



27 September 2012

Re: Reply to the Ombudsman's request for submission – Frontex's fundamental rights strategy

Dear Professor Diamandouros,

We write to you following your call for a submission with regard to Frontex's reply to your enquiry on the Agency's fundamental rights strategy. This is a joint submission by Statewatch and Migreurop.

Statewatch monitors civil liberties and fundamental rights in the European Union and has, over more than 20 years, documented and analysed legal and political developments in the field of Justice and Home Affairs. Statewatch has been particularly involved in monitoring the development of the EU's border management and migration policies, including the establishment of Frontex. An observatory has been created where documentation regarding the Agency is available (www.statewatch.org/frontex).

Migreurop is a Euro-African network bringing together 43 NGOs and individual members. Since its establishment in 2005, the organisation has reported on the externalisation of EU migration policies and its impacts on fundamental rights, as well as on the detention and the deportation of migrants in Europe and beyond. Its expertise, its field knowledge and its critical analyses on EU migration and border management policies led the Green EFA parliamentary group to commission a report on the impact of Frontex activities on fundamental rights in 2010¹.

Safeguarding and promoting human rights requires Frontex's overall strategy to be geared towards preventing human rights violation during the Agency's operations.

According to several NGO reports, fundamental rights may have been violated during some Frontex activities and the adoption of a fundamental rights strategy is therefore essential. Some rights were reported to be in particular danger of being breached: protection against non-*refoulement*; the right to claim asylum; protection against inhuman and degrading treatment; the right to leave one's country; protection against collective expulsions; protection of personal data; and protection from discrimination

¹ Migreurop (2010) Frontex agency: which guarantees for human rights?
<http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>

It would be expected that Frontex's fundamental rights strategy contain effective preventive and redress mechanisms, making clear that its operational activities and their preparation (e.g. risk analyses, operational plans) will never breach fundamental rights. However, in its reply to the Ombudsman, the Agency never referred to the allegations that human rights may have been put at risk in its work and did not reflect on the serious concerns expressed by many organisations, as outlined below

Frontex safeguards are intended to ensure that officers in Frontex operations respect fundamental rights, but they do not question the human rights impact of some of the Agency's operations, although some may - by nature - put fundamental rights at risk (collection and exchange of personal data; cooperation with third countries; targeted interceptions of certain groups; forced return).

Furthermore, in saying that human rights violations cannot be anticipated or prevented and that it is not the Agency's responsibility if such violations do take place, Frontex has adopted a restrictive approach to the human rights impact of its activities, and put forward a strategy where preventive mechanisms remain weak and where redress mechanisms are absent. In so doing, Frontex seems to fall short of two of its commitments presented in its reply to the Ombudsman: a "zero tolerance policy" and the mainstreaming of fundamental rights into all Frontex activities. We thus argue that the understanding of the human rights risks in the context of Frontex operations may be underestimated and that the proposed safeguards are unsatisfactory as a result.

In view of Frontex's major role in EU's border management policy and the fundamental rights aspects at stake in the work of the agency, we therefore welcome the Ombudsman's call for a submission which allows civil society organisations to share their views, and hope this contribution will be useful in evaluating the effectiveness of Frontex's fundamental rights strategy.

1. Applicable legal framework in implementing the Charter of fundamental rights

Frontex is a European Agency bound by European law, especially the Schengen Borders Code, and the European Charter of fundamental rights. The European Court of Justice (ECJ) has jurisdiction over the legality of the Agency's acts and its respect for the European Charter of fundamental rights. Frontex stated in its reply to the Ombudsman that "*respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management*".

However, the applicability of the Charter of fundamental rights during Frontex activities lacks clarity, which directly impacts on the Agency's liability. First, despite the argument that the Code of Conduct for all persons participating in Frontex activities (hereafter "the Code of Conduct") is legally binding (see answer to Question 2 on "Codes of Conduct"), the fundamental rights strategy adopted in May 2011 refers to the Code of Conduct as "*generally accepted standards (i.e. soft law)*" [emphasis added]. Moreover, in a 2008 UN Institute for Disarmament

Research publication, the Vice-President of the Geneva International Peace Research Institute stated that “a code of conduct is not legally binding”.²

There seems to be legal uncertainty as regards the binding nature of the Code of Conduct which may prove problematic as it may be impossible to launch proceedings for human rights violations based on a breach of the Code of Conduct.

Moreover, according to article 3 of the Code of Conduct, the applicable legal framework in Frontex activities refers to “*national laws, European legislation, and international standards*”. The lack of clarity regarding the hybrid nature of Frontex, i.e. whether it is an inter-governmental body or an independent European agency, raises serious **legal issues when it comes to identifying the legal framework applicable to the implementation of the European Charter of fundamental rights**. Indeed, the interpretation of the European Charter may differ amongst Member States, except if specific ECJ case law exists in that matter. The Fundamental Rights Strategy does not clarify which specific framework is applicable during which operation. These questions remain particularly unclear when Frontex is operating in international seas or in third countries’ territorial waters or territory.

Does the national jurisprudence of the host Member State apply even for officers who come from other Member States? Does European jurisprudence apply? In particular: what degree of coercion is deemed proportionate when intercepting irregular migrants or when returning irregular migrants? What specific situations are considered inhumane or degrading? What exchange of personal data is authorised for national law enforcement officers?

Clarifying the question of the applicable jurisdiction is extremely important, all the more so as the interpretation of what qualifies as a human rights violation needs to be reviewed regularly based on jurisprudential developments.

The use of coercion (article 19) and the use of weapons (20) in Frontex activities are of particular concern in this respect. In both cases, law enforcement officers should use force and weapons only in accordance with the national law of the host Member State, “for the performance of duties **or** in legitimate self-defence or in legitimate defence of other persons” [emphasis added].

First, it is striking in the wording that coercion or weapon can be used in the performance of duties but also in other situations (“or”): this is a serious empowerment which should be justified both on the level of proportionality or necessity. Not only was the necessity of such powers not duly accounted for, but there seems to be no safeguards in the use of force when an officer would not perform his/her duties. Moreover, as explained in the 2011 study on the Ethics of Border Security commissioned by Frontex, border guards’ legal obligations with respect to the use of force and the use of weapons vary significantly. Yet, no guarantee is given in the fundamental rights strategy that law enforcement officers will be adequately informed of the applicable legislation during the operation they are part of. Finally, to which jurisdiction should an officer who is not a national of the host Member State be accountable for if coercion/weapon is used disproportionately? The need for clarification on this point is also needed when Frontex intervenes in the high seas or in the territorial seas of a third country.

² Josef Goldblat, *Treaty or code of conduct?*, in Disarmament Forum - Arms Control in the Middle East 2008 http://www.unidir.org/bdd/fiche-article.php?ref_article=2730

2. The Consultative Forum (CF) and the Fundamental Rights Officer (FRO)

The creation of the CF and the appointment of a FRO was decided less than a year ago. The European Parliament had initially proposed the establishment of an independent Advisory Board on Fundamental Rights. At the time of this submission, the recruitment process of a FRO is not completed and the inauguration meeting of the CF took place on 5 September 2012. It is therefore too soon to evaluate with certainty what the effective role of the CF and FRO will be. However, several elements raise concerns as to the alleged independence of both entities and their capacity to support Frontex in safeguarding fundamental rights.

- **Access to information**

In the original Article 26(a) proposed by the European Parliament, the Advisory Board was to access any information upon request, in particular “*the evaluation reports of the joint operations and pilot projects referred to in Article 3(4) and the Return Operation Reports referred to in Article 9(3)*”.

The adopted Article 26(a)(4) states instead:

“The Fundamental Rights Officer and the Consultative Forum shall have access to all information concerning respect for fundamental rights”.

This formulation is less explicit than the original proposal by the European Parliament, and it is unclear whether the information provided will be that which Frontex considers has to do with the respect of fundamental rights, or which the CF deems necessary to be transmitted. This concern is reinforced by that fact that the revised Regulation 2004/2007 does not include the obligation for Frontex to provide information upon the CF’s request.

It remains to be seen whether the change in the initial formulation suggested by the European Parliament will limit access to information that Frontex deems in relation to the respect for fundamental rights, or whether the CF and the FRO will be given access to all information they may need to ensure that fundamental rights are “*mainstream[ed] into all activities of Frontex*”.

- **Independence**

Contrary to the initial proposal by the European Parliament, where the Advisory Board was an independent body legally distinguished from Frontex, the FRO will be employed by Frontex and, as such, “*will be required to make a declaration of commitment to act independently in Frontex’ interest*” (point 4 of the job description) [emphasis added].

It remains to be seen whether, in practice, working in the interest of a specific entity is compatible with the principle of independence.

Besides, Frontex Management Board’s decision of 23 May 2012 states:

“Members of the Consultative Forum and their representatives, as well as other participants mentioned in Article 4 shall comply with the obligations of professional secrecy”[emphasis added].

Far from being independent, it seems that CF is attached to the same rules as any person working with Frontex. While it is understandable for operational and strategic information to

remain confidential, it is not clear how far the duty of professional secrecy should extend: to what information does professional secrecy apply (all information exchanged within the CF? some information only)? Who will decide about it (Frontex? the CF itself? the Commission)? What will be the sanction against organisations which may breach professional secrecy? What authority will have the final word in deciding whether professional secrecy has been breached?

Many of the civil society organisations in the CF have monitored and commented on fundamental rights in public reports, press releases and advocacy work. The capacity of these organisations to pursue their work and fulfil their mission should be guaranteed and no ambiguity left on their ability, including for their representatives at the CF, to publicly report on violations of fundamental rights which they may be aware of.

3. Joint operations

- **Lack of clarity regarding effective preventive mechanisms**

Article 3(a) of Regulation 2004/2007 on the establishment of Frontex lists the elements to be included in the operational plan prior to each joint operation and pilot project. This list does not mention any assessment on the impact of the operation on fundamental rights.

Frontex argues that “*violations of human rights cannot be predicted before they actually happen*”. This seems to suggest that no satisfactory preventive mechanism can be put in place, which is surprising in two respects. First, some situations where migrants are likely to be in a vulnerable situation can be anticipated (e.g. those involving interception; transfer to law enforcement authorities; forced return). Second, many international/European conventions and recommendations are available and may be useful in establishing procedural safeguards. The recommendations by the Council of Europe³, the United Nations⁴, or even guidelines on interviewing methods when interacting with children⁵, asylum-seekers, or vulnerable people, are not referred to by Frontex in its reply to the Ombudsman.

In the absence of any public version of the Common Core Curriculum in use at present, it remains difficult to evaluate whether border guards will be properly trained or the procedural guidelines applicable during the operations. Upon request, Statewatch was given partial access to the 2007 version of the Common Core Curriculum (CCC). The CCC stated for example that border guards should be “*able to list accepted interviewing methods in general and ethical principles for interviewing children, women, traumatised persons or victims of human trafficking*”. However, the “accepted interviewing methods” are not listed. No access to the chapter on “coercive measures” was given. It seems that the Common Core Curriculum of border guards should be subject to evaluation by the competent authorities, i.e. the EU Ombudsman, the UNHCR, and the European Commission, the UNHCR (in charge of safeguarding the Treaties

³ For example: Committee of Ministers of the Council of Europe, 2009 Guidelines on human rights protection in the context of accelerated asylum procedures <https://wcd.coe.int/ViewDoc.jsp?id=1469829&Site=CM>

⁴ For example: UNHCR 2003 Conclusion on Protection Safeguards in Interception Measures <http://www.unhcr.org/refworld/type,EXCONC,,,3f93b2894,0.html> ; OHCHR 2004 Human Rights Standards and Practice for the Police <http://www.ohchr.org/Documents/Publications/training5Add3en.pdf>

⁵ For example UNHCR 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum <http://www.coe.int/t/dg3/children/News/GuidelinesUCSAeng.pdf>

which the European Charter of fundamental rights is part of). Such supervision will help ensure that the theoretical, legal and practical understanding of migration is based on the thorough review of the literature and relevant reports so that it translates into procedures where the fundamental rights of migrants are seen as a priority. This point is essential; indeed, criticism on Frontex's reports and practices suggest that the CCC has so far failed to prevent prejudice on irregular migration (see below section on non-discrimination).

In its reply to your enquiry, the Agency stated that the Operational Plan will include preventive mechanisms and lists the following measures: fundamental right awareness and reporting mechanisms. While the training of officers is clearly necessary, it does not seem appropriate to consider that "reporting obligations" are a means to prevent abuse.

It is hoped that the standard operating procedure, which Frontex said was being drafted, will include proper preventive mechanisms (guidelines on the use of force and coercion during Frontex operations, presence of medical staff in all Frontex operations, procedural guidelines applying to officials when interacting with migrants such as safeguards for the privacy of interviewees; access to a translator, prohibition of *refoulement* and collective expulsions, informing migrants that they can lodge an asylum claim). A genuine fundamental rights strategy should safeguard fundamental rights before violations happen.

- **Suspension or termination of joint operations**

Frontex asserted that fundamental rights will be respected during joint operations, and that the Executive Director will suspend or terminate any operation where the "conditions to conduct such operations are no longer fulfilled". It is very important that Frontex is open to any contribution that helps identify human rights violations, including from third parties. Nevertheless, Frontex did not give any information on the nature of the "conditions" to be fulfilled during an operation, nor did it elaborate on the circumstances which may lead the Executive Director to suspend or terminate an operation.

In fact, criteria will be defined and included in the standard operating procedure to assess "*whether an incident is a possible violation of Fundamental Rights*". However, this process will remain internal as the SOP is being drafted by an "internal task force" which does not include the CF despite its expertise on fundamental rights issues.

It is not known whether these criteria will be made public, subject to review by the CF, whether the European Parliament will be informed about them or if they will be regularly re-assessed in the light of relevant jurisprudential developments.

Besides, the Agency did not mention an important element of article 3 whereby the Executive Director may suspend or terminate an operation "*in whole or in part*". None of the criteria to evaluate the need for a total or partial suspension is detailed.

Transparency regarding the decision to maintain operations and the criteria applicable to what qualified as "serious" human rights violations, is missing. The absence of oversight of these decisions, which lie solely in the hands of the Executive Director, is concerning.

- **Interviews, screenings and briefings**

Pursuant to Council Decision 2010/252 supplementing the Schengen Borders Code on sea surveillance during Frontex operations, sea operations coordinated by Frontex may include *“stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board”*.⁶

Moreover, part of Frontex’s joint operations consists of “screening” and interviewing undocumented migrants at land borders (as detailed on the Agency’s website). Interviews are generally conducted shortly after migrants have been intercepted, and it is likely that many of them may be under stress, if not in shock, and in need of support and protection.

Despite the very delicate nature of these operations and the high professional standards required to deal with vulnerable people, the fundamental rights strategy and the related action plan do not foresee any specific procedure or protocol ensuring that the right to physical and mental integrity (article 3 of the Charter of fundamental rights) is respected, that vulnerable people are properly approached including children⁷, and that the rights to privacy and protection of personal data are respected (articles 7 and 8 of the Charter of fundamental rights) including for migrants in need of international protection. No reference is made to interviewed migrants being fully informed about who Frontex officers are, what the purpose of the interview is, what information will be collected and the rights of interviewees regarding the collection, process and transmission of their personal data (see section on data protection below).

Finally screening and interviews are described by Frontex as a means to gather criminal intelligence, as stated by the Frontex Director of Operations Division in November 2011.⁸ This raises a number of issues regarding data protection obligations and exchange of data with third parties (see data protection section below).

