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PROTECTION OF EXTERNAL BORDERS AND PROTECTION OF HUMAN LIVES: EQUAL GOALS OR ALTERNATIVE ACTIONS FOR FRONTEX?

by Laura Ferrara*

SUMMARY: 1. Background. – 2. The European Border and Coast Guard Agency. – 3. Scandals and Investigations. – 4. Future Developments.

1. Background

With the closure of *Mare Nostrum* operation¹, strongly deliberate and financed by the Italian Government, the European Commission announced the start of the *Triton* operation led by Frontex Agency², which was supposed to replace it in terms of mandate and objectives and which would be financed with Europeans funds.

It was the end of 2014, a year that foreshadowed serious difficulties to be faced in the management of migratory flows and which had been marked by numerous interventions not only to patrol the external borders of Italy but above all to respond to distress calls launched from the Mediterranean.

However, although the *Mare Nostrum* operation ended proudly having rescued more than 100,000 people, the European Commission – pressured by requests for clarification from many Members of the European Parliament – soon explained that the mandate of the *Triton* operation would not have fully coincided with that of the Italian mission: the operation led by Frontex agency, in fact, would not have contemplated search and rescue operations as well as the operational scope would have been significantly reduced, not being able to go beyond 30 sea miles from the Italian coast.

The reasons were soon explained: the main intention coincided with the support to Italy in the surveillance of the external borders, leaving search and rescue operations to the compliance with international law and the law of the sea.

With the *Triton* operation, it was progressively clear what would have been the strategy put in place by the European Commission to cope with the numerous arrivals at the European coasts and, more generally, it emerged the underlying logic of the management of migratory flows; a logic that would have seen increasingly linking the issue of migration to that of national and European security.

A few months after the launch of the European mission, the 18 April 2015 marks the date of the largest maritime accident that occurred in the Mediterranean in the post-war period: about 700 people lost their lives (although testimonies speak about more than

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¹ Italian Ministry of Home Affairs's Press Release, *Si conclude 'Mare Nostrum', al via 'Triton'*, 11 December 2018, available at: www.interno.gov.it/it/notizie/conclude-mare-nostrum-triton.

² European Commission's Press Release, *Frontex Joint Operation 'Triton' – Concerted Efforts for managing migrator flows in the Central Mediterranean*, 31 October 2014.

900), added to the deaths of hundreds of other people in the desperate attempt to reach the Italian and European coasts.

The years of 2014, 2015 and 2016 were in fact marked not only by the peak of arrivals but also by the highest number of deaths in the Mediterranean³, putting a strain on the ability of the Member States to cooperate with each other and with third countries and undeniably decreeing the failure of European policies on migration and asylum. In 2015, in fact, the Council adopted a Decision in support of Italy and Greece⁴, the countries of first entry most affected by the arrivals of asylum seekers and therefore found themselves in more difficulty than other European countries in managing identification and first reception operations, as well as in the examination of the application for international protection.

In application of the Article 80 of the Treaty on the Functioning of the European Union (TFEU), which provides for the principle of solidarity and fair sharing of responsibility among all the Member States of the European Union in the management of migratory flows, the decision of 22 September 2015 temporarily derogated from the mechanisms and criteria that determine the competent Member State and established the relocation of a total of 120,000 applicants in clear need of international protection, thus lightening the asylum system of Italy and Greece which, with the migration crisis of that period, was under great pressure.

The Decision was taken by a qualified majority of EU Member countries, with the intention of dealing with an emergency situation, thus overcoming the resistance of those who believed that each country should be able to manage the situation within its own territory and, above all, would have to be able to adequately protect the external borders which represented the de facto gateway to the entire European territory.

And if on the one hand there were those who immediately took sides against this Decision, such as Slovakia and Hungary, many other European Union countries in fact showed little propensity to collaborate, so much so that almost a year after the adoption of the decision the places made available by all countries represented only 7% of the total required to proceed with the relocation of asylum seekers from Italy⁵.

Italy was blamed for its reluctance to carry out identification and registration operations for asylum seekers, thus allowing them to cross internal borders and reach another country in which to apply for international protection, just as it was contested for the excessive slow processing of applications. Situations and behaviors that annoyed other countries, leading them to be less supportive of so-called first-entry countries.

Slovakia and Hungary appealed, raising a series of pleas concerning, in summary, the unsuitability of Article 78, paragraph 3 TFEU as the legal basis of the decision, on the alleged irregularity of the adoption procedure as well as on the violation of the principle of proportionality. The appeal was later rejected by the Court of Justice of the European Union⁶, but the intention to annul the decision taken by a qualified majority gave the measure of the absence of political will in wanting to face the migration crisis in a shared and community way.

Therefore, although there was an attempt to build a Common European Asylum System worthy of being defined as such, understood as a body of rules capable of

³ Data provided by the UNHCR and available at <<https://data.unhcr.org/en/situations/mediterranean>>.

⁴ Council Decision (EU) 2015/1601 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, of 22 September 2015, in OJ L 248, of 24 September 2015.

⁵ F.R. GENOVIVA, *Relocation: il programma per la redistribuzione di richiedenti asilo stenta a decollare*, in *UNHCR Italia*, 2016, available at <<https://www.unhcr.org/it/risorse/carta-di-roma/fact-checking/relocation-programma-la-redistribuzione-richiedenti-asilo-stenta-decollare/>>.

⁶ Court of Justice of the European Union (Grand Chamber), Judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council*.

managing the phenomenon of migratory flows in a shared and supportive manner, in fact the awareness of the distance of positions and interests between Countries on this issue led the European institutions to focus on the outsourcing of migration management, entrusting the solution to close agreements with third countries such as Turkey, and to prevent further migration crises with consequent pressure on national asylum systems by focusing on the protection of external borders of European Union.

The goal of protection from threats from outside the European Union in fact found the countries aligned along the common axis of security, thus proceeding in the direction of building Fortress Europe.

2. The European Border and Coast Guard Agency

The VIII legislature of the European Parliament ends with one goal achieved and one missed in terms of migration and asylum. In fact, if the work on the reform package of the Common European Asylum System failed to move forward and enter the heart of the negotiations due to the deadlock created within the Council, on the reform of the Frontex Agency it was possible to speed up the times by bringing the institutions European Union to approve Regulation (EU) 2019/1896⁷ which transformed the Frontex Agency into the European Border and Coast Guard Agency, increasing its tasks, powers, responsibilities and budget.

Frontex is currently the largest of the European agencies, with a budget of EUR 754 million and a staff of over 1,900 from EU Member States and Schengen Associated Countries, including 900 members of the standing corps of the guard border and coastal border workers employed in Frontex operations.

Furthermore, Article 110 of the new Regulation provides for the establishment of fundamental rights observers employed as statutory staff of the Agency. These officials are distributed in the different operational areas under the supervision of the Fundamental Rights Officer and are tasked with monitoring, assisting, advising and assessing the fundamental rights compliance of Frontex's activities. By the end of 2020, the Agency was expected to recruit at least 40 fundamental rights monitors. At the end of summer 2022, the Agency had yet to hire 9 of these officials.

The corpus with which it was decided to endow the Agency (of a size such as to lead many to think that the European Union was preparing the ground for the creation of a European army) immediately clarifies the objective, which is moreover made explicit on several occasions in the explanatory memorandum to the legislative proposal presented by the European Commission, namely to ensure effective control of the EU's external borders and considerably step up the effective return of irregular migrants.

Protection of external borders, intensification of repatriations and trust to be strengthened between European countries in the ability to protect external borders are the concepts that are reiterated several times and which follow, without interruption, a very specific plan to limit as much as possible the arrivals by discouraging the departures of migrants.

⁷ Regulation (EU) 2019/1896 of the European Parliament and of the Council *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU), of 13 November 2019, in OJ L 295, of 14 November 2019.*

3. Scandals and Investigations

Following numerous scandals reported by the media⁸, international organizations⁹ and NGOs¹⁰, Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) decided in 2020 to investigate allegations related to a possible involvement of Frontex in pushbacks and violations of fundamental rights by Member State authorities at the EU's external borders. As part of these investigations, the LIBE Committee summoned the then Executive Director, Fabrice Leggeri, to appear before LIBE to answer questions from Members in order to clarify the Agency's involvement in these activities and asked the Control Committee (CONT) to postpone the discharge of the Frontex budget for 2019 (discharge later granted in October 2021). However, in May 2022, the Parliament decided again to postpone the discharge of the Agency's budget, this time for the financial year 2020 (October 2022). Following these scandals, in April 2022, Fabrice Leggeri resigned from his function as Executive Director of the Agency. Since July 2022, Aija Kalnaja has replaced him as interim executive director, pending the official appointment of the new executive director.

In January 2021, LIBE also set up the Frontex Control Working Group to monitor all aspects of the Agency's functioning, including respect for fundamental rights, transparency and accountability to Parliament. The Working Party conducted a fact-finding investigation, collected evidence and presented its final report in July 2021¹¹. The report concluded that the Agency does not ensure respect for fundamental rights during the operations it coordinates as it has failed to monitor and report potential human rights violations or misconduct as set out in the founding regulation.

In December 2020, the European Anti-Fraud Office (OLAF) also opened an investigation against the Agency. On 28 February 2022, the Director General of the European Anti-Fraud Office (OLAF), Ville Itälä, presented OLAF's final report on Frontex at a meeting of the CONT and LIBE committees. OLAF investigated allegations of misconduct within Frontex in relation to human rights violations at the EU's external borders. OLAF's report reveals that Frontex management was aware of the human rights violations (including violent pushbacks by the Greek authorities) and deliberately avoided reporting them, instead trying to cover them up. The report reveals that in the aftermath of the incidents, Frontex management hid cases of possible human rights violations from its fundamental rights officer and that the Agency suspended its aerial surveillance activities to stop recording such violations. Furthermore, Frontex allegedly co-financed some of the Greek units that carried out the pushbacks and did not put an end to the joint operations as Article 46 of the founding Regulation of the Agency provides in these circumstances.

⁸ Euractive, *EU Border Agency Frontex 'Covered up' Greek Pushbacks: Reports*, 29 July 2022; N. NIELSEN, *Frontex Confirms Chief Read OLAF Report, But Still Keeps Greek Operations*, in *euobserver*, 7 October 2022; K. FALLON, *Revealed: EU Border Agency Involved in Hundreds of Refugee Pushbacks*, in *The Guardian*, 28 April 2022.

⁹ Council of Europe, *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017*, 18 September 2018, CPT/Inf (2018) 42.

¹⁰ Human Rights Watch, *Frontex Failing to Protect People at EU Borders*, 23 June 2022; European Council on Refugee and Exiles, *Frontex: Leggeri Out Reportedly over OLAF Scrutiny as New Investigation Points to Cover Up of Pushbacks, Coast Guard Agency is 'Arming Up', Switzerland Sees Protests Ahead of Referendum on Continued Support*, 29 April 2022.

¹¹ Committee on Civil Liberties, Justice and Home Affairs's Working Document *on Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations* (rapporteur: Tineke Strik), of 14 July 2021.

Frontex has also been harshly criticized by the European Court of Auditors¹² which has made numerous observations regarding, in particular, the capacity and effectiveness of the assistance provided by Frontex to the Member States in the management of the external borders of the EU, in the fight against immigration irregularity and cross-border crime, raising questions about the Agency's ability to carry forward the mandate given to it by the co-legislators in 2016 which still remains only partially implemented. The Court also underlined the lack of internal control in the management of the budget and human resources.

These alleged violations have led some lawyers and associations to sue the Agency before the EU Court of Justice. The two Dutch lawyers, Lisa Komp and Flip Schüller,¹³ were the first to file a lawsuit against Frontex for violating the fundamental rights of a Syrian family who, in October 2016, were repatriated from Greece to Turkey on a Frontex-operated flight and from Greece. Lawyers argue that the family has been denied the right to asylum. Frontex has denied any responsibility in this regard. More recently, the Dutch organization front-lex¹⁴ sued Frontex before the European Court of Justice seeking compensation for damages for Jeancy K., a Congolese refugee who entered Greece to seek asylum but was instead forcibly rejected.

4. Future Developments

Following numerous scandals and investigations over the last year, the Agency has taken some important steps to ensure full respect for human rights in its operations. The Fundamental Rights Officer now has an almost full team of Fundamental Rights Monitors and the Agency has recently adopted an action plan which should inform his work.

The Agency also has an independent grievance mechanism to monitor and ensure respect for fundamental rights in all of the Agency's activities.

In order to prevent situations like the current ones from reoccurring in the future, the Agency is requested by many to ensure greater and stricter compliance with its obligations regarding the protection of fundamental rights and the European acquis on the right to asylum, also through the appointment of a new executive director who can be more sensitive to these aspects.

Furthermore, according to the founding regulation of Frontex, the European Commission by 5 December 2023 (every four years thereafter) will carry out an evaluation of the regulation which involves, in particular, a specific analysis of the way in which the Charter of Rights has been observed principles and relevant Union law.

Beyond the measures adopted by the European Agency, it is necessary to reflect on the strategy and policy underlying the creation and strengthening of Frontex itself, on the mandate conferred on it, on the objectives set.

Unable (or unwilling) to find a European solution to the management of migratory flows, the EU Member countries have in fact pushed more and more in the direction of externalisation, strengthening the protection of EU borders and thus making arrivals of asylum seekers with a danger to national security. If, therefore, on the one hand the EU recognizes the right of asylum to those who are forced to leave their country of origin due to ongoing wars, persecutions or other reasons related to survival reasons, on the other it

¹² European Court of Auditors' special report *Frontex's support to external border management: not sufficiently effective to date*, 2021.

¹³ N. NIELSEN, *Dutch Lawyers Take Frontex to EU Court Over Pushbacks*, in *euobserver*, 21 October 2021.

¹⁴ Available at <https://www.front-lex.eu/_files/ugd/fd60d6_5623378d835041dc81938af16f8aa7f8.pdf>.

makes it increasingly difficult the exercise of this right arriving at agreements with third countries aimed at discouraging departures. But at what cost? Is it right to create an equivalence between migration and security? Because making the two concepts coincide indiscriminately is equivalent to setting the protection of borders and the protection of human lives as two parallel objectives, which involve distinct actions. And it is also equivalent to implicitly admitting that certain people are recognized as falling within the category of those who are expendable.

The European Union, the home of democracy, the rule of law, guardian of respect for the Charter of Fundamental Rights, cannot accept anything like this.