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Towards a human rights dimension of FRONTEX?

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Abstract:

On October 16th 2012 in Warsaw, the Consultative Forum on fundamental rights to FRONTEX has been inaugurated. Nine out of fifteen members are NGOs that will in next years assist FRONTEX with their opinions and recommendations in the human rights field.

On-going critique of FRONTEX operations

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ([FRONTEX](#)) exists since 2004. Among its duties belong coordination and implementation the operations of Member States related to external border management or joint return operations.

The functioning of the FRONTEX Agency is however criticized in the long term in relation to lack of upholding to human rights standards. At the external border of the EU many people have died and others are still dying at the moment. Linked to the activities of FRONTEX, human rights are being violated on a regular basis and a lot of those violations are never reported. This has been clearly showed by the 2011 Migreurop study introduced in an [article on MigrationOnline.cz](#) or in the more recent report of Amnesty International from June 2012 ([S.O.S. Europe – Human Rights and Migration Control](#)).

Let me mention some of the latest events, where FRONTEX has been involved and that raised concerns among the civil society: 9 September 2012 was on the Italian island Lampedusa saved with a considerable delay a shipwreck with Tunisian migrants. A number of migrants did not get into safety and most probably have drowned during the journey. In contradiction to international law, on 28 August 2012 a group of 71 people from Sub-Saharan Africa, including women and children, intercepted at the Spain-Morocco border sent back to Morocco¹. Spain has an agreement on cooperation with Morocco that allows and facilitates

¹ International law does not allow such return of non-nationals to a country from which they came. It is only

return of non-nationals to Morocco.

FRONTEX is present also at the Greek-Turkish border. Smuggling of desperate refugees from Syria and other countries through Turkey to Greece is a good business during which unfortunately people die in the Aegean Sea and in the Evros river region, which is still mined at the Turkish side.

FRONTEX employees in Greece do send foreigners to detention centers that completely lack basic human rights standards. That is also what has been stressed by the European Court for Human Rights on 25 September this year.²

These and many others are cases of operations where FRONTEX is active and where a big part of the European budget is spent.³ Member States border police and FRONTEX border guards were many times accused of violating human rights of migrants and refugees and the Agency is being criticized for the lack of migrants right protection violating international and European law.

Let us recall the Strasbourg court judgement from early 2012 *Hirsi v. Italy*.⁴ The court ruled that Italy was wrong while sending people intercepted in the Mediterranean Sea back to Libya, without giving them the possibility to seek asylum and not seeking safeguards from torture or other inhumane treatment for the returnees to Libya. Italy thus acted in contradiction to the international principle of *non-refoulement*.⁵ In the same time the Court has induced that even the operation took place in high seas, thus not in the waters under Italian jurisdiction, from the moment the Italians have intercepted the boat, the people fall under the jurisdiction of Italy and it has to take full responsibility for them. This responsibility clause is applicable also to FRONTEX operations, be it common operations of Member States or not. FRONTEX cannot get rid of responsibility for people it has intercepted in the high sea and return them to their country of origin or transit without applying basic human rights standards applicable in the EU (for example give refugees the possibility to seek asylum).

Although similar incidents repeatedly occur, FRONTEX operations are still not independently monitored so it is not made sure that those in need of protection will be identified in due time and that the *non-refoulement* will not be violated.

allowed through a controversial agreement between Spain and Morocco. Migrants returned to Morocco often end up suffering in detention or other inhumane treatment and thus such returns are contrary to the internationally recognized principle of *non-refoulement*.

² Violation of ARTicles 3 and 13 European Convention on Human Rights, judgement from 25 September 2012 (*Ahmade c. Grèce*, application no. 50520/09; available in French here:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113481>

³ The budget of the Agency in 2012 amounted to 84,9 million €

⁴ *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, 23 February 2012

⁵ *Non-refoulement* is a principle of customary international law which forbids expulsion, deportation, return or extradition of a foreigner to his country of origin or any other country, where his life or freedom would be threatened. Case of returning people to a transit country, it always needs to be verified that their rights will not be violated after return.

Changes in the FRONTEX Regulation in October 2011 a their realisation

Civil society organisations together with the European Parliament did in the long term ask for strengthening the obligations of FRONTEX to safeguard human rights.⁶ Thanks to that came into force the Regulation 1168/2011 in the end of 2011⁷, that amended the Regulation from 2004⁸ establishing the European Agency.