- **Non-discrimination**

Many Frontex risk analyses identify specific groups as constituting an important part of irregular migrants apprehended at the external borders of the EU. The identification of these groups has led to the organisation of operations specifically targeting ethnic groups, in potential breach of article 21 of the Charter of fundamental rights (non-discrimination) and of article 6(2) of the Schengen Borders Code according to which:

“While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

The issue was already highlighted by Migreurop in its 2011 report on the fundamental rights aspects of Frontex’s activities. According to this report:

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:111:0020:0026:EN:PDF>

⁷ Ibid at 5

⁸ <http://www.balkananalysis.com/greece/2011/09/23/safeguarding-europe%E2%80%99s-southern-borders-interview-with-klaus-roesler-director-of-operations-division-frontex/>

*“[Q]uestions can be raised about the objectives and process of certain FRONTEX joint operations targeting specific national groups. The Frontex General Report 2007 reports on Operation HYDRA, which took place at 22 airports in 16 Member States. Aimed explicitly at tackling “illegal Chinese immigration by air”, it resulted in the arrest of 291 Chinese nationals in April-May 2007. Another example from the same year is Operation SILENCE targeting immigration from Somalia. This type of targeted intervention clearly raises the question of racial discrimination in the Agency’s operations”.*⁹

Suspicion of some minority groups based on unverified assertions (e.g. *“claiming asylum in the EU is part of Roma overall seasonal strategy for their livelihood”*, 2012 Western Balkans Annual Risk Analysis p.29) is likely to act as an incentive for controlling certain individuals because of their presumed belonging to an ethnic group or nationality. The fundamental rights strategy does not specifically address “profiling” issues at the border. Although article 12 of the Code of Conduct prohibits discrimination, Frontex does not recognise targeted border controls as discriminatory, as expressed in [their reply to the LIBE committee’s enquiry](#):

“Frontex risk analysis reports (based on the Common Integrated Risk Analysis Model) take in consideration several different indicators that help to identify the different types of irregular immigration flows and to prepare on one hand the MS authorities in the planning of their activities at the external border and on the other hand the planning of the Joint Operations that the Agency will coordinate during the year.

Nationality or country of origin are between these indicators and serve in one hand to create a picture of the migratory reality towards the EU territory, but also to create awareness to border authorities on different trends and modus operandi developed by criminal organizations involved in trafficking or smuggling of human beings, which normally are directly associated to certain nationalities and/or countries of origin.”

Nevertheless, concern was already expressed in 2009 by the European Parliament over the thin line between interceptions of people based on statistical evidence with respect to serious crime and irregular migration, and discrimination based on ethnicity or nationality:

*“Whereas both descriptive and predictive profiling may be legitimate investigative tools when they are based on specific, reliable and timely information as opposed to untested generalisations based on stereotypes, and when the actions taken on the basis of such profiles meet the legal tests of necessity and proportionality; whereas, however, **in the absence of adequate legal restrictions and safeguards as regards the use of data on ethnicity, race, religion, nationality and political affiliation, there is a considerable risk that profiling may lead to discriminatory practices**”*[emphasis added].¹⁰

It thus seems legitimate to underline the potential risk that Frontex’s reports and analyses may lead to some discriminatory practices, and call for clearer safeguards to ensure that the fundamental rights of migrants are respected during border checks or border surveillance operations.

⁹ Migreurop (2010) p.21

¹⁰ European Parliament, Profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control, P6_TA(2009)0314, 24 April 2009 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:184E:0119:0126:EN:PDF>

- **Operations at sea**

Since the ruling by the European Court of Human Rights (ECHR) in *Hirsi v Italy*¹¹, the prohibition of collective expulsion and the obligation of non-*refoulement* extends to extra-territorial actions. Since the entry into force of the Lisbon Treaty, the European Convention on Human Rights applies to all Member States of the European Union. Moreover, Article 6(3) of the EU Treaty states: "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". The Union, including its institutions and agencies, shall therefore respect the ECHR.

Consequently, it may have been expected that Frontex reflects on the *Hirsi* ruling and that guarantees are given that interception operations at sea which involve cooperation with third states will be subject to close supervision and monitoring by the CF, the FRO, and that Frontex abides to its obligations in its extra-territorial activities.

This possibility is not mentioned in the fundamental rights strategy. In general, **Frontex did not mention any form of monitoring mechanism with respect to its cooperation with third countries**, especially in light of the ECHR jurisprudence. Following the ECHR ruling, the Agency should have taken measures which acknowledge its legal obligation to respect fundamental rights in its extra-territorial activities, and explicitly prohibit the transfer of migrants to third countries, including when intercepted at sea, whose individual situation and need of protection has not been assessed in a fair manner on the EU territory. It is all the more regrettable that some reports by the Agency suggest that Frontex probably participated in "push back" operations without allowing migrants to have their individual situation examined on EU territory (access to asylum, need of protection).¹² International NGOs, including Migreurop¹³, have documented and denounced the reality of push back operations and the denial of asylum during Frontex operations.¹⁴

Besides, in a recent decision on the annulment of Council Decision 2010/252 supplementing the Schengen Borders Code on sea surveillance during Frontex operations, the European Court of Justice (ECJ) highlighted that:

"[P]rovisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of

¹¹ ECHR, Case of *Hirsi Jamaa and Others v Italy*, Grand Chamber, 27765/09
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22%3A\[%22901565%22\]%2C%22display%22%3A\[0\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22%3A[%22901565%22]%2C%22display%22%3A[0]})

¹² Frontex's 2008 Operation HERA in Senegal's and Mauritania's territorial waters at the request of the Spanish government was denounced as a push back operation. The Agency stated in a press release that "Persons that were intercepted during Joint Operation HERA 2008 at sea have either been convinced to turn back to safety or have been escorted back to the closest shore (Senegal or Mauritania)".
http://www.frontex.europa.eu/newsroom/news_releases/art40.html

¹³ *Ibid* at 1. p.11-13

¹⁴ Human Rights Watch (2009) *Pushed Back, Pushed Around Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*
http://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf

*the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required”.*¹⁵

Council Decision 2010/252 was annulled on 5 September 2012, but will remain in force until a new text is adopted. According to this decision, border guards’ powers during sea surveillance operations coordinated by Frontex may include:

*“(f) Conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country”.*¹⁶

Whether these powers will be maintained after a new decision has been adopted by the Council and the European Parliament is not known. In the meantime however, Frontex has the capacity to hand over intercepted migrants to third countries, i.e. before migrants access European territory. As a consequence, based on Frontex’s fundamental rights obligations, and especially in the light of the recent ECHR ruling in *Hirsi v Italy*, the Agency may be expected to provide clear procedural guarantees that all migrants intercepted at sea will be brought to the EU so they can lodge an asylum claim or have their individual situation assessed and examined in a fair manner on EU territory before any return decision is made by the competent authorities. No guarantee is given either that no migrant will be handed over to third countries where they may face torture, inhuman or degrading treatment or punishment. Tangible elements are lacking in Frontex’s fundamental rights strategy.

4. Joint return operations

It is worth noting that the suspension or termination clause is not applicable to joint return operations. This decision is illogical Frontex since is often in charge of coordinating joint return operations. Many NGOs have reported the use of disproportionate force against migrants and on cases of degrading and inhuman treatment upon return, including against children.¹⁷

In view of the above, the establishment of a specific Code of Conduct applicable during joint return operations is welcome, although the legal force of that document is not certain (see above comments on legal nature of codes of conducts). However, it is surprising that the fundamental rights strategy did not explicitly mention the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC which are referred to in the Returns Directive.

The absence of a suspension/termination clause applicable to joint return operations may be in breach of Frontex’s legal obligation under the European Charter of fundamental rights. Frontex, like any EU institution and Agency, has the duty to make sure that migrants are not facing inhumane and degrading treatment during its operations (article 4 of

¹⁵ Court of Justice of the European Union, C-355/10, European Parliament v Council of the European Union, 5 September 2012

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=126363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1280714>

¹⁶ Ibid at 6

¹⁷ <http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Annual-Report-2011.pdf>

the Charter of fundamental rights), and that they will not be sent back to countries where returnees may face torture, inhuman or degrading treatment (article 19 of the Charter of fundamental rights). Their physical and mental integrity shall also be protected (article 3 of the Charter of fundamental rights). Safeguards, including the suspension of operations where information on the risk of/actual violation of these rights exist, are missing.

Finally, in a ruling given in December 2011, the ECJ highlighted that “*European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union*”.¹⁸ Although this opinion specifically referred to Member States’ responsibility under Regulation 343/2003 (so-called Dublin Regulation), the court still emphasised that some deficiencies may exist in the way Member States abide by the Charter on fundamental rights. More recently, France has been accused by the UN Special Rapporteur on the human rights of migrants of carrying out collective expulsions of Roma.¹⁹ These examples show that deficiencies may exist in some Member States which may lead to the breach of article 19 of the Charter on fundamental rights. The fundamental rights strategy should therefore include measures which enable the Agency to make sure that returnees were issued a deportation order based on an individual and fair examination of their situation (including their access to fair remedy in being able to challenge their deportation order).

5. Data protection

One of the activities of the Frontex Fundamental Rights Action Plan is directly linked with the protection of personal data. Activity 17 reads: “*Ensuring the adequate protection of personal data: Establishment of appropriate measures and procedures regarding processing of personal data ensuring the protection of personal data.*”

According to Frontex, the personal data of migrants are rarely collected. Most personal data are reportedly collected from Frontex staff members.²⁰ However, personal data of migrants are also collected, as explained by Frontex in a reply to the European Data Protection Supervisor in May 2010, where the Agency listed personal data collected during joint return operations and then transmitted to airlines.

The fundamental rights strategy does not clearly mention that intercepted migrants will be informed on their personal data being collected, possibly exchanged with EUROPOL, retained, and about their rights as data subjects.

Moreover, it remains unclear how Frontex may obtain certain information leading to the arrest of “suspected” individuals in third countries or in border areas, as mentioned for example in Frontex’s latest General Report (four “suspected facilitators” were arrested during operation

¹⁸ Court of Justice of the European Union, Opinions of the Advocate General in Joined Cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2105669>

¹⁹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12466&LangID=E>

²⁰ E-mail exchange with the European Data Protection Supervisor in January 2012.

Hubble carried out in Tripoli, Algiers and Tunis airports, p.34; refusal of entry to some Albanian nationals following “alerts” issued about them, p.11).

No safeguard is foreseen in the fundamental rights strategy to ensure that the transmission of information to Frontex, e.g. by law enforcement authorities of third countries for the purpose of the identification of “suspected” individuals, will not breach the right of every person to leave every country including his own (article 13 of the Universal Declaration of Human Rights), **the rights to liberty and security** (article 6 of the Charter of fundamental rights) **and the right to asylum** (article 18 of the Charter of fundamental rights).

Frontex has been collecting personal data for several years without adopting any appropriate measure implementing Directive 45/2001. To date, no information has been made public that such implementation measures have been adopted. Yet, according to the EDPS in January 2012 with reference to the amended Regulation 2004/2007:

*“Pt. 31 of the EDPS Opinion of 17 May 2010 indeed pointed out that there were no specific rules on data subject rights and information provided to data subjects in the proposal. While it is true that **the adopted text does not contain such provisions**, it should also be noted that Articles 11 to 19 of Regulation (EC) No 45/2001 apply in any case”* [emphasis added].²¹

The long-term absence of tangible data protection implementation measures is particularly concerning considering Frontex’s new mandate which allows the Agency to collect personal data during all operations, retain this information for up to three months (10 days when collected during a joint return operation), and exchange it with EUROPOL and other European agencies (based on working arrangements approved by the European Data Protection Supervisor).

This vacuum is all the more concerning as Frontex is about to play a major role in the centralisation and coordination of information exchange in EUROSUR. **It is therefore important that the fundamental rights strategy includes clear and comprehensive data protection safeguards as well as redress mechanisms if the rights of data subjects are violated**, in application of article 8 of the Charter of fundamental rights.

6. Relations with third countries and the respect for the principle of non-refoulement

Although this was not specifically addressed in the Ombudsman’s enquiry, it seems important to assess Frontex’s fundamental rights strategy in the context of the Agency’s cooperation with third countries. **Frontex can engage in working arrangements with third countries without any democratic oversight on the agreements signed, without prior approval of the Commission, the European Parliament and without consulting the CF.**

According to activity 15 of the Fundamental Rights Action Plan: *“The negotiations on the Working Arrangements and Cooperation Plans with Third Countries will take into account the FR strategy”*.

²¹ Ibid

However, the absence of any proper human rights assessment of the operations in which Frontex takes part (whether border management operations, cooperation, or return operations) is disturbing and seems to suggest that **the impact of cooperation with third countries on the fundamental rights of migrants is underestimated.**

Cooperation with third countries is clearly established in Working Arrangements as a way to “counter illegal/irregular migration and related cross-border crime”, as well as to “strengthen security at relevant borders between the EU” and the third country concerned. As exposed earlier, **no proper monitoring or supervisory mechanisms exists to ensure that cooperation does not prevent people from leaving their country or does not breach the principle of non-refoulement.**

Moreover, according to the Frontex Regulation, liaison officers “shall only be deployed to third countries in which border management practices respect minimum human rights standards”. **Frontex has not given any details on how the respect of minimum human rights standards in border management will be evaluated.** Moreover, the fact that the general human rights situation is overlooked in the decision and that only border management practices in partner countries will be taken into account before deploying liaison officers is particularly concerning, especially with respect to countries where violations of human rights are documented by international organisations and local NGOs (for example Nigeria²²). The fact that people may decide not to stay in these countries and leave may indicate that human rights standards are not adequate. The absence of any thorough assessment of the human rights situation in third countries is particularly concerning. This partial understanding of the reasons migrants leave a country of origin or of transit has been particularly criticised with respect to Frontex’s study on unaccompanied minors.²³

Although Frontex’s liability in third countries is not clearly established, and although article 9 of Regulation 2004/2007 stipulates that the Agency should not enter “into the merit of the return decision”, the ECHR’s jurisprudence on the extra-territoriality of the application of article 3 of the European Convention of Human Rights (prohibition of torture, inhuman and degrading treatments) suggests that Frontex may have to ensure that returnees will not be subject to torture, inhumane and degrading treatments upon return. The fulfilment of this obligation would at least require that the human rights situation in the country of return is assessed properly prior to return. However, the applicable legal framework, and in especially Frontex’s liability with respect to EU and international law is particularly unclear. As stated in each working arrangement signed with third countries, the practical implementation of working arrangements “shall not be regarded as a fulfilment of international obligations by the European Union” and third countries. **Does that mean that Frontex is acting outside of international law?** Or that Frontex cannot be held accountable for breaching international law? What is the validity or legality of these agreements?

²² <http://www.amnesty.org/en/region/nigeria/report-2012>
http://www.omct.org/files/2010/05/20688/nigeria_mission_report.pdf

²³ “The findings as presented in this study are incomplete, partial and in some instances contain stigmatizing statements about unaccompanied children”, in Separated Children in Europe Programme, Save the children, Human Rights Watch: Letter to Frontex’s Executive director regarding *Frontex’s study on unaccompanied minors in the migration process*, 29 June 2011 http://www.separated-children-europe-programme.org/publications/Letter_Frontex_study_unaccompanied_minors_from_SC_HRC_SCEP_29062011.pdf

Besides, in light of the recent Court of Justice of the European Union ruling regarding Council Decision 2010/252 and the ECHR judgment in *Hirsi v Italy*, and as emphasised above, sea operations which involve cooperation with third states, whether through bilateral agreements between an EU state and a third country, or through a working arrangement signed by Frontex, should be subject to particular scrutiny and close monitoring by the CF, the FRO, the European Parliament and the Commission. The recent cooperation agreements in border management and sea surveillance between Italy and Libya²⁴, and between Malta and Libya²⁵, are examples of situation which may lead to Frontex operations in Libyan seas and cooperation at the Libyan border.

