

APPEAL FOR THE CANCELLATION OF THE FRONTEX REGULATION

In 2010 Migreurop carried out an investigation on the European agency Frontex. The report was commissioned by the Greens/EFA group in the European Parliament, and established that the agency constituted a threat to the respect of fundamental rights¹. Despite claims that further safeguards would be established to improve the situation, no satisfactory answer came with the amendment of the Frontex Regulation in November 2011. These concerns were echoed in the enquiry launched by the European Union Ombudsman regarding the agency's respect of its obligations with respect to European law.² In practice, Frontex's main priorities remained security and the need to reduce illegal immigration, not the respect of human rights. Frontex acts as the arm of EU member states for a forced management of migratory flows, and as such brings about an increase of the risks threatening migrants. The agency's operations take place without the slightest democratic control, and their delocalisation allows European states to exempt themselves from all obligations relating to fundamental rights that are normally enforced on their territory.

Below, the main violations of the migrants' human rights brought about by the missions and the working of FRONTEX as well as by its juridical setting are discussed: the right of asylum and the right not to be subjected to torture or to cruel, inhumane or degrading treatment. These rights are more specially threatened within the context of collective expulsions. Moreover, the subcontracting of migration controls to third countries, the improper use of personal data, the lack of control on the use of firearms and the use of force all generate a worrying amount of risk to the respect of human rights..

Given these risks, it is clear that FRONTEX is incompatible with the respect of migrants' rights. For that reason, Migreurop and its partners are launching a campaign of denunciation of the actions by FRONTEX and call for the cancellation of the legislation that created the agency. Meanwhile, activities by FRONTEX that do not offer sufficient guarantees for the respect of human rights must absolutely be suspended, notably interception operations at sea and collective expulsion flights.

During this transitory period, several urgent measures must be taken in order to reinforce the European Parliament's control over FRONTEX activities, i.e.:

- Parliamentary delegations should be organised to check the compatibility of FRONTEX activities with the member states' fundamental rights obligations;
- The European Parliament must have unconditional access to all agreements that have to date been signed by FRONTEX. Agreements with third parties must be made transparent and public from the moment they are adopted;
- Human and financial resources should only be made available to Frontex with the prior consent of the European Parliament ; the content of bilateral agreements between member states and third states should also be subject to approval by the European Parliament.

Through investigation and advocacy, the present campaign aims to inform and denounce the juridical opacity in which actions are carried out by the FRONTEX agency in European and African countries. It also aims to demonstrate the incompatibility of FRONTEX's mandate with the respect of fundamental human rights.

¹ « Frontex Agency : what guarantees for human rights ? »

² <http://www.ombudsman.europa.eu/fr/cases/correspondence.faces/en/11316/html.bookmark>

Why is FRONTEX incompatible with the respect of migrants' human rights?

FRONTEX was created in 2004 and is based in Warsaw (Poland). As the European agency for cooperation at the external frontiers, it has become the key actor for the control of the EU's external frontiers. FRONTEX coordinates operations at Europe's sea, air and land borders, and organises joint return flights from several member states. The agency's budget and the number of operations carried out have consistently increased since its creation. The rules regulating its mandate were amended in November 2011 in order to ensure more financial and technical means and better autonomy for the initiation and the management of its operations.

The revised mandate provides for a widening of FRONTEX competences, but without providing sufficient juridical means and guarantees in order to ensure the respect of fundamental rights. Since the agency was set up, a number of questions have arisen as to the compatibility of its activity with the respect of migrants' rights:

- Control operations at the external frontiers of the Union that aim at turning away migrants towards neighbouring countries may represent a violation of the right to seek asylum and of the principle of *non-refoulement*, both written down in the Geneva Convention on the status of refugees and in the European Convention of Human Rights. A recent decision by the European Court of Human Rights confirmed these doubts through condemning Italy, in February 2012, for operations of interception and *refoulement* towards Libya by sea;
- Joint flights organised by FRONTEX for the return of illegal migrants can be likened to collective expulsions that are prohibited under article 4 of Protocol 4 of the European Convention of Human Rights. No guarantee is given that expulsions under the aegis of the agency are organised with a strict respect of the conditions set forth by the European Court of Human Rights: examination of the individual and differential situations of the applicant, lack of motivation for a collective return in the process leading to the expulsion ;
- Agreements signed by FRONTEX with third countries tend to put the responsibility of border control on those states, inciting them to take measures that are potentially in violation of article 13 of the Universal Declaration of Human Rights, for instance in restricting the right to emigrate;
- The European Data Protection Supervisor has also raised concern about the lack of data protection safeguards in the draft amended Frontex regulation and recommended that the Commission gives a clear definition of the conditions and circumstances under which the agency was entitled to treat personal data. Despite these requests, the framework for management and retention of personal data does not respect the European framework for the protection of personal data.
- The scope of cooperation with Europol, in particular exchange of information between the two agencies, remains vague. This is particularly problematic as FRONTEX will play a major role in the setting up of the European border surveillance system EUROSUR;
- The amendment of the regulation which created the agency extends the authorisation for carrying firearms to all members of FRONTEX teams, without mention of the minimum principles of necessity and proportionality. The heterogeneity of national codes of conduct regulating the use of force by border guards was pointed out by a study on the ethics of border

control carried out by the Centre for the Study of Global Ethics of the University of Birmingham in 2011 at the request of the agency. The lack of a homogeneous European framework regulating the use of force by the staff in charge of border controls leaves the door open for a worrying permissiveness;

- Beyond the question of fundamental rights violations, FRONTEX's mandate allows the creation of partnerships with third countries: this is a dangerous threat to the sovereignty of non-EU states. On the basis of « working arrangements », the agency cooperates with third states to set up interception as well as joint return operations. The authorities of these « buffer states » are encouraged to strengthen their border, even going as far as inflicting penal sentences on their own nationals in case of « irregular » trespassing. Lastly, in the name of « co-development », FRONTEX institutionalises the outsourcing of controls and responsibilities that are the prerogatives of EU member states. Besides, Frontex constitutes a tool of EU's migration policies and, as such, is part of the instrumentalisation of cooperation and aid conditional upon the management of migration flows.

The juridical framework surrounding the activities of FRONTEX favours a dilution of responsibilities and thus increases the danger of breaches to fundamental rights. Whereas the member states remain legally responsible for the control of their borders and the operations related to it, the agency enjoys a large amount of autonomy. As a legal entity, it is entitled to sign agreements with third parties (states or European and international organizations). But actions by the FRONTEX agents fall within the responsibility scope of the member states who send their frontier guards on assignment for the agency's operations (FRONTEX itself employs little staff). Such juridical vagueness makes the definition of responsibilities in cases of human rights violations extremely complicated.