

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by email)

Mr. P. Nikiforos Diamandouros
European Ombudsman
1 avenue du Président Robert Schuman
CS 30403
F-67001 Strasbourg Cedex, France

Reference

CM1217

Regarding

Public consultation on Frontex and fundamental rights

Date

26 September 2012

Dear Mr. P. Nikiforos Diamandouros,

In response to your invitation to submit comments for your ongoing inquiry into the EU Borders Agency Frontex, the Meijers Committee wishes to make the following remarks.

Frontex and Human Rights

Ever since the establishment of Frontex, the Meijers Committee has expressed its concerns on Frontex' relationship with fundamental rights (See our letters CM0710 and CM08007 on our website, www.commissie-meijers.nl). In particular, our Committee has stressed that border operations coordinated by Frontex must take place under clear legal parameters and operational guidelines that guarantee compliance with fundamental rights, including protection from *refoulement*, safeguards against arbitrary arrest and detention and access to justice. The development of such a framework is especially salient in respect of maritime controls, since the current rules applicable to these controls continue to suffer from gaps and inconsistencies.

In its response to your questions, Frontex underlines the development of its fundamental rights strategy and notes the improvements of the revised Frontex regulation in that respect. Although the Meijers Committee welcomes these changes, it is of the opinion that the human rights vulnerability of the Agency not only depends on the individual conduct of border guards and other officers, but stems, more fundamentally, from the highly contested political and legal environment in which the Agency operates. It is very doubtful therefore, whether such improvements as a fundamental rights officer, a consultative forum or the Frontex code of conduct should be expected to effectively address the many human rights concerns that were raised by stakeholders. In the view of the Meijers Committee, legislative changes should not only be pursued within the Frontex regulation and internal rules of the Agency, but should also address the obligations of the Member States taking part in Frontex-coordinated operations, in particular in the context of Frontex Operational Plans and the Schengen Borders Code.

For your inquiry, the Meijers Committee would like to refer to two recent judgments by the European Court of Human Rights and the EU Court of Justice.

The judgments ECtHR *Hirsi Jamaa et al. v. Italy* and Case C-355/10, *European Parliament v. Council*, annulment of Decision 2010/252/EU

The *Hirsi* judgment (23 February 2012, appl.no. 27765/09) of the European Court of Human Rights (Grand Chamber) has strongly condemned interdiction practises conducted by an EU Member

State, Italy, on the basis of bilateral agreements with a third State (Libya) as in clear contrast with several provisions of the system of the European Convention of Human Rights. In particular, the Strasbourg Court has recognized that interceptions and push-back operations carried out in the high seas or even territorial waters of third states:

- constitutes exercise of jurisdiction for the purposes of Article 1 of the ECtHR,
- breach Article 3 ECtHR, exposing persons at the risks of inhuman and degrading treatments in Libya, as well as the risk of arbitrary repatriation to Eritrea and Somalia,
- violate Article 4 of Protocol No. 4 of the ECtHR, prohibiting collective expulsion of aliens,
- breach Article 13 of the ECtHR, read *juncto* with Article 4 of Protocol No. 4, for the lack of a remedy –having suspensive effects- at national level to enforce the substance of the Convention rights.

The first merit of the judgment is to clarify ECtHR obligations binding an EU member state in the framework of operations allegedly aiming at combating illegal immigration and conducted alongside EU coordinated border surveillance operations (Frontex JO Poseidon); at another level, the judgment has exposed the flaws in Union law in this respect. The Strasbourg Court underlined that interceptions at sea must be accompanied by clear procedural safeguards in terms of access to the asylum system and judicial review.

At the Union level, Council Decision 2010/252/EU was an attempt to bring clarity in the competences and obligations of Member States in the context of maritime controls. That decision has however been annulled by the CJEU in its recent judgment in Case C-355/10 because only the European Union legislature was entitled to adopt such a decision. Importantly, the Court left open the question whether that Decision amended the essential elements of the Schengen Borders Code and the Frontex Regulation. This question is particularly salient, since the Schengen Borders Code contains essential safeguards for persons who are subjected to border controls. The Decision, however, failed to spell out any procedural safeguards accompanying the interception measures enumerated in the Decision, including such intrusive measures as the apprehension of migrants and the handing over of the ships and persons on board to a third country. How these measures relate to the guarantees on refusal of entry in the Schengen Borders Code or guarantees on detention in EU directives on asylum and return is unclear. In light of the *Hirsi* judgment, any new instrument replacing that Decision should lay down clear procedural guarantees that protect against the arbitrary implementation of such measures or refer to existing guarantees under EU law. While waiting for a new instrument replacing Decision 2010/252/EU, compliance of the EU' fundamental rights framework by FRONTEX should be ensured embracing a teleological interpretation of the legislation in place as well as adopting operational guidelines incorporating the substance of rights, as clearly spelled out also by the Strasbourg Court.

Frontex Operational Plans

The Meijers Committee would like to make the same recommendation in respect of Frontex Operational Plans. The manner in which these plans are drafted is of crucial nature for ensuring that the operations take account of relevant human rights concerns. According to the Frontex regulation, these plans set forth the operational aim, the geographical area where the operation is conducted, the tasks and instructions of guest officers, command and control provisions and, in respect of sea operations, the relevant jurisdiction and legislation in the geographical area where the joint operation takes place. The Frontex regulation does however not stipulate that these plans also set forth appropriate human rights guarantees. There may therefore be an essential tension between the practical instructions given to border guards and their duty to comply with fundamental rights. Due to the confidential nature of Operational Plans, it is impossible to verify whether the instructions laid down therein sufficiently guarantee against arbitrary removals, arbitrary arrest or ensure access to justice. Moreover, since such human rights guarantees must, according to the case law of the European Court of Human Rights, be "in accordance with the law" and therefore be

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"accessible and foreseeable", it is anyhow paramount that clear human rights safeguards for maritime controls in respect of issues as *inter alia* disembarkation, return, refusals of entry, the questioning of migrants on board, the seizing of ships and arrest of migrants, are laid down in a legislative EU instrument (ECtHR, 16 April 1979, *Sunday Times v. United Kingdom*, no. 6538/74). Meanwhile, the compliance of Operational Plans and more generally FRONTEX' actions with EU fundamental rights framework should be ensured via accountability mechanisms.

Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. mr. C.A. Groenendijk
chairman