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WEISKORN Michael

From: Paolo Biondi [REDACTED]
Sent: 10 September 2012 16:17
To: DERKACZ Marcin
Subject: RE: European Ombudsman own-initiative inquiry into implementation of its fundamental rights obligations by Frontex

Attachments: Contribution.docx

Dear Mr. Derkacz,

Please find attached the updated version of my contribution.

The contribution does not contain any confidential information therefore can be published with my name and surname.

Best regards

Paolo Biondi

Under the Lisbon Treaty, the Charter of Fundamental Rights acquired legally binding status, henceforth Frontex is subjected to the Charter and can be called upon to account for its actions before the Court of Justice of the European Union (CJEU) with respect to reviewing legality, actions for failure to act (Article 265) and preliminary rulings concerning the validity of acts (Article 267). The Court now has jurisdiction expanded to give preliminary rulings on matters relating to asylum, visas and immigration, but its jurisdiction do not cover the responsibility of agencies, hence Frontex can not be called in front of the court for failure to act in accordance, for instance, with respect to fundamental rights.

Frontex as many other EU organizations has a Fundamental Rights Strategy on paper but nothing is planned to be implemented anytime soon in a concrete way. Without mentioning the single cases in which Frontex have been involved in the past, directly or indirectly, right now the agency has been given by the EU the unique role of keeping migrants out of its borders. Such facts' allegation represents nothing new to those dealing with the matter but given a number of factual proofs, it represent an uncontested reality and for this reason the operate of the agency should be monitored by a fully independent body and not by a Fundamental Rights Officer, as it has been planed so far.

Frontex, in accordance with the newly approved regulation, has gained more autonomy from the Member States and it has seen its budget increased as any other agency in the EU, even if in such general economic constraint. Its budget reached almost 100 millions of euro, and still according to the regulation it has been given a great autonomy and even the possibility to stipulate agreements on the control of the borders with States neighbouring the EU. We can foreseen, due to the current situation, that one of these agreements will be soon probably signed with Turkey and it will eventually include also checking points at the airports, along the borders with Greece and on the high sea. Considering the actual situation in Syria, Turkey and Greece and the crisis in the middle east, this will lead to a big number of refuse of entries in the EU, even to potential or already declared refugees and asylum seekers. The status of the EU officers at the EU external borders, especially in non-EU countries, is not regulated by the international law and it is in a developing phase, according also to the Hirsi vs. Italy case whose interpretative meaning, supported by ECHR's law case, could lead to positive developments in this context.

Frontex is also part of a bigger framework, which includes the EASO agency and the new EUROSUR system currently under discussion in Brussels. EASO has a minor role, since the agency is newly created and will not be able to be concrete in its external dimension anytime soon, considering also its little budget due to the recent EU austerity measures. EASO's little role is also due to the fact that the actual policy of the EU is more directed in preventing entries than managing them within its borders. At the same time EASO does not have any preventive role and it is still slowly trying to become a relevant actor in the EU external dimension. (This role currently is totally delegated to Frontex)

On the other side, the EUROSUR system is supposed to serve different roles but the main one will be preventive of migrants' landings. The EUROSUR will be also at Frontex disposal making out of it a dangerous instrument, if not used in accordance with the EU Fundamental Rights Policy. It will mostly help to prevent departures from the neighbouring countries' coasts but it will not give any contribution to the save of life at sea as recently stated in Brussels, since maritime rescue operation are not part of the EUROSUR system and board guards will not have any access to the information collected by the system.

Frontex in the recent times is also developing an improved communication strategy which compared to the past should keep it far from the public discussion, critic and scrutiny as much as possible and try to show its operate as crystal and clear. Having a scrutiny on its operate will become harder and harder because the EU, through the Frontex external activities, will put in place an "effective" push back strategy and we will probably assist to less attempts to take the sea by migrants departing from the neighbour countries to the EU. This will lead to a greater violation of human rights, especially the right to leave one's own country. The deployment by FRONTEX of operations in the territorial waters of third countries, poses serious risks also in terms of respect for the principles laid down in Art. 13.2 UDHR and Art.

12.2 ICCPR.

All these arguments contextualised can clearly indicate that it is all in the Frontex interest to show its activity as in line with international human rights law, but at the same time also demonstrates that the Frontex strategy for the future is strongly against the latter law and that little is being done to change the current dramatic situation in the Mediterranean sea. Due to the little development of the international law in the recent years, especially the one concerning the extraterritorial application of the EU law, it will be difficult to demonstrate that Frontex is failing in its promises to act in line with the human rights and the Geneva Refugee Convention will see declassified its authoritative role.

A positive development in the direction of limiting Frontex activities at the external borders, can be the CJEU's ruling of 5 September 2012 with whom the Court annuls Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex.

In the latter ruling the Court, among the other things, notes that the powers conferred to Frontex, in the contested Code, has as result that the fundamental rights of the persons concerned by its activities may be interfered with to such an extent that the involvement of the European Union legislature is required. This means that the comitology procedure adopted by the Commission to apply such a Border Code, lacked of legislative authority and needs to pass through the scrutiny of the European Parliament before being eventually approved.

The negative outcome of the ruling is that currently Malta is considering to resume hosting Frontex migration patrols in the central Mediterranean which will lead to a more increased control on the refugees flowing from Libya. This added to the Frontex cooperation with Spain on the West African coasts of Mauritania, Morocco and Algeria, the Italian cooperation with Frontex and Libya and the new Frontex operation in Greece at the borders with Turkey, will lead to a complete Frontex control on any departure point to the EU on the Mediterranean sea.