A lot of the changes that the Regulation brought were in line with the critique of the agency for non-compliance with human rights standards at external EU border operations. Among the main amendments in this regard is the obligation of FRONTEX to adopt a “Fundamental Rights Strategy” (Article 26a Regulation), provide training for border guards on human rights obligations (new Article 5(a)), ensure independent monitoring of the Fundamental Rights Strategy implementation (Articles 25(2), 26a(3)), recruit a Fundamental Rights Officer (Article 26a(3)) and establish the Consultative Forum on fundamental rights (Article 26a(2)). The amending Regulation is also strengthening human rights protection of migrants and refugees and explicitly mentions the necessity of being in line with the *non-refoulement* principle.⁹ Some aspects that may seem left rather unfinished, such as the independence of the Fundamental Rights Officer, the missing obligation to allow for independent monitoring of all FRONTEX operations or the non-binding character of the Consultative Forum recommendations show the strong position of Member States (the Council of the EU) that did not allow such suggestions to go through during the negotiations.

In the course of 2012 FRONTEX adopted a number of measures that the Regulation obliges it to. Many organisations have thus concerns on its contents or efficacy in practice. In the summer 2012 the European Ombudsman thus asked FRONTEX several questions (with regards to the adoption of the Fundamental rights strategy or of the Consultative Forum), [published its answers](#) and asked NGOs and individuals to comment on FRONTEX’s answers. Several comments came from the Jesuit Refugee service, Red Cross, Amnesty International, [Caritas Europa](#) and other organisations stressing mainly the missing independent monitoring of FRONTEX operations, factual independence of the Fundamental Rights officer, the need to apply human rights mechanisms and be aware of the FRONTEX’s responsibility in all its operations and actions. All the documents related to this inquiry are available [zde](#).

One of the crucial measures stemming from the amending Regulation was the establishment of the Consultative Forum. Nine out of fifteen members are non-governmental organisations, other members are international organisations and European agencies: the Fundamental Rights Agency (FRA), the UN High Commissioner for Refugees (UNHCR) and the European

⁶ See the Migreurop 2011 study introduced in MOL article: <http://www.migrationonline.cz/e-library/?x=2289803>

⁷ REGULATION (EU) No 1168/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0001:0017:EN:PDF>

⁸ See Regulation 2007/2004: http://www.frontex.europa.eu/assets/Legal_basis/frontex_regulation_en.pdf

⁹ See new Article 2, para 1a

Asylum Support Office (EASO); Council of Europe, International Organisation for Migration (IOM) and the Organisation for security and cooperation in Europe (OSCE). NGOs could have applied to become members in the CF, out of which FRONTEX has chosen 9 representatives with a mandate for the next three years. Those are: Amnesty International, Caritas Europa, Churches Commission on Migrants in Europe, International Catholic Migration Commission, European Council on Refugees and Exiles (ECRE), International Commission of Jurists, Jesuit Refugee Service, Platform for International Cooperation on Undocumented Migrants (PICUM) and Red Cross.

The Forum does not have a decisive power, but rather recommending role and it will meet at least twice a year. Throughout the year 2013 it shall focus on human rights related documents that FRONTEX is to adopt, for example the Code of Conduct on Return operations.

Where is FRONTEX heading the year after?

A year after the political negotiations over the amending Regulation are over a hope starts to show that FRONTEX is coming into a new phase, where its activities will be more controlled.

The situation shows changes after the Lisbon treaty, when the Migration and asylum field is fully covered by the co-decision procedure, which means a strengthened role of the European Parliament. The EP can go further than its previous consultative role, acts as equal partner to the Council (the member states representatives) and has thus more power to push through its opinions. The comments of the Parliament supported by NGOs have thus helped to form the amending Regulation that came into force in October 2011. On the other side the migration policy of EU Member States is still recently focusing on “combatting illegal migration” and the political discourse of the countries still views migration and “migration flows” as a threat in itself which can be also seen in negotiations over specific legislations.

The FRONTEX Management Board consists of Member States representatives that are still the main actors of the common European migration policy heading towards strengthening the external EU border controls. The FRONTEX is responsible towards the Management Board which has an impact on it to a certain extent; on the other side it has legal obligations to follow the amended Regulation. The changes adopted in October 2011 can thus have a decisive effect on the situation of migrants that come into contact with FRONTEX.

The establishment of the Consultative Forum of independent experts in the migration field in the EU sounds rather promising. It will thus depend till which extent FRONTEX will cooperate with it, provide internal information on its operations and whether it will apply the recommendations of the Forum that will not be legally binding. The specific role of the CF will thus show with time, but let us hope that it will be able to act of its own initiative and contribute constructively to the work of the European agency. The role of the Fundamental Rights Officer¹⁰ can be also questioned, as she will be subordinated to the FRONTEX

¹⁰ Ms. Inmaculada Arnaez Fernandez, see: <http://www.frontex.europa.eu/news/management-board-designates->

leadership while supposed to act independently. Such a work relationship may or may not have influence on her independence.