Finally, the role of liaison officers from third countries allowed in the Agency “for a limited period of time” (article 14(3)) is unclear: no details were given on what their visit will consist of, or what information they will be given access to. **No impact assessment has so far been made public on the possible impact of such cooperation on fundamental rights and the necessary safeguards to ensure the protection of the human rights of migrants.**

7. Monitoring mechanisms

Monitoring mechanisms are paramount to ensure effective safeguards and promotion of fundamental rights. The fact that Frontex will follow-up on allegations of human rights violations submitted by all relevant actors including third parties is welcome. It is also appreciated that the Agency has foreseen possible actions to be taken in response to serious violations of fundamental rights, including corrective mechanisms (as referred to in the fundamental rights strategy). However several elements remain unresolved:

- No explicit reference is made to the existing guidelines applying to joint return by air pursuant to Council Decision 2004/573/EC
- No monitoring mechanism is explicitly mentioned with respect to the collection, processing and exchange of personal data: the EDPS is only involved before data is exchanged, i.e. during negotiations of a working arrangement with European agencies.
- Monitoring responsibilities remain internal (FRO employed by Frontex; Management Board; Executive Director competent to decide on the suspension/termination of an operation and take action) which may affect the transparency and effectiveness of the monitoring system; as to the CF, its capacity to fulfil its task and access all information needed remains unclear (see earlier comments).
- The absence of opportunity for members of the CF and/or for the FRO to conduct announced and unannounced visits when Frontex carries out its activities.
- Absence of any monitoring mechanism of operations and cooperation involving third countries: the approval of the European Commission prior to the deployment of liaison officers remains insufficient.
- The absence of complaint mechanisms and means of redress in cases of human rights violations during Frontex operations: actions in response to fundamental rights violation and corrective mechanisms in situations where the responsibility of Frontex

²⁴ <http://www.statewatch.org/news/2012/sep/01italy-libya-immigration-cooperation.html>

²⁵ <http://www.afm.gov.mt/NewsDetails?l=1&nid=1745&cid=87>

may be involved remain incomplete if the victims of such violations are not given access to an effective remedy (article 13 of the Charter of fundamental rights)

8. Liability of Frontex in case of human rights violations

Protection of fundamental rights is based on two major elements: effective preventive mechanisms, and effective reactive mechanisms including effective remedy for victims and sanctions for perpetrators of human rights violations. Unfortunately, the fundamental rights strategy presented by Frontex falls short of offering satisfactory preventive mechanisms and redress mechanisms.

Frontex's fundamental rights strategy is mostly based on "soft" preventive mechanisms: much emphasis is laid on the training of the European Border Guard Teams, on respect for the Code of Conduct, and on internal monitoring mechanisms.

Effective remedy regarding fundamental rights violations is lacking, mainly because Frontex denies any direct responsibility in the potential violations of fundamental rights that may occur during Frontex activities. In terms of liability, the European Court of Justice is the only court which has jurisdiction over Frontex. However, the court is not competent to examine individual claims of fundamental rights violations. The absence of any specific complaint mechanism against the Agency implies that individuals cannot lodge a complaint against what they claim were violations of their fundamental rights during a Frontex operation. Does this suggest that victims have no right in the fundamental rights strategy?

Frontex argues that it "*has no authority to decide on individual cases, since this is the competence of the Member States only*" and that "*Frontex' staff members do not have executive powers in the fields of border control; all such powers are only in the hands of the Member States authorities. Hence, any person claiming that his/her fundamental rights were violated by an action from that authority may use both national and EU mechanisms to file a complaint*". This understanding of the Agency's liability seems erroneous in two respects.

First, **the absence of "executive powers" in many operations does not mean the Agency is not one of the actors involved in these operations.** An entity which plays an active role in intercepting, interviewing, returning migrants and dealing with some of their personal data cannot argue that it has no responsibility in the way fundamental rights are respected and may also be breached. This was highlighted by the Parliamentary Assembly of the Council of Europe in its Resolution 1821 on the interception and rescue at sea of asylum seekers, refugees and irregular migrants where the notion of "*de jure or de facto jurisdiction*" is referred to.²⁶ In fact, the Frontex's fundamental rights strategy shows that the Agency acknowledges its responsibility in safeguarding fundamental rights. The absence of complaint mechanisms seems to imply that the Agency cannot fail in its obligation to safeguard and promote fundamental rights, and seems at odds with its "*zero tolerance policy*".

²⁶ Parliamentary Assembly of the Council of Europe, Resolution 1821 (2011): *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1821.htm>

Second, it does not seem accurate that the Agency is a mere coordinator and does not have a direct responsibility in the way operations are conducted, especially since the revision of the Agency's mandate. Frontex will decide on the deployment of the European Border Guards Teams and on the equipment to be sent during the operations. European Border Guards may be seconded for six months to the Agency which means that they will be under Frontex's control for six months. Furthermore, the responsibility of the Agency is directly and fully engaged in the way Working Arrangements with third countries will be implemented, especially with regard to the implementation of technical cooperation in third countries, and in the behaviour of liaison officers deployed in third countries. The recent ECJ ruling on Council Decision 2010/252 emphasises that, at present, the power conferred to border guards during Frontex sea operations "mean that the fundamental rights of the persons may be interfered with".²⁷

Frontex argues that "any person claiming that his/her fundamental rights were violated by an action from that authority may use both national and EU mechanisms to file a complaint". This supposes though that Frontex makes sure that all intercepted migrants are given the possibility to access an EU Member State where a complaint can be lodged, and that intercepted migrants are informed (in a language they can understand) about the possibility to lodge a complaint if they believe their rights have been violated. Such guarantees are not given by Frontex.

Moreover, the absence of any complaint mechanisms seems to be in breach of the rights to an effective remedy guaranteed in article 13 of the Charter of fundamental rights. By depriving any potential victim the right to lodge a complaint, Frontex is opposing the normal judicial process whereby it is up to a court, not to EU Agency, to examine the admissibility of the case.

It is worth noting that, to date, no disciplinary procedure has been adopted by Frontex. The Agency informed Statewatch, following an information request by email, that the "Frontex disciplinary system will be adopted by the Management Board in the next meeting to take place in the fall".²⁸ However, no mention is made, in Frontex's reply to the Ombudsman, of the planned adoption of such a disciplinary procedure. The future adoption of this disciplinary procedure furthers the ambiguity of Frontex regarding its liability. Why should disciplinary procedures be adopted if there is no need for complaint mechanisms? And are disciplinary procedures compatible with the absence of complaint mechanisms?

Conclusion

In view of the recently amended mandate of Frontex, the Agency may:

- Initiate joint operation
- Engage in direct cooperation with third countries
- Identify third countries where liaison officers should be deployed and decide, based on its Management Board's approval, to deploy them
- Conduct or help coordinate joint operations
- Return irregular migrants

²⁷ Ibid at 15

²⁸ Email correspondence with Frontex on 12 July 2012.

- Exchange information with EUROPOL including personal data
- Process personal data and retain this data up to three months

The authorities in charge of ensuring that Frontex respects and protects fundamental rights are mostly internal (Management Board, Fundamental Rights Officer, Executive Director). Uncertainty regarding the capacity for action of both the Consultative Forum and the Fundamental Rights Officer, is coupled with concerns regarding the effectiveness of the proposed mechanisms put forward and serious shortcomings in the Agency's fundamental rights strategy.

Throughout the years, Frontex has played a growing role in assessing "threats" and "risks" at the EU external borders. Its risk analyses are used as significant background information for further decision-making as illustrated in the Commission's latest report on visa liberalisation in the Western Balkans:

"The FRONTEX alert reports continue to provide a detailed analysis of the dynamic migration inflow trends from the region. The reports are instrumental for better understanding the phenomenon of the abuse of visa liberalisation, assessing its development and identifying concrete measures to tackle the challenges".²⁹

According to the Commission,

*"For agencies playing a role in preparing or taking decisions, one of the goals has been to give those decisions extra credibility and authority: with agencies helping to demonstrate that decisions are based on technical/scientific grounds. This requires the agencies to take decisions on the basis of reliable information and expertise, making **transparency** and **scientific competence** essential requirements. It also creates a challenge, with the need to balance this technical dimension of agencies with the need for all public bodies to be **properly accountable**"*[emphasis added].³⁰

Frontex's methodology and practices do not fully meet the standards set by the Commission. Risk analyses have been criticised by expert NGOs for potentially conducing to discriminatory practices, questioning the "scientific" nature of the conclusions drawn in those reports. Moreover, it seems that in many aspects, Frontex is not transparent about its operations, not to mention the accountability of the Agency.

In view of the above, the fundamental rights strategy as it was presented by Frontex in its reply to your office is inadequate. Safeguards and reporting mechanisms appear insufficient compared to Frontex's involvement and responsibilities in the initiation, coordination and conduct of border control at the EU's external borders. The absence of any redress mechanism for potential victims of human rights violations and the denial by Frontex of any direct responsibility if cases of violations were to be found reflect a disturbing misrepresentation of the Agency's mandate under the revised Regulation 2004/2007. The revision of Frontex's

²⁹ European Commission, Report from the Commission to the European Parliament and the Council on third report on the Post-Visa Liberalisation Monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010, 5 September 2012, 13273/12

<http://register.consilium.europa.eu/pdf/en/12/st13/st13273.en12.pdf>

³⁰ European Commission, Communication from the Commission to the European Parliament and the Council - European agencies –COM/2008/0135 final */

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0135:EN:HTML>

mandate did not clarify whether the Agency remains a mere inter-state instrument or is in fact an independent agency accountable for its activities. The absence of democratic oversight of its activities, including cooperation with third countries, is particularly troublesome, a fact which was underlined in a Resolution adopted by the Council of Europe as the Agency's mandate was revised.³¹ The FRS is being implemented on these unclear bases and is therefore likely to have a limited impact on the protection and promotion of fundamental rights.

³¹ Ibid at 26. "The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency. While the Assembly welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned."