



Red Cross / EU Office
Bureau Croix-Rouge / UE

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

COMMENTS OF THE NATIONAL RED CROSS SOCIETIES OF THE MEMBER STATES OF THE EUROPEAN UNION AND OF THE INTERNATIONAL FEDERATION OF THE RED CROSS AND RED CRESCENT SOCIETIES ON THE ENQUIRY CONCERNING FRONTEX¹

28 September 2012

Dear P. Nikiforos Diamandouros,

The National Red Cross Societies of the Member States of the European Union and the International Federation of the Red Cross and Red Crescent Societies welcome the public consultation on FRONTEX and Fundamental Rights as it allows us to bring to the fore our humanitarian point of view and concerns in relation to the activities of the EU Borders Agency, FRONTEX and their impact on the vulnerability of migrants.

As National Red Cross Societies, we are part of the International Red Cross and Red Crescent Movement - the world's largest humanitarian organisation - and are committed to address the needs and vulnerabilities of all migrants in order to protect, support and assist them. We promote respect for their rights and needs, regardless of their status, and deliver needs-based services. We support the implementation of Resolution 3 of the 31st International Conference of the Red Cross and Red Crescent Movement in which 176 governments pledged to ensure that migrants, irrespective of their legal status, have access to the support that they need and that they are treated at all times with respect and dignity.² You will note from part 2 of the Resolution that governments have agreed to ensure that their "*national procedures at international borders, especially those that might result in denial of access to international protection, deportation or interdiction of persons, include adequate safeguards to protect the dignity and ensure the safety of all migrants*" and to grant to migrants appropriate international protection and their access to relevant services. The Resolution also recalls that States should "*ensure that relevant laws and procedures are in place to enable National Societies to enjoy effective and safe access to all migrants*", in order to deliver humanitarian assistance and protection services.

We are highly supportive of the European Ombudsman's enquiry concerning FRONTEX and the implementation of its Fundamental Rights obligations as it allows gaining a better knowledge regarding the management of the EU's external borders and identifying ways to give effect in particular to part 2 of the Resolution. In the context of the management of the external borders of the EU, we have previously raised concerns with regards to the possibility for migrants to access international protection, the respect for the dignity of migrants and the effective prevention of inhuman and degrading treatment.³

Safeguarding the right to seek asylum and effectively preventing refoulement constitute essential dimensions brought up by FRONTEX operations and pilot projects. Attempts to prevent irregular entry of third country

¹ The relevant elements provided by FRONTEX and referred to in this document are available on the Ombudsman website: <http://www.ombudsman.europa.eu/en/press/release.faces/en/11765/html.bookmark>. For more information please contact: migration@redcross-eu.net

² 31st International Conference of the Red Cross and Red Crescent, '*Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion*', Resolution, 31IC/11/R3.

³ *Position paper on the right to access to international protection*, recommendation of the national Red Cross societies of the member states of the European Union and the International Federation of Red Cross and Red Crescent Societies, 17 November 2011.

nationals to the EU have led to situations in which considerations of border protection and crime prevention have repeatedly prevailed over humanitarian and human rights concerns, thereby leading to situations where access to international protection is denied and the human rights of vulnerable migrants are violated.⁴ The implementation of the FRONTEX Fundamental Rights Strategy should guarantee that its activities will neither contribute to deporting or returning persons to territories where they may face persecution, torture or arbitrary violations of the right to life or irreparable harm nor prevent individuals from accessing a fair asylum procedure during which individual claims to international protection are appropriately assessed. We would like to stress that migrants arriving at or travelling towards borders must be treated as individuals with specific needs, vulnerabilities and rights, including the right to seek asylum. In particular, the FRONTEX Fundamental Rights Strategy should in our view clarify that border management agreements with third states can only be signed and implemented if strictly compliant with fundamental rights.⁵ Such agreements and arrangements must never be designed or implemented in a way which deliberately or by accident leads to lowering the human rights standards of the EU or in any way inhibit the right to seek asylum. In order to enhance transparency, it should be mandatory to involve the European Parliament in the negotiations between FRONTEX and third countries.

We welcome FRONTEX's detailed response to the Ombudsman's specific questions. Such exchange of information should take place on a regular basis so as to assess the ways in which FRONTEX's Fundamental Rights Strategy is implemented over time and which effects it will have on the ground. We welcome the establishment of a Code of Conduct based on the rule of law and the respect of fundamental rights and are satisfied to see that the right to international protection figures prominently therein. We particularly appreciate that this Code of Conduct will be amended on the basis of the comments voiced by the FRONTEX Consultative Forum on Fundamental Rights in which the Red Cross/EU office has been invited to take part. We however regret that the FRONTEX Fundamental Rights Strategy is not **legally binding** and we strongly encourage establishing effective and transparent mechanisms to ensure implementation. We take note of the zero tolerance policy FRONTEX wishes to pursue and its intention to follow up on infringements of the Code of Conduct with disciplinary measures as far as its own staff are concerned but regret that **sanctions** applicable to other participants to FRONTEX operations are not detailed.⁶

The National Red Cross Societies of the Member States of the European Union and the International Federation of the Red Cross and Red Crescent Societies are aware that FRONTEX's primary task is to coordinate the cooperation of the EU member states and Schengen associated countries.⁷ Yet in view of the wide range of parties involved in such operations, we recommend that the **allocation of responsibility** for each aspect of these be clearly set out during their design in order to guarantee accountability. This requires in particular clarification of who can be held accountable for any fundamental rights breaches and of where to disembark migrants intercepted at sea.

The consistency of FRONTEX operations with the EU Charter of Fundamental rights and the relevant international and EU law framework including the Schengen Borders Code⁸ and the Return Directive⁹ needs to be subject to an independent and effective monitoring and review. The responsibility to assess whether an incident may possibly be causing or have caused violations of fundamental rights should not be left to the exclusive appreciation of FRONTEX or operational participants.¹⁰ We recommend that independent and effective monitoring and **complaint mechanisms**¹¹ be put in place subject to obligation of transparency and involving external watchdogs such as the European Parliament. In particular, an effective complaint

⁴ Refer for instance to Fundamental Rights Agency, Coping with a fundamental rights emergency – the situation of persons crossing the Greek land border in an irregular manner, March 2011, p. 20.

⁵ See point 28 and 29 of the Fundamental Rights Strategy.

⁶ Article 23 of the Code of Conduct, Fundamental Rights Strategy point 32.

⁷ See FRONTEX's response to the Ombudsman question regarding the inclusion of a complaints mechanism for persons affected by FRONTEX activities, p. 2 of Annex 1.

⁸ Regulation No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, 13.4.2006.

⁹ 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, OJ L 348, 24.12.2008.

¹⁰ See FRONTEX's response to the Ombudsman question regarding the establishment of a mechanism by which persons claiming to be affected and/or other persons may complain to FRONTEX about violations of fundamental rights, p. 10 of Annex 1.

¹¹ As foreseen in article 13 of the EU Charter of Fundamental Rights.

mechanism would require that FRONTEX delivers a deportation order to returned persons specifying existing remedy mechanism to challenge the decision.¹²

With regard to FRONTEX's involvement in return operations, we would like to remind that return should take place in safe and dignified conditions, in full respect for the human rights and dignity of those affected and in compliance with international law principles and more specifically the principle of non-refoulement.¹³ In this context, return operations should only take place after it has been ascertained that every migrant has been given the opportunity to assert her/his individual claims through adequate procedures and only if the situation in the country of return complies with human rights. In this respect, we would welcome the inclusion in the Fundamental Rights Strategy of a specific mechanism for ensuring that chain refoulement is prevented. We would further like to underline that voluntary return should always have priority over forced return. The content of the upcoming Code of Conduct for return activities in particular the operation of a return monitoring mechanism¹⁴ should be the result of a participatory consultation process with key stakeholders including Civil Society Organisations gathered for instance within the FRONTEX Consultative Forum on Fundamental Rights.

We would also like to draw your attention to the role of FRONTEX in collecting personal data. Currently, the Fundamental Rights Strategy does not contain any specification as to the use of the data collected in particular with regards to potential transfer to third parties such as EUROPOL or the authorities of third countries. We are particularly concerned about the consequences this may have on the right of everyone to leave any country, including his own and on the right to seek asylum.

The nature of FRONTEX activities implies that this agency is a key player in managing the movements across borders particularly in the Mediterranean Sea. Over the past year, an increasing number of migrants have lost their lives in this region of the world. We commend all rescuers who have been carrying out their operations in extremely difficult conditions but believe that more needs to be done. Therefore we urge that FRONTEX Fundamental Rights Strategy includes specific guidelines to deal with situations of distress in order to ensure that all necessary measures are taken to prevent further loss of lives of vulnerable people. Equally, the suffering of family members who remain behind without any news regarding the fate of their beloved ones should not be forgotten. Any information on persons who have lost their lives while crossing borders should be shared with relevant authorities in order to provide meaningful answers to families.

We thank you for your attention and thank you once again for having given us this opportunity.

¹² As called for in the Jesuit Refugee Service's response to the Ombudsman enquiry, 2 August 2012.

¹³ As mentioned in Article 1(2) of the amended FRONTEX regulation.

¹⁴ 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, OJ L 348, 24.12.2008, article 8(6).