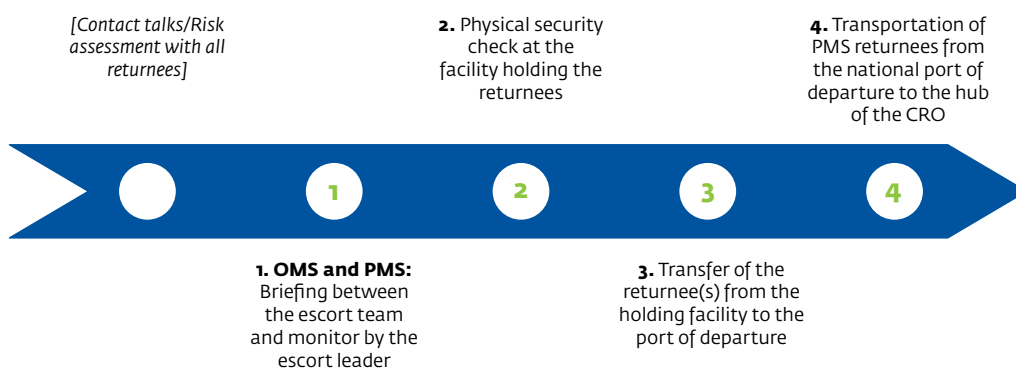
- a) Pre-Return phase:
  - ♦ Keeping in contact with the advance party.
  - ♦ Providing the advance party delegation with the necessary information about the returnees and information on the travel documents that they have.
  - ♦ Arranging travel for the TCoR advance party including adequate accommodation if they need to stay over.
  
- b) Pre-Departure phase:
  - ♦ On the day of the operation, the Member State escort leader meets the members of the advance party and drives them to the secured operational area for the start of the pre-departure phase process.
  - ♦ The OMS escort leader, and/or the PMS escort leader hosting the advance party delegation conducts a briefing to explain how the operation is being organised and update them on developments about the return operation.
  - ♦ Assisting them during the whole handover procedure.
  - ♦ Keeping them updated and facilitate information exchange among all participants involved in the return operation.
  - ♦ The OMS escort leader will be in charge of the operational briefing prior the departure with all participants, including the advance party representatives.

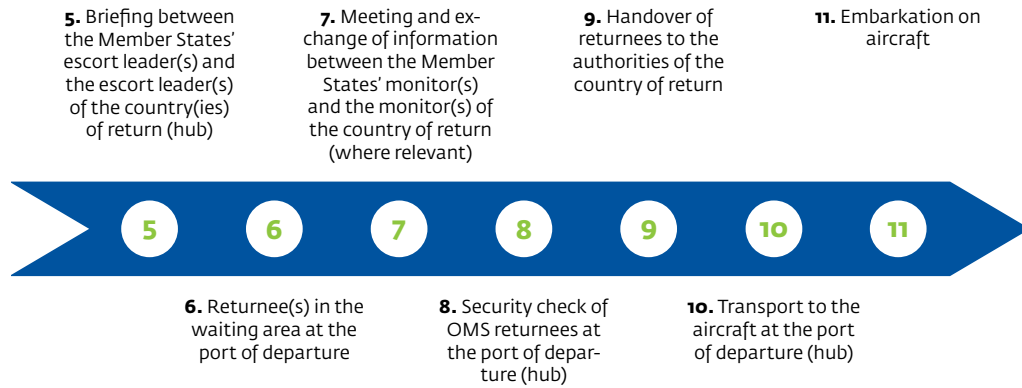
**The representatives from the advance party have the following roles and responsibilities during the organisation and implementation of CROs:**

- a) Pre-Return phase
  - ♦ Providing the OMS and/or the PMS hosting the advance party with information about the officers and other members (e.g. doctor or monitor) in their delegation.
- b) Pre-departure phase
  - ♦ Remaining in contact with OMS/PMS escort leaders for updates on latest developments in the operation and for information relating to the risk assessments that have been carried out.
  - ♦ Carrying out the administrative handover of the returnees, which includes verification and acceptance of the travel documents as well as acknowledgement of the protocol document between MS and TCoR related to the handing over of all administrative and personal belongings of the returnees.
  - ♦ Participating in the operational briefing conducted by the OMS escort leader prior to embarkation and departure.
- c) Arrival phase
  - ♦ On arriving at the third country of return, participating in the debriefing conducted by the Frontex representative, or by the OMS representative, with all the participants involved.

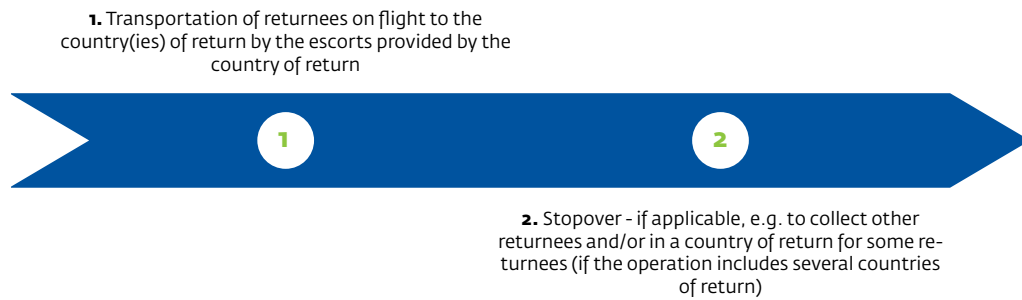


**Pre-Departure Phase – CRO**

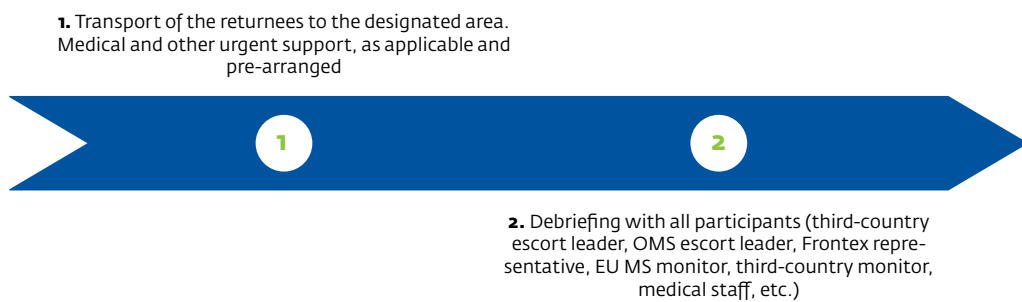




### In-Flight Phase – CRO



### Arrival Phase – CRO



The debriefing of the CRO takes place after the return operation has arrived in the country of return, either at the airport or in a designated area.

## 5. The different roles during a forced-return operation

The following provides an overview of the different roles and responsibilities of the various participants during a forced-return operation:

### Escort Leader (EL)

- ♦ Leader of the escort national team and responsible, within his/her team, for the adequate implementation of the return operation. He/she will be the highest authority/decision maker after the captain. In some cases the OMS includes a Head of Operation and an EL.



### Frontex Representative

- ♦ Coordinates the return operation, provides advice to the Head of Operation and all ELs.
- ♦ Observes that the EU standards and the Frontex CoCs are observed during the entire operation.



### Escort

- ♦ Officer responsible for the security and well-being of a returnee; accompanies the returnee at all times.
- ♦ Directly responsible for implementing control and restraining techniques when necessary.



### Monitor

- ♦ Observes that the return operation is conducted in a humane manner with respect for fundamental rights of the returnees



### Medical Staff

- ♦ Guarantees the health of all participants during the return operation. Should be informed in advance of previous known medical conditions of returnees.
- ♦ Final decision maker about fit-to-fly of returnees.



### Interpreter

- ♦ Provides assistance for the communication between returnees and other participants.



### Back-Up Team (BUT)

- ♦ Supports all escort teams during all phases of a return operation
- ♦ Special relevance for securing doors at all time: on the ground for embarkation and disembarkation; during inflight keeping the aisle free and to replace other escorts if needed.





### Back-Up Team Leader (BUT-L)

- ♦ Leader of the back-up team and responsible for the effective implementation of the back-up team's work.
- ♦ Coordinates with all ELs.



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### Observer

- ♦ External stakeholder taking part in the return operation to observe it for different purposes (e.g. training, Embassy representative, etc.)



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### Official

- ♦ Ministry representative (e.g. migration officer)



## 6. Management of the pool of forced-return monitors

Article 29 (1) of EBCG Regulation 2016/1624 established that Frontex would be the permanent structure into which the Pool should be embedded. It notes, *“The Agency shall, after consulting the fundamental rights officer, constitute a pool of forced-return monitors from competent bodies who carry out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC and who have been trained in accordance with Article 36 of this Regulation”*. Paragraph 2 of the same Article states that *“...Member States shall be responsible for contributing to the pool by nominating forced-return monitors corresponding to the defined profile...”*. On 7 January 2017, the Pool was established within Frontex in line with this Article.

The process for further revision of EBCG Regulation 2016/1624 was launched in September 2018. On 8 November 2019, the Council of the European Union adopted the revised EBCG Regulation, Regulation 2019/1896<sup>52</sup>, which entered into force in December 2019. The revised EBCG Regulation provides for an even broader mandate for Frontex, and for strengthening of the agency’s staff and technical equipment.

With the new Regulation, Article 29 (pool of forced-return monitors) became Article 51(1). It reiterates that, *“The Agency shall, after taking due account of the opinion of the fundamental rights officer, constitute a pool of forced-return monitors from competent bodies of the Member States who carry out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC and who have been trained in accordance with Article 62 of this Regulation”*. In other words, the new Regulation reconfirmed that the Pool would be managed and coordinated by Frontex.

Before the Pool became operational, the Frontex Management Board determined the monitor profile for the Pool and the number of forced-return monitors to be made available to the Pool. On 6 December 2016, the Management Board adopted the profile and set the initial number for the size of the Pool at 50. In 2020, the monitor profile was brought into line with the provisions of EBCG Regulation 2019/1896. The Frontex Management Board adopted its Decision MB 40/2020 of 26 November 2020 on the revised profile and determining the number of forced-return monitors to be made available to the Pool. Subsequently, Frontex published another open call for nominations to the Pool. The call for monitors to the Pool is open, as the nomination of monitors to the Pool is part of an ongoing process (i.e. MSs can continuously nominate monitors to the Pool).

### Communication and coordination in the framework of the Pool

Frontex communicates with MSs on all matters related to its activities through the National Frontex Point of Contacts (NFPOCs). The NFPOCs are appointed by the MSs on the basis of Article 13 of Regulation (EU) 2019/1896, according to which: *“Each Member State shall appoint a national contact point for communication with the Agency on all matters pertaining to the activities of the Agency, without prejudice to the role of the national coordination centres”*<sup>53</sup>.

<sup>52</sup> 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>53</sup> The NFPOCs already appointed by MSs have done so on the basis of Article 23 of Regulation (EU) 2016/1624 (in force before December 2019).

The Pool's Secretariat is responsible for supporting and coordinating the activities of the Frontex entities involved in the Pool's day-to-day operations and management. These include the:

- ♦ Capability Programming Office (CAP);
- ♦ European Centre for Returns Division (ECRet Division);
- ♦ Fundamental Rights Office (FRO);
- ♦ Training Unit (TRU);
- ♦ Information and Communication Technology Unit (ICT); and
- ♦ Information Fusion Centre (IFC).

Hence, among its main tasks is facilitate that the entities are communicating and coordinating with each other. Furthermore, the Secretariat acts as the main point of contact for forced-return monitors including addressing their enquiries.<sup>54</sup> It also coordinates with other external stakeholders and the NMBs as required.

The TRU coordinates training and capacity building activities directly with service providers, experts, and via official channels with MSs trainers and participants.

The CAP mainly coordinates the nomination of monitors to the Pool and the monthly calls for monitors to be deployed to a RO via the NFPOCs, but also does it via the NMBs.

The ECRet Division communicates with the MSs about their requests for monitors via the FAR. For the deployment itself, the ECRet Division communicates with the monitors about the basic operational details related to the RO and facilitates the contact between the monitor and the requesting MS points of contact. Even though at that stage, the requesting MS is the monitor's main point of contact, the ECRet Division provides support whenever it is needed.

The FRO is in contact with monitors for any specific inquiries they may have and for anything they need to clarify after monitoring an operation.

Both the FRO and the ECRet Division communicate with MSs to follow-up on specific recommendations and other issues related to the ROs that have been carried out as relevant. They are also actively involved in training and capacity building activities for monitors in the Pool and are, therefore, in direct contact with them as necessary.

Frontex maintains a communication platform for the Pool's forced-return monitors on the Frontex One-Stop-Shop (FOSS)<sup>55</sup>. This platform is set up to allow the monitors to exchange information with each other. It enables them to:

- ♦ Download the monthly calls for return operations;
- ♦ View and upload events in the calendar via the FRO;
- ♦ Raise various work-related issues via a discussion forum;
- ♦ Download general information and background documents relevant to their work;
- ♦ Upload documents via the FRO that they wish to share;
- ♦ Access information about the way the Pool functions;
- ♦ Contact other users on various work-related issues.

<sup>54</sup> Specific questions monitors have about e.g. their assignment, cancellations, visa issues, operational details etc., should, however, be addressed to the ECRet Division and CAP respectively.

<sup>55</sup> FOSS is the Agency's platform for sharing information with Member States, Schengen-Associated-Countries and other designated partners.

## 6.1 Nomination of monitors to the pool of forced-return monitors

Nominations by Member States to the Pool are made by their national monitoring bodies. Monitoring carried out by monitors from the Pool means that a contingency of a Member States is monitored at their request by a monitor from another Member States. It is important to note that the monitor from the Pool requested by a Member States to participate in monitoring a return operation monitors that specific contingency, not the entire operation; however, other participating Member States (PMS) may agree that the same monitor also monitors the RO on their behalf.<sup>56</sup> A requesting Member States can be either the organising Member State (OMS) or a PMS; in practice, it is usually the OMS that requests a monitor from the Pool. The Member States can also request more than one monitor from the Pool.

According to Article 51(2) of Regulation (EU) 2019/1896, Member States are responsible for nominating monitors to the Pool.<sup>57</sup> These monitors have to be members of “[...] *competent bodies of the Member States who carry out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC [...]*”<sup>58</sup>. The Member States’ national monitoring bodies usually via their NFPOCs are responsible for the nomination of monitors corresponding to the profile established by the Frontex Management Board. The nominations always have to be made for each upcoming operational year, but in principle nominations are possible all year long. Nominations are done via the OperaEvo system<sup>59</sup> and in addition via e-mail to [abt@frontex.europa.eu](mailto:abt@frontex.europa.eu). Any changes such as new nominations or withdrawals also have to be notified to [abt@frontex.europa.eu](mailto:abt@frontex.europa.eu).

The Frontex Management Board Decision 40/2020 of 26th November 2020 states that the number of forced-return monitors made available to the Pool should be a minimum of:

- a) Fifty forced-return monitors to be nominated by the Member States;
- b) Five fundamental rights monitors, acting as forced-return monitors, to be nominated by the Fundamental Rights Officer on the basis of Article 109(3)(c) of Regulation (EU) 2019/1896.

The information about the nomination procedure and the general profile of a Pool monitor is available on the communication platform for the pool of forced-return monitors on FOSS with the support of and in consultation with CAP.

The CAP sends a yearly reminder to the Member States to nominate monitors to the Pool<sup>60</sup> attaching the general profile for Pool monitors<sup>61</sup>. Member States nominate monitors to the Pool via the CAP. The CAP then sends confirmation of the nomination to the Member State, with copies to their national monitoring body. The communication should state whether the

<sup>56</sup> Article 16(4) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018) specifies that “[w]hen feasible and subject to prior agreement between the MS concerned, forced-return monitors may also monitor on behalf of other MS taking part in [a return operation].”

<sup>57</sup> “Member States shall be responsible for contributing to the pool by nominating forced-return monitors corresponding to the defined profile” (Article 51(2) of Regulation (EU) 2019/1896).

<sup>58</sup> Article 51(1).

<sup>59</sup> An interface created by Frontex.

<sup>60</sup> National monitoring bodies are responsible for nominating monitors to the Pool from competent national bodies who carry out forced-return monitoring activities in accordance with Art. 8(6) of the Return Directive.

<sup>61</sup> To ensure the independence and correct application of Return Directive Article 8(6), monitors nominated to the Pool have to be part of the respective national monitoring body and cannot be individuals.

monitor is eligible to be deployed immediately, or whether they need to attend the course for forced-return monitors first<sup>62</sup>.

## 6.2 Management of the Pool

The day-to-day management and deployment of monitors to specific forced-return operations is largely handled to varying degrees by the Capability Programming Office (CAP), the European Centre for Returns Division (ECRet Division) and the Fundamental Rights Office (FRO). The Training Unit (TRU) is involved in all training-related activities. Moreover, the Information and Communication Technology Unit (ICT) maintains the reporting application for the Pool and the Information Fusion Centre (IFC) maintains the communication platform for the pool of forced-return monitors on the Frontex One-Stop-Shop (FOSS)<sup>63</sup>. The Secretariat handles the overall coordination as explained in detail below.

### 6.2.1 The Capability Programming Office (CAP)

As responsible for the capability process CAP administrates the Pool, and is the interface between the MSs and Frontex. The CAP is in contact with the MSs for all the issues related to the nomination of monitors to the Pool or receipt of nominations to the monthly call. The CAP is also in charge of maintaining a database of monitors that includes their names, contact details, language(s) spoken, other specific expertise, etc. CAP is also part of the selection committee that selects monitors to be deployed to return operations, based on predefined criteria in coordination with the ECRet Division and FRO. CAP's main tasks include:

- ♦ Acting as the contact point for/with the MSs for all the issues related to the nomination of monitors to the Pool;
- ♦ Maintaining a database that contains all the relevant information on the members of the Pool (their names, contact details, countries, institutions, training, language skills, participation in meetings/workshops organised for the Pool, number of deployments from the Pool, special qualifications, etc.) which functions as the central tool for the administration of the Pool;
- ♦ Preparing monthly calls for monitors to be deployed to a return operation and coordinating with the National Frontex Points of Contact (NFPOCs)<sup>64</sup>;
- ♦ Selecting monitors to be deployed to return operations, based on predefined criteria and in cooperation with the ECRet Division and FRO;
- ♦ Recording the decisions taken at the meeting between FRO, the ECRet Division and CAP and officially letting MSs know, via an email to the NFPOCs (with copies to the monitors nominated) which monitor has been assigned to which operation.

62 Monitors can be nominated to the Pool regardless of whether they have attended the training or not. However, they can only be deployed to monitor on behalf of the Pool once they have received the course for forced-return monitors.

63 FOSS is the Agency's platform for sharing information with Member States, Schengen-Associated-Countries and other designated partners.

64 The NFPOCs are appointed by the MSs on the basis of Article 13 of Regulation (EU) 2019/1896, according to which: "Each Member State shall appoint a national contact point for communication with the Agency on all matters pertaining to the activities of the Agency, without prejudice to the role of the national coordination centres". The NFPOCs already appointed by MSs have done so on the basis of Article 23 of Regulation (EU) 2016/1624 (in force before December 2019).

### 6.2.2 The European Centre for Returns Division (ECRet Division)

The ECRet Division is responsible for coordinating the deployment of monitors from the Pool. The ECRet Division communicates with MSs on the issues concerning the deployment, such as the schedule of a return operation. In addition, when the date of a return operation is approaching and information in the Frontex Application for Returns (FAR)<sup>65</sup> indicates that a specific return operation does not have a monitor, the ECRet Division asks the MS, via the FAR, to consider requesting a monitor from the Pool. In this way, the ECRet Division proactively encourages MSs to deploy monitors in all return operations. The ECRet Division is also part of the selection committee that selects monitors to be deployed to return operations, based on predefined criteria in cooperation with FRO and CAP. Staff from the ECRet Division also participate in training-related activities as experts and trainers. ECRet Division's main tasks include:

- ◆ Communicating with the MSs about their requests for monitors via the FAR;
- ◆ Coordinating with CAP regarding MSs' nominations of monitors for deployment to return operations;
- ◆ Selecting monitors to be deployed to return operations, based on predefined criteria and in cooperation with CAP and FRO;
- ◆ Providing to the monitor via an automated email from FAR basic operational details related to the return operation and the contact details of the main contact person(s) of the requesting MS;
- ◆ Facilitating the participation of trainee monitors in return operations;
- ◆ Participating as experts and trainers in training-related activities for monitors in the Pool;
- ◆ Supporting TRU in developing and updating training material relevant to the Pool.

### 6.2.3 The Fundamental Rights Office (FRO)

The FRO is an independent body that reports to the Frontex Management Board. It monitors all Frontex activities, provides preventive and protective measures, supports all the activities organised or coordinated by Frontex with training materials on fundamental rights, and provides observations on operational plans, evaluation reports and support with drafting strategic documents. The FRO is the main coordinator and case handler for Frontex' serious incident reporting (SIR) related to potential violations of fundamental rights and main case handler of the Frontex complaints mechanism.

Regarding the management of the Pool, the FRO drafts bi-annual observations based on its analysis of the monitoring reports that have been submitted, including its own observations. The findings from the monitoring reports are presented by the FRO to the Executive Director and the Frontex Management Board. In its bi-annual observations the FRO also compiles trends, identifies good and bad practices and provides recommendations that are annexed

<sup>65</sup> FAR is an online tool to coordinate the organisation of forced-return operations and is accessible only to Frontex and return-enforcing institutions in Member States. FAR is part of the Integrated Return Management Application (IRMA).

to the Executive Director's evaluation reports.<sup>66</sup> Furthermore, the FRO publishes its Annual Reports on its activities and on the extent to which the activities of the Agency respect fundamental rights, including on return and monitoring matters. In addition, it provides advice and recommendations relating to fundamental rights compliance in return operations. The FRO is also part of the selection committee that selects monitors to be deployed to return operations, based on predefined criteria in cooperation with CAP and the ECRet Division. It is also involved in developing and updating relevant training material, templates, forms etc. and its staff participate in training-related activities as experts and trainers. FRO's main tasks include:

- Analysing monitoring reports that have been submitted to formulate its own observations;
- Compiling trends, identifying good and bad practices and providing recommendations;
- Presenting its observations to the Executive Director and the Frontex Management Board.<sup>67</sup> The findings from the monitoring reports of return operations are annexed to the Executive Director's evaluation reports that cover all return operations conducted during the previous semester.
- Following up the observations it has made with the ECRet Division, bilaterally with MSs and in relevant fora (Member States' Direct Contact Points in Return Matters, national monitoring bodies), the Frontex Consultative Forum, etc.;
- Drafting policy reports/providing observations relating to fundamental rights compliance in return operations;
- Selecting monitors to be deployed to return operations, based on predefined criteria and in cooperation with CAP and the ECRet Division;
- Receiving reports from trainee monitors in return operations and providing feedback as relevant;
- Supporting TRU in developing and updating relevant training material;
- Developing templates, forms for the Pool etc.;
- Participating as experts and trainers in training-related activities for monitors in the Pool (delivery targeted sessions, preparation of materials/contributing to further development of training/evaluations, etc.);
- Assigning fundamental rights monitors to the Pool for return monitoring activities;
- Handling possible complaints submitted via the complaints mechanism.

<sup>66</sup> In line with Article 50 (7) of Regulation (EU) 2019/1896, the executive director transmits "[...] every six months a detailed evaluation report to the European Parliament, to the Council, to the Commission and to the management board covering all return operations conducted in the previous semester, together with the observations of the fundamental rights officer."

<sup>67</sup> The FRO report is not public. However, any EU citizen, as well as any natural or legal person residing or having a registered office in the EU has the right to access documents held by Frontex, subject to the conditions laid down in Regulation (EC) No 1049/2001 <https://frontex.europa.eu/contact/public-access-to-documents-applications>.

#### 6.2.4 The Training Unit (TRU)

The TRU sets common standards across Europe for border and coast guard education and training. The topic of forced-return monitoring belongs to the Specialisation Training Sector, which runs several training activities aimed at return: forced-return escort officer (FRESO) Specialised course, Course for return specialists and Course for forced-return monitors. In short, the TRU develops and delivers training programmes with a view to ensuring common standards are implemented across the EU. The unit plays a key role in the development of training materials, specifically related to the methodology.

In close cooperation with the ECRet Division and FRO, the TRU designs and updates return related courses (including face-to-face training, e-learning, webinars, workshops, etc.) in line with the Sectoral Qualifications Framework (SQF) and their periodic revision. The TRU also develops assessment methods for courses and runs training and capacity building activities for the monitors in the Pool. TRU's main tasks include:

- ♦ Designing courses (including face-to-face training, e-learning, webinars, workshops, etc.) in line with the Sectoral Qualifications Framework (SQF) and their periodic revision;
- ♦ Developing assessment methods for courses;
- ♦ Developing and updating course content;
- ♦ Organising and running capacity building activities for the monitors in the Pool such as the course for forced-return monitors, online courses, training of trainers, targeted workshops, etc.;
- ♦ Organising and running various events for monitors (e.g. targeted workshops, webinars etc.).

#### 6.2.5 The Information and Communication Technology Unit (ICT)

The ICT Unit is responsible for the development, maintenance and support of the Agency's ICT infrastructure, as well as the IT services and products set up to support all the Frontex entities' functioning smoothly. It is also tasked with implementing the Agency's digital transformation. The unit is responsible for maintaining a high level of security throughout the entire Agency's IT systems, and for remaining aware of and constantly improving security solutions as new threats appear. Within the ICT Unit, the PCAT (Projects, Contracts and Applications Sector) is responsible for all matters related to the planning, delivery and maintenance of ICT applications. Members of the sector participate in planning, architecting, design, procurement, development, deployment, support and change management related to individual projects and solutions. The ICT Unit maintains the Pool's reporting application and is responsible for technical support.

#### 6.2.6 The Information Fusion Centre (IFC)

The IFC was established in February 2019 as a horizontal entity within the Situational Awareness and Monitoring Division. The overarching objective of the IFC is to support the critical tasks performed by the DSAM business units (Situational Awareness and Monitoring Division), such as the FSC (Frontex Situation Centre), the RAU (Risk Analysis Unit), and the VAU



(Vulnerability Assessment Unit) to improve situation awareness, analysis and assessment. The IFC aims to be a provider of up-to-date, reliable and innovative information services and knowledge and technology- driven capabilities in support of the SAM (Situational Awareness and Monitoring) business units and partners. The information services and capabilities are based on the fusion of a wide range of data amongst which are earth observation data, vessel data, aerial surveillance live streaming and data from Frontex operational activities. The fusion results in the provision of mapping visualization services, business intelligence, operational data sets and dashboards, and contributes to the planning of follow-up surveillance activities. With regard to the Pool, the IFC maintains the communication platform for the forced-return monitors on FOSS and is responsible for technical support.

### 6.2.7 The Secretariat

The Pool's Secretariat is responsible for supporting and coordinating the activities of the Frontex entities (CAP, ECRet Division, TRU, FRO, IFC and ICT) involved in the day-to-day operations and management of the Pool. The main purpose of the Secretariat is to ensure that the Pool is effectively and efficiently managed and to streamline the cooperation between the entities that share the various tasks involving forced-return monitors, including close coordination and information sharing with all the relevant entities. The Secretariat acts as the main point of contact for forced-return monitors including addressing their enquiries<sup>68</sup>. The FRO, as an independent body reporting to the Frontex Management Board, hosts the Secretariat.

#### Tasks of the Secretariat

With the support of and in close cooperation with CAP, FRO, the ECRet Division and TRU, the Secretariat is responsible for the daily administration of the Pool. It provides the Advisory Board with administrative and logistical support and supports the CAP in managing the database containing information about the members of the Pool. The Secretariat is also responsible with the IFC for maintaining the communication platform for the pool of forced-return monitors on FOSS and with the ICT Unit for the reporting system, which includes coordinating and sharing information with monitors. In addition, it helps in the development of training material as well as policy material, guidelines, factsheets etc. and supports the preparation of training, meetings and workshops, etc. including the substantial preparations. When necessary, the Secretariat coordinates Frontex activities with monitoring bodies in MSs that do not contribute to the Pool. One of the Secretariat's main tasks is to coordinate and share information between all the relevant Frontex entities. The Secretariat is responsible for the following tasks:

- ♦ Daily administration of the Pool;
- ♦ Supporting the work of the Advisory Board;
- ♦ Supporting CAP in the management of information for the administration of the Pool by maintaining the database that contains all the relevant information about the members of the Pool (their names, contact details, countries, institutions, training, participation in meetings/workshops, language skills, number of deployments from the Pool, special qualifications such as expertise in child protection, etc.);

<sup>68</sup> Specific questions monitors have about e.g. their assignment, cancelations, visa issues, operational details etc., should, however, be addressed to the ECRet Division and CAP respectively.

- ♦ Maintaining the communication platform for the pool of forced-return monitors on FOSS in coordination with the IFC;
- ♦ Uploading and maintaining the information about the nomination procedure on the communication platform with the support of and in consultation with the CAP;
- ♦ Uploading information on new nominations to the Pool on the communication platform;
- ♦ Uploading the reminder about the nomination of monitors to the Pool on the communication platform;
- ♦ With the support of and in consultation with CAP, uploading and maintaining the general profile of a Pool monitor on the communication platform;
- ♦ Maintaining the reporting system in coordination with the ICT Unit;
- ♦ Supporting the development of guidelines and policy material for the monitors and the Pool;
- ♦ Supporting the production of manuals, templates, forms etc. in coordination with relevant entities;
- ♦ Ensuring the coordination of training and capacity building activities for monitors in close cooperation with the TRU and the other entities involved;
- ♦ Uploading and maintaining information and documents relevant for training and capacity building on the communication platform;
- ♦ Organising and coordinating the mentoring of new monitors by monitors from the Pool;
- ♦ Maintaining and updating the guide to mentoring trainee monitors, as required, in coordination with the FRO;
- ♦ Organising and coordinating trainee monitoring missions in coordination with the ECRet Division;
- ♦ Coordinating updates of the reporting application in cooperation with the FRO and ICT;
- ♦ Maintaining and updating, as necessary, the standard concept for the participation of monitors in the course for escort leader in forced return operations and the standard presentation for the session conducted by the participating monitor in coordination with the FRO.
- ♦ Organising an annual lesson learned meeting for monitors and return enforcing institutions once a year in coordination with the TRU, FRO, the ECRet Division, and CAP or other entities and stakeholders as necessary;
- ♦ Organising on request or identified need, targeted online workshop/webinars in coordination with the TRU, FRO, the ECRet Division and CAP or other entities and stakeholders;

- ♦ Coordinating and sharing information with monitors in the Pool including via the communication platform in close cooperation with relevant entities;
- ♦ Coordinating and producing updates of the country factsheets and their dissemination through the communication platform in coordination with relevant entities;
- ♦ Coordinating Frontex activities with other monitoring bodies in MSs that do not contribute to the Pool and non-EU country monitoring bodies where relevant;
- ♦ Contributing to reports by other entities, if needed (e.g. administrative, progress, financial and/or policy reports);
- ♦ Supporting the gathering of data to prepare relevant statistics/statistical overviews regarding the work and efficiency of the Pool;
- ♦ Coordinating and sharing information between all the relevant Frontex entities.

### **Transparency and independence of the Pool**

The Pool contributes to a functioning EU Return System in line with Directive 2008/115/EC, guaranteeing and protecting the fundamental rights of returnees through independent and transparent forced-return monitoring based on a common European framework, standards, good practices and harmonised procedures.

The management structure and procedures for the Pool help to establish its sustainability and clear and transparent responsibilities and workflows. The system's independence is due to monitors in the Pool being nominated by the MSs from the competent bodies responsible for carrying out forced-return monitoring activities in accordance with Article 8(6) of Directive 2008/115/EC. In addition, (as explained in further detail below), the Advisory Board provides for a system of checks and balances by adding a layer of external actors to its functional structure.

The Secretariat, that is hosted by the FRO, increases the operational and procedural effectiveness and efficiency of the Pool through its coordinating role and involvement in the relevant procedures and workflows described in more detail below. Moreover, the reporting system contributes to the Pool's efficiency, transparency and effectiveness and the communication platform for the Pool's forced-return monitors on FOSS enables monitors to receive and share information with each other. In addition, the training and capacity building activities available strengthen the monitors' professional development and deepen their expertise. Ultimately, this helps further European standards, good practices and harmonised procedures in forced-returns and forced-return monitoring.

### **6.3 Deployment of Monitors to Return Operations**

Monitors from the Pool can only be deployed on the basis of a request by a MS. In this regard, Article 51(4) of Regulation (EU) 2019/1896 states that “[t]he Agency shall make the forced-return monitors available upon request to participating Member States to monitor, on their behalf, the correct implementation of the return operations and return interventions throughout their duration. [...]”. This means that the monitor from the Pool is responsible for monitoring the contingent of the MS that requested the monitor, i.e. the activity of the forced-return monitor from the Pool is meant to support on demand the national monitoring system of the requesting MS.

Article 16(4) of the Frontex “Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex” also specifies that “[w]hen feasible and subject to prior agreement between the MS concerned, forced-return monitors may also monitor on behalf of other MSs taking part in [a return operation].”

### 1. Request for a monitor(s) by MSs

- ♦ The OMS or a PMS requests (a) monitor(s) by ticking a box in the Frontex Application for Returns (FAR).<sup>69</sup>
- ♦ The FAR system automatically sends notifications to the CAP regarding MSs’ requests for monitors (this is an automated process).

### 2. Monthly call for monitors from Frontex

- ♦ The CAP collects the requests for monitors and once a month, (usually by the 11th of each month), prepares a monthly call (i.e. a letter) for the nomination of monitors for operations taking place the following month.
- ♦ The CAP sends the monthly call to the NFPOCs of all the MSs who contribute monitors to the Pool with copies to the respective NMBs.<sup>70</sup> The call contains all the operational details known to the CAP at this point in order for the NMBs to decide which operations to nominate monitors to. It includes general information about the return operations, e.g. the type of operation, the destination, date, airport of departure (if known at the time of the call), etc. The NMBs can nominate monitors to specific operations listed in the call.
- ♦ The CAP uploads the call to the communication platform for the pool of forced-return monitors on FOSS.
- ♦ The MSs have seven days to respond. Subsequently, the NFPOCs coordinate with the respective monitoring bodies and communicate the availability of monitors to Frontex.
- ♦ After this deadline, the CAP gathers all the nominations, prepares an overview of the upcoming return operations in the coming month and calls for a meeting with FRO, the ECRet Division and CAP.<sup>71</sup>

### 3. Decision by Frontex to assign nominated monitors to specific return operations

- ♦ The CAP organises a meeting with the ECRet Division and FRO to agree on the specific monitors to be assigned to specific return operations (based on predefined selection criteria).

<sup>69</sup> FAR is an online tool to coordinate the organisation of forced-return operations and is accessible only to Frontex and return-enforcing institutions in MSs. FAR is part of the Integrated Return Management Application (IRMA).

<sup>70</sup> The call requests the NMBs to indicate which operations they would be available for and interested in nominating monitors to.

<sup>71</sup> The objective of the meeting is for staff from all three entities to go through each request and nomination to decide on the monitors i.e. assign the nominated monitors to specific operations.

The following criteria are used for assigning monitors to specific operations:

- ♦ The operations to be covered are prioritised as follows:
  1. Collecting return operations (CROs), where at least one monitor has to be present.<sup>72</sup>
  2. Joint return operations (JROs).
  3. National return operations (NROs).
- ♦ The country of return is also a consideration in the process of assigning monitors. The experiences of representatives from Frontex, and those of OMSs and PMSs in relation to the country of return, as well as past monitoring reports detailing issues that have arisen from previous return operations to specific countries of return, are among factors that are taken into account in the decision-making process.
- ♦ The availability of the monitors nominated to return operations listed in the call.
- ♦ Other criteria also considered are that the:
  - ♦ Skills and specific experience of the available monitors should match the particular return operation.
  - ♦ Language(s) that the monitor speaks should ideally match the language(s) spoken by the returnees.
- ♦ The “fairness” principle is applied, according to which the planned return operations should be fairly distributed among the available monitors and all monitors should be assigned as equally as possible to operations.

#### **4. Response from Frontex to national nominations to specific return operations**

- ♦ The CAP records the decisions taken at the meeting with FRO and the ECRet Division and officially lets MSs know, via an e-mail to the NFPOCs, with copies to the respective MSS’ monitoring bodies, which monitor has been assigned to which operation.
- ♦ If there are ROs where no monitors have been nominated and others where several monitors have been nominated, the CAP in consultation with FRO and the ECRet Division asks the NMBs if it is possible to shift nominations from a RO that already has a monitor(s) to one that has not received any nominations.
- ♦ The ECRet Division enters the decision on which monitor is to monitor which operation onto FAR.
- ♦ The Secretariat collects information and statistics and uploads them onto the communication platform for the pool of forced-return monitors on FOSS to ensure transparency of the Pool with regard to which operations were monitored by which NMB.

<sup>72</sup> “[...] At least one Member State representative, and one forced-return monitor from the pool established under Article 51 or from the monitoring system of the participating Member State, shall be present throughout the entire return operation until arrival at the third country of return.” (Article 50(3) of Regulation (EU) 2019/1896).

## 5. Preparing the monitoring mission

- ♦ The ECRet Division collects the operational details of the mission (via FAR) and an automated email is sent to the monitors concerned. The email contains information on the flight schedule, the contact details of the main contact for the operation (the Escort Leader/EL if available), financial rules etc.
- ♦ If monitors request additional support (e.g. visa support letter, information on vaccinations etc.), the ECRet Division refers them to the requesting MSs. If their specific request is not addressed by the requesting MS, the ECRet Division offers support.
- ♦ If there are changes to the flight schedule, the ECRet Division contacts the monitors via an automated email generated by FAR.
- ♦ If a monitor other than the one who was assigned to a particular return operation is needed (e.g. the assigned monitor falls ill and cannot be deployed), the CAP contacts the NMBs to try to arrange for another nomination (outside of the monthly call).
- ♦ As soon as new/additional operational information becomes known, the ECRet Division forwards it to the monitors.

### Accreditation card

Article 83(1) of Regulation (EU) 2019/1896 provides that “[t]he Agency shall, in cooperation with the host Member State, issue a document in the official language of the host Member State and another official language of the institutions of the Union to the members of the teams for the purpose of identifying them [...]”. Paragraph 2 of the same Article specifies that “[t]he document shall be returned to the Agency at the end of each joint operation, migration management support team deployment, pilot project, rapid border intervention, return operation or return intervention.”

- ♦ The ECRet Division uploads the accreditation cards in PDF for the MSs in the FAR and emails the accreditation card for the specific monitoring mission to the monitor.
- ♦ In addition, on the day of the operation, the monitor(s) receive the printed accreditation card in a plastic badge holder.
- ♦ When a Frontex representative participates in a forced-return operation, they provide the monitor with the accreditation card. When no Frontex representative is present during the pre-departure or in-flight phase, the person responsible in the host MS prints out the accreditation card, puts it in a plastic badge holder, and hands it to the monitor who is being deployed<sup>73</sup>.
- ♦ At the end of the operation, the monitor needs to return the accreditation card to the OMS EL or another MS representative in charge.

### Implementation plan

- ♦ In cooperation with the OMS, Frontex draws up an implementation plan and distributes it to the PMSs before the implementation of the forced-return operation. The

<sup>73</sup> Frontex uploads the accreditation cards in PDF for the MSs in the FAR.

OMS and all PMS ELs are responsible for: informing all the participants in their contingent (i.e. EOs, monitors, etc.) about the contents of the implementation plan, sharing the annexes and ensuring compliance with the plan. This obligation is specified in each implementation plan.

- ♦ The MSs share the implementation plan as soon as possible with the monitor. The ECRet Division regularly reminds MSs about the importance of sharing information as soon as possible with the monitor.
- ♦ The implementation plan includes a list of the authorised restraints and equipment permitted during the forced-return operation agreed by the OMS together with Frontex in accordance with its national legislation, and in line with international and EU law.<sup>74</sup>.
- ♦ As regards CROs, the information on the restraints that can be used for specific operations is provided by the OMS in cooperation with the EL of the third country of return. They are responsible for informing the monitor about the level of restraints allowed on the flight at the briefing at the beginning of the CRO at the latest.
- ♦ The implementation plan includes the following annexes available to all participants in the forced-return operation:
  - ♦ Serious incident report template;
  - ♦ Code of conduct that applies to everyone participating in Frontex operational activities;
  - ♦ Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex;
  - ♦ Complaints form for potential violations of fundamental rights;
  - ♦ Rules of the complaints mechanism;
  - ♦ List of potential fundamental rights violations during operations.

#### Reflective vest

Frontex provides reflective vests to all participants in forced-return operations coordinated by Frontex including to the NMBs that contribute to the Pool. These vests have to be used when monitoring a Frontex-coordinated return operation.

#### **Carrying out the monitoring mission**

- ♦ Before the monitoring mission (i.e. during preparation) and throughout the monitoring mission including briefing and debriefing, the monitor communicates and coordinates closely with the requesting MS and the ECRet Division.
- ♦ The monitor participates in the entire return operation from the pre-departure phase until the hand-over of the returnees in the third country of return, i.e. during the pre-departure, in-flight, arrival, and return-flight phases. In case of unaccepted returnees, the monitoring continues until the handover back in the country of departure.

<sup>74</sup> However, no PMS is allowed to use restraints that are not permitted in their national legislation, even if those measures are accepted in the implementation plan for that particular operation.

- ♦ During the pre-departure phase the monitor participates in the **briefing** by the EL (head of operation) together with the main participants of the return operation.
- ♦ During the return-flight phase, the monitor participates together with the main participants of the return operation in the **debriefing** during which the monitor gives a brief account of their observations reflecting the content of the monitoring report that will be submitted at a later stage.

### Drafting, submitting and distribution of the monitoring report

According to Article 50(5) of Regulation (EU) 2019/1896 “[t]he forced-return monitor shall submit a report on each forced-return operation to the executive director, the fundamental rights officer and to the competent national authorities of all the Member States involved in the given operation. If necessary, appropriate follow-up shall be ensured by the executive director and competent national authorities respectively”.

#### Submission of monitoring reports

- ♦ Monitors submit their monitoring report via the reporting application within 14 days of the end of the operation (or as quickly as possible if monitor(s) grade(s) their reports as URGENT<sup>75</sup> or within 48 hrs where the FRO requests an urgent report – see further below).
- ♦ The report enters the reporting system (case management application of the FRO) which produces a basic output report<sup>76</sup> in the form of a locked Word document. The basic output report is then sent by the system as an attachment via e-mail to an initial distribution list. The list includes the FRO, the Frontex Executive Director and the ECRet Division (Frontex Joint Return Coordination Centre – FJRCC) in line with Article 50(5) of Regulation (EU) 2019/1896. The basic output report is also sent to the monitor(s) who submitted the report as well as the national preventive mechanism (NPM) and NMBs of the MS(s) monitored.
- ♦ The report is automatically uploaded onto the FAR system, to enable access by the competent national authorities of all the MSs involved in a particular operation.
- ♦ The FRO uses the case management application to monitor submissions of reports.
- ♦ If the FRO receives a Serious Incident Report (SIR)<sup>77</sup> or complaint regarding a return operation, it contacts the monitor and can ask them to submit their report within 48<sup>78</sup> hours.

<sup>75</sup> Any incident of a sensitive or public interest nature, which occurs during the course of an operation (occurrence, natural or caused by human action) and which may affect or be relevant to the Frontex mission, image, the safety or the security of participants in Frontex coordinated activities, including violations of Fundamental Rights or infringements of the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, are to be reported.

<sup>76</sup> This is to contain all of the information submitted by the monitor(s), in a compact, readable format.

<sup>77</sup> In the event of a serious incident, the OMS escort leader reports it to the national Crisis Focal Point which activates the Serious Incident Reporting (SIR) procedure by informing the Frontex Situation Centre (FSC) and the Frontex Operational Team. A call is made to the Senior Duty Officer of the FCS within 2 hours of knowing about the incident and in writing within 48 hours using the SIR template which is sent to the FSC [fsc@frontex.europa.eu](mailto:fsc@frontex.europa.eu) copied to [FJRCC@frontex.europa.eu](mailto:FJRCC@frontex.europa.eu)

<sup>78</sup> Same time limit as for Serious Incident Reports.



### Follow-up to reports

- ♦ The FRO takes account of the monitor's recommendations in formulating their own official recommendations to other Frontex entities and to the MSs concerned.
- ♦ Every six months, the FRO does an analysis of the observations from forced-return operations from the previous six months. They examine cases where there are issues of concern, especially those covering multiple operations that may indicate systemic failings. The FRO observations form part of the six-monthly evaluation report sent by the Executive Director to the EU Parliament, Council, Commission and the Management Board of Frontex.
- ♦ The FRO presents its findings to the Management Board of Frontex and the Advisory Board of the Pool.
- ♦ The FRO emails its observations to all Pool monitors as well as to the NFPOCs of the MSs/competent authorities.
- ♦ The FRO drafts a feedback report on a regular basis based on the references in cases to monitors' recommendations, so that examples of what has been done following similar and related recommendations can be clearly seen. The report is shared with the Pool monitors, NMBs and NPMs.
- ♦ The Secretariat, in cooperation with the TRU, supports the FRO in organising meeting(s) with Pool monitors to discuss lessons learned, including the administration of the Pool and follow-up to recommendations. Representatives of return-enforcing institutions are also invited to these meetings. NMBs without Pool monitors of their own are also invited.

The ICT is responsible for technical support and maintenance of the reporting application. The FRO together with the ECRet Division, the CAP and ICT is responsible for updating the reporting process as required. The Secretariat provides support as necessary.

### **Financing and reimbursement of monitoring costs**

All costs related to the participation in a forced-return operation, including flight ticket to/from the hub/port of departure, accommodation, daily subsistence allowance (DSA), monitoring fee, insurance<sup>79</sup>, visa costs, vaccination costs and any other related costs are always reimbursed on an individual basis/agreement between the requesting MS and the monitoring body in line with the national rules of the monitoring body in that MS.

Once the monitor has been selected for an operation, the monitor or the monitoring body responsible submits the estimated costs of their participation prior to the return operation.<sup>80</sup> The requesting MS includes the estimated costs of the monitor's participation in the estimated budget that is sent to Frontex. After the forced-return operation, the MS reimburses the monitoring body's costs. Frontex then reimburses the MS.

<sup>79</sup> The insurance (e.g health, travel or any other type) needs to be ensured by the requesting MS under the general principle of duty of care. If the national monitoring body arranges such insurance for the monitors from the Pool, the costs can be claimed from the requesting MS.

<sup>80</sup> In order to ensure that both the amount and nature of the costs sent to the MS/Frontex are in line with the national rules of the monitor's home country, the monitor/NMB needs to copy the Direct Contact Point in Return Matters (DCP) and the NFPOC.

There are two methods for financing the monitoring costs:

1. Primarily, all costs and mission arrangements related to monitoring the return operation are borne directly by the requesting MS and Frontex reimburses the MS after the return operation. The requesting MS organises the flight ticket to and from the hub/port of departure and the accommodation for the monitor(s). Following the return operation, the monitor submits all the remaining costs (e.g. insurance, monitoring fee, etc.) estimated before the forced-return operation, to the MS for reimbursement.
2. Another option is that the monitoring institution covers the costs and mission arrangements based on a specific and direct agreement with the requesting MS. In this case, the monitor(s) and/or the respective monitoring body organises the flight ticket to and from the hub/port of departure and the accommodation themselves and pre-pays all the related costs. After the forced-return operation, all the costs are submitted to the MS for reimbursement. The estimated costs have to be submitted to the requesting MS prior to the forced-return operation.

# **Chapter 2**

## **Fundamental Rights Applicable in Forced-Return Operations**



## Chapter 2: Fundamental Rights Applicable in Forced-Return Operations

This chapter introduces the fundamental rights<sup>81</sup> applicable during a forced-return operation and their specific relevance in the different phases of a forced-return operation. While Chapter 3 covers in detail what the monitor should specifically observe in each separate phase of a forced-return operation, Chapter 4 covers reporting.

### 2.1 Introduction to fundamental rights

It is important that forced-return monitors are very familiar with the **fundamental rights** that are **specifically applicable to forced-return operations**. The task of the monitor is to **closely observe** if these rights are respected during an operation and to include the observations in the monitoring report.

In accordance with international, EU and national law, all **States** are under the **obligation to guarantee fundamental rights**. As ELs, escorts and medical staff act on behalf of the State, they have the obligation to adhere to fundamental rights during a forced-return operation. However, those tasked to directly enforce the return are under particular scrutiny. This includes the EL and the escorts who have a **specific mandate** during a forced-return operation **to exercise force and apply means of restraint** under certain circumstances.

The monitors, through their independence, observation and report, support the effective compliance with fundamental rights and could also be called upon to cooperate during investigations in cases of alleged violations.

States are the main entities responsible for ensuring that human rights are respected and guaranteed by public authorities who are obliged to perform their duties accordingly towards individuals who are within the State's jurisdiction, including non-nationals. States have the duty to set up mechanisms for the prevention of human rights violations and to **proactively** ensure their protection by holding accountable those who violate them on their territory and providing effective remedy to those whose rights are violated.

The **United Nations (UN) system** is the **global framework** for human rights standards and protection. Following the 1948 Universal Declaration of Human Rights, the UN adopted several international conventions relevant to the protection of certain human rights, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the Universal Declaration of Human Rights is not an international treaty and therefore does not impose obligations upon states, its rights have been incorporated in international law and reflected in customary international law; they have been replicated in various conventions and included in States' constitutions.

<sup>81</sup> A distinction in using the term fundamental rights and human rights mainly relates to the fact that human rights is used more often in the international context, e.g. conventions relate to human rights, whereas within the EU the term fundamental rights is used relating to the concept of human rights. The Charter of Fundamental Rights that the EU adopted in 2000 underlines this. The terms can thus be used interchangeably and this material mainly refers to the term fundamental rights as used in the EU. Compare also with: <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights>.

The **Council of Europe (CoE) system**, with its European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols as well as the European Court of Human Rights (ECtHR), is one of the most advanced **regional systems** of human rights protection in the world. The CoE has adopted numerous treaties that are binding for the States that have ratified them. It also provides a whole **institutional system** to monitor human rights protection. In the context of forced-return operations, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is most relevant. It provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment and thus complements the judicial work of the European Court of Human Rights.<sup>82</sup> Also, the CPT monitors the situation of persons who are deprived of their liberty<sup>83</sup> while being forcibly returned to their country of origin, or a country of transit or another third country. Therefore, the **CPT has the mandate to monitor and report** on forced-return operations. Its findings and recommendations are a valuable source for Europe-wide standard-setting and improvement of forced-return procedures.

Both the UN and CoE frameworks are extremely relevant for the **European Union (EU) context**, since all EU Member States (MS) are part of these systems and these human rights standards have been incorporated into the respective national and EU legal frameworks. Already in the Treaty on the Functioning of the EU (TFEU) and the Treaty on European Union (TEU), fundamental rights are laid down as essential values of the EU<sup>84</sup>; Article 2<sup>85</sup> and 6<sup>86</sup> of the TEU are considered the constitutional backbones of fundamental rights protection in the EU legal order.

The Charter of Fundamental Rights of the European Union (Charter) confirms the rights guaranteed by the ECHR.<sup>87</sup> As regards the relation between the Charter and the ECHR, according to Article 52(3) of the Charter, in so far as it contains rights which correspond to rights guaran-

82 <https://www.coe.int/en/web/cpt/about-the-cpt>.

83 Forced returnees might be deprived of their liberty not only during the actual forced-return operation – from the pre-departure phase until the arrival in the country of return – but often already before the day of the actual return operation within pre-removal detention facilities that may also be subject to CPT visits.

84 “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States” (Article 67(1) TFEU) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

85 “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” (Article 2 TEU) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

86 “1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” (Article 6 TEU) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

87 “This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.” (Preamble of the Charter of Fundamental Rights of the European Union, 2000/C 364/01).

“The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.” (Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>).

ted by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. This does not prevent Union law to provide more extensive protection.

Although the Charter reaffirms international and European human rights standards, it explicitly distinguishes between the rights of EU citizens and the rights of all individuals residing on EU's territory, including non-nationals, irrespective of their migratory status. In Article 51(1), the Charter specifies its application only to EU institutions and EU Member States when implementing EU law.<sup>88</sup>

## 2.2 List of vulnerable groups in EU law

**Vulnerable persons require specific attention** and may require special assistance and protection throughout a forced-return operation. In line with Article 3(9) of the Return Directive, "*vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence*". It is important to bear in mind, that vulnerable persons are often also exposed to discrimination and therefore require specific attention and protection. Therefore, in line with Article 21 of the Charter of Fundamental Rights of the European Union, "**any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited**".<sup>89</sup>

In relation to forced-return operations organised by Frontex, Article 80 (3) of the EBCG Regulation states that "*the European Border and Coast Guard in performing of its task shall **take into account the special needs of children, unaccompanied minors, persons with disabilities, victims of trafficking in human beings, persons in need of medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation, and shall address those needs within its mandate. The European Border and Coast Guard shall in all its activities pay particular attention to children's rights and ensure that the best interests of the child are respected***". As a forced-return operation is a very particular situation in itself, it is important to bear in mind that even groups which have not been explicitly listed above may be considered vulnerable, e.g. cultural minorities.

## 2.3 Fundamental rights instruments applicable to forced-return operations

The specific rights and principles applicable to forced-return operations as well as the process before and during their execution, originate from a number of international and regional legal instruments on fundamental rights and refugee law. The following list is **not exhaustive**, as there are a number of other relevant regional legal fundamental rights instruments, in addition to a large number of guidelines and standards that are applicable. This list provides a **summary of key documents** applicable in the specific case of forced-return operations:

- ♦ The Universal Declaration of Human Rights (1948);

<sup>88</sup> FReM II Discussion Paper: Workshop on Good Practices: Fundamental Rights Compliance in Forced-Return Operations, p. 1-3.

<sup>89</sup> Charter of Fundamental Rights of the European Union, Article 21, Non-discrimination:

1. Any discrimination based on any grounds, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

- ♦ The European Convention on Human Rights and all related protocols (1950);
- ♦ The Convention relating to the Status of Refugees (Geneva Convention) (1951);
- ♦ The International Covenant on Civil and Political Rights (1966);
- ♦ The Optional Protocol relating to the Status of Refugees (1967);
- ♦ The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- ♦ The European Convention for the Prevention of Torture (1987);
- ♦ The UN Convention on the Rights of the Child (1989); and
- ♦ The Charter of Fundamental Rights of the European Union (2000).

The **Convention for the Protection of Human Rights and Fundamental Freedoms** (European Convention on Human Rights – ECHR)<sup>90</sup> was signed in Rome in 1950 and came into force in 1953. The Treaty **secures basic rights for anyone within the borders of the countries belonging to the Council of Europe (CoE)**, no matter whether they are a **citizen of a CoE Member State or people of other nationalities**. The ECHR was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights (1948) and make them binding. The European Court of Human Rights (ECHR) applies and protects the rights and guarantees set out in the European Convention on Human Rights. The Convention guarantees specific rights and freedoms and prohibits unfair and harmful practices, securing **among others**:

- ♦ The right to life (Art.2);
- ♦ Freedom from torture (Art.3);
- ♦ Freedom from slavery (Art.4);
- ♦ The right to liberty (Art.5);
- ♦ The right to a fair trial (Art.6);
- ♦ The right not to be punished for something that wasn't against the law at the time (Art.7);
- ♦ The right to respect for family and private life (Art.8);
- ♦ Freedom of thought, conscience, and religion (Art.9);
- ♦ Freedom of expression (Art.10);
- ♦ Freedom of assembly (Art.11);

<sup>90</sup> Although the EU and its institutions are not directly bound by the ECHR, Article 6(3) of the Treaty of the European Union states that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights [...] shall constitute general principles of the Union’s law.”



- The right to marry and start a family (Art.12);
- The right not to be discriminated against in respect of these rights (Art.14);
- The right to protection of property (Protocol 1, Art.1);
- The right to education (Protocol 1, Art.2);
- The right to participate in free elections (Protocol 1, Art.3); and
- The abolition of the death penalty (Protocol 13).<sup>91</sup>

Furthermore, and as already outlined in Chapter 1, the **Charter of Fundamental Rights of the EU** brings together in a single document the **fundamental rights protected in the EU**. It includes all the rights found in the case law of the Court of Justice of the EU; the rights and freedoms enshrined in the European Convention on Human Rights; other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments<sup>92</sup>. The Charter is consistent with the European Convention on Human Rights. When the Charter contains rights that stem from the Convention, their meaning and scope are the same.<sup>93</sup> The provisions of the Charter are addressed to the institutions and bodies of the EU and the national authorities only when they are implementing EU law.<sup>94</sup>

#### 2.4 Fundamental rights at risk during a forced-return operation

Fundamental rights are universal to all individuals and they are indivisible. A number of fundamental rights applicable to third-country nationals that are to be returned are specifically to be observed during forced-return operations.

Monitoring is a tool for reinforcing observance of fundamental rights during a forced-return operation. It is a way of verifying that those carrying out the forced-return operation uphold the fundamental rights of returnees during the whole process. Monitors play a preventive role through their presence during forced-return operations and can help to ensure there is a greater level of accountability in the event of actions or omissions by officials carrying out the forced-return operation that contravene the EU Charter of Fundamental Rights, applicable international human rights law and national legislation. The presence of monitors observing and reporting on the forced-return operation means that those responsible for carrying out the return operation can be held accountable for the actions they take, or fail to take, during the operation.

91 <https://www.equalityhumanrights.com/en/what-european-convention-human-rights>.

92 The Preamble of the Charter of Fundamental Rights of the EU specifies that “[the] Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.” <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>).

93 [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm).

94 The Charter applies when EU countries adopt or apply a national law implementing an EU directive or when their authorities apply an EU regulation directly. In cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions they have ratified ([http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm)).

The role of the forced-return monitors in the Pool is to **observe, analyse and report** on whether the return operation was conducted in a humane manner, respectful of the dignity of the person and in compliance with fundamental rights as enshrined in the EU Charter of Fundamental Rights, applicable international human rights law and national legislation. The monitor of forced-return operations has **no powers of intervention** and should, therefore, **never intervene**.

The following section introduces the fundamental rights and specific aspects of those rights that could possibly be violated during a forced-return operation. When talking about return, one of the main principles to be followed is **non-refoulement**, which is the key principle of international refugee law that States have to ensure. The monitor needs to be well acquainted with the principle of *non-refoulement*, but has no powers of intervention and thus should never intervene. However, the monitor can always alert the escort leader if s/he notices a potential situation of *refoulement*.

Article 33 of the Convention relating to the Status of Refugees enshrines the prohibition against returning (*refouler*) a refugee – and hence also a person seeking asylum – to a risk of persecution. The prohibition of *refoulement* is also reflected in primary EU law, specifically in Articles 18 and 19 of the EU Charter and Article 78 of the Treaty on the Functioning of the EU (TFEU). The 27 EU Member States accepted this obligation when ratifying the EU treaties.

Secondary EU law relating to borders, asylum, migration, and return also prohibits *refoulement*. Article 3 of the ECHR, as interpreted by the European Court of Human Rights (ECtHR), and the EU asylum *acquis* have expanded the type of harm to which a person cannot be returned, to include a prohibition against returning someone to torture, inhuman or degrading treatment or punishment, and other serious harm.

The prohibition of *refoulement* is absolute – it does not allow any derogation or exception. The principle of *non-refoulement* bans not only a return to the country of origin (*direct refoulement*) but also a transfer to countries where individuals are exposed to the risk of onward removal to the country of origin (*indirect or onward refoulement*).<sup>95</sup> This means, for example, that returning an asylum seeker to a country neighbouring the EU in which he or she previously stayed is only possible if – after assessing the individual's personal circumstances – the authorities are satisfied that he or she will be readmitted by the third country and protected from unsafe onward removal. Return to a third country is not allowed if there is a real risk that the individual would be subjected to inhuman or degrading treatment<sup>96</sup>, including, for example, in detention facilities. International refugee law further requires that the person concerned be allowed to access asylum procedures in the third country.<sup>97</sup> There is a general consensus that international refugee law also requires that the asylum seeker has access to sufficient means of subsistence to maintain an adequate standard of living in the third country, and that the third country takes into account any special vulnerabilities of the person concerned.<sup>98</sup> EU law also reflects this requirement: Article 38(1)(e) of the Asylum Procedures

95 Executive Committee on the International Protection of Refugees (EXCOM), Conclusion No. 97 on Protection Safeguards in Interception Measures (LIV) – 2003 at (a) (iv); ECtHR, *M. S. S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 293.

96 ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011. CJEU, *Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011.

97 Executive Committee on the International Protection of Refugees (EXCOM), Conclusion No. 87 (L) – 1999 at (j).

98 UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*, Lisbon Expert Roundtable, 9 and 10 December 2002.

Directive (2013/32/EU) requires that, if found to be a refugee, the individual must have access to protection in accordance with the Geneva Convention.

Any form of removal or any interception activity that prevents entry may result in collective expulsion if the removal or interception is not based on an individual assessment and if effective remedies against the decision are unavailable. Collective expulsion is prohibited by Article 19 of the EU Charter and Article 4 of Protocol 4 to the ECHR. The ECtHR has made it clear that this prohibition also applies on the high seas.<sup>99</sup>

The following list includes rights that are – **in one way or the other** – directly linked to forced-return operations. In line with the indivisibility principle of fundamental rights<sup>100</sup>, **all rights apply equally to all**. The list however highlights those rights at greater risk of being breached during a forced-return operation:

- ♦ Right to life;
- ♦ Right to liberty and security;
- ♦ Prohibition of torture and inhuman or degrading treatment or punishment;
- ♦ Right to human dignity;
- ♦ Right to non-discrimination;
- ♦ Freedom of thought, conscience, and religion;
- ♦ Access to information;
- ♦ Right to health;
- ♦ Access to food and water as basic needs;
- ♦ Rights of vulnerable groups (victims of trafficking, persons with disabilities, etc.);
- ♦ Right to family unity;
- ♦ Rights of the child/best interest of the child;
- ♦ Right to personal data protection and privacy;
- ♦ Right to property; and
- ♦ Right to good administration/ to complaint.

<sup>99</sup> FRA Fundamental Rights report 2016 (p.15): <http://fra.europa.eu/en/publications-and-resources/publications/annual-reports/fundamental-rights-2016>.

<sup>100</sup> Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are interrelated, interdependent, and indivisible. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law, and freedom of expression; economic, social and cultural rights, such as the right to work, social security, and education; or collective rights, such as the rights to development and self-determination, are indivisible, interrelated, and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others. (<http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>).

### 2.4.1 The right to life

The life of returnees has to be **guaranteed and effectively protected** during a forced-return operation. The Charter of Fundamental Rights establishes in Article 2 that “[e]verybody has the right to life, and that nobody shall be condemned to death penalty or executed.” Furthermore, the European Convention on Human Rights establishes also in Article 2:

*“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally ...*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to carry out a lawful arrest or to prevent the escape of a person lawfully detained;<sup>101</sup>*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”*

In addition to the above, Article 7 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex covers the use of coercive measures, establishing the following standards to be applied during a JRO:

1. The use of coercive measures must be legal, necessary and proportional, not exceeding reasonable force, and with due respect to the returnee’s rights, dignity and their physical integrity. The use of coercive measures takes appropriate account of the individual circumstances of each person, such as their vulnerable condition;
2. Coercive measures may be used only when strictly necessary on returnees who refuse or resist removal or in response to an immediate and serious risk of the returnee escaping, causing injury to themselves or to a third party, or causing damage to property;
3. Coercive measures likely to compromise or threaten the possibility of the returnees to breathe normally are prohibited. The relevant escort leader periodically reviews the continuing necessity and proportionality of deploying coercive measures, and particularly of applying means of restraint, when these are used for prolonged periods, based on a dynamic risk assessment;
4. The OMS and Frontex provide for a list of authorised restraints in the operational documents in advance of the RO or RI. Where applicable, this list must be distributed to the relevant PMSs prior to the RO or RI. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures under medical supervision to ensure flight security;
5. No PMS participants are required to use coercive measures not allowed under their national legislation even if those measures are accepted by the OMS and Frontex for that particular RO or RI; and

<sup>101</sup> Or as in the case of an administrative detention, deprived of their liberty.

6. Returnees must not be threatened in order for them to board a means of transport. They must not be punished for not having done so without prejudice to sanctions provided for by applicable legislation.<sup>102</sup>

**Use of force and means of restraint should only be applied:**

- ♦ When strictly necessary (refusal and/or resistance of the returnee, inclination to and/or use of violence and self-harm);
- ♦ In line with the individual risk assessment conducted (establishing whether a returnee is likely to try to resist the removal and might resort to violence and/or self-harm in order to do so);
- ♦ According to the (approved) list of authorised (and forbidden) means of restraints; and/or;
- ♦ In accordance with the national legal requirements detailing the requirements and limits for the use of restraints as part of a forced-return operation.<sup>103</sup>

**Overall security and safety is paramount**, for all participants during a forced-return operation. A forced-return operation can thus be interrupted under circumstances that endanger the safety of the operation and/or in the case of serious violations of fundamental rights.

Article 5 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex establishes that return operations or return interventions coordinated by Frontex must be interrupted or terminated in cases where it would be unsafe to continue:

*Returnees' safety, as well as the safety of the participants and of the crew members, are paramount during RO and RI. The captain of the aircraft/vessel or head of RO/the competent authorities of the MS hosting an RI or Frontex, depending on the phase of the RO or RI, must suspend or terminate the RO or RI in case they consider its continuation unsafe.*<sup>104</sup>

Please refer to 2.4.3 for more information specifically related to forced-return operations.

#### **2.4.2 Right to liberty and security**

The right to liberty and security is guaranteed by both the Charter of Fundamental Rights of the European Union (Article 6) and the European Convention of Human Rights (Article 5). The latter foresees that *"everyone has the right to liberty and security of person and no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

<sup>102</sup> Article 7 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>103</sup> National legislation in some instances "prescribes" the use of certain restraints on returnees as a precautionary measure from the outset during a forced-return operation. Should the restraints be used in accordance with the national legal framework, their legality cannot be questioned by a forced-return monitor.

<sup>104</sup> Article 5 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

(b) The lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(f) The lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Please refer to 2.4.3 for more information specifically related to forced-return operations.

### 2.4.3 Prohibition of torture and inhuman or degrading treatment or punishment

The prohibition of torture and inhuman or degrading treatment or punishment is clearly stated in a number of declarations and conventions.<sup>105</sup> Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is of specific relevance for forced-return operations:

*“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*

The right to life; the right to liberty and security; and the prohibition of torture and inhuman or degrading treatment or punishment are **closely linked to the implementation of forced-return operations**. Both, in relation to respecting the principles for the use of force and means of restraint as well as physical or mental threats and pressure.

At times, law enforcement activities require the use of force during forced-return operations. However, as the disproportionate use of force in extreme circumstances can lead to death, it is important to clarify the principles under which the use of force may be applied in practice. The monitoring report must capture all facts and details in case of the use of force (the reporting on the use of force and means of restraint is covered in detail in Chapter 4).

**When force is used**, it shall always be applied based on the limitations provided by the **principles of legality, necessity, and proportionality**. Any measure taken shall be proportional to the legitimate objective pursued, not exceeding reasonable force, and in line with national legislation. Another crucial factor for consideration when monitoring the use of force is that it should be used as the **means of last resort**, after de-escalating means were first sought or there was no possibility to use them prior to using force.

The **use of force that impedes the breathing of a returnee is strictly forbidden**, both by international and regional human rights standards as well as by the Frontex CoC for Return Operations and Return Interventions coordinated or organised by Frontex. The positional asphyxia has the potential consequence of preventing the returnees for breathing and can cause death (see also Chapter 3.16.2).

<sup>105</sup> Universal Declaration of Human Rights 1948, Article 5; European Convention for the Prevention of Torture, 1987, Article 3; International Covenant on Civil and Political Rights, 1976, Article 7; European Convention on Human Rights - ECHR, Article 3; EU Charter of Fundamental Rights, Article 4.

The right to liberty in general refers to detention, i.e. a person that shall be forcibly removed might be deprived of his/her liberty in order to prepare the return. There are however other mechanisms and organs which monitor the protection of fundamental rights at that stage. Consequently, these are usually outside the responsibility of the monitor of the pool of forced-return monitors.

The use of means of restraint is also primarily understood as a restriction of the right to liberty. Under certain circumstances the inappropriate use of means of restraints may violate the human dignity or infringe the right to physical integrity of the returnee depending of the consequences of their application. Therefore, the monitor needs to closely observe the application and duration of means of restraints.

Following the obligation that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, it is prohibited to physically assault, threaten, force, or punish returnees.

#### 2.4.4 Human dignity

The **dignity of returnees must be guaranteed** at all stages of the forced-return operation. This includes that returnees should have suitable clothing (e.g. adequate to the climate they are leaving and to which they are going), as well as assistance, where required, to be able to carry their belongings in suitable containers (bags, boxes, and/or suitcases). All valuable personal belongings of returnees must be kept by the respective escorts rather than treated as hold luggage. It should be stored in sealed envelopes or a transparent plastic bag with the name of the owner marked<sup>106</sup> and should be returned to the returnee before disembarkation<sup>107</sup>. Additionally, access to hygienic items for babies and female returnees should be ensured during the entire operation.<sup>108</sup>

The right to human dignity is also related to the use of force, in the sense that coercive measures should be applied with due respect to the returnees' human dignity and physical integrity. This includes trying to separate a child from a parent in a calm manner in order to avoid restraining a parent in front of their children and avoiding as far as possible placing the returnee in degrading positions. In the past, the CPT has highlighted the use of certain apparently innocuous material (nappies outside of trousers) in adult returnees as a potential violation of their human dignity. It has to be born in mind though, that undressing a returnee against his or her will in order to apply a diaper, might also potentially violate their human dignity.

#### 2.4.5 Non-discrimination

The principle of non-discrimination is enshrined in Article 21 of the Charter of Fundamental Rights and Article 14 of the European Convention of Human Rights. It applies throughout the entire forced-return operation during which **no returnee shall be subject to any unfair treatment or arbitrary action**. The Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex specifies that *“RO and RI are to be conducted without discrimination on any ground such as gender, racial or ethnical origin, genetic fea-*

<sup>106</sup> Frontex Guide to JROs, p. 30.

<sup>107</sup> Frontex Guide to JROs, p. 34.

<sup>108</sup> Frontex Guide to JROs, p. 30.

tures, language, religion or belief, nationality, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation or other status.”<sup>109</sup>

#### 2.4.6 Freedom of thought, conscience and religion

Related to the right to religion<sup>110</sup>, returnees shall be granted, where possible, the appropriate time and space to observe the customs according to their faith and to pray. As a return operation per se does not always offer the possibility for proper space and time for prayer, this right can be guaranteed by offering the person the opportunity to pray, for example, whilst seated in between the escorts. If prayer time coincides with, for example, boarding the means of transportation, the right to religion is not infringed by not offering the possibility to pray at that precise moment. Instead, it should be explained to the returnee that they can pray once seated. Restraints should, where possible, not impede prayer. However, **security during a JRO is at the forefront of the escorts’ consideration, for both returnees and other participants**. Escorts may refuse a returnees’ demand to loosen restraints for praying if necessary. However, this decision has to be based on the prior risk-assessment and/or a situation of agitation that made the use of restraint necessary. It is **important that such decisions are not based on a perceived unimportance of the right to religion**, or taken as an arbitrary decision potentially discriminating against the returnee and their religious faith.

Returnees’ conscience or religion might have an impact on the choice of food, which should be taken into consideration. Returnees might also choose to fast and therefore refuse to eat for a certain period, whereas the fast-breaking might need to happen at a precise time not coinciding with the regular food serving schedule. **Proper communication** between the escorts and returnee facilitates respect for such principles and the search for a common solution.

#### 2.4.7 Access to information

Prior to their return, returnees should be provided with:

- ♦ Information in a language they understand;
- ♦ Information regarding the detailed process of the return operation;
- ♦ Information on the possibility to lodge a complaint on ill-treatment during the return;<sup>111</sup>
- ♦ Access to allowed means of communication before the actual return in order to notify family or friends in the country of return about the predicted arrival (normally a phone call); and
- ♦ Information regarding the possibility of further support in the country of return, if available.

<sup>109</sup> Article 4(2) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>110</sup> Enshrined in Article 10 of the EU Charter of Fundamental Rights and Article 9 of the European Convention on Human Rights.

<sup>111</sup> Article 6 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex defines that the competent authorities of the Member States are expected to give sufficient and clear information to the returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation.



Individuals with hearing or visual impairment should be provided with access to necessary equipment or personnel to ensure that they have understood what the procedures are, and are able to communicate their needs.

Information about the national and Frontex complaint mechanism<sup>112</sup> should be provided and any relevant form should be made available.

The OMS must consider the need to have an interpreter on board to help the medical staff and escorts communicate with returnees. The PMS may bring their own interpreter(s) during the connecting transport and also during the joint return flight, if they consider it necessary. However, they should seek the prior agreement of the OMS to provide their own interpreter.<sup>113</sup>

#### 2.4.8 Right to health and access to medical assistance

According to Article 8(1) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex, *“The returnees are to be removed **only as long as they are “fit-to-travel”** at the time of the RO or RI. The OMS must refuse the participation of a returnee who is not fit-to-travel”*. The **procedures** to examine whether a returnee is fit-to-travel in a forced-return operation **differs among Member States**, and also depends on which means of transportation is used. In some Member States, for example, all returnees must undergo a fit-to-travel test, whereas in other Member States only persons with known/communicated medical conditions (physical and/or psychological) must undergo a medical test. According to Article 8(2) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex it says that: *“In a reasonable time prior to the RO or RI, the authorities of the MS are **required** to provide for a **medical examination** of a returnee, **subject to their agreement**, where they have a **known medical condition** or where medical treatment is required. Medical procedures should be carried out in a manner that observes the principles of medical confidentiality and dignity.”* In this regard, the relevant PMSs must inform the OMS in advance regarding any medical condition of a returnee that would need special care and attention.<sup>114</sup> The Frontex Guide for JROs provides a model fit-to-travel form for medical examinations.<sup>115</sup>

Specific attention has to be paid during the medical examination to psychological disorders or prior trauma that the person has suffered, including securing (the continuation of) medication, if applicable, as a psychologically unstable returnee might pose a risk to him/herself and the return operation.

All medical examinations should be conducted individually and not in groups, with access to an interpreter in order to communicate with the doctor, if required. The examination should be conducted out of hearing and - unless the doctor concerned requests otherwise - out of sight of escorts. The doctor should inform returnees about the result of the examination.

The Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex foresees the **obligatory presence of appropriate medical staff** during the entire duration of a Frontex-coordinated return operation.<sup>116</sup> Medical staff participating

<sup>112</sup> Established in Article 72 of the EBCG Regulation.

<sup>113</sup> Frontex Guide to JROs, p. 14.

<sup>114</sup> Article 8(3) Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>115</sup> Frontex Guide to JROs, page 38.

<sup>116</sup> Article 14(2) of the 11 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

in return operations shall be provided with a fully equipped emergency kit, including medical equipment and medication most commonly used in emergencies. A list with recommendations is annexed to the Frontex Guide for JROs<sup>117</sup>. The presence and active engagement of medical personnel in the wellbeing and health of returnees helps to avoid incidents that could result in the health of returnees being jeopardised during a forced-return operation.

#### 2.4.9 Access to food and water as basic needs

Several international instruments relate to the right for everyone to be free from hunger and to have access to adequate food. Therefore, returnees must be provided with **sufficient and adequate food and water** throughout the entire forced-return operation. It is common practice to provide the same type of food for returnees as for the other participants. In addition, food requirements of individual returnees (gluten free, sugar free, Halal, Kosher, vegetarian meals, etc.) must be observed.

#### 2.4.10 The rights of vulnerable people

As described above, vulnerable people are persons who for reasons of age, gender, race, ethnic or social origin, religion or belief, or due to social, economic, ethnic and/or cultural circumstances, may be exposed to discrimination or require specific attention and protection. Many suffer from multiple levels of discrimination, for instance, due to their disability, their age, and social origin or sexual orientation.

During a forced-return operation, the special needs of vulnerable individuals or groups should be taken into account and they should be given assistance. This includes accommodating mobility issues, the need for medication, providing adequate food and water (e.g. including suitable temperatures for baby food, taking into consideration food allergies, etc.). Monitors, beyond the information provided to them by the EL, must be proactive in identifying any vulnerable persons.

With regard to vulnerable people, there are several (non-exhaustive) **recommendations** both for ELs/escorts and monitors to take into account. The EL shall carry out a **vulnerability assessment and proactively seek information** from the other PMSs; consider the fit-to-travel information from the other Member States and coordinate with the medical staff on board; always consider the best interest of children; whenever possible, separate families from the other returnees; apply child friendly communication techniques; seek to separate children in case of use of coercive measures; and whenever possible, grant privacy to the returnee(s). The monitor should request information on the vulnerability assessment ahead of the operation from the EL; request information on any medical issues (with due respect to data protection); look out for the medical staff on board and exchange information with them; closely monitor those identified as particularly vulnerable, take notes and report on the observations; report vulnerability-related information in cases where it is not provided or obviously not gathered; check whether female escorts are on board whenever females and children are returned and whether the number of female escorts is deemed appropriate/sufficient corresponding to the number of female returnees and children; monitor whether a breach of privacy creates vulnerability for a returnee.

<sup>117</sup> Frontex Guide to JROs, pages 44-50.

#### 2.4.11 The right to family unity

Whenever possible, **families should be transported and seated together and separated from other adult returnees**, especially in cases where the return involves convicted criminals or returnees evaluated with considerable risk of resorting to violence. In this regard, the Guide for Joint Return Operations by Air coordinated by Frontex (2016) recommends providing a separate area at the airport for families with children and people with special needs.<sup>118</sup>

The Guide specifies that special attention must be paid to the embarkation of families with children in order to avoid exposing children to the possible violent behaviour of other returnees (e.g. separate transport for families with children and pregnant women from the waiting area to the plane). In addition, pregnant women (single or with families) and families with children shall board the aircraft separately and shall be seated separately from other returnees. Also normally family members should not be separated when on board.<sup>119</sup> The Guide however emphasises that children should not be exposed to violent and aggressive adults; their view should be shielded and their physical integrity should be ensured. Therefore in **exceptional cases** when extreme non-compliance of a family member takes place, i.e. if a family member acts in a violent or aggressive way, this person **may be separated from the rest of the family** for as long as necessary.<sup>120</sup>

Escorts should be attentive to the fears and anxieties of children and assist parents and guardians appropriately, to comfort and reassure them by using child-friendly communication skills.

#### 2.4.12 Rights of the child/best interest of the child

Article 3 of the Convention on the Rights of the Child requires that *'in all actions concerning children and young people, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'*.

The term "best interests" broadly describes the well-being of a child. Such well-being is determined by a **variety of individual circumstances**, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment, and their experiences.

The best interests of children must be the **primary concern** in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect the children concerned.

When determining the best interests of the child, it is important to consider all rights of the child. In addition to the norms contained in the Convention on the Rights of the Child (CRC), there are other relevant legal bases, both at an international and a national level. In accordance with Article 41 of the CRC the higher standard must always apply<sup>121</sup>.

<sup>118</sup> Frontex Guide to JROs, page 26.

<sup>119</sup> Frontex Guide to JROs, page 31.

<sup>120</sup> Frontex Guide to JROs, page 32.

<sup>121</sup> Article 41, CRC (1989): Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State. (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>)

### 2.4.13 Data protection and privacy

Article 8 of the Charter of Fundamental Rights of the European Union establishes the protection of personal data:

1. *Everyone has the right to the protection of personal data concerning him or her;*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified; and*
3. *Compliance with these rules shall be subject to control by an independent authority.*<sup>122</sup>

**Personal information** of the returnee, such as the file kept by the authorities with relevant information, the return decision and other such information, must be handled in line with the (national) legal framework and requirements for personal data protection. This information shall thus not be available to all the participants of a forced-return operation but be kept according to agreed responsibilities by either the head of operation and/or the respective EL. Information regarding the medical conditions of returnees is to be kept with the medical personnel on board. **Generally, monitors do not have access to the personal files and data of the returnees.**

Whenever possible, **privacy** should be granted to the returnee(s). During security checks, as much privacy as possible should be granted to the returnee(s), and the security check of a female returnee should be conducted by a female escort (and male by a male escort). The monitor should observe the security check, respecting the returnees' privacy, it should be sufficient if the door is left ajar in order for the monitor to be able to listen to the conversation and determine whether the tone and language used are respectful. If an incident is heard, the monitor may look into the room in order to be able to gather the facts of the situation for the monitor report.

Any form of recording during a RO or RI is possible only when **specifically agreed between the relevant MS, Frontex and/or the company operating the means of transport**, and in compliance with applicable legislation on protection of personal data. Recording for private use is prohibited.<sup>123</sup> The national legal framework in this regard differs and needs to be considered separately in each specific case. However, **a monitor may never use any type of video and/or audio recording devices during a forced-return operation.**

Privacy when using the toilet must be respected. However, for security reasons the door is usually kept ajar on board the flight with the escorts waiting outside the door. The monitor may observe the procedure, i.e. the returnee being brought to the lavatory, the escorts waiting outside the door that is kept ajar, and the returnee coming out of the toilet. As such, the returnee cannot claim to have been mistreated by the escorts during a toilet visit. The Guide for Joint Return Operations by Air coordinated by Frontex (2016) advises that one (or more, depending on the aircraft) of the toilets should be designated and labelled for the sole use of returnees. For security reasons, the crew should not use the same toilet as returnees.<sup>124</sup>

<sup>122</sup> (European Parliament and European Commission (EC) 2000: 10).

<sup>123</sup> Article 13 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>124</sup> Frontex Guide to JROs, page 27.

#### 2.4.14 Right to property

To safeguard the right to property, foreseen in Article 17 of the Charter of Fundamental Rights, it is necessary to have **systems in place** to ensure that returnees can recover essential property and be assisted to close any standing affairs in the country from which they are being returned (e.g. with social services, health care or banking) prior to removal (in the pre-return phase). This is usually outside the scope of the forced-return monitor.

The luggage of returnees should be transported with care. The Guide for Joint Return Operations by Air coordinated by Frontex (2016) recommends that one escort, preferably from the OMS back-up team, is assigned to deal with luggage handling. The returnees' luggage is not to be treated as hand luggage, but should be stored in the aircraft hold. Sealable firm bags are required to carry returnees' belongings. Luggage stored in the aircraft hold needs to be clearly labelled with a name tag. Furthermore it recommends that when more than one destination is involved, luggage to different destinations should be marked with different colours, e.g. the flag of the country of return, and/or a flight tag-with an IATA code. Moreover, the PMS should inform the OMS if there is an exceptional situation regarding luggage.<sup>125</sup> **Special attention** should also be paid to returnees' personal belongings and valuable items (e.g. laptops, mobile phones, jewellery, money, etc).<sup>126</sup> As mentioned above, the Guide for Joint Return Operations by Air coordinated by Frontex (2016) foresees that returnees' personal belongings and valuables should be stored in a sealed envelope or a transparent plastic bag and marked with the name of the returnee and kept by the respective escorts/EL as carry-on luggage.<sup>127</sup> They should be **handed-over to returnees prior to disembarkation in the country of return**.<sup>128</sup>

#### 2.4.15 Right to good administration/right to complaint

Article 41 of the EU Charter of Fundamental Rights enshrines the right to good administration.<sup>129</sup> This is closely linked to the right to an effective remedy, guaranteed both in Article 47 of the EU Charter of Fundamental Rights<sup>130</sup> and Article 13 of the European Convention on

<sup>125</sup> Frontex Guide to JROs, pages 21-22.

<sup>126</sup> Frontex Guide to JROs, page 29.

<sup>127</sup> Frontex Guide to JROs, page 30.

<sup>128</sup> Frontex Guide to JROs, page 31.

<sup>129</sup> Article 41 - Right to good administration:

1. Every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

<sup>130</sup> Article 47 - Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Human Rights<sup>131</sup>. These international instruments are legally binding and apply to all EU institutions, bodies, and agencies.<sup>132</sup>

In line with the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, any participant in the return operation who has reason to believe that a violation of the CoC or of a fundamental right has occurred has the obligation to report this to Frontex. Article 6 provides that the competent authorities of a Member State are expected to give sufficient and clear information to the returnees about the return operation, including the possibility to lodge a complaint concerning alleged ill treatment during the operation. Thus, the right to complaint must be understood as one aspect of the right to effective remedy in accordance with the principles of good administration. Consequently, it must be respected as a fundamental right principle.

Article 72 of the European Border and Coast Guard (EBCG) Regulation 2016/1624 **establishes a specific complaints mechanism** for any person who believes their fundamental rights have been violated by the Agency's activities, including in return operations. This mechanism **coexists** with the **national complaints mechanisms** that are available to complaints against national authorities in each of the Member States.

## 2.5 European Border and Coast Guard - complaints mechanism and serious incident reporting (SIR)

### Frontex Complaints Mechanism

Article 111 of Regulation (EU) 2019/1896 establishes a complaints mechanism to monitor and ensure the respect for fundamental rights in all Frontex activities. Any person who is directly affected by alleged fundamental rights violations during operational activities by staff involved in Frontex activities may submit a complaint in writing to Frontex. The Fundamental Rights Officer is responsible for handling complaints received by Frontex in accordance with the right to good administration<sup>133</sup>.

When a Frontex representative participates in a forced-return operation, they should carry the complaints forms. When no Frontex representative is present, the OMS representative has to carry copies of the complaints form. The complaints form is also annexed to the implementation plan. Furthermore, a booklet informing about the complaints mechanism is available in different languages online and in hard copy<sup>134</sup>.

<sup>131</sup> Right to an effective remedy. Everyone whose rights and freedoms, as set forth in this Convention, are violated shall have an effective remedy before a national authority notwithstanding violations that have been committed by persons acting in an official capacity.

<sup>132</sup> The European Ombudsman's Guide to Complaints, a publication for EU staff, also highlights that maladministration may be found if an institution or agency fails to respect fundamental rights, legal principles, or the principles of good administration. This means that, EU institutions and staff must respect their legal obligations and ensure the public are treated properly and are able to enjoy their rights fully. The European Code of Good Administrative Behaviour also serves to further develop the fundamental right to good administration and to describe and identify the elements of it.

<sup>133</sup> Any further information on the complaints mechanism is available at: <https://frontex.europa.eu/accountability/complaints-mechanism/>

<sup>134</sup> Albanian, Arabic, English, Farsi, French, Georgian, German, Pashtu, Russian, Serbian, Spanish, Tigrinya, Urdu and Kurdish.

### Frontex Serious Incident Reporting (SIR)

Another monitoring tool is the Frontex Serious Incident Reporting – the so-called SIR. It requires any participant in return operations or return interventions who has reasons to believe that a violation of the Code of Conduct or of Fundamental Rights has occurred to report it to Frontex via the appropriate channels, such as the SIR system. In the context of return operations, the returnees would submit complaints, while participants, such as an escort officer or escort leader, initiate a SIR.

A Serious Incident (SI) is an event, caused by an action or failure to act by a person, or by force of nature, which directly or indirectly involves Frontex participants or assets and which: entails a potential violation of EU or international law, in particular related to Fundamental Rights and international protection obligations, and/or involves a potential violation of the Frontex Codes of Conduct (CoCs), and/or has serious actual or potential negative implications on Frontex's tasks or activities and/or has a serious potential life-changing impact on a participant's health.

There are three categories of Serious Incidents (SI):

- Category 1: Situations of potential violations of fundamental rights or international protection obligations (directly reported to the Fundamental Rights Office)
- Category 2: Situations of potential violations of Codes of Conduct provisions
- Category 3: Situations with serious actual or potential negative implications on Frontex core tasks

The SIR form is an annex to the Implementation Plan.

#### 2.5.1 General guidance on the Frontex complaints mechanism<sup>135</sup>

Any individual, of any age, or a person or party acting on their behalf, may submit a complaint to Frontex, if they believe that they have been directly affected by the actions of staff involved in a Frontex activity, and they consider that one or more of their fundamental rights have been violated due to those actions.<sup>136</sup>

An individual can be represented by any party (e.g. another person, lawyer, organisations, family member, legal guardian, etc.) and any of these parties may file a complaint on their behalf. Further, cases involving multiple complainants can be submitted.

A complaint must be submitted in writing and will then be handled by the FRO, who monitors and promotes fundamental rights within Frontex. Use of this complaint form helps the FRO to process complaints more efficiently, but **any other written means** is also permitted. At any stage of the procedure, the FRO may request complainants to submit additional information, documentation, or clarification regarding the complaint. For this reason, it is important to state and regularly update contact details.

<sup>135</sup> Whole part see: <http://frontex.europa.eu/complaints/>.

<sup>136</sup> For a list of fundamental rights as per the EU Charter see List of Potential Fundamental Rights Violations During Operations ([https://frontex.europa.eu/assets/Key\\_Documents/Complaints/Appendix\\_-\\_List\\_of\\_FR\\_in\\_Charter.pdf](https://frontex.europa.eu/assets/Key_Documents/Complaints/Appendix_-_List_of_FR_in_Charter.pdf)).

Complaints may be **submitted in any EU language, as well as in Albanian, Arabic, Farsi, Georgian, Kurdi, Pashto, Russian, Serbian, Tigrinya and Urdu**. The complaint **forms are also available in these languages**. The complainants do not need to go through national procedures before being submitted to Frontex. However, this Frontex complaint mechanism does not prevent complainants from accessing other forms of complaint, such as national or European courts. The complainant should explain the detailed facts of their complaint, identifying the impact that those actions have had on their fundamental rights to the extent that this is possible.

Frontex and the FRO treat all complaints as confidential unless complainants explicitly waive the right to confidentiality on the form or in any other written manner. If a complaint is declared inadmissible, **the FRO will inform complainants in writing** regarding the reasons for the inadmissibility and, if possible, provides them with further options for addressing their concerns.



# **Chapter 3**

## **Forced-Return Monitoring**



## Chapter 3: Forced-Return Monitoring

Chapter 3 covers the roles and responsibilities of monitors, detailing what the monitor should specifically observe in each separate phase of a forced-return operation. It also covers the roles and responsibilities of escorts during forced-return operations and the use of force, and means of restraint. Finally, it deals with the possible impact of monitoring on the monitor and coping strategies.

### 3.1 Monitoring within the framework of the Pool

Article 8(6) of Directive 2008/115/EC (Return Directive) requires “*Member States [to] provide for an effective forced-return monitoring system.*” Hence, the pool of forced-return monitors consists of monitors who are members of competent bodies in Member States that carry out forced-return monitoring activities in accordance with this article.

The pool is a subsidiary mechanism of the national monitoring system and is activated whenever a Member State requests a monitor from the pool, either because no monitor is available in the Member State for a specific forced-return operation or because the Member State does not have an effective monitoring system in place. The monitors deployed from the pool replace the national monitoring system of the requesting Member State during a specific forced-return operation.

During return operations coordinated by Frontex, the activity of the forced-return monitor from the Pool is to provide support, on demand, for the national monitoring system of the requesting Member State.

Monitoring carried out by monitors from the Pool means that a contingency of a Member State is monitored at their request by a monitor from another Member State. It is important to note that the monitor from the Pool requested by a Member State to participate in monitoring a return operation monitors that specific contingency, not the entire operation; however, other participating Member States (PMS) may agree that the same monitor also monitors the return operation on their behalf.<sup>137</sup> A requesting Member State can be either the organising Member State (OMS) or a PMS; in practice, it is usually the OMS that requests a monitor from the Pool. The Member States can also request more than one monitor from the Pool.

With the exception of collecting return operations (CRO), where the physical presence of a monitor is mandatory<sup>138</sup>, Regulation (EU) 2019/1896 does not clearly specify the obligation to

<sup>137</sup> Article 16(4) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018) specifies that “[w]hen feasible and subject to prior agreement between the MS concerned, forced-return monitors may also monitor on behalf of other MS taking part in [a return operation].”

<sup>138</sup> In line with Article 50(3) of Regulation (EU) 2019/1896 “[...] At least one Member State representative, and one forced-return monitor from the pool established under Article 51 or from the monitoring system of the participating Member State, shall be present throughout the entire return operation until arrival at the third country of return.”

physically monitor all forced-return operations.<sup>139</sup> However, Frontex advises physical monitoring of all forced-return operations by charter flights to safeguard their compliance with fundamental rights.

### 3.2 Role of the forced-return monitors of the Pool

The role of the forced-return monitors in the Pool is to observe, analyse and report on whether the return operation was conducted in a humane manner, respectful of the dignity of the person and in compliance with fundamental rights as enshrined in the EU Charter of Fundamental Rights, applicable international human rights law and national legislation. The monitor of forced-return operations has no powers of intervention and should, therefore, never intervene.

Monitoring is a tool for reinforcing observance of fundamental rights during a forced-return operation. It is a way of verifying that those carrying out the forced-return operation uphold the fundamental rights of returnees during the whole process. Monitors play a preventive role through their presence during forced-return operations and can help to ensure there is a greater level of accountability in the event of actions or omissions by officials carrying out the forced-return operation that contravene the EU Charter of Fundamental Rights, applicable international human rights law and national legislation. The presence of monitors observing and reporting on the forced-return operation means that those responsible for carrying out the return operation can be held accountable for the actions they take, or fail to take, during the operation.

The task of the forced-return monitor is to focus on how the return operation is conducted. The Pool's mandate does not allow monitors to question the decision, or enforcement of the decision to return a third-country national, though they can note down any complaints returnees make about the decision to return them, in their reports about the return operation.<sup>140</sup> It is important to note that transfers from one Member State to another, which are regulated under the Dublin Regulation, do not qualify as returns in the sense outlined in the Return Directive. Therefore, the Return Directive's obligation to effectively monitor forced-returns does not cover these transfers.<sup>141</sup>

<sup>139</sup> According to Article 50(5) of Regulation (EU) 2019/1896 "[e]very return operation organised or coordinated by the Agency shall be monitored in accordance with Article 8(6) of Directive 2008/115/EC. The monitoring of forced-return operations shall be carried out by the forced-return monitor on the basis of objective and transparent criteria and shall cover the whole return operation from the pre-departure phase until the handover of the returnees in the third country of return. The forced-return monitor shall submit a report on each forced-return operation to the executive director, the fundamental rights officer and to the competent national authorities of all the Member States involved in the given operation. If necessary, appropriate follow-up shall be ensured by the executive director and competent national authorities respectively".

<sup>140</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) standards include allowing returnees to lodge last-minute applications for asylum. In some countries a representative from the national authorities is assigned to the return operation to allow any last-minute asylum application to be lodged, including before a judge.

<sup>141</sup> The Dublin (III) Regulation (No 604/2013) of the European Parliament and the Council, in force from 1 January 2014 and replacing the 2003 Dublin (II) Regulation (No 343/2003) sets out the criteria and mechanisms for determining which EU country is responsible for examining an asylum application. Article 3(1) of the Dublin Regulation No. 604/2013, requires that EU Member States examine any application for international protection lodged by a third-country national or a stateless person and that such application be examined by one single Member State. The objective is to avoid asylum seekers being sent from one country to another, and to prevent abuse of the system by the submission of several applications for asylum by one person. The criteria for establishing responsibility to examine an asylum application run, in hierarchical order, from family considerations, to recent possession of a visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly, or regularly. Among the various criteria listed in the Dublin Regulation, the State responsible for allowing the applicant to enter the common area (specifically if entered irregularly, Article 15, Chapter III), is typically determined to be the State responsible for reviewing the application (Chapter III of the Dublin Regulation). (<http://eur-lex.europa.eu/legal-content/EN/TX-?uri=celex:32013R0604>)

A forced-return monitor is consequently tasked with observing and gathering information in order to produce a report on whether the forced-return operation was conducted in compliance with fundamental rights. Observance of fundamental rights is expected to be enhanced through continuous evaluation of the return operations and improvements that are made to them based on the reports and recommendations made by monitors.

Forced-return monitors should be independent from the State and/or the organisation enforcing the return so that they are not bound by the orders of the members of the return operation carrying out the forced-return operation. They should also preferably not have been involved in providing services such as legal advice or psycho-social counselling, to the returnee beforehand. These measures are important to safeguard the objectivity and independence of the monitor. Thus, when a State nominates a monitor, the monitor's independence from that State should be guaranteed. As mentioned above, under no circumstances can a forced-return monitor working in the Pool question or examine the legality of the return decision.

As described in further detail below<sup>142</sup>, a forced-return monitor is a member of the national body of a Member State that is responsible for forced-return monitoring in accordance with Article 8(6) of Directive 2008/115/EC or a fundamental rights monitor employed as statutory staff of Frontex in line with Article 110(1) of Regulation (EU) 2019/1896<sup>143</sup>, who carries out independent monitoring of return operations as well as return interventions throughout their duration.

In order to fulfil the professional standards expected, monitors need to exercise neutrality, confidentiality, and ethical commitment and have an acute understanding of the importance of the monitor's report. In order to be able to fulfil their role and tasks, the monitor has to understand and accept the mandate and responsibilities of the officials in charge of the operation, in particular the escort officers and escort leaders.

### 3.3 How does monitoring reinforce observance of fundamental rights?

Monitors from the Pool of forced-return monitors must observe and report on the whole return operation. In accordance with Article 50(3) of Regulation (EU) 2019/1896 on the European Border and Coast Guard *"The monitoring of forced-return operations shall be carried out by the forced-return monitor on the basis of objective and transparent criteria and shall cover the whole return operation from the pre-departure phase until the handover of the returnees in the third country of return"*.

The following definition of forced-return monitoring helps to clarify how monitoring reinforces the observance of fundamental rights:

Forced-return monitoring is an activity during which a return operation is observed, analysed and reported on whether it was conducted in a humane manner, respectful of the dignity of the person and in compliance with fundamental rights as enshrined in the EU Charter of Fundamental Rights and applicable international human rights law. The monitor of forced-return operations has no powers of intervention and thus should never intervene.

<sup>142</sup> See profile of a forced-return monitor.

<sup>143</sup> 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.

Forced-return monitors must know and understand their mandate during a forced-return operation and always use this mandate as a framework for their actions. Monitors must have knowledge and understanding of the international human rights standards relevant to their role during the operation. This knowledge can be gained through participation in training on fundamental rights, and by regular consultation with colleagues and/or supervisors on the various aspects of fundamental rights monitoring. In this regard, all monitors of the Pool have to complete the same course for forced-return monitors and participate in other related events organised by Frontex for the Pool.

It is important to note that during return operations coordinated by Frontex, the Frontex Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex<sup>144</sup>, which complements the provisions of the Frontex Code of Conduct for all persons participating in Frontex activities<sup>145</sup>, also applies to the monitors. Monitors thus have to be conversant with the content of these Codes of Conduct.

Monitoring can act as control mechanism in return practices and can be a tool for a greater level of transparency to ensure that return operations are carried out in line with fundamental rights standards. The presence of independent monitor(s) accurately and impartially monitoring the operation and submitting their reports can lead to increased awareness among those conducting the return operations about the importance of complying with human rights law and adhering to the rules and standards set by national, regional and international bodies. The unbiased and neutral reporting by an independent monitor contributes to creating greater transparency, and serves the interest of both the returnees and the enforcing authorities:

- ♦ For the returnee, a monitor's report can provide evidence for supporting, for example, possible claims of mistreatment and excessive use of force<sup>146</sup>;
- ♦ For the escorts and the escort leader (EL), a report can be used as evidence in investigations by an independent authority into the claims or accusations to clear the escorts if the allegations prove to be unfounded.<sup>147</sup>

Monitors must be objective. Therefore, it is crucial they gather as much information as possible, especially through dialogue with the officials responsible for carrying out the operation, throughout every phase of the operation.

Reporting is the final step in the monitoring process, the ultimate aim of which is to safeguard the fundamental rights of the returnees. Therefore, the monitoring reports must be objective, precise and accurate to clearly document possible violations of fundamental rights during the forced-return operation. The reports should also include other observations and recommendations on steps to improve the way a forced-return operation is conducted and raise standards of protection. They should also report good practices, as applicable.

<sup>144</sup> [http://195.13.183.215/moodle/pluginfile.php/18084/mod\\_resource/content/1/Code\\_of\\_Conduct\\_for\\_Return\\_Operations\\_and\\_Return\\_Interventions.pdf](http://195.13.183.215/moodle/pluginfile.php/18084/mod_resource/content/1/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf)

<sup>145</sup> [https://frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](https://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf)

<sup>146</sup> The term 'use of force' means any type of physical intervention used on another person.

<sup>147</sup> A report submitted by independent personnel from the law enforcement body (or private security personnel) implementing the return operation is considered relevant as it circumvents the possibility of the application of the so called "blue code", an allegedly unwritten rule amongst law enforcement personnel that might impede officers from reporting the misconduct of fellow officers.

Monitoring reports together with reports submitted by the Organising Member State (OMS) and/or Frontex, may be used in investigations following claims or accusations against officials. Similarly, monitoring reports serve as an important tool to continuously evaluate and revise future return operations by taking corrective measures, where required.

### 3.4 Key tasks and responsibilities of a forced-return monitor

A forced-return monitor has a number of specific tasks and responsibilities to perform during the course of the different phases of a forced-return operation. These are described in more detail under the various headings below. The following are a forced-return monitor's key tasks and responsibilities:

- ♦ Report on whether the forced-return operation was conducted in a humane manner and in compliance with fundamental rights<sup>148</sup>;
- ♦ Report on whether returnees were treated respectfully and in compliance with fundamental rights;
- ♦ Report on whether any use of force was in line with the rules set out in the Implementation Plan, did not exceed reasonable force and was used with due respect for the returnee's rights, dignity and physical integrity;
- ♦ Report on the returnees' behaviour towards the escort officers and other participants<sup>149</sup>;
- ♦ Report on any other incidents;
- ♦ Maintain a position where they can properly observe the return operation, but without obstructing the work of the escort officers or hampering the effectiveness, security, or safety of the operation;
- ♦ Collect all the relevant facts during the pre-departure, in-flight, arrival and return flight phases focusing on the questions: What do I see? What does it mean? What needs to be improved (bad practice) or multiplied (good practice)?
- ♦ Respect the principles of accuracy, confidentiality, impartiality, and non-discrimination at all times;
- ♦ May address the escort leader with any observations or questions at an opportune moment;

<sup>148</sup> A monitor needs to observe fundamental rights compliance in forced-return operations, paying particular attention to the following rights: right to life; right to liberty and security; prohibition of torture and inhuman or degrading treatment or punishment; prohibition of *refoulement*; right to human dignity; right to non-discrimination; freedom of thought, conscience and religion; access to information; right to health; access to food and water as basic needs; rights of vulnerable groups (Vulnerable persons include minors, unaccompanied minors, persons with disabilities, elderly people, pregnant women, victims of human trafficking, single parents with small children, persons with medical conditions, and persons who have been subjected to torture, rape, or other serious forms of psychological, physical, or sexual violence); right to family unity; rights of the child/best interest of the child; right to personal data protection; right to privacy; right to property; right to complaint/good administration.

<sup>149</sup> The term 'participant' means any person, including escorts, monitors, interpreters and medical staff taking part in a return operation or return intervention, other than the returnee (see Article 3(b) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018)).

- ♦ Indicate when information was received from third-parties;
- ♦ Make recommendations to end or improve bad practices or ones to spread good practices based on the facts they have observed and where applicable, address them to the relevant stakeholders.

### 3.5 What it means to be a forced-return monitor

#### **The essential questions the monitor should ask themselves are:**

- ♦ What do I see and hear?
- ♦ What does it mean?
- ♦ What aspects of the return operation need to be improved and what aspects work well that could be duplicated elsewhere?

#### **In order to fulfil their duties, forced return monitors should:**

- ♦ Have the necessary training in forced-return monitoring;
- ♦ Be physically, medically and psychologically fit to perform the duties of a forced-return monitor;
- ♦ Demonstrate the maturity and emotional stability to be able to perform their tasks as a forced-return monitor;
- ♦ Have very good knowledge of the procedures, and the duties and rights of all the officials involved;
- ♦ Follow the principles of accuracy, confidentiality, impartiality and non-discrimination;
- ♦ Carry out their assigned tasks in a dutiful, timely, and accurate manner throughout the forced-return operation;
- ♦ Know what coercive measures are permitted;
- ♦ Have access to all the necessary information prior to and during the return operation;
- ♦ Keep calm in all situations;
- ♦ Maintain a professionally distant manner throughout the entire return operation;
- ♦ Be impartial and objective towards all parties involved in a forced-return operation;
- ♦ Be able to distance themselves emotionally;
- ♦ Respect confidentiality and not disclose any information gained while fulfilling their monitoring obligations to any other parties besides those clearly stated in the reporting criteria;



- ♦ Have the necessary equipment, such as a pen and notebook during the return operation and a username, password and device to access the reporting application.

### 3.5.2 Profile of the forced-return monitors of the Frontex pool of forced-return monitors<sup>150</sup>

#### Definition

A forced-return monitor is a person from a national body of a Member State competent for forced-return monitoring in accordance with Article 8(6) of Directive 2008/115/EC or a fundamental rights monitor employed as statutory staff of the Agency who carries out independent monitoring of return operations as well as return interventions throughout their duration. Forced-return monitors do not intervene during the execution of the return operation or return intervention.

#### Indicated tasks and functions

- ♦ To monitor fundamental rights compliance in return operations as well as in return interventions, in line with national legislation and regional, EU and international fundamental rights standards, and in particular to observe whether fundamental rights are complied with, legal obligations met and returnees are treated in a humane manner in respect of the dignity of persons.
- ♦ To report the findings in relation to fundamental rights compliance in return operations and return interventions to the Executive Director, to the Fundamental Rights Officer and to the competent national authorities of the Member States taking part in the given operation or intervention.

#### Qualifications and experience required

A forced-return monitor has to have knowledge and understanding of:

- ♦ Fundamental rights obligations, in particular fundamental rights protection in the context of return operations such as human dignity, respect for the principle of non-refoulement, the necessity and proportionality principles and the duty of precaution in the context of use of force and measures of restraint;
- ♦ The principle of non-discrimination and the right to complain to the competent authorities;
- ♦ The Return Directive (2008/115/EC), the Council of Europe's Twenty Guidelines on Forced Returns (2005)<sup>151</sup>, the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>152</sup> as well as other applicable procedures, laws and recommendations related to return operations and return interventions;

<sup>150</sup> The Frontex Management Board adopted Decision MB 40/2020 of 26 November 2020 with the revised profile for a monitor and determining the number of forced-return monitors to be made available to the pool of forced-return monitors.

<sup>151</sup> Adopted by the Committee of Ministers on 4 May 2005 at the 925th meeting of the Ministers' Deputies of Council of Europe.

<sup>152</sup> Council of Europe, <https://www.coe.int/en/web/cpt/standards>

- ♦ International and European standards on child protection<sup>153</sup>, other vulnerable groups as well as gender aspects, including those reflected in the Frontex Guide for Joint Return Operations by Air (JROs)<sup>154</sup>, the Return Handbook<sup>155</sup> and/or further guidelines on this matter;
- ♦ Cultural and social contexts of the returnees.

A forced-return monitor has to be able to:

- ♦ Impartially observe fundamental rights compliance in return operations and return interventions;
- ♦ Identify conduct which raises concerns from a fundamental rights point of view and link this to the relevant legal standards;
- ♦ Draft a detailed monitoring report in accordance with the procedures and reporting tools, outlining all relevant information as well as detailing relevant observations, including recommendations as well as good practices and lessons learned concerning return activities;
- ♦ Demonstrate flexibility, openness and resilience to face the complexities of the role.

In addition, a forced-return monitor shall:

- ♦ Exercise the appropriate level of autonomy and the good ability to assess and act adequately in complex situations in the process of monitoring return operations and return interventions.

### **Eligibility criteria**

To be eligible to join the pool of forced-return monitors, a person must meet the following criteria:

- ♦ Be a member of a competent body in a Member State that carries out independent forced-return monitoring in accordance with relevant international, EU and national law, or for statutory staff of the Agency, be nominated by the Fundamental Rights Officer on the basis of Article 109(3)(c) of the Regulation;
- ♦ Possess knowledge, skills and competences as described under “3. Qualifications and experience required”;
- ♦ Have undergone advanced training relevant to the tasks and powers of a forced-return monitor. In particular, this training should cover relevant Union and international law, including on fundamental rights, access to international protection, protection of children and other persons in vulnerable situations, gender aspects;

<sup>153</sup> The required knowledge will be applicable for a limited number of monitors.

<sup>154</sup> Guide for Joint Return Operations by Air coordinated by Frontex issued on 12.05.2016;

<sup>155</sup> Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ L 339, 19.12.2017, p. 83).

- Have experience in monitoring return operations, readmissions and/or places of detention or deprivation of liberty or other similar areas, preferably in a migration context;
- Have an adequate knowledge of the English language (equivalent to CEFR level B2);
- Be able to physically and psychologically cope with the tasks, including the ability to remain patient and calm in challenging situations.

In addition, the following would be advantageous:

- Experience in cooperating or working with the Agency, relevant national authorities and/or with international or non-governmental organisations in the area of returns;
- Specific expertise in child protection;
- Experience of working with children/other vulnerable groups;
- Knowledge of languages spoken in countries of destination of return operations;
- Knowledge and/or experience in de-escalation and/or mediation techniques and methodologies;
- Basic medical knowledge;
- Training on emergency procedures on board aircraft.

### 3-5-3 Preparation checklist for monitors

During a forced-return operation it is recommended to use a backpack for belongings to facilitate movement and to keep both hands free.

#### **Information a monitor should have received in preparation for a forced-return monitoring mission:**

- The Implementation Plan;
- The date and time of the return operation and ports of departure;
- The country(ies) of return;
- Port of departure, stopover information (when applicable);
- If it is a JRO, the names of the OMS and PMS;
- Essential travel documents and other documentation;
- The number of returnees and their gender and origin;
- List of recommended immunisations (if required by the country of return). It is the responsibility of the monitor to get their immunisations and/or other necessary medical precautions;
- List of restraints that are authorised and those that are forbidden;
- Indication of any returnees considered vulnerable including minors, unaccompanied minors, persons with disabilities, elderly people, pregnant women, victims of human trafficking, single parents with small children, persons with medical conditions, and persons who have been subjected to torture, rape, or other serious forms of psychological, physical, or sexual violence.

**Essential travel documents:**

- ♦ Details/information regarding visa arrangements;
- ♦ Valid passport and visa, if required;
- ♦ Letter of appointment to the mission (if available);
- ♦ ID card/passport (also required to show alongside the letter of appointment to confirm the monitor's identity, if available);
- ♦ Valid certificate of vaccination (if required);
- ♦ Travel and health insurance information.

**Personal belongings:**

- ♦ Backpack for ease of movement and to keep both hands free;
- ♦ Pocket-sized notepad (not A4) and pen;
- ♦ Mobile phone for personal use with the approval of the escort leader;
- ♦ Some cash and a credit/ATM card;
- ♦ Mosquito repellent (if required);
- ♦ Spare set of glasses (if required);
- ♦ Any medication required.

**Dress code:**

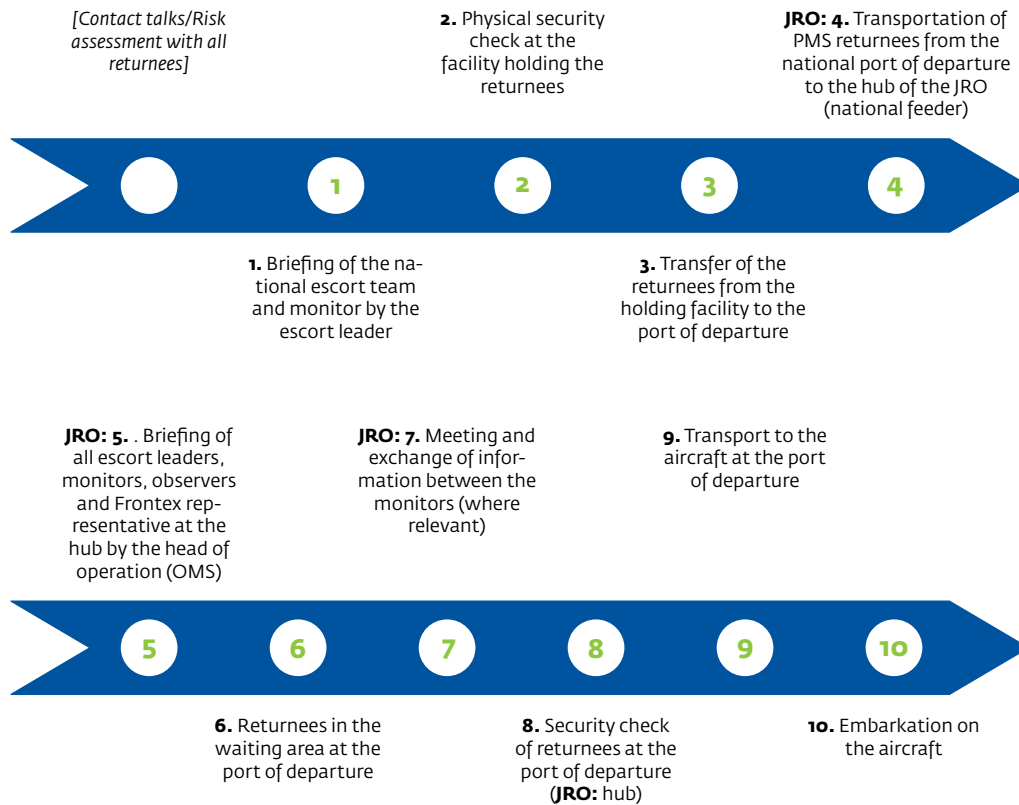
- ♦ Civilian clothes (avoid uncomfortable clothing such as high heels, neck tie, etc.);
- ♦ Extra set of clothes, whether a stopover is planned or not, as the schedule might change;
- ♦ Reflective vest, identifying the person wearing it as a "monitor", and ensuring they are easily identified so they can access restricted areas, such as the airfield. The reflective vest is to be worn in all weathers over the coat;
- ♦ Waterproof clothing with a hood or cap; no umbrellas as they impede movement and observation;
- ♦ Sleeping masks, headphones and earplugs are not permitted (with the exception of returns completed successfully and an empty flight back to the country of departure).

As a general rule, the monitor should try to be where things happen throughout a forced-return operation. This means, that if something happens they can be present immediately. However, if, for example the pilot has put on the seat-belt sign on the aircraft, the monitor is not allowed to move. The monitor must always bear in mind that they **shall not hinder escorts or doctors in their duties or risk being hurt themselves**.

**3.6 Monitoring the pre-departure phase**

The pre-departure phase covers the period from leaving the (temporary) holding facility until embarkation on the aircraft. In this phase, the physical security check (body search) of the returnee(s) is conducted, the escort team is briefed and the returnee may stay in a holding/waiting/detention facility at the place of embarkation. The pre-departure phase ends after embarkation on the aircraft.<sup>156</sup>

<sup>156</sup> With JROs, this phase begins at the hub, meaning that returnees escort teams and monitors from the PMS have already completed all phases of pre-departure, in-flight (or on board a bus/ train) up to the arrival at the hub of the JRO, where the procedures start anew when they join the JRO.



### Step 1. Briefing of the national escort team and monitor by the escort leader<sup>157</sup>

#### Positioning of the monitor

The monitor is not required to be in a specific position. The monitor should participate in the briefing where information about the upcoming return operation with the number of returnees, time of arrival, Implementation Plan, risk assessment, vulnerabilities, etc., is shared. They should introduce themselves to the escort leader, escorts, and other officials in the return operation.

#### What to observe

The monitor participates in the briefing of the escort leader and escorts prior to the return operation, in order to:

- ♦ Be introduced to the escort leader and the team by name and role;
- ♦ Be informed about the outcome of the risk assessment of the returnees and the op-

<sup>157</sup> Some countries e.g. Austria, conduct what are known as contact talks prior to return which include a first risk assessment. As these contact talks are an exception to the rule, these guidelines begin with the briefing of the national escort team and the monitor by the escort leader. In those countries like Austria where the authorities hold an individual meeting with the returnee to tell them about the return procedure, the monitor should attend the meeting. If the monitor is not informed about these meetings, it should be noted in the report.

eration itself. The monitor can request information about the returnees, especially regarding any hunger strikes, self-injury, medical conditions, threats against escorts, and/or aborted removals etc.;

- ♦ Gather information on any particular vulnerabilities or any vulnerable persons among the returnees and whether particular attention is being paid to their situation and concerns;
- ♦ Be informed about the list of restraints that are authorised and those that are forbidden (including certain materials that might be forbidden);
- ♦ Acquaint themselves with the Implementation Plan including information about the aircraft e.g. type of aircraft used, seating plan, final number of returnees, and PMS etc.

The individual risk assessments on the returnees, the list of restraints that are authorised and those that are not, and the Implementation Plan, which includes the plan for security and surveillance, are key tools for the monitor. These documents will help the monitor decide what the priorities are and determine which aspects of the return operation may require particular attention. The monitor should pay particular attention to those returnees who, based on the outcome of the risk assessment, are most likely to be uncooperative as these returnees are more likely than others to be restrained because of their behaviour. Therefore, these returnees should be closely monitored to see that whatever happens during the course of the return operation complies with the fundamental rights of all the returnees. Attention should also be paid to the treatment of any vulnerable persons (e.g. children, elderly people, pregnant women, people with disabilities, etc.).

## Step 2. Physical security check at the facility holding the returnees

Returnees undergo physical security checks to ascertain any risks to the return operation and to check that they do not have any objects that could be used to harm themselves or others. Wherever possible, the monitor should be present while the returnees are undergoing the physical security check, to gather information about any incidents, medical problems or issues involving self-harm, that may have occurred after the returnees were informed that they were being returned. They should also find out how any such medical issues have been treated.<sup>158</sup>

### Positioning of the monitor

The monitor should be present during physical security checks, if possible. Where the monitor is not of the same gender as the returnee (and under certain circumstances), the monitor can monitor the situation from outside the room with the door kept ajar.

### What to observe

The monitor should observe that:

- ♦ The escorts clearly explain to the returnee that they are going to be carrying out a physical security check before they commence;

<sup>158</sup> During a JRO, the physical security check applies to the returnees of the OMS, as the PMS' returnees will already have arrived at the JRO port of departure at the hub.

- ♦ The physical security check is conducted with appropriate regard to privacy, particularly if the returnee is asked to remove their clothing completely;
- ♦ The physical security check is carried out by officers of the same sex (i.e. a female officer conducts the physical security check on a female returnee and a male officer on a male returnee);
- ♦ The door to the room where the security check is being carried out is not closed completely but remains ajar so that a monitor is aware of any escalating situation such as a verbal dispute indicated by one or both parties screaming and/or shouting;
- ♦ If the monitor is not of the same sex as the returnee, they should at least be allowed to hear what is going on during a body search (e.g. with the door kept ajar) and note down in their report if this practice is not followed;
- ♦ In addition to any personal belongings that have to be taken away for security reasons (e.g. a belt), all valuable items such as money and jewellery are collected by the escorts and a protocol listing the items is prepared. The returnee should sign the list and the package containing their personal belongings should be marked with their name. The returnee should be informed about the procedure regarding their personal belongings, who will be in charge of keeping them safe during the flight and when they will be returned to the returnee. The escorts need to take these precautions to ensure that returnees' personal belongings are clearly marked so that they are not mixed up or get lost.

It is also very important that the monitor observes and takes notes to ensure that:

- ♦ The escorts carry out the physical security check calmly, professionally, and respectfully and that they do not allow spectators to gather. Any use of inappropriate language, or unprofessional or juvenile behaviour by the escort staff or any other officials at the holding facility should be immediately reported to the escort leader, and included in the final report;
- ♦ If coercive measures are used, the monitor makes notes and sketches of the techniques and restraints that were used, and whether they were legal, necessary and applied proportionally (i.e. the duration was kept as short and with as minimal an intensity as possible). This should also be included in the final report.

### **Step 3. Transfer of the returnees from the holding facility to the port of departure**

The monitor should be present when the escorts pick up the returnees from the holding/detention facility where they are temporarily being held.

With a JRO, this only applies to the returnees of the OMS at the JRO hub, as the PMS escorts usually arrive with the returnees and monitor/s at the port of departure for the JRO.

#### **Positioning of the monitor**

Wherever possible, the monitor should be in the same vehicle as the returnees. Different types of vehicles can be used to transfer returnees from a holding/detention facility to the

port of departure. Depending on the outcome of the risk assessment, a returnee may be transferred in a regular vehicle, e.g. a coach or bus, or in police-secured transport, which may be a police car or van with a specially adapted cell. If more than one vehicle is used to transport the returnees, the monitor, following the instructions of the escort leader, should travel in the same vehicle as returnees evaluated to be at higher risk of resisting removal or with vulnerable returnees. The monitor should be seated in the best position to be able to clearly see and hear what is happening during the transfer. The escort leader will make the decision about where the monitor sits as they are in the best place to be able to make this assessment. It is important to note that it always remains at the discretion of the escort leader to decide which vehicle the monitor sits in and where they sit in that vehicle.

### What to observe

At this stage, the monitor should observe that:

- ♦ The returnees are appropriately dressed. If a belt has had to be removed for security reasons it has to be guaranteed that a returnee's trousers stay up without them having to use their hands to hold them up. If shoelaces have had to be removed, the returnees should still be able to walk normally and not lose their shoes while they are walking;
- ♦ The personal belongings of the returnees are packed in proper bags and boxes and have a nametag, so the returnees can identify their luggage when they reach the country of return. Depending on the number of returnees, a large number of bags and boxes may have to be prepared for the transfer to the port of departure. The bags and boxes should be of sufficient quality to withstand the journey and be collected upon arrival in the country of return. If a returnee does not have appropriate bags or packaging for their belongings, these should be provided by the holding/detention or waiting facility;
- ♦ The vehicles for transportation of returnees are clean and well maintained;
- ♦ Depending on the season and weather conditions, any air-conditioning system is used appropriately. This should equally be applied in the seating area and holding cells;
- ♦ The time returnees have to spend in cells inside a police coach is limited to the minimum length possible;
- ♦ Cells inside a police coach are not used as waiting areas;
- ♦ The doors of the vehicle are kept open if there is a delay and a wait cannot be avoided, (provided it is in line with the risk assessment that has been carried out);
- ♦ Vulnerable persons among the returnees are treated appropriately. As stated above, in MSs where vulnerable groups are transported separately, the monitor should decide which group to accompany after consultation with the escort leader, who has the final say.<sup>159</sup>

<sup>159</sup> There might be different practices amongst PMSs with regard to the transportation of vulnerable groups to the aircraft. In some countries, they may be brought in a separate vehicle, while in others they may be transported along with the rest of the returnees.



In cases where a family member, such as a parent, resists removal and therefore has to be separated from the rest of family and transported separately to the airport or other port of departure, the monitor should pay attention and note that:

- ♦ The family is kept informed about the situation of the member of the family who is resisting removal and that the person resisting removal knows what is happening to the family;
- ♦ The length of separation is kept as short as possible.

#### **Step 4. (JRO) Transportation of PMS returnees from the national port of departure to the hub of the JRO (national feeder)**

In a JRO, the PMSs transport the people they are returning to the hub of the operation. In this specific step of the return operation, the PMS would follow the relevant steps of the pre-departure and in-flight phases that are described in detail further below until they arrive at the hub of the operation to join the JRO.

#### **Step 5. (For JROs) Briefing of escort leaders, escorts, monitors, observers, and Frontex representatives at the hub by the head of operation (OMS)**

The monitor should take part in the briefing for all escort leaders, escorts, monitors, observers, and Frontex representatives. This is conducted by the head of operation from the OMS and is where all the introductions are made. Medical personnel and/or interpreters may also present.

#### **Positioning of the monitor**

The monitor is not required to be in any particular position. They should introduce themselves and request information about the returnees, particularly any information about incidents that may have occurred on the way to the hub of the JRO as well as information regarding the use of coercive measures and any known vulnerabilities.

#### **What to observe**

- ♦ The monitor participates in the briefing prior to the return operation, in order to be:
  - Introduced to the escort leaders and other participants by name and role;
  - Informed about the outcome of the risk assessment of the returnees and the operation itself. The monitor can request information about the returnees, especially regarding any hunger strikes, self-injury, medical conditions, threats against escorts, and/or aborted removals etc.;
  - Given the list of authorised/forbidden restraints (including certain materials that might be forbidden) agreed by those responsible for the JRO (if it has not been shared previously);
  - Informed about the Implementation Plan and the other elements of the operation including security, surveillance plan, type of aircraft used, seating plan;
  - Informed about any vulnerabilities or any vulnerable persons among the returnees and whether their specific needs have been considered and taken into account.

### Step 6. Returnees in the waiting area at the port of departure

During return operations, returnees wait with the escorts and the monitor(s) until the departure of the aircraft in an appropriate waiting or holding area that allows for supervision and security. The layout of the waiting area may vary, depending on the infrastructure of the waiting facility.

#### Positioning of the monitor

The monitor should stay with the returnees if all the returnees have to wait in the same room. Otherwise, the monitor should divide their time between the different rooms/cells where the returnees are waiting. The monitor should position themselves strategically, to ensure that they are able to observe returnees who, following the risk assessment, are considered to be of higher risk. At this stage, the monitor should be able to move freely around the waiting area (in accordance with the outcome of the risk assessment).

#### What to observe

At this stage, the monitor should observe that:

- ♦ Depending on the number of returnees and the risk assessment, an emergency doctor is present or on call and that during return operations coordinated by Frontex, appropriate medical staff are present throughout the return operation<sup>160</sup>;
- ♦ Medical staff have checked on returnees with medical problems or special needs;
- ♦ Agitated returnees are separated from other returnees to calm the situation and avoid tension;
- ♦ Sufficient food, water, non-alcoholic drinks but no hot beverages is offered to the returnees, including during unexpected delays such as technical problems with the aircraft, bad weather conditions, etc. Due to the schedule of the return operation and the related transfer, returnees may have missed a meal in the holding/detention facility and this should be taken into consideration;
- ♦ Returnees are given the opportunity to use the toilet and that the visit to the toilet is carried out in line with the correct procedure for visits to the toilet;
- ♦ The needs of smokers to smoke are addressed as far as possible;
- ♦ Religious needs are addressed as far as possible;
- ♦ The waiting facility is properly equipped e.g. that there are sufficient number of chairs, a children's play area is set up, if required and possible, etc.

<sup>160</sup> Article 14 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex specifies that:

"1. During each [return operation] and [return intervention] at least one medical doctor provided by the OMS should be present.  
2. The OMS provides appropriate medical staff and, depending on an assessment of the returnees' and escorts' needs and language skills, suitable interpreters during the [return operation] and [return intervention].  
3. If necessary, the PMS may also provide its own medical staff in [a] [return operation] and [return intervention]."

### **Step 7. (For JROs) Meeting and exchange of information between the monitors (where relevant)**

Monitors who were on a national feeder to the JRO might sometimes, though not necessarily, continue to monitor the return operation from the hub through to end of the operation in the country/countries of return. Whenever several monitors are involved, it is important that the monitor(s) from the Pool introduce(s) themselves to the national monitor(s). It is advisable that they:

- ♦ exchange information on the status of the return operation and challenges that have been encountered or that they may encounter;
- ♦ brief each other with relevant information about the returnees they have been monitoring during the operation from their respective countries (national feeder operations) to the hub of the JRO;
- ♦ exchange information about vulnerable persons.

#### **Positioning of the monitor**

National monitors who have been observing the operation from their respective country to the JRO hub (the national feeder) will stay with the escorts and the returnees of their PMS in the waiting area at the port of departure at the hub. Therefore, in most cases, the national monitors and the monitors from the Pool exchange information in the waiting area at the port of departure.

### **Step 8. Security check of returnees at the port of departure (JRO: hub)**

As part of a forced-return operation by air, return operations might include an additional security check of the returnees and their luggage at the airport (hub), depending on the requirements of the airport authority and the regulations in the Member State. In most cases, this security check is carried out by the official airport security personnel.

#### **Positioning of the monitor**

The monitor should position themselves in such a way as to be able to observe the screening of the returnees. The monitor must also go through the security check.

#### **What to observe**

- ♦ The monitor must observe how the security check of each returnee is carried out and whether the usual security protocol is followed.

### **Step 9. Transport to the aircraft at the port of departure**

The escorts should accompany the returnees to the aircraft, remaining vigilant and taking precautions against returnees self-harming.

**Positioning of the monitor**

On the transfer transport (coach, bus, car, etc.), to the aircraft, the monitor should ask to be assigned to a seat either in the middle of the vehicle or at the back, to be able to have a good view of the escorts and the returnees.

Arriving at the aircraft being used for the return operation, the monitor should be one of the first to exit and position themselves where they can observe how the returnees and escorts leave the vehicle. If a returnee refuses to disembark, the monitor should closely observe the situation, without hindering the escorts and make a note of the time and what happened.

**What to observe**

At this stage, the monitor should observe that:

- ♦ The escorts are close to the returnees while guiding them from the coach or bus to the aircraft and should check the number and position of escorts accompanying the returnees up the gangway;
- ♦ Measures to prevent returnees from self-harming have been taken, as well as the related infrastructure such as, the use of a covered mobile gangway;
- ♦ The restraints and materials being used are the ones authorised for use during the transport and embarkation, and are only used if strictly necessary;
- ♦ Vulnerable persons among the returnees are attended to appropriately, and that due consideration is given to how and when vulnerable groups such as families with young children and individuals with disabilities are boarded.

**Step 10. Embarkation on the aircraft****Positioning of the monitor**

For the embarkation process, the monitor should position themselves at the entrance of the aircraft (at the lower end of the gangway) in order to be able to observe the procedure. Where a returnee refuses to embark, the monitor should closely observe the situation without hindering the escorts and make a brief note of the incident and timing.

**What to observe**

At this stage, the monitor should observe that:

- ♦ The escorts accompany the returnees when they disembark from the coach or bus, walk to the aircraft, board the plane and walk to the seat they have been allocated without unnecessary use of force.

**3.7 Monitoring the in-flight phase**

The in-flight phase begins once every passenger has boarded the aircraft and the door of the plane door has been closed. It ends with the arrival at the final destination, i.e. the country of return or, in the case of an unsuccessful return, back to the country of departure, including transit via another country.

The monitor should pay special attention to the following;

- ♦ The seating positions, including the location of children in relation to other returnees and the adult(s) accompanying them;
- ♦ Any incident that takes place and the behaviour/response of escorts;
- ♦ Any means of restraint that were used; the mode of use and the duration (legality, necessity and proportionality);
- ♦ Medical incidents, the presence of a doctor or other medical personnel and what they did;
- ♦ The provision of food and drink;
- ♦ Lavatory procedures;
- ♦ Complaints made by returnees and the response to these.

1. Transportation of returnees on flight to the country of return



2. Stopover - if applicable, e.g. to collect other returnees (with their escorts) and/or in a country of return for some returnees (if the operation includes several countries of return). **In the case of a stopover, the in-flight phase applies again.**

### Step 1. Transportation of returnees on flight to the country of return

#### Positioning of the monitor

Airplanes have different interiors. Some have one continuous cabin for passengers while others are divided into different compartments. In general, the monitor should be assigned to a seat in the middle or at the back of the cabin so that they can observe the escorts and the returnees. They should be close to the contingency of the Member State that they are monitoring. If a particular returnee needs to be observed more closely, where possible, the monitor should find a seat in one of the rows nearby.

The monitor should avoid being seated in a place where their view or ability to move is restricted. The escort leader should inform the monitor about the seating arrangements during the briefing, and should address any questions or concerns the monitor may have. Where more than one lavatory is available, the monitor should use the lavatory the escorts have been told to use.

Monitors should not remain seated throughout the entire journey, but should move around from time to time in order to observe what is going on.

If two monitors are monitoring this phase of the forced-return operation, ideally, one should be seated at the back of the cabin and the other should be seated in the middle or at the front of the cabin in order to be able to see what is going on throughout the cabin.

Monitors should stay awake for the entire return operation.

### **What to observe**

At this stage, the monitor should observe that:

- ♦ The chartered aircraft meets the requirements of the return operation as well as the needs of returnees, including vulnerable groups, and escorts (regarding availability of seats, lavatories, temperature, etc.);
- ♦ Lavatory visits take place regularly, in line with the needs of returnees, and are conducted in line with the lavatory procedure;
- ♦ Sufficient food, water, non-alcoholic beverages, including for those with specific health and religious requirements, is offered to returnees. Escorts and returnees should be offered the same kind of food and drinks. Hot liquids, e.g. coffee, tea should be avoided as should cutlery;<sup>161</sup>
- ♦ The catering for returnees is adequate. In order to evaluate whether it is or not, the monitor should consume the same food and/or drinks the airline provides to the returnees;
- ♦ Where a means of restraint is used, the escorts check the returnee regularly. The monitor should observe means of restraint being used for as long as they are in place and document their use, making a quick sketch immediately after observing the incident, annotating the sketch to show the position/s of the returnee/s and the escort(s) and what each/all of them were doing. It should also include the exact duration, as accurately as possible. If the monitor has reason to believe that a means of restraint is no longer appropriate, or that the intensity could be reduced, they can communicate this to the escort leader and/or head of operation of the JRO;<sup>162</sup>
- ♦ In cases of perceived imminent danger, the monitor should inform the escort leader (JRO: head of operation) immediately;
- ♦ Access to medical care is guaranteed, as required. If the monitor has any questions about a particular returnee they should ask the doctor/paramedic on board for clarification. The role of the monitor is not to double-check the medical care provided by the doctor, but to report whether care was provided and what type of care was provided;
- ♦ Sedatives to facilitate removal are not used as they are forbidden without prejudice to emergency measures under medical supervision to ensure flight security.<sup>163</sup>

<sup>161</sup> Ideal catering would include finger food such as sandwiches. Cutlery (knives, spoons and forks) should always be avoided.

<sup>162</sup> The decision regarding the use or termination of the use of means of restraint, however, remains strictly with the escort leader and the head of operation, in the case of a JRO.

<sup>163</sup> Article 7(4) of the Code of Conduct for Return Operations and Return Interventions Coordinated and Organised by Frontex.

### Step 2. Stopover – if applicable

If, apart from re-fuelling, a stopover is also used to pick up more escorts and returnees, the monitor should observe their embarkation. Where a stopover involves a new group of returnees boarding the plane, the seating arrangements should already have been planned in advance so that this new group of returnees does not walk past returnees who are already seated.

Ideally, the monitor(s) already on board and any newly-arrived monitor(s), should brief each other about the situation. If the monitor in charge of the new group of returnees joining the operation does not board the plane, the monitor/s already on the plane should speak to the escort leader in charge of the new group of returnees, to gather information regarding possible risks, use of restraints, vulnerable groups, medical conditions etc.

During a long stopover (e.g. overnight) after returnees have been handed over to the national authorities in the country of return, the monitor is advised to stay in the same accommodation as the escorts.

It is important to mention, that there is a chain of command on board an aircraft. Everyone on board a forced-return operation, including the head of the operation, escort leaders, escorts, Frontex personnel, doctors, interpreters, and monitors have to follow the orders of the pilot, who has the ultimate say on situations that might endanger the flight.

### 3.8 Monitoring the arrival phase

The arrival phase covers the period starting from arrival at the country of return, and ends when the returnees are handed over to the national authorities in the country of return, or in the case of an unsuccessful return, with the handover to the authorities back at the country of departure.

National authorities in the country of return can refuse the readmission of a returnee. This may be the case when documents are not accepted, if there are doubts about the nationality of the returnee, or the returnee is in need of specific medical care, which the country of return is not equipped to provide. The number of refusals for the reasons given here is usually low, especially in JROs.

The monitoring responsibility ends the moment the escorts hand the returnees over to the national authorities in the country of return (or in the case of an unsuccessful return, back to the country of departure). Monitoring the treatment of the returnees by the national authorities on arrival is not within the forced-return monitor’s remit. However, if the monitor witnesses any mistreatment, they should include details in the monitoring report and gather as much information as possible from the escort leader/head of operation (JRO).



## Step 1. Arrival by aircraft in the country of return

### Positioning of the monitor

Upon arrival in the country of return, the monitor should stay close to the group of returnees as the escorts prepare to hand them over to the national authorities. In a JRO, normally preparations for the handover is done by one country, followed by another and so on.

### What to observe

At this stage the monitor should observe that:

- ♦ Any remaining hand-cuffs, body-cuffs or other restraints are removed following arrival, if possible;
- ♦ All the personal belongings, which were taken away for security reasons, are given back to the right person prior to the handover to the national authorities in the country of return;
- ♦ Legitimate complaints by returnees that e.g. luggage, money or documents have been lost or damaged are handled efficiently by the escorts;
- ♦ Any other complaints by returnees related e.g. to their treatment by the escorts or other participants are received and/or the escort leader informs returnees about the complaints mechanism and hands them a copy of the complaint form for potential violations of fundamental rights annexed to the Implementation Plan. The monitor should include details of the complaints made by the returnees e.g. against escorts, in their monitoring report.

## Step 2. Handover of returnees to the authorities in the country of return

The OMS is responsible for contacting the authorities of the country of return prior to the operation. This takes place well in advance of the operation itself. In the case of a JRO, the PMS are usually involved in this process. Once the return operation has been conducted and the aircraft has arrived in the country of return, the escort leader/head of operation establishes first contact with the national authorities. The escort leader of the OMS and, in the case of a JRO each PMS, hand the returnees over to the authorities of the country of return, with their luggage and any other items.

Where appropriate and feasible, the OMS and PMS invite consular staff, immigration liaison officers, or advance parties of the Member States concerned, to facilitate the handover of the returnees to the local authorities, insofar as this is consistent with national practices and procedure.

### Positioning of the monitor

When the returnees are handed over to the local officials inside the aircraft, the monitor should be seated in one of the front rows close to the entrance, where they have a good view of what is going on and are within hearing range. If the returnees disembark and are handed over to the authorities outside the aircraft (e.g. the arrival building), the monitor should



closely follow any instructions given by the escort leader and if possible, accompany the escorts and the returnees to the place where the returnees are handed over.

### **What to observe**

At this stage the monitor should observe that:

- ♦ Any remaining hand-cuffs, body-cuffs or other restraints have been removed immediately after arrival, if possible;
- ♦ All personal belongings, which were taken away for security reasons have been handed back to the returnees prior to disembarkation and prior to the handover to the authorities in the country of return;
- ♦ The luggage of the returnees is still in good condition and returned to the returnees in an organised way, if it is possible to monitor this procedure;
- ♦ The returnees are handed over to the national authorities by the escort leader.

If the aircraft is returning immediately after the handover and the monitor remains on board, they should watch from a window seat, or if possible, from a position on the gangway, how the luggage was delivered to the returnees, and if it was. They should also observe how the returnees were treated by local policemen or border guards. Any incidents or mistreatment by local policemen or border guards witnessed by the monitor should be documented in the monitoring report. In preparing future return operations to this country of return, the authorities in the OMS/PMS can make use of this information to put in place measures that may help to ensure the correct treatment of returnees when they arrive.

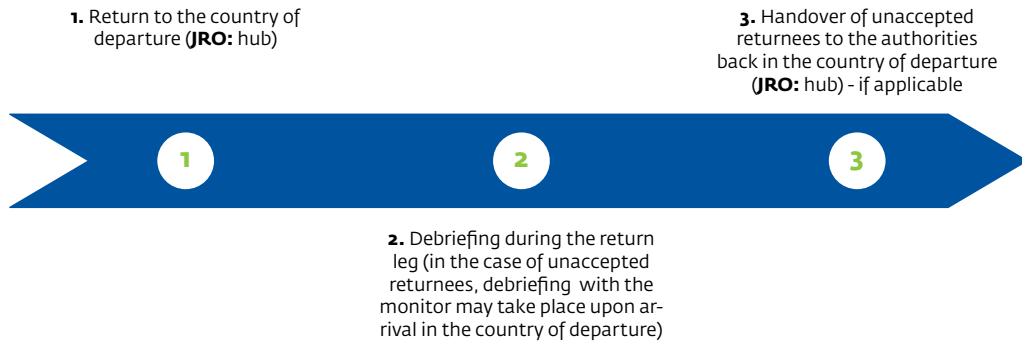
### **Step 3. Overnight stay – if applicable**

It is rare that an overnight stay in the country of return is necessary, as the OMS will try to organise a return directly after arrival. However, an overnight stay might be necessary if a forced-return operation has covered a long distance, if airport opening-hours make permission for take-off and landing a problem, or if there is a technical problem with the plane. If this happens, different countries have different procedures. It may also be that returnees are not accepted by the authorities in the country of return and have to stay overnight before the return journey back to the country of departure. The monitor should closely follow any instructions given by the escort leader. However, monitoring tasks related to this specific situation are not included in these guidelines.

### **3.9 Monitoring the return-flight phase**

The return-flight phase covers the period starting after the handover procedure in the country of return until arrival at the airport of departure (hub in the case of JROs).

Returnees are not normally on the return flight, so the debriefing of the operation usually takes place then. However, if there are unaccepted returnees on the flight, the monitor should stay close to them throughout the return flight and all the duties that a monitor carries out continue to apply as described in the in-flight and arrival phases above. Nevertheless, in such circumstances the monitor should attend the debriefing, which may also take place when the flight arrives back at the country of departure.



### Step 1. Return to the country of departure

#### Positioning of the monitor (in the case of unaccepted returnees)

In the case of unaccepted returnees, the monitor should remain close to them on the journey back.

**What to observe** (see *In-flight and arrival phase* where the same steps apply).

Depending on national procedures, either the same escorts remain responsible for an unaccepted returnee, or a back-up team of escorts, if available, may be responsible for the returnee on the flight back to the country of departure.

Where all the returnees were accepted by the country of return, the monitoring duty only includes the following step.

#### Step 2. Debriefing during the return leg<sup>164</sup>

Monitors should participate in the debriefing with the Frontex representative, escort leader, and other participants, as applicable. They should note who was present at the debriefing, what time it was held and where, and provide a brief account to the escort leader and other participants of their main findings and observations, in particular any incidents that occurred during the operation. The monitor should inform the escort leader about any incidents that they will mention in their report and that need to be followed up by the authorities. Feedback provided by the escort leader, if any, should be mentioned objectively in the monitor's monitoring report. The debriefing is normally conducted on the aircraft during the return leg. The debriefing may also take place following arrival in the country of departure.

#### Step 3. Handover of unaccepted returnees (JRO: hub) – if applicable

In cases where handover of unaccepted returnees back in the country of departure occurs, the monitor should observe this phase as described in detail in Step 2 of the arrival phase further above (handover to the authorities in the country of return).

<sup>164</sup> In the case of unaccepted returnees, debriefing with the monitor may also take place when the flight arrives back in the country of departure.

### 3.10 Monitoring collecting return operations (CROs)

As mentioned above, CROs include only a pre-departure phase and one or several in-flight phases. The handover of the returnees to the authorities of the country of return is already done during the pre-departure phase. During a CRO the debriefing takes place after the arrival in the country of return either at the airport or in a designated area. In case of several countries of return, there are several in-flight phases. The monitoring tasks as described in the steps above in the pre-departure and in-flight phases are also applicable for CROs.

### 3.11 Monitoring specific incidents

If a particular incident occurs during the course of the forced-return operation, monitors should take note of the following details:

- ♦ Description of facts e.g. what happened during the incident (including location and time);
- ♦ The role of each person in the incident;
- ♦ Whether the actions were legal, necessary and proportional and the basis for that assessment;
- ♦ What factors triggered the incident;
- ♦ What activities were performed well and by whom, e.g. escort, escort leader, returnee, etc.

According to the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, individuals participating in Frontex-coordinated activities are required to report any incidents involving suspected or alleged violations of fundamental rights or of the Frontex Codes of Conduct via the appropriate reporting channel, for example via the Frontex Serious Incident Reporting (SIR) system.<sup>165</sup> This system is usually used by escorts to report any incident of a sensitive or public interest nature, including any fundamental rights violations, as defined in the Implementation Plan. It is crucial for monitors to include any incidents in their reports, because the evaluation of such reports helps Frontex to adapt future return operations.<sup>166</sup> Including these incidents in the monitoring reports can also alert the authorities, such as the ministries in the Member States who are responsible for forced returns and in some cases, the investigating authorities, to a particular or systemic issue that they need to address.<sup>167</sup>

Even though the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex obliges any participant to report violations of the code of conduct and/or of fundamental rights via the appropriate channels, such as the SIR, forced-return monitors report any violations of the code of conduct and/or fundamental rights via their monitoring report and not via the SIR to avoid double reporting. Both the monitoring reports and SIRs reach the FRO directly.

<sup>165</sup> Frontex Guide for JROs, p. 12.

<sup>166</sup> Frontex Guide for JROs, p. 17.

<sup>167</sup> In line with regional and international human rights standards they have ratified.

### 3.12 Monitoring the use of force and means of restraint

Monitors must pay particular attention to every incident that involves the use of force or means of restraint on a returnee – each time it is used and/or used more than once or repeatedly. They should make careful notes of the incident and sketches to include in their monitoring report.

Any use of force should be based on an individual risk assessment that escorts should be constantly evaluating throughout the forced-return operation based on a dynamic risk assessment. The monitor should observe the use of force and should note the context in which the restraints are used, the time, what type of restraints were used and for how long. The monitor should also note: the effects of the restraint on the returnee; whether there are any injuries; what was going on around the returnee (e.g. were other family members present who witnessed the use of force?); if there were threats to other returnees or escorts.

It is important that the monitor reports each instance of the use of force and means of restraint in the monitoring report they submit. The monitor should request information including details about the measures applied, from the escort leader at an appropriate time, e.g. after the situation has been brought under control. The monitor should also take notes of any good practice in handling situations such as this and include it in their final report. Including examples of good practice in the reports that go to Frontex and the relevant authorities in the Member States involved in the operation can help to spread good practice in other forced-return operations.

In order for the monitor to be able to assess the legality of the use of force, they need to know about the different types of restraint measures allowed under the national legal framework of the country monitored. Most importantly, and as mentioned above, the Implementation Plan includes the list of authorised restraints and equipment permitted during the return operation that the OMS together with Frontex decided in accordance with the national legislation of the OMS, international law and EU law, in particular the Charter of Fundamental Rights. However, no PMS should use coercive measures that its legislation does not allow, even if those measures are allowed by the OMS for that particular operation.<sup>168</sup>

Ideally, monitors should experience during respective training what it is like to use restraints on someone or have them used on them as part of their training in order to be knowledgeable about the various techniques and their application.

For the note-taking and subsequent reporting, it is important to keep in mind the following questions in relation to the use of coercive measures:

- ♦ Did the relevant authorities carry out an individual risk assessment before the forced-return operation and did it take into account any vulnerabilities?
- ♦ Did the returnee have any medical conditions that were taken into account?

<sup>168</sup> Prior to a return operation, monitors should consult the respective National Country Factsheet of the requesting Member State. The Factsheet contains information regarding the national forced return procedures, the authorities responsible for forced returns, risk assessment carried out prior to the operation, coercive measures and means of restraint permitted by law, relevant information on the national monitoring mechanism, as well as complaint mechanisms. The factsheets are available on the communication platform for the pool of forced-return monitors on the Frontex One-Stop-Shop (FOSS).

- Did the escort leader/escorts inform the returnee that it was in their interest to co-operate, and that uncooperative behaviour would not stop the return operation? When was the returnee informed and in what context?
- Did the escorts make use of de-escalation and communication skills prior to using force or restraints?
- What was the specific situation that required the use of force by the escorts?
- If family members were also present, did they move them away? If not, was it because e.g. it was not possible under the circumstances?
- Did the use of restraint measures comply with legal provisions set out in national laws (see National Country Factsheets and Implementation Plan)?
- In addition to the legal provisions for restraint measures, were they necessary and proportional?
- For how long were restraint measures used? Was the length reasonable or excessive?
- Did the returnee show signs of injury?
- Positional asphyxia: Were returnees restrained in a way that prevented or impeded the mechanism of normal breathing? What led to the returnee being restrained? Was it to limit a potentially dangerous situation? Was the returnee closely monitored by the escorts and medical personnel whilst restrained?<sup>169</sup>
- Did the escorts comply with their legal obligation to report incidents in relation to the use of force?
- Did the returnee say they wanted to file a complaint?
- Was the returnee informed that they could lodge a complaint and how to do it? Were they given the complaint form that is annexed to the Implementation Plan?

### 3.13 Role of escorts, escort leaders, back-up team and Frontex representative

Escorts are the law enforcement officers/security personnel responsible for accompanying third-country nationals being forcibly returned. Escorts execute a return decision taken by the competent state authorities. Each (national) group of escorts has an EL in charge of managing the (respective national) group of escorts.<sup>170</sup> The role of an escort is to ensure and enforce the return of the respective returnees in a safe and humane manner and according to the relevant national legal framework and where operations are coordinated by Frontex, according to both Frontex CoCs.

<sup>169</sup> Officials should recognise the heightened risk of positional asphyxia during restraint; they must take steps to avoid it, should be able to recognise the heightened risk factors, recognise the warning signs of positional asphyxia, reduce the risk of it happening and take immediate emergency action in the event that positional asphyxia is suspected.

<sup>170</sup> The allocation of the role of ELs and the ratio of escorts per escort leader differs amongst Member States. For example, it might be one EL per five returnees or one escort leader per group of escorts for a returnee/family, etc. During a return operation, each national team (even though it might have more than one EL present) appoints one EL with the function of a "contact point" for the head of operation.

Escorts are usually provided by the OMS and the PMS, but there is also the possibility that a MS request escorts from the Pool of Forced-Return Escorts, created by the EBCG Regulation and approved by Frontex Management Board Decision, where a profile is defined.

The back-up team is a group of escorts not assigned to a specific returnee/family, but acting as support to the escorts of both OMS and PMS(s) (i.e. assisting if necessary during violent incidents, or during lavatory procedures, etc.). The employment of a back-up team and their number of escorts during NROs differs among Member States. In practice numbers are considered based on various factors, such as the information from the risk assessment, the number of returnees on board, the travel time, and any other possible difficulties that might be encountered. During a JRO, the OMS is responsible for providing an appropriate escort back-up team. The PMSs may also provide their own back-up team, if necessary.

It is important that escorts are respectful of the returnees at all times. It is their responsibility to apply necessary safety measures, when required, to enable the removal and, at the same time, to ensure that the returnees poses no danger to themselves or other participants of the return operation.

### 3.13.1 Main tasks of escorts

The main tasks of escorts include;

- ♦ Implementing/enforcing the return operation in line with the respective national legislation, applicable fundamental rights and codes of conduct in place;
- ♦ Guaranteeing the safety of their assigned returnees and participants of the forced-return operation, including the (proportional) use of force as a last resort;
- ♦ The provision of all relevant information on the planned removal of the returnees prior to their return, including the information that the return operation will run smoother if the returnee co-operates, and that if they do not co-operate, their removal will be enforced;
- ♦ Conducting risk assessments on the co-operation of returnees and sharing of that information/assessment with relevant participants of the forced-return operation during the briefing;
- ♦ Following and implementing the security and surveillance plan on board the aircraft defined by the head of operation of the OMS (movements within the cabin, meals, etc.);<sup>171</sup>
- ♦ The provision of all relevant information (technicalities, procedures, Implementation Plan, seating plan, etc.) to all participants of a return operation during the briefing; and
- ♦ In co-operation with the EL, ensure the handover of the returnees to the respective national authorities in the country of return.

During the return operation, the escorts have to ensure the returnees' safety as well as the safety of the other participants. If necessary, they are authorised to apply force to carry out the return, but the desired strategy is one of de-escalation and calming of any situation. Es-

<sup>171</sup> Common Guidelines, Annex of the 2004 Council decision on joint removal: 3.1. (Council of Europe 2004: 6).

corts are specifically trained for such scenarios. It is the duty of escorts to communicate important facts (i.e. self-harm, obstructive behaviour, etc.) to the EL (JRO: head of operation). In addition, escorts should assist the returnees where necessary.

The number of escorts accompanying the return will depend on the risk assessment conducted. The practice differs amongst Member States. If a female is to be returned, it is recommended that at least one woman should be part of the escort team. The same applies in the case of minors (especially if no guardian accompanies the minor) or families to be returned.

It is important to note that while escorts are allowed to use force and necessary means of restraint (proportionally and not exceeding reasonable force), “returnees should be briefed regarding the enforcement of their removal and advised that it is in their interest to cooperate fully with the escorts. It should be made clear that any disruptive behaviour will not be tolerated and will not lead to the aborting of the removal operation”.<sup>172</sup>

### 3.13.2 Special tasks of the escort leader

The term “escort leader” (EL) refers to the escorts who are, in accordance with the instructions given, in charge of managing a national group of escorts during a JRO. Each OMS and PMS appoints its own EL.<sup>173</sup> Each PMS appoints one EL who as head of their national delegation is also the main contact person for the head of the whole operation. The national EL is also the one that shares information, participates in briefings, etc.

One EL is always the head of operation. The term “head of operation” refers to the person appointed by the OMS as having the overall responsibility for the JRO. Where no particular person is appointed, the EL of the OMS is to be considered as the head of operation.<sup>174</sup> The head of operation (or OMS EL) may decide upon the necessary termination of a forced-return operation.

After the return operation, the **EL is to provide a written report** to the authority that ordered the return. It must include information on the use of force (reason, techniques applied, and duration) as well as any other incidents that occurred. In case of an investigation and/or any findings of wrongdoing, the usual disciplinary procedures as for other law enforcement officers apply to escorts.

### 3.13.3 Skills required by escorts

In the majority of Member States, escorts are law enforcement officers who have been subject to standard law enforcement training. Escorts then receive additional, specialised training to fulfil their specific duties. In some countries, they form part of a special unit. In other countries, however, the escorts are from private security companies, which the State engages for these specific tasks.<sup>175</sup> There is no unified approach to the selection and training of escorts across the Member States. However, Frontex provides uniform EL training and escort training to both Member States and third-countries (for CROs). In most countries escorts

<sup>172</sup> 2.1(b) of the Annex of the 2004 Council decision on joint removal. (Council of Europe 2004: 5)

<sup>173</sup> Article 3(h) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>174</sup> Article 3(j) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.

<sup>175</sup> Escort officers may come from private security companies that are not law enforcement officers. They are, however, specifically trained and authorised to use force, and are accompanied by one law enforcement officer in charge.

receive specific training aimed at meeting the requirements of escorting individuals during forced-returns and often benefit from on-going training.

Overall, escorts should receive relevant training, amongst others things, related to:

- ♦ Regular practical exercise on the use of force and means of restraint, including mitigation of risks related to this (e.g. positional asphyxia syndrome<sup>176</sup>);
- ♦ Legal training including on fundamental rights;
- ♦ De-escalation strategies;
- ♦ Emergency procedures on board an aircraft (and/or other means of transport); and
- ♦ First-aid training.

In relation to “soft-skills” required by escorts, their behaviour should be calm, patient, polite, non-discriminatory, and respectful. Knowledge of foreign languages is not a must but always considered an asset among escorts. During return operations coordinated by Frontex, ELs should at least possess sufficient knowledge of English, as briefings are usually held in English. Article 14 of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex further establishes the obligation that the OMS provides suitable interpreters during the JRO based on an assessment of the returnees’ needs and escorts’ language skills.

### 3.14 Pre-departure phase

During the pre-departure phase the escort team is briefed while the returnee(s) may stay in a holding/waiting/detention facility at the place of embarkation. Respective national escorts will search each returnee thoroughly (in accordance with the national law) before leaving the Member State of first departure and before boarding.

Before the embarkation of the joint flight, the PMS EL and other relevant JRO participants will attend an operational briefing organised by the OMS EL. The briefing point and time will be determined by the OMS’s EL in due time. The OMS EL discusses the latest updates including the passenger lists, seating plan, boarding and in-flight procedures, arrival phase and the security, including the use of coercive measures. Each PMS EL provides the OMS EL with the information on the current mental and physical state of the returnees. The PMS ELs should subsequently brief their escorts with this latest information. A separate briefing is conducted by the organiser of the JRO with the cockpit and the cabin crew.

During the pre-departure phase, special attention should also be paid to valuable personal belongings and baggage of the returnees.

#### Embarkation

- ♦ The cabin of the aircraft is thoroughly searched by the back-up team for any dangerous items prior to embarkation;

<sup>176</sup> This is a form of asphyxia which occurs when someone’s position prevents him/her from breathing adequately. A small but significant number of people die suddenly and without apparent reason during restraint by police, prison (corrections) officers, and health care staff. Positional asphyxia may be factor in some of these deaths.



- Boarding takes place in a secure area. Escorts and returnees are seated as directed by the OMS escorts. Pregnant women (single or with families) and families with children are enabled to board the aircraft separately and are seated separately from other returnees. The seating plan is distributed during the operational briefing before the departure;
- Emergency exit rows are not to be utilised for seating of returnees; and
- Once on board, all passengers take their seats and remain seated.

### 3.15 The in-flight phase

The in-flight phase starts with the closure of the doors of the means of transportation (e.g. aircraft, bus, train, ship) used for the removal and ends with the arrival at the final destination, including the transit via another country.

All escorts (including ELs and head of operation) ensure the safety of their returnees and that of other participants of the forced-return operation. During the in-flight phase:

- No member leaves their designated returnee unless relieved by another escort or by a back-up team member;
- Any movement of a returnee from a seat is granted according to the rules set during the operational briefing; and
- Toilet(s) for the sole use of returnees are designated and clearly labelled. Only one escorted returnee at the time is permitted to move on board in order to access the toilet. Escorts are advised to block the toilet door open (i.e. keep it ajar) in order to observe so that the returnee does not inflict any self-harm.

During this phase a security back-up team may operate in the aircraft. This team isolates and deals with any issues/incidents as instructed by the Escort Leader, as well as securing the exit doors. All relevant incidents during this phase have to be brought to the attention of the OMS EL.

### 3.16 Stopover

After arrival of the aircraft at the stopover airport, the OMS EL meets with a representative of the stopover Member State.

- The OMS EL and the PMS ELs embark at the stopover. The OMS EL leads an operational briefing with the same participants as during the one organised before departure. The PMS ELs should subsequently brief their escorts with this latest information;
- As the power is exercised by the authorities of the Member State where the stopover takes place, the boarding procedure and the use of force are under the responsibility of the stopover Member State, who assists other PMSs in embarking, if needed; and
- Other participants remain on board the main aircraft.

### 3.17 Arrival phase

The arrival phase covers the period starting from arrival at the country of return and ending after the returnee(s) have been handed over to the national authorities in the country of return.

- ◆ When the aircraft comes to a stop and a complete standstill at the final parking position any restraint should be removed from the returnees;
- ◆ At this point, they are handed back their personal belongings, which were transported in the cabin;
- ◆ The OMS EL makes the first contact with the representative of the country of return in order to prepare the hand-over;
- ◆ The OMS EL and the EL of each PMS meet relevant representatives of the country of return and hand over the travel documents and other relevant documentation, while presenting the returnees;
- ◆ Baggage in the hold is offloaded; and
- ◆ The OMS EL informs the PMS ELs about the necessity to disembark the aircraft or not, either for a planned overnight stay or for administrative or technical reasons.

### 3.18 Return-flight phase

In the case any returnee is refused readmission to the country of return, the escort team escorts the returnees back until the place of departure. As mentioned above, this phase is then also monitored. The debriefing is normally conducted during the return phase, with all the relevant participants in the return operation, in particular the ELs, the back-up team leader, the monitor and the Frontex representative. The debriefing can also take place back at the hub/country of departure. All PMS ELs and the OMS EL are respectfully asked to complete a "JRO Debriefing Form". The feedback provided in the forms is utilised during the debriefing and by Frontex for the Final Return Operation Report.

**For CROs, the pre-departure and the hand-over, in-flight and arrival phases are applicable.**

### 3.19 Use of force and means of restraints<sup>177</sup>

The Twenty Guidelines on forced-returns recommends that in order to limit the use of force, all individuals involved as well as the competent authorities should seek the cooperation of returnees at all stages of the return process.<sup>178</sup> This principle is also included in Article 6 of the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex. Information about possible hunger strikes, self-injurious behaviour, threats against escorts, or actions taken to abort a forced-return operation must be taken into account, even though this information does not automatically justify using force or means of restraint in a preventive manner.

<sup>177</sup> Compare with Common Guidelines in the Annex of the 2004 Council decision on joint removal (Council of Europe 2004: 4ff).

<sup>178</sup> Twenty Guidelines on Forced-Returns, Council of Europe, 2005, Guideline 15.

Means of restraint can thus be applied to safeguard the health and safety of the returnee, of escorts, other participants (including monitors, crew and support staff, or other passengers), and property. However, in the case of the use of force, all reasonable efforts must first be made to manage violent,<sup>179</sup> recalcitrant,<sup>180</sup> or disturbed behaviour by persuasion or other means that do not entail the use of restraint. The use of a restraint technique should only be considered when all other practical means of managing the situation, such as de-escalation, verbal persuasion, and voluntary 'time out', have failed or are judged by the escort to be likely to fail in the circumstances.

When restraint is necessary, only authorised restraining techniques and material are to be employed. Nonetheless, in these situations, proportionality, necessity, and accountability are paramount to make the use of force justifiable. Additionally, the dignity, privacy, cultural values, and any special needs of the person being returned should always be considered as far as possible. Sometimes force may be necessary in order to apply the authorised means of restraint. The restrictive space of a carrier (aircraft, ship, train, bus) may restrict the range of alternatives available to escorts. The monitor must observe carefully and be able to make an objective judgement to be reflected in their report. It is highly recommended that the monitors, when in doubt, talk to the EL to understand the escorts account for the use of force and the measures applied after the incident is over.

Article 7 of the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, covers the use of coercive measures, establishing the following standards to be applied during a return operation:

1. The use of coercive measures must be legal, necessary and proportional, not exceeding reasonable force, and with due respect to the returnee's rights, dignity and their physical integrity. The use of coercive measures takes appropriate account of the individual circumstances of each person, such as their vulnerable condition;
2. Coercive measures may be used only when strictly necessary on returnees who refuse or resist removal or in response to an immediate and serious risk of the returnee escaping, causing injury to themselves or to a third party, or causing damage to property;
3. Coercive measures likely to compromise or threaten the possibility of the returnees to breathe normally are prohibited. The relevant escort leader periodically reviews the continuing necessity and proportionality of deploying coercive measures, and particularly of applying means of restraint, when these are used for prolonged periods, based on a dynamic risk assessment;
4. The OMS and Frontex provide for a list of authorised restraints in the operational documents in advance of the RO or RI. Where applicable, this list must be distributed to the relevant PMSs prior to the RO or RI. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures under medical supervision to ensure flight security;

<sup>179</sup> Violent/violence is understood as 'Any incident in which a person is abused, threatened, or assaulted. This includes an explicit or implicit challenge to their safety, well-being, or health. The resulting harm may be physical, emotional or psychological.' (HM Prison Service Prison Service Order 2750, London: NOMS, 2007).

<sup>180</sup> Obstinate and uncooperative attitude towards authority or discipline.

5. No PMS participants are required to use coercive measures not allowed under their national legislation even if those measures are accepted by the OMS and Frontex for that particular RO or RI.<sup>181</sup>

### 3.19.1 Use of means of restraint

Means of restraint should only be used:

- ♦ When strictly necessary. For instance, in cases of resistance of the returnee, or when they are threatening to use violence or self-harm;
- ♦ In line with the individual risk assessment, when established that a returnee is likely to try to resist the return and might resort to violence and/or self-harm in order to prevent it;
- ♦ According to the approved list of authorised and forbidden means of restraints; and/or
- ♦ In accordance with the national law detailing the requirements and limits for the use of restraints as part of a forced-return operation.<sup>182</sup>

The means of restraint that might be used during a forced-return operation, depending on the specific national legislation from the different Member States, may include the following:

- ♦ Hand Cuffs (steel, plastic, Velcro, textile);
- ♦ Leg Cuffs (Velcro, plastic);
- ♦ Body Cuffs (with Velcro or metal fittings);
- ♦ Head Protections (helmet, spit mask).

### 3.19.2 Restraining techniques to be avoided and the risk of positional asphyxia syndrome

At places where it is anticipated that bodily force might need to be applied, e.g. at holding or waiting facilities or at the steps into the transport, it is good practice to have foam mats pre-positioned on the ground and possibly against the wall, to cushion the impact of the use of bodily force.

Degrading and potentially harmful, even life-threatening techniques are to be avoided. These include:

<sup>181</sup> Article 7 of the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex (2018).

<sup>182</sup> National legislation in some instances "prescribes" the use of certain restraints on returnees as a precautionary measure from the outset during a forced-return operation. Should the restraints be used in accordance with the national legal framework, their legality cannot be questioned by a forced-return monitor. Nevertheless, its use could be assessed in the light of the principles of necessity and proportionality and related recommendations by the monitor could be brought forward.

- ♦ Restraining persons on the floor. For example, techniques such as the 'prone restraint' involves forcing a person face down onto the floor, placing their hands behind their back and putting pressure on their torso, shoulders and neck. This can cause disproportionate discomfort and put the life of the individual in jeopardy when too much force (pressure) is used. If the floor is used as a last resort, then this should be for the shortest period of time and only for the purpose of gaining reasonable control;<sup>183</sup>
- ♦ Pregnant women should never be placed in a face down position; and
- ♦ Pressure should not be placed on the neck, especially not around the angle of the jaw or the windpipe. Pressure on the neck, particularly in the region below the angle of the jaw (the carotid sinus) can disturb the nervous control of the heart and lead to a sudden slowing or even stoppage of the heart.

A degree of **positional asphyxia** can result from any restraint position where restriction of the neck, chest wall or diaphragm occurs. See the following illustrative pictures for dangerous positions<sup>184</sup>:



**Diaphragmatic blockage**



**Airway plugging**

**Positional asphyxia (or postural asphyxia)** is a form of asphyxia, which occurs when someone's position prevents him/her from breathing adequately. A small but significant number of people die suddenly and without apparent reason during restraint by police, prison (corrections) officers, and healthcare staff. Positional asphyxia is thought to be a factor in some of these deaths. If left in a prone position, even without weight being applied to the back, the persons own body weight can restrict breathing and cause death.<sup>185</sup>

The use of force that impedes the breathing of a returnee and hence could lead to positional asphyxia is strictly forbidden. Officials should recognise the heightened risk of positional asphyxia during restraint; they must take steps to avoid it, should be able to recognise the heightened risk factors, recognise the warning signs of positional asphyxia, reduce the risk of it happening and take immediate emergency action in the event that positional asphyxia is suspected.

<sup>183</sup> Nottingham University Hospital NHS, Restraint Policy, 2009.

<sup>184</sup> Frontex Guide for JROs, p. 39 (from a Frontex PPT on medical precautionary measures for escort officers developed within a Frontex project by medical doctors for the Medical Doctors' Handbook on Medical Precautionary Measures for Escort Officers).

<sup>185</sup> Frontex Guide for JROs, p. 40.

**This risk increases when:**

- ◆ The head is forced downwards towards the knees;
- ◆ The person is immobilised when seated;
- ◆ The person is on the floor face down;
- ◆ The torso is compressed against or towards the thighs (restricts the diaphragm and compromises lung inflation);
- ◆ The body position of a person results in a partial or complete obstruction of the airway and the subject is unable to escape from that position;
- ◆ Pressure is applied to the back of the neck, torso, or abdomen of a person held in the prone position;
- ◆ Pressure is applied which restricts the shoulder girdle or accessory muscles of respiration while the person is lying down in any position;
- ◆ The person is obese (particularly those with large stomachs and abdomens);
- ◆ The person is a child or small adult;
- ◆ The person has a heightened level of stress (agitated and thus increased heart rate);
- ◆ The person may be suffering respiratory muscle failure related to earlier violent muscle activity (such as a struggle/previous resistance);<sup>186</sup>
- ◆ The person is intoxicated with alcohol or drugs, or has a known history of substance abuse, particularly cocaine; and/or
- ◆ The person is unconscious.<sup>187</sup>

**Warning signs of positional asphyxia** include:

- ◆ Verbal complaints of being unable to breathe properly together with increased effort;
- ◆ A violent and noisy person suddenly becomes passive, quiet, and tranquil;
- ◆ Blue discolouration to facial skin (this is difficult or impossible to see with very pigmented skin); and/or
- ◆ Gurgling/gasping sounds/foam or mucus coming from the nose or mouth.<sup>188</sup>

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<sup>186</sup> Nottingham University Hospital NHS, Restraint Policy, 2015

<sup>187</sup> Frontex Guide for JROs, p. 41.

<sup>188</sup> Frontex Guide for JROs, p. 41.

### 3.19.3 Specific tasks for escorts in the event restraining techniques are applied

Should restraining techniques be used, the escorts should monitor the health of the person being restrained and actively control how the restraints are being applied.

Escorts always need to ensure that any restraint used is in line with the national legal framework. During return operations co-ordinated by Frontex they have to be in line with the approved list according to the Implementation Plan. They should also ensure that any restraints used are proportionate and necessary, including the validity of the duration of its application.

The escorts should specifically ensure measures to reduce the risk of asphyxia, which include:

- ◆ Once handcuffed, persons should be raised to their feet, placed on a seat or, if violence continues, restrained in the recovery position;
- ◆ Taking care not to put pressure on the person's back as breathing can be restricted, even if the person is placed in the recovery position;
- ◆ Observing the person's condition (e.g. vital signs) continually whilst being restrained, as death can occur suddenly and develop beyond the point of viable resuscitation within seconds rather than minutes;
- ◆ Getting medical assistance immediately if there is any reason for concern regarding the person's condition;<sup>189</sup>
- ◆ Supporting and protecting the restrained person's head and neck appropriately;
- ◆ Not compromising the restrained person's airways and breathing;<sup>190</sup>
- ◆ Making every effort to use techniques that do not use the deliberate application of pain; and
- ◆ The level of force applied is reasonable and necessary and proportionate to a specific situation, and is applied only for the minimum amount of time necessary.

Where warning signs of pain or risk of loss of life are present, the restrained person must immediately be released or the restraint modified as far as practicable to reduce restriction, and medical personnel must be summoned.

An individual dying from positional asphyxia may not be able to speak or shout prior to collapse. Warning signs related to positional asphyxia include:

- ◆ An individual struggling to breathe;
- ◆ Complaining of being unable to breathe;
- ◆ Evidence or report of an individual feeling sick or vomiting;

<sup>189</sup> Frontex Guide for JROs, p. 42.

<sup>190</sup> Nottingham University Hospitals, 2015.

- ◆ Swelling, redness, or bloodspots to the face or neck;
- ◆ Marked expansion of the veins in the neck;
- ◆ Individual becoming limp or unresponsive;
- ◆ Sudden changes in behaviour (either escalating or de-escalating);
- ◆ Loss of, or reduced levels of, consciousness; and/or
- ◆ Respiratory or cardiac arrest.<sup>191</sup>

### 3.20 Possible impact of forced-return monitoring and coping strategies for the monitors

It is the task of the monitor during a forced-return operation **to observe and report but never interfere**. The fact that a monitor has no mandate to intervene can, especially in the case of incidents, be very challenging and requires a high level of emotional control during the return operation. There are also effects that a monitor might experience after a return operation.

#### 3.20.1 Impacts during the monitoring mission - how to handle your emotions?

The intuitive reaction of most individuals, when something is perceived as wrong, is to intervene. Indeed, society teaches people to do so. The actual strength of this feeling differs between individuals and might also be related to whether the individual concerned has an extroverted or introverted personality. Nonetheless, observing a situation which goes against an intuitive feeling and refraining from acting upon that feeling is challenging.

The monitor in these situations must remain calm, controlled, and cannot show agitation, or display visible or audible reactions, and under no circumstances can they walk away from the situation.

Also, when approaching the EL with observations, for example, if the monitor feels that in a certain case means of restraint could be loosened or removed, the monitor has to stay calm, controlled and provide suggestions only. **It is always at the discretion of the EL and escorts whether to respond to the observations and suggestions made or not, based on their risk assessment.**

In order to be able to perform the tasks as a monitor, it is paramount that the individual:

- a) Realises that emotions may impede the monitoring task, even to the point of endangering objectivity in reporting; and
- b) Develops and applies strategies to handle these emotions and remains calm and controlled in order to discharge the duties of a monitor.

Individual strategies can be applied, and over time each person may realise what works best for them. However, some **general strategies** that are considered helpful in order to main-

<sup>191</sup> Nottingham University Hospitals, 2015.



tain control under stressful and emotional circumstances and in order to be able to continue monitoring, include:

- ♦ To breathe actively and consciously in and out – counting up to 5 and down to 0;
- ♦ To remind yourself of your task as the monitor; if necessary say to yourself in your head (repeating it as often as necessary) that “you cannot intervene, you are not allowed to intervene, focus on what happens”; and
- ♦ To concentrate on taking notes. In all situations, this is the monitor’s main task; remind yourself while taking notes, to be as objective as possible.

While observing, monitors can experience a variety of emotions, ranging from compassion, the urge to intervene, frustration at not being able to intervene, indifference (based on the fact that one cannot intervene, or that one has already seen such a situation several times before), to rejection of the individuals they deal with, which can apply to the returnee(s) as well as to the escorts.

### 3.20.2 Impacts following an actual monitoring mission

Forced-return operations, especially those involving incidents, can have an impact on the monitor even after the operation.

On the one hand, this relates to the fact that the range of emotions described can impact the ability of monitors to report objectively, and thus can negatively impact the performance of the monitor. Therefore, while writing the report, the monitor has to continuously control themselves and check whether what is written is objective and factual.

On the other hand, situations witnessed during a forced-return operation, and the feeling of not having been able to intervene, may impact the wellbeing of the monitor even long after the operation. Since the monitor will most likely not be observing a forced-return operation every day or several times a week, secondary trauma (also called vicarious trauma) might not necessarily apply.<sup>192</sup> Nonetheless, being subjected to stressful and difficult situations, as well as not being able to intervene, can have a lasting impact. The first step is realising that this has happened, which is closely related to careful self-observation.

Some symptoms that are related to secondary trauma include:<sup>193</sup>

- ♦ Intrusive thoughts;
- ♦ Chronic fatigue;
- ♦ Sadness;
- ♦ Anger;

<sup>192</sup> Professionals who work with victims of trauma or human rights violations, as well as more generally with people in need on a regular basis, experience psychological strain. The demanding complexity of the work and frequent encounters with people who are traumatised or afraid, or who exhibit mental or physical distress, as well as hearing their stories, can lead to these professionals developing vicarious or secondary trauma, which has to be identified and acted upon.

<sup>193</sup> Frontex, Fundamental Rights Manual for Border Guard Trainers, 2012.

- ♦ Poor concentration;
- ♦ Detachment;
- ♦ Emotional exhaustion;
- ♦ Fearfulness;
- ♦ Shame;
- ♦ Absenteeism; and/or
- ♦ Alcohol or drug abuse.

### 3.20.3 Coping strategies

If a monitor experiences any of the above symptoms or has concerns, they should not hesitate to act.

- ♦ Talk to somebody. Talking about it helps. It may be a friend or even a fellow monitor (see below). However, be sure to observe the required confidentiality and do not reveal any names or details of the return operation. Instead, focus on describing your own emotions and the difficulties you are experiencing;
- ♦ Seek professional help, e.g. counselling. Depending on the organisation you work for, supervision sessions might also be a possibility, so inform yourself; and
- ♦ In many professions, peer support has proved to be of great help, especially in relation to dealing with difficult situations. Talking to colleagues (e.g. other monitors) might provide the opportunity to share any kind of related emotions or frustrations, as well as to discuss possible coping strategies. If not offered as a regular and institutional approach (which might be externally moderated and/or be provided to all monitors once or twice a year), monitors can discuss the possibility of establishing peer support groups involving different set-ups and/or exchanges via established platforms.

### 3.20.4 Key points to remember

- ♦ The monitor must respect the principles of accuracy, confidentiality, impartiality, and non-discrimination at all times;
- ♦ The report must state the facts. This includes observations of things that happened and that did not happen;
- ♦ Where appropriate, factual observations (including the what, when, by whom, and why, where applicable) must be included in the report;
- ♦ The monitor must not voice opinions about the general system of returns or question the legality of the return decision/removal order;
- ♦ The report must also include observations of situations or issues that were handled well so as to facilitate the documentation of good practices and learning;

- While writing the report, and when reporting on incidents, the monitor must constantly review the information provided, to guarantee objectivity in the reports;
- The monitor must be aware of the fact that observation of return operations can have impacts on his/her ability to discharge the task and also on his/her well-being after the event;
- Strategies relating to how to deal with rising emotions, include focusing on techniques to manage breathing, reminders of the required tasks and mandate, and comprehensive and thorough note-taking; and
- Should the monitor, at any time, experience symptoms related to being overwhelmed by what has been witnessed, they should seek supervision (if accessible) and/or professional help.



# **Chapter 4**

## **Drafting and Submitting a Monitoring Report**



## Chapter 4:

# Drafting and Submitting a Monitoring Report

This chapter presents the main aspects that a monitor should know regarding note-taking and writing the report following the forced-return operation.

### 4.1 General principles of reporting

The report shall **reflect the facts and details about the observations** that were made during the operation. It should **follow a presentation of facts on: a) what did I observe, b) what does it mean, and c) recommendations** - what needs to change. Within the pool of forced-return monitors, the monitor(s) deployed at the request of a Member State to a specific operation shall submit a report in English or any other official language of the EU via the reporting application provided by Frontex. The reporting application has in-built checklist texts that provide guidance to the monitor when drafting the report. The application including the checklist texts is only available in English, but the report may be drafted in any other official language of the EU. The FRO ensures translation into English, as applicable.

The monitor must be as precise, and concise as possible whilst always ensuring that all relevant details are reported.

When drafting the report, monitors should;

- Include the same **findings/observations** in the report as addressed during the debriefing;
- Only include **facts**. If the information is not first-hand, they should state the source of the information;
- Use **appropriate language** i.e. language that is neutral and impartial;
- Avoid reporting in the first person "I" and instead **write in the third person** since the returnees and escorts should be the focus of the report at all times;
- **Verify the information** included in the report, even if this takes time after the forced-return operation, particularly if there are details you are not sure of or need to check with others involved in the return operation such as an official or a fellow monitor;
- Indicate whether the **preparation of the mission** was sufficient or if any challenges were encountered during the preparation, what the challenges were and how the escorts dealt with them;
- Include any **complaint** made by a returnee against any alleged ill-treatment by an official that took place during the operation;

- ♦ Reflect in the **summary** of the report, your main findings, using precise terminology. Make sure your information is factually correct and highlight any incidents or particular problems;
- ♦ Provide **recommendations** drawn from the operation that are backed up the details (evidence) of the incident or problem you observed, including examples of both **good practices** to be shared and bad practices that need to be addressed. Always indicate who these recommendations, or a particular recommendation, are addressed to where relevant.

In view of the strong focus on fundamental rights of those being returned, it is easy to forget that the monitor also has the **duty to report on any misbehaviour of the returnee(s) vis-à-vis an escort**. Positive comments and **good practices identified** as well as any differences between countries' procedures of the return operations should be included so that Member States can benefit from each other's practices. Experienced monitors should also mention if they have observed certain patterns, e.g. that the use of measure x appears to always result in y, regardless of whether the outcome is positive or negative.

Monitors shall respect at all times **before, during, and after the forced-return operation** the principles of accuracy, confidentiality, impartiality, and non-discrimination:

**Accuracy:** make a clear distinction between facts and allegations by either cross-checking information provided or ensuring the full factual account of the different parties within the report. In the reports, be as precise and concise as possible, while at the same time ensuring that all relevant details are reported to establish whether or not fundamental rights and/or procedures have been observed or violated.

*What might hamper accuracy?*

- ♦ Bias of the monitor towards one of the participants – either escorts or returnees;
- ♦ Contradictory information and not taking the time to double check it;
- ♦ Lack of access to information;
- ♦ Reproducing allegations as facts; and
- ♦ Not taking notes while or shortly after a given observation.

**Confidentiality:** do not disclose any information gained by fulfilling ones monitoring obligations to any other party, other than those clearly stated in Article 50(5) of the European Border and Coast Guard Regulation. Namely, the Executive Director of Frontex, the Fundamental Rights Officer of Frontex, and the competent national authorities of the Member States involved in the given operation. The latter is automatically done via the FAR.

*What might hamper confidentiality?*

- ♦ Thinking that the other person is so distanced from your work that it does not matter if you share information;
- ♦ Careless handling of notes e.g. losing them; and



- ♦ Stress and the need to unburden oneself by telling someone else.

**Impartiality and non-discrimination:** it is not appropriate to include personal opinions about the general conduct and implementation of forced-return or return decisions in the report. All data should be properly documented and all accounts should be stated without any prejudice and/or discrimination towards anyone based on their sex, nationality, religion, and/or role within the forced-return operation.

*What might hamper impartiality and non-discrimination?*

- ♦ Holding strong views on migration or on law enforcement agencies;
- ♦ Personal or family life experiences of migration or encounters with migrants, refugees, or security services;
- ♦ Personal or family life experiences of people from different ethnic or having different skin colour than yours, or being of a different religion, sexual orientation, age etc.; and
- ♦ Feeling that there is a sense of hierarchy and following those who you feel to be better informed or superior to you and who might put pressure on you.

#### 4.1.2 Note-taking

It is advisable that the monitor uses a notebook which has a protective hard cover (it is also easier to take notes on a firm material) and that the pages are sewn in, so that they cannot easily be removed. Ideally, the notebook should also have numbered pages. If the page numbers are not pre-printed, it is advisable to insert them before going on the forced-return operation.

The following advice is designed to make note-taking easier for monitors and to make the notes easier to use when drafting the report after the mission:

1. Make sure you understand the **reporting format**.
2. Start the notes for each operation you participate in on a new page and write the **name and date of the operation** at the top.
3. Keep the first page to record the **names of the officials involved in the operation**. It is good practice to ask officials to write their names on this page, so that you have the correct spelling. Alongside each name, add their role, e.g. "doctor".<sup>194</sup>
4. Keep the next page to record **returnee numbers** broken down by country.
5. From the third page onwards, make **timed notes**, starting with the exact time on your wristwatch. This should remain set to the time zone where the operation started throughout the entire operation.
6. Make your notes in the **language you are most comfortable with**; they do not have to be in English.

<sup>194</sup> In the report, remember not to include personal data about any of the officials or returnees such as their names.

7. For speed, use whatever **abbreviations** you would normally use when you make notes, provided that you can read and understand them afterwards when you are drafting your report.
8. If you observe the **use of force or restraints**, you should make a quick sketch immediately after observing the incident, annotating the sketch to show the position/s of the returnee/s and the escort/s and what each/all of them were doing. This will make it easier for you to accurately describe the incident in your report.
9. Even if the operation is going well and things are calm, you should **continuously observe** the returnees and everything that is happening around them.
10. At intervals, you should note down **examples of good practices**, e.g. escorts answering returnees' questions. This is evidence of the overall conduct of the operation.
11. After the operation is over, do **not alter or erase any** notes.

#### 4.1.3 Dos and don'ts in writing the report

- ♦ Use appropriate language, e.g. instead of using the word "arrested", the monitor could use "brought into administrative detention";

In relation to a specific incident, the report should provide the following in detail (as it should have been noted whilst monitoring/observing the operation):

- ♦ Description of facts e.g. what happened during the incident (include location and time);
- ♦ The role of each person in the incident;
- ♦ Whether the actions were proportional, necessary, and accountable and what was the basis for this assessment;
- ♦ What factors that triggered the incident;
- ♦ What can be done to address concerns; and
- ♦ What activities were performed well and by whom, e.g. escort, EL, returnee, etc.

As already stressed earlier, the monitor should:

- ♦ Address the same findings/observations in the debriefing as in the report;
- ♦ Not include personal data of the returnees or any participants in the reports;
- ♦ Discern between facts observed and hearsay or interpretation and include only the former;
- ♦ State the source of the information, if not first-hand;

- Always verify the information included in the report, even if this may take time after the forced-return operation; and
- Clearly differentiate between the monitor's own observations and information obtained from secondary sources.

As emphasised above, the monitor has to be as precise and concise as possible whilst ensuring that all relevant details are reported. Besides all relevant information on the forced-return operation, including the number of returnees, the report should contain the following information:

- Any significant incidents that occurred;
- Any means of restraint (type and duration) used in the course of the operation as well as the circumstances leading to it;
- Any force applied in the course of the operation as well as the circumstances leading to it;
- Any complaint regarding any alleged ill-treatment, incident, or other situation, including alleged violations of fundamental rights that took place during the operation; and
- Any actions that proved to be particularly helpful and/or positive (to provide lessons learned).

#### 4.2 The reporting process

According to Article 50(5) of Regulation (EU) 2019/1896 “[t]he forced-return monitor shall submit a report on each forced-return operation to the executive director, the fundamental rights officer and to the competent national authorities of all the Member States involved in the given operation. If necessary, appropriate follow-up shall be ensured by the executive director and competent national authorities respectively”.

Monitoring reports are submitted via the Fundamental Rights Monitoring System (FRMS). This is an IT system designed to support the monitors of the Pool in their monitoring and reporting. It also supports the FRO in analysing the monitoring reports, thereby monitoring fundamental rights compliance in Frontex-coordinated operations.

FRMS is specifically designed to support the monitoring of forced-return operations. Monitors of the Pool submit their reports through a web-based application which is part of FRMS. Monitors working as national monitors that monitor during Frontex-coordinated operations submit their reports by e-mail to the FRO that uploads them into the FRMS IT system.

The FRMS IT system has two major components:

- a) a central system with a database, which is part of the IT infrastructure of Frontex and is used by the FRO;
- b) a progressive web application (PWA) that can run in the browsers on the desktop and mobile devices used by the monitors.

On desktop computers, the PWA runs under both Microsoft Windows and Apple MacOS, and on tablets and smartphones, under both Android and Apple iOS. All of the FRMS services available to the monitors and their national monitoring bodies are provided through the PWA.

The PWA is accessible via the browser and there is no third-party software to be downloaded. It is very secure and monitors can use it when connected on-line to a central server at Frontex and off-line when travelling without an on-line connection. This enables them to work on their reports during the return flights from missions. The reports are submitted when connected on-line to a central server at Frontex. The FRO is able to see what reports are due, review these when they come in and follow up, as necessary.

Depending on the nature of the operation, data fields that are not relevant do not appear. Monitors are able to navigate the PWA easily and certain operational data is pre-filled by the FAR. The screen layouts allow monitors to move easily around their report in any order and to review its contents before submission. Screens allow monitors to click on "information buttons" that contain checklists to get specific guidance about each field.

Below are the main steps:

- ♦ Prior to the monitoring mission, the monitor logs on to the reporting system and uses their mission ID to access the report file and to review the Operation Identity, Monitors and Planned Itinerary sections of the Overview. If monitor plans to use a tablet off-line during the mission to complete their report, the monitor logs in using their tablet and uses their mission ID to access the draft report and downloads it onto the mobile application.<sup>195</sup>
- ♦ After the mission, there are two ways to submit the report:
  1. Monitor who has not started a draft report in the PWA on a tablet logs in to the central reporting system and completes their draft report.
  2. Monitor who has started a draft report in the reporting application connects the application to the central reporting system and uploads their draft. They then complete their draft by logging in to the central system through a browser on their desktop computer.

### Submission of monitoring reports

- ♦ Monitors submit their monitoring report via the PWA within 14 days of the end of the operation (or as quickly as possible if monitor(s) grade(s) their reports as URGENT<sup>196</sup> or within 48 hrs where the FRO requests an urgent report – see further below).
- ♦ The report enters the reporting system (case management application of the FRO) which produces a basic output report<sup>197</sup> in the form of a locked Word document. The

<sup>195</sup> Where there is co-monitoring, just one monitor logs in. The monitors share the same report file. Both can draft it on-line to compose the draft report, but not simultaneously.

<sup>196</sup> Any serious incident caused by an action or failure to act by a person, or by force of nature, which directly or indirectly involves Frontex participants that occur during the course of a Frontex-coordinated return operation, are to be reported. The monitor reports through their monitoring report; any other participants via other appropriate channels such as the Frontex Serious Incident Report (SIR) system.

<sup>197</sup> This is to contain all of the information submitted by the monitor(s), in a compact, readable format.

basic output report is then sent by the system as an attachment via e-mail to an initial distribution list. The list includes the FRO, the Frontex Executive Director and the ECRet Division (Frontex Joint Return Coordination Centre – FJRCC) in line with Article 50(5) of Regulation (EU) 2019/1896. The basic output report is also sent to the monitor(s) who submitted the report as well as the National Preventive Mechanism(s) and national monitoring body/ies of the Member State(s) monitored.

- ♦ The report is automatically uploaded in the FAR system, to enable access by the competent national authorities of all the Member States involved in a particular operation.
- ♦ The FRO uses their case management application (central system with a database) to monitor submissions of reports.
- ♦ If the FRO receives a Serious Incident Report (SIR)<sup>198</sup> or complaint regarding a return operation, it contacts the monitor and can ask them to submit their report within 48<sup>199</sup> hours.

#### Follow-up to reports

- ♦ The FRO takes account of the monitor's recommendations in formulating their own official recommendations to other Frontex entities and to the Member States concerned.
- ♦ Every six months, the FRO does an analysis of the observations from return operations from the previous six months. They examine cases where there are issues of concern, especially those covering multiple operations that may indicate systemic failings. The FRO observations form part of the six-monthly evaluation report sent by the Executive Director to the EU Parliament, Council, Commission and the Management Board of Frontex.
- ♦ The FRO presents its findings to the Management Board of Frontex and the Advisory Board of the Pool.
- ♦ The FRO emails its observations to all Pool monitors as well as to the NFPOCs of the Member States/competent authorities.

<sup>198</sup> A Serious Incident (SI) is an event, caused by an action or failure to act by a person, or by force of nature, which directly or indirectly involves Frontex participants or assets and which:

- Entails a potential violation of EU or international law, in particular related to Fundamental Rights and international protection obligations, and/or
- Involves a potential violation of the Frontex Codes of Conduct (CoCs), and/or
- Has serious actual or potential negative implications on Frontex's tasks or activities and/or
- Has a serious potential life-changing impact on a participant's health.

In the event of a serious incident, the OMS escort leader reports it to the national Crisis Focal Point which activates the Serious Incident Reporting (SIR) procedure by informing the Frontex Situation Centre (FSC) and the Frontex Operational Team. A call is made to the Senior Duty Officer of the FCS within 2 hours of knowing about the incident and in writing within 48 hours using the SIR template which is sent to the FSC [fsc@frontex.europa.eu](mailto:fsc@frontex.europa.eu) copied to [FJRCC@frontex.europa.eu](mailto:FJRCC@frontex.europa.eu).

Fundamental rights violations are reported as category 1 (situations of potential violations of fundamental rights or international protection obligations) and are directly submitted to the FRO (direct reporting channel to the FRO). This means that the FRO is the main responsible to handle such SIRs. When the FRO starts their investigation they identify the responsible actor(s) and gather all the facts. To close the SIR, the FRO produces a final report and introduces recommendations.

<sup>199</sup> Same time limit as for Serious Incident Reports.

### 4.3 Formulation of recommendations

Recommendations should be drawn from the operation and should be supported by the facts (evidence) about the incident that occurred or the problem that was observed. When making recommendations, the monitor must explain why they are making the recommendation and what it relates to. Wherever relevant, these recommendations should indicate the relevant stakeholders, they are addressed to e.g. recommendations for the return enforcing authority; recommendations for the escort leader (for the escorts, medical staff, interpreter, etc.).

Recommendations should seek to propose specific solutions. They should follow on logically from the monitoring report and should be specific, measurable, and achievable. They should propose how a given situation/problem could be improved by suggesting an alternative action that could be taken. If the monitor identifies actions/procedures that are not currently being followed or permitted in a particular country, laws or policies that might need amending or where a country is not abiding by regional or international laws it has ratified, they should point these out. Similarly, they should put forward any recommendations regarding additional or new practices or safeguards that could improve fundamental rights protection.

# **Annexes**





# Monitoring Forced Returns – A Short Guide to Note-Taking

## Your (paper) notebook

Monitors are advised to use a notebook with a **hard protective cover** (a hard cover also makes it easier to take notes) with **pages that are sewn in**, so that they do not fall out and cannot easily be removed. Ideally, the **pages of the notebook should also be numbered**. If the notebook does not have page numbers pre-printed, it is advisable to number them before the start of the forced-return operation.

As the notebook is a primary source of evidence and may be needed if there is an investigation, it is important to **keep it somewhere secure**.

## Your notes

The following advice is designed to make note-taking easier for monitors and to make the notes easier to use when the report is being drafted after the mission:

3. Make sure you understand the **reporting format**.
4. Start the notes for each operation you participate in on a new page and write the **name and date of the operation** at the top.
5. Keep the first page to record the **names of the officials involved in the operation**. It is good practice to ask officials to write their names on this page, so that you have the correct spelling. Alongside each name, add their role, e.g. "doctor".<sup>200</sup>
6. Keep the next page to record **returnee numbers** broken down by country.
7. From the third page onwards, make **timed notes**, starting with the exact time on your wristwatch. This should remain set to the time zone where the operation started throughout the entire operation.
8. Make your notes in the **language you are most comfortable with**; they do not have to be in English.
9. For speed, use whatever **abbreviations** you would normally use when you make notes, provided that you can read and understand them afterwards when you are drafting your report.
10. If you observe the **use of force or restraints**, you should make a quick sketch immediately after observing the incident, annotating the sketch to show the position/s of the returnee/s and the escort/s and what each/all of them were doing. This will make it easier for you to accurately describe the incident in your report.

<sup>200</sup> In the report, remember not to include personal data about any of the officials or returnees such as their names.

1. Even if the operation is going well and things are calm, you should **continuously observe** the returnees and everything that is happening around them.
2. At intervals, you should note down **examples of good practices**, e.g. escorts answering returnees' questions. This is evidence of the overall conduct of the operation.
3. After the operation is over, do **not alter or erase any** notes.

# Monitoring Forced Returns – A Short Guide to Reporting

## Debriefing

Monitors should participate in the debriefing<sup>201</sup> during which they should:

- ♦ Note who was present at the debriefing, what time it was held and where.
- ♦ Provide a brief account to the escort leader and other participants of their main findings and observations, in particular any incidents that occurred during the operation.
- ♦ Inform the escort leader about any incidents that they will mention in their report and that need to be followed up by the authorities.<sup>202</sup>

## Drafting the Report

When drafting the report, monitors should:

- ♦ Include the same **findings/observations** in the report as addressed during the debriefing;
- ♦ Only include **facts**. If the information is not first-hand, they should state the source of the information;
- ♦ Use **appropriate language** i.e. language that is neutral and impartial;
- ♦ Avoid reporting in the first person "I" and instead **write in the third person** since the returnees and escorts should be the focus of the report at all times;
- ♦ **Verify the information** included in the report, even if this takes time after the forced-return operation, particularly if there are details you are not sure of or need to check with others involved in the return operation such as an official or a fellow monitor;
- ♦ Indicate whether the **preparation of the mission** was sufficient or if any challenges were encountered during the preparation, what the challenges were and how the escorts dealt with them;
- ♦ Include any **complaint** made by a returnee against any alleged ill-treatment by an official that took place during the operation;
- ♦ Reflect in the **summary** of the report, your main findings, using precise terminology. Make sure your information is factually correct and highlight any incidents or particular problems;

<sup>201</sup> Normally conducted on the aircraft during the return leg. The debriefing may also take place following arrival in the country of departure.

<sup>202</sup> Feedback provided by the escort leader, if any, should be mentioned objectively in the monitor's monitoring report.

- ◆ Provide **recommendations** drawn from the operation that are backed up the details (evidence) of the incident or problem you observed, including examples of both **good practices** to be shared and bad practices that need to be addressed. Always indicate who these recommendations, or a particular recommendation, are addressed to where relevant.

### Main principles

Monitors should respect the principles of accuracy, confidentiality, impartiality, and non-discrimination at all times **before, during, and after the forced-return operation**.

**Accuracy:** Make a clear distinction between facts and allegations by either cross-checking the information provided or ensuring the full factual account of the different parties within the report. In the reports, be as precise and concise as possible, while at the same time ensuring that all the relevant details have been included to establish whether or not fundamental rights and/or procedures have been observed or violated.

**Confidentiality:** Not to disclose to any other party any information gained in the course of fulfilling monitoring obligations other than those clearly stated in Article 50(5) of Regulation (EU) 2019/1896, that is: the Executive Director of Frontex; the Fundamental Rights Officer of Frontex; and the competent national authorities of the Member States involved in the return operation. The latter is done automatically via the Frontex Application for Return (FAR).

**Impartiality and non-discrimination:** It is not appropriate to include personal opinions in the report about the general conduct and implementation of a forced return or return decisions. All data should be properly documented and all accounts should be stated without prejudice and/or discrimination towards anyone based on their sex, nationality, religion, and/or role within the forced-return operation.

# The Rights of Children Returned with their Family During Forced-Return Operations Coordinated by Frontex – A Draft Checklist for Forced- Return Monitors

## Background

A child is any person below the age of 18.

Article 3(1) of the UN Convention on the Rights of the Child ratified by all EU Member States, states that *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*<sup>203</sup>

In line with this principle, Article 24(2) of the EU Charter of Fundamental Rights establishes that *“ [i]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”*<sup>204</sup>

Article 80(3) of the European Border and Coast Guard Regulation requires that the Agency *“shall in all its activities pay particular attention to children’s rights and ensure that the best interests of the child are respected.”*<sup>205</sup>

In any return operation coordinated by Frontex, children are accompanied by their parent/s or by a primary caregiver.

## Checklist

### 1. Information gathering

Prior to the forced-return operation, the monitor should gather relevant information about the operation from:

- The Implementation Plan (IP);
- The national factsheets on forced-returns and forced-return monitoring available to the Pool of forced-return monitors via the communication platform on the Frontex One-Stop-Shop(FOSS);<sup>206</sup>

<sup>203</sup> <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>204</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

<sup>205</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573722151667&uri=CELEX:32019R1896>.

<sup>206</sup> The Agency’s platform for sharing information with Member States, Schengen-associated countries and other designated parties.

- The list of passengers (PAX), where available.

## **2. Briefing before the forced-return operation**

During the briefing, the monitor should check that:

- Escort officers have carried out the necessary risk and vulnerability assessments;
- Officers assigned to the return operation have been trained in child protection and communication with children;
- The escort leader has organised the seating-plan and embarkation procedure in a way that ensures families are separate from other returnees;
- The time of day that families with children were picked up by the authorities was taken into account, avoiding the middle of the night or early morning;
- Other specific needs, such as school terms, conclusion of exams etc., are respected in accordance with the best interests of the child;
- The children and their parents have all the documents, including birth certificates, health records and school certificates they will need for their return;
- Whether there were any incidents when families were initially picked up that could negatively affect the children's well-being, requiring extra care and attention.

## **3. Participants involved in the forced-return operation<sup>207</sup>**

The monitor should observe that throughout the entire return operation:

- Escort officers wear civilian clothing, and are easily identifiable;
- Escort officers include specialists trained in children's rights and child protection;
- There is a balance of male and female escort officers;
- A social worker or psychologist is present as required, who interacts with the children and their families;
- A continuum of care is maintained the entire return operation.

## **4. Communication and the right to information**

The monitor should observe that throughout the entire return operation, escort officers ensure that parents and children understand what is going on, and that the whole process runs as intended and in keeping with the best interests of the child. Specifically, monitors should verify that:

<sup>207</sup> The term 'participant' means any person, including escorts, monitors, interpreters and medical staff taking part in a return operation or return intervention, other than the returnee (see Article 3(b) of the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex (2018).

- All participants communicate clearly and in a manner that is culturally appropriate, informal, and suitable to the level of maturity of the child;
- Children receive comprehensive information about what is happening and what is going to happen next in a way they are able to understand;
- Escort officers and other participants are friendly, polite, attentive to the needs of the child and contribute to creating a relaxed atmosphere;
- Children are allowed to ask questions and clarify the information that has been given to them;
- Escort officers, social workers and other participants provide information in a language that the children understand and check that the children have accurately understood the information that has been given to them;
- Escort officers and other participants do not use the children as interpreters to facilitate communication with parents or other returnees;
- The parents' wish to inform the children themselves is respected while ensuring that escort officers check that parents are passing on the necessary information and support them in sharing information with their children;
- Complaint forms about the return process itself are accessible to both parents and children; that they are adapted into a format and language that is child-friendly and explain what the complaints mechanism is and how to present and submit a complaint.

## **5. General conditions**

The monitor should establish that:

- Escort officers and other participants assess the particular needs of each child on an individual basis, including possibilities for them to play or ask questions;
- Escort officers make adequate food and water available at frequent intervals throughout the return operation;
- Children are allowed to keep their own belongings, such as their bottles, small toys or mementos;
- Breastfeeding is allowed and that the opportunity to breastfeed in private is offered whenever possible;
- Adequate special care for families with smaller children and babies is provided, including diapers, baby food, and heating for bottles.

## **6. Waiting area**

The monitor should verify that:

- The security check is carried out in a culturally-, gender-, and age-sensitive manner and as far as possible, with the cooperation of the parents;

- A separate waiting area and lavatory is designated for families with children whenever possible;
- Children are allowed to play, and if possible, a children's play area is set up with a sufficient number of toys that are culturally appropriate and suitable for both boys and girls.

#### **7. Incidents, use of force and means of restraint**

The monitor should observe that:

- Children are not separated from their family unless it is in their best interest;
- Escort officers assisted by a social worker or psychologist, as agreed, intervene to take care of children in cases where parents are unable to do so;
- When separation from the parents is deemed to be in the best interests of the child, it is carried out in a manner that minimises the child's stress, is done for as short a time as possible and the reasons are explained to the child in a child-sensitive way by the escort officers assisted by a social worker or psychologist, as agreed;
- The necessity of continuing to separate the children from their family is constantly reviewed on the basis of an ongoing risk assessment carried out by the escort leader;
- Children do not witness the use of force or situations where means of restraint are used against parents, family members or other adults, unless it is unavoidable. In such case, the escort officers assisted by a social worker or psychologist, as agreed, explain the reasons in a child-sensitive way;
- Children are kept at a distance from aggressive returnees;
- Escort officers employ all possible de-escalation techniques to avoid any use of force or means of restraint against children. The use of force or means of restraint against children is prohibited other than in highly exceptional cases and only to prevent the child from harming themselves or another person;
- The principles of legality, necessity and proportionality are respected.





# Forced-Return Monitoring. Background Reader

**September 2021**

The Background Reader was elaborated within the framework of the EU funded projects “Forced-Return Monitoring II” (FReM II) and “Forced-Return Monitoring III” (FReM III). The projects were implemented from September 2016 until December 2021 by the International Centre for Migration Policy Development (ICMPD) in co-operation with 22 partner states, the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Fundamental Rights (FRA).

The main target group of the Background Reader are forced-return monitors from the pool of forced-return monitors (Pool), established through of the European Border and Coast Guard Regulation. It also targets trainers and experts that conduct the course for forced-return monitors for monitors of the Pool. The Background Reader contains the necessary content that the course should convey.

An integral part of the continuous enlargement of the Pool is to ensure quality training for forced-return monitors that is in accordance with all return and monitoring related legislation, guidelines and procedures. The Background Reader was elaborated in line with this requirement, covering all the topics that are most relevant for the training of forced-return monitors of the Pool.