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## DEVELOPMENT OF FRONTEX VIS-À-VIS INSTRUMENTALIZATION OF MIGRATION AS A TOOL OF HYBRID WARFARE – IS MORE INSTITUTIONALISATION THE ANSWER?<sup>1</sup>

**Abstract:** This article investigates the evolution of Frontex, the EU’s border management agency, in response to migration challenges and its role in the context of hybrid warfare. It critically examines the agency’s expanded mandate post-2015 migration crisis and its efforts to balance security enhancements with human rights protections amid concerns over the instrumentalization of migration by states like Belarus and Russia. The article assesses Frontex’s development, addressing its dilemmas, particularly in terms of accountability and human rights adherence. It questions the efficacy of further institutionalizing Frontex, emphasizing the need for a nuanced approach that respects both security and human rights. Whereas the first part of the article applies a predominantly descriptive approach, the second part uses the analytical method to determine if Frontex’s ongoing expansion is an apt strategy against the backdrop of migration as a tool in hybrid conflicts, reflecting on its implications for EU security and fundamental rights.

Keywords: Migration; hybrid warfare; Frontex; human rights

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## 1. Introduction

Migration flows of asylum seekers, economic or irregular migrants, are associated with various threats to the security and public order of Member States, including terrorism, organised crime, and civil unrest.<sup>2</sup> This connection between migration flows, asylum processes, and current security policies in Europe is a significant issue in both political discussions and academic research. This process is often referred to as the securitisation of migration.<sup>3</sup> The crucial aspect of discussion on migration in the context of security policy in Europe is the question of how to protect the external borders of the European Union. However, the exercise of state authority is fundamentally limited to a state's own territory and is based on the legal system established in this territory by this state authority. This also applies to border protection in the Member States of the European Union. The legal authorisations required to implement border protection measures are enshrined in the national law of the respective member state. In the European Union, protection of external borders has become a supranational task. European institutions have issued provisions that concretise the 'protection of the external borders'. One particularly important measure was the establishment of the European border management agency Frontex. It was established in 2004 as the European Agency for the Management of Operational Cooperation at the External Borders and since has changed significantly as a consequence of the challenges that EU Member States had to face over the past two decades.

It is no exaggeration to say that it is in particular over the past decade, when EU countries have found themselves overwhelmed by events that seriously undermined the foundations of European security, starting from the 2013–2014 crisis in Ukraine, the Syrian conflict, to the outbreak of war and Russia's infringement of Ukrainian sovereignty. Migration flows increased significantly after internal conflicts that turned into international confrontations and escalated into full-scale warfare. Thus, over the past

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2 Léonard, "EU border security and migration into the European Union: FRONTEX and securitisation through practices", 231.

3 For an overview on the concept of securitization, see for example Tomaszewska, *Przegląd Strategiczny*, 317-319; on Frontex tasks as securitization practices, see for example Léonard, EU border security and migration into the European Union: FRONTEX and securitisation through practices; see also for example: Gifra, "Securitizing migration in times of crisis: private actors and the provision of (in)security".

few years, EU countries have repeatedly found themselves confronted with complex situations beyond their control. Consequently, it was the ‘refugee crisis’ of 2015 that exasperated the securitization and militarization of EU-wide migration policies, a phenomenon that is often, albeit contentiously, traced back to post 9/11 counter-terrorism measures. The significant expansion of Frontex mandate was among the many symptoms of this process.

In 2021, the Belarusian government attempted to disrupt the European Union by incentivizing irregular migrants to enter EU territory. Such instrumentalization of irregular migration for political purposes and the related security concerns prompted a swift policy response aimed at mitigating the risk of exploiting irregular migration at the EU’s external borders. To counteract migrant manipulation, the EU and its Member States implemented a range of measures, encompassing enhanced border controls or the enactment of new legislation. The manipulation of migrants poses challenges to the EU and its Member States in safeguarding external borders and gives rise to humanitarian crises. However, this phenomenon is not novel, such scenarios may increase and diversify in the future, given the prevailing global backdrop of conflict, animosity, a surge in migration, and the fortification of borders.

The question to be addressed by this contribution is, whether the ever-expanding mandate of Frontex, i.e. continuing institutionalisation<sup>4</sup> of external border protection as a security measure to mitigate risks following from (often instrumentalised and orchestrated) migration flows constitutes a suitable answer.<sup>5</sup> This article investigates the evolution of the governance of the Frontex agency in response to migration that is (mis)used as a tool of hybrid warfare. It will start with addressing agency’s institutional developments following the 2015 migration crisis, which has exasperated

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4 The continuous institutionalization in the protection of external borders of the European Union, but also the FRONTEX Agency itself, attracted a remarkable amount of attention in the media, in the world of politics, but also in the academic literature. For an overview of the issues connected with the process of institutionalization in the EU External Borders Policy see for example: Léonard, “The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy”.

5 The contribution will, however, not deal with the question whether such situations, when irregular migration is created, supported, and used by States to achieve their goals, should indeed be categorized, and denoted as measures of hybrid warfare. On the possible consequences of such categorization and use of the narrative of “hybrid warfare“, see for example: Akal, “European Union-Belarus Border Crisis: Why the narrative of “hybrid warfare” is dangerous”.

the securitization and militarization of EU-wide migration policies. As will be shown, Member States sought to address the main shortcomings within the Frontex governance framework in response to persisting, but also emerging challenges. Nonetheless, the core issues associated with increased institutionalism, especially sovereignty concerns and institutional constraints, persist.<sup>6</sup> The article will elaborate on how the EU and its Member States responded in 2021 to the Belarusian government's efforts to disrupt the European Union by incentivizing irregular migrants to enter EU territory and the instrumentalization of migration by Russia in the context of the ongoing conflicts. The conclusions based on these elaborations shall identify the positive aspects of continuing institutionalisation of security measures, but at same time also highlight the challenges connected to such a development.

As to the methodology applied, the varied methodologies employed throughout the article are a strategic choice, corresponding to the focus and topics discussed in each section. The early sections provide a brief legal synthesis, reflecting the extensive scholarly discussion already existing around Frontex's developments. In contrast, the sections analyzing recent instances of forced migration as hybrid threats necessitate a different methodological approach. The analytical method predominates also in the concluding sections to shine a light on the significant risks and shortcomings of further empowering Frontex in this context.

## **2. Frontex and the Development of its Mandate vis-à-vis Securitization of EU's Migration Policy**

### 2.1. Frontex and its Mandate before the 2015 'Migration Crisis'

The continuous attempts to strengthen the EU's Area of Freedom, Security and Justice, which in the specific context of securitization of migration policy can be traced back to the attempts to regulate immigration policy since the signing of the Schengen Agreement in 1985, but also factors such as the threats following the attacks of 11 September 2001 in the United States, Member States of the European Union decided in 2004 to create the Frontex

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<sup>6</sup> For an overview on the evolution see for example: Cortinovis, "The Evolution of Frontex Governance: Shifting from Soft to Hard Law?".

Agency,<sup>7</sup> an ‘innovative and tailor-made institutional response’.<sup>8</sup> The original task of Frontex was to coordinate the operational management of activities at the external borders of the European Union by providing support to EU Member States. Frontex was to act by offering ‘technical support and expertise in the management of the external borders’<sup>9</sup> without affecting Member States exclusive responsibility for the control and surveillance of external borders,<sup>10</sup> which was explicitly reaffirmed by several sections of the regulation. Frontex did not mean a materialization of the long-debated idea of a European Border Police. However, the possibility of its creation was left open. Consequently, Member States opted to maintain flexibility regarding the potential expansion of the Agency’s competences, effectively leaving the door open for future developments in this area.

Despite Member States’ clear reluctance to relinquish sovereignty<sup>11</sup> over border control, there has been a push towards establishing a genuinely supra-national entity endowed with the authority to develop its operational strategy and wield corresponding executive powers. This tension has set Frontex on a path of continuous reform, progressively enhancing its operational autonomy. The initial reform of Frontex took place already two years after the agency’s inception. Regulation (EC) No. 863/2007<sup>12</sup> brought about two significant changes to Frontex’s legal framework. Firstly, it clarified the powers granted to staff involved in Frontex’s operational activities. Secondly, the regulation introduced Rapid Border Intervention Teams (RABIT),<sup>13</sup> which Frontex could deploy at the request of a member state facing ‘urgent and exceptional pressure, especially the arrival at points

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7 Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, pp. 1-11.

8 Jorry, “Construction of a European Institutional Model for Managing Operational Cooperation at the EU’s External Borders: Is the FRONTEX Agency a decisive step forward?”.

9 Article 1 para 3 Regulation (EC) No. 2007/2004.

10 At the same time, the staff deployed during its joint operations were apparently vested with executive powers.

11 Hrabálek, Burianová, “To Intervene or Not to Intervene? Positions of the Member States Towards the Article 18 of the European Border and Coast Guard Proposal”.

12 Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199, 31.7.2007, p. 30-39.

13 Cf. Wiecken, „Frontex und RABITS – Die Verlagerung des Europäischen Grenzschutzes”, 3-9.

of the external borders of large numbers of third-country nationals trying to enter the territory of that Member State illegally’ (Regulation 863/2007). These steps, though incremental, marked progress in the agency’s journey towards operational autonomy and aligned with the Commission’s goal of further supranationalizing external border control policies.

Regulation No. 1168/2011,<sup>14</sup> adopted on 25 October 2011 empowered Frontex to ‘initiate and carry out joint operations and pilot projects in cooperation with the Member States concerned and in agreement with the host Member States’ (Article 3). Additionally, Frontex gained control over a technical equipment pool and the authority to acquire its own equipment. The 2011 reform mandated the agency to implement its ‘fundamental rights strategy’ and establish an effective mechanism for monitoring the respect of fundamental rights in all its activities.

## 2.2. Expansion of Frontex’s Competences in Response to the 2015 Migration Crisis – a (controversial) Step Forward

Following the large-scale arrivals of refugees in Europe in 2015, the EU and its Member States began what has now become a long-term process of significantly reinforcing the EU’s border security framework. The refugee crisis of 2015 exerted significant pressure on the EU’s Integrated Border Management system, and most observers concurred that the crisis was exacerbated by the absence of effective external border controls and Frontex’s inability to provide a sufficient supplementary response; a key solution to overcoming the crisis and restoring orderly border management was perceived to lie in the comprehensive reform of Frontex.<sup>15</sup> The EU decided to respond by strengthening Frontex and creating the EU Border and Coast Guard. The pivotal legislative reform came with adoption of the Regulation of 2016 (Regulation No. 2016/1624),<sup>16</sup> which significantly broadened Frontex’s

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14 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, OJ L 304, 22.11.2011, p. 1-7.

15 Tomaszewska, *The Evolution and Relevance of the European Border and Coast Guard Agency (Frontex) in Shaping the Asylum and Migration Securitization Process in the European Union. Przegląd Strategiczny*, 316.

16 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007

operational scope and capabilities. Frontex underwent a shift, adopting a more police-oriented character. It was equipped with its own resources and deployable units.<sup>17</sup> Nevertheless, certain proposals, for example for strengthening the possibility to intervene in reluctant Member States (based on the decision of the Commission), were not adopted, especially because of Member States' sovereignty considerations.<sup>18</sup> Regulation No. 2016/1624 not only 'rebranded' Frontex as the European Border and Coast Guard Agency but established a more robust legal and operational framework for Frontex, focusing on the collaboration between the agency and Member States. One of the pivotal changes was the enhancement of Frontex's operational capabilities, which was a departure from its previous mandate that primarily focused on coordination and support. Regulation (EU) 2016/1624 introduced a framework for the Agency to lead and participate in joint operations and rapid interventions at external borders.<sup>19</sup> These provisions were critical in enabling a more agile and immediate response to emerging crises at the EU's borders. A notable enhancement in its mandate was the provision for the formation of a rapid reaction pool, alongside the empowerment to procure its own equipment, marking a departure from its earlier, more limited scope focused primarily on coordination and support. The establishment of a technical equipment pool, as specified in Article 39, further underscored the shift towards a more resource-independent operational model, aiming to ensure that the Agency could respond effectively to the needs of Member States without undue delay. However, it needs to be pointed out, that a number of the measures planned during that period have not been entirely executed, such as the establishment of a European reserve comprising 1,500 border guards, the deployment of Frontex liaison officers to Member States, and the formation of an EU vehicle pool.<sup>20</sup> Regulation (EU) 2016/1624 also addressed concerns raised by scholars and human rights advocates about the balance between security and human rights in the context of EU border management. These concerns continued despite the attempt

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of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, p. 1-76.

17 Šimečka, Tallis, *Collective Defence in the Age of Hybrid Warfare. Discussion Paper. Ústav mezinárodních vztahů*, 20.

18 Hrabálek, Burianová, "To Intervene or Not to Intervene? Positions of the Member States Towards the Article 18 of the European Border and Coast Guard Proposal", op.cit.

19 Articles 14 ff. Regulation (EU) 2016/1624.

20 Bossong, "The Expansion of Frontex. Symbolic Measures and Long-Term Changes in EU Border Management", 2.



to balance enhanced operational capabilities and human rights concerns by establishing the position of a Fundamental Rights Officer and the integration of fundamental rights in the operational plans of the agency.<sup>21</sup>The legislative evolution continued with Regulation (EU) 2019/1896,<sup>22</sup> which further expanded the Agency's mandate and introduced the concept of a standing corps of border guards. This development, articulated in Articles 55 to 58, was groundbreaking, as it aimed to provide the Agency and, by extension, the EU, with a permanent, readily deployable force to manage migration and secure the EU's external borders. This force is tasked with supporting Member States in border control, return operations, and cooperating with third countries, reflecting a comprehensive approach to migration management that extends beyond the EU's borders.

### **3. Instrumentalization of Migration as a Means of Hybrid Warfare**

Frontex can be regarded as being at the forefront of the comprehensive response of the EU and its Member States to developments at their borders since the migration crisis in 2015. These developments include created artificial 'influxes' of migrants. In 2021, the Belarusian government incentivized irregular migrants to enter the territory of the European Union creating in this way an artificial 'influx' of migrants. Since June 2021, the Belarusian government has been facilitating the journeys of refugees and asylum seekers to Minsk, encouraging and navigating them to cross into the three neighbouring countries by foot. The situation prompted a swift policy response aimed at mitigating the risk of exploiting irregular migration at the EU's external borders. The manipulation of migrants that gives rise to a humanitarian crisis, was recognized as a challenge to the EU and its Member States in safeguarding external borders. As a phenomenon, such orchestrated migration by a third state pursuing its own political goals is not novel. Gkliati argues that the EU itself and its Member States have been the target of such practices at least 40 times in the period between 2014 and

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21 For critical analysis of the EU's border management practices, particularly the humanitarian aspects versus the securitization of migration, in the wake of the Regulation (EU) 2016/1624, see for example: Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm".

22 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1, OJ L 295, 14.11.2019, p. 1-131.



2020.<sup>23</sup> Similar situations were orchestrated for example by Turkey in early 2020,<sup>24</sup> and by Morocco in May 2021,<sup>25</sup> putting pressure on the EU and its Member States.

Several past or current conflicts have been linked to Russia's activities in the international arena (e.g. the Donbass War in Ukraine or its military interference in Syria<sup>26</sup>), raising the question whether these migration flows to the EU could potentially be part of Russia's hybrid warfare<sup>27</sup> strategy, aimed at stirring up regional instability and weakening the authority, credibility and unity of the European Union in the international arena.<sup>28</sup> Whereas the instrumentalization of migration by the Lukashenko government in Belarus is treated as a fact, analyses focusing on migration flows from the perspective of modern hybrid warfare remain scarce.<sup>29</sup> However, the fact remains that States and EU's institutions see a clear pattern. On 14 December 2023, Finland announced a new closure of the entire border with Russia to stop the inflow of asylum seekers, following what Finland believes is an orchestrated move by Moscow in retaliation for the Nordic country's decision to increase defence cooperation with the United States.<sup>30</sup> Moreover, the President of the European Commission, Ursula von der Leyen, addressed the 27 national leaders, ahead of the European Council meeting, in a letter. She wrote that 'Finland has been impacted by illegal border

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23 Gkliati, "Let's Call It What It Is: Hybrid Threats and Instrumentalisation as the Evolution of Securitisation in Migration Management".

24 Stanicek, *EU-Turkey relations in light of the Syrian conflict and refugee crisis. European Parliament Think Thank*.

25 In May 2021, over two days, Morocco permitted the irregular entry of 10,000 people into Ceuta. See: Mascarenas, "The 'Instrumentalisation' of Migration".

26 Punda, Shevchuk, Veebel, "Is the European Migrant Crisis another Stage of hybrid War?", 123-126.

27 For the discussion of the concept of hybrid warfare in the context of events in Ukraine see e.g., Kofman, "Russian Hybrid Warfare and Other Dark Arts"; Popescu, *Hybrid Tactics: neither new nor only Russian*.

28 Punda, Shevchuk, Veebel, *ibidem*.

29 For a proposal for a taxonomy of migration instrumentalization events, as well as an overview of possible actors involved, see: Fakhry, Rácz, Parkes, *Hybrid CoE Working Paper 14: Migration instrumentalization: A taxonomy for an efficient response*.

30 Reuters. Finland says Russia leads asylum seekers to its borders. 15 December 2023. Available online at: <https://www.reuters.com/world/europe/finland-will-again-shut-russian-border-over-asylum-seekers-minister-says-2023-12-14/> (last accessed 14 December 2023).

crossing orchestrated by Russia' and referred in this context specifically to 'instrumentalization'.<sup>31</sup>

The abovementioned situations have been denoted as hybrid threats or hybrid warfare. The use of such terminology might be problematic, as already defining the term 'hybrid warfare' or 'hybrid threat' presents a formidable challenge, primarily due to two key reasons. Initially, the term carries connotations of