

Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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To Michael Collon
Clerk of Sub-Committee F
Select Committee on the European Union
Committee Office,
House of Lords,
London SW1A 0PW

Reference CM0710

Regarding Frontex Inquiry: Call for Evidence

Date 5 September 2007

Dear Members of the House of Lords,

In response to your call for evidence on the functioning of Frontex, the Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') would like to draw your attention to a number of concerns regarding operations of sea border controls coordinated by Frontex in the recent past which the Standing Committee put forward earlier to the European Parliament and Dutch Parliament. This letter is a synopsis of letters sent to these Parliaments. You find attached the letter and memorandum sent to the European Parliament in October 2006. The Standing Committee is worried in particular about measures of pre-border control coordinated by Frontex which have the potential to jeopardize access to protection of those who according to international law are entitled to protection. The Standing Committee observes that the current institutional and legal embedding of Frontex does not properly address the issue of mixed flows of migrants, practices of pre-border controls and operational cooperation with third countries.

Frontex activities: refugee concerns

Under the header of operations Hera-II and Hera-III, started in May 2006, Frontex coordinated operations of sea border control carried out by several Member States in sea areas surrounding the Canary Islands. Part of these operations took place in the territorial waters of third countries and in close collaboration with third countries (Senegal and Mauritania) and were targeted at the prevention of departure of migrants towards the Canary Islands and at intercepting and sending back migrants before they left the territorial waters of the African States. According to statistics released by Frontex, in the period August – December 2006, 3.887 immigrants were intercepted and denied further passage towards the Canary Islands. In the course of the recent operation Nautilus coordinated by Frontex in the Central Mediterranean (June-July 2007), search and rescue missions also extended to Libyan territorial waters. According to several accounts, migrants intercepted in Libyan waters have been sent back to Libya without a prior screening procedure or determination of the identity of migrants.¹

The Standing Committee would like to point out that it cannot be ruled out beforehand that refugees who are entitled to protection according to international and community law are also subject to these intercepting measures. It is not guaranteed that refugees or other persons entitled to protection returned to African ports receive appropriate protection in the third countries with which EU Member States, coordinated by Frontex, cooperate.² The Standing Committee is worried, in particular, that an increase of operations of pre-border control – in intensity and/or geographical proliferation – could sincerely jeopardize access to international protection for refugees and would deprive the right to asylum as provided for in EC asylum legislation of its practical meaning, since a situation

¹ See e.g. *Migration News Sheet*, Migration Policy Group, Brussels, July 2007, pp. 11-13.

² This is especially so for Libya, but it is notable that neither Frontex, nor the European Commission or Member States taking part in these border controls have made an assessment of the refugee protection regime in other African States cooperating with the EU in taking in intercepted migrants.

is created whereby all migrants, including refugees, are effectively denied access to the territory of the European Union.

Member States taking part in pre-border control operations apparently operate under the premise that migrants still within the territorial waters of third countries fall under the exclusive responsibility of third countries. This is also the premise underlying the (partly public accessible) Operations Plan Hera III, drawn up by Frontex, according to which the following actions should be taken to fulfill the operation objectives [paragraph 19.1]:

- “- Carry out an optimal maritime and aerial surveillance of the waters close to Mauritania and Senegal, with the authorization of the Mauritanian and Senegalese authorities, carrying onboard the E.U. vessels personnel from these countries that are the responsible of the operations and are the people that must send back the immigrants to the national authorities in the coast.
- Avoid the departure of the illegal immigrants towards the Canary Islands and in the case of the departure, intercept the small boats and return the immigrants to the national authorities.”

The Standing Committee would like to point out that EU Member States participating in such operations may be equally accountable under international law for possible human rights violations ensuing from these operations. It can be inferred from the international legal regime on State responsibility for acts taken in conjunction with other States and doctrine on the extra-territorial assertion of jurisdiction that States may remain responsible for human rights violations which are the result of acts taking place extra-territorially and/or of concerted actions with other States.³ In the attached document, a legal analysis is presented of applicable Community legislation regarding refusal of entry at the EU's external borders (especially Article 13 Schengen Borders Code) and relevant international instruments (the prohibition of refoulement as enshrined in Article 33(1) Refugee Convention and Article 3 ECHR); which raise serious concerns about the legality of the modus operandi of the operations described above. In sum, the Standing Committee is of the opinion that the physical transfer of border controls towards the high seas or territorial waters of third countries may not be used as a means to circumvent international obligations or norms laid down in Community law regarding border controls and asylum applications lodged at the border or within the territories of EU Member States. The Standing Committee regrets that the strategy of pre-border controls is increasingly used without an accompanying legal and operational framework which pays due account to international and community law on asylum. This accompanying framework should in particular address the issue of effective monitoring mechanisms regarding compliance of third States with international human rights and refugee law; specific consideration for persons in need of international protection at the operational level of border management; and an explicit guarantee that all border controls⁴, ensure access to the asylum procedure for those who apply for asylum, in accordance with the Dublin regulation (Article 3(1)) and the procedures directive 2005/85/EC, irrespective of whether the border controls are employed unilaterally, under the coordination of Frontex, or in conjunction with third states; and irrespective of where they are carried out.

Frontex activities: accountability concerns

Search and rescue missions and operations of pre-border control go beyond traditional concepts of border management and should only be applied within an appropriate institutional framework ensuring accountability and democratic control. According to the regulation establishing Frontex (Reg. 2007/2004), an annual activity report has to be made public and a work programme for the coming year has to be forwarded to the European Parliament, the Council and the Commission, which has to be adopted according to the annual Community budgetary procedure. Regular supervising over Frontex' activities takes places within the Management Board of Frontex, in which each participating Member State appoints a representative on the basis of their degree of high level relevant experience and expertise in the field of operational cooperation on border management. As of December 2006, a vast majority of members of the Board are high ranking officials from national border guards and the aliens police, without necessarily having a legal or asylum expertise.⁵ The Standing Committee observes that although the European Parliament may invite the Executive Director of the Agency to report on the carrying out of his/her tasks (Article 25(2) Regulation 2007/2004), an institutionalised mechanism of prompt democratic oversight over operational activities of Frontex is non-existent and the one-sided composition of the Management Board may turn out not to be instrumental for the set up of protection-sensitive border management strategies or for ensuring appropriate scrutiny of the legality of proposed or ongoing operations, for example regarding the drafting of operational plans or the conclusion of working agreements with third countries.

³ See in particular Articles 8 ('conduct directed or controlled by a State') and Article 16 ('Aid or assistance in the commission of an internationally wrongful act') of the Articles on State Responsibility; on extra-territorial responsibility for intercepting measures taken at sea, see in particular ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, Appl. 39473/98.

⁴ Functionally defined in the Schengen Borders Code as activities carried out in response to an intention to cross or the act of crossing that border for the purpose of preventing unauthorised entry; see Article 2(9) Reg. 562/2006.

⁵ Frontex Annual Report 2006, pp. 25-26.

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In sum, the Standing Committee signals the following deficiencies with regard to current Frontex activities:

- There is currently no adequate legal, nor operational framework at Community level for conducting border policies targeted at mixed migratory flows of illegal migrants and asylum seekers which guarantees access to international protection for those entitled to protection (paragraph 3, Annex VI Schengen Borders Code remains silent on the matter);
- There is currently no adequate legal, nor operational framework at Community level laying down under which conditions (taking account of human rights obligations) cooperation with third countries regarding border controls may take place;
- There is currently no adequate mechanism of democratic accountability on Community level which ensures a pro-active scrutiny and/or a prompt reactive scrutiny of individual operations coordinated by Frontex.

The Standing Committee takes great interest in the House of Lords inquiry into Frontex and is prepared to provide the House with further information on this subject.

Yours sincerely,

On behalf of the Standing Committee,

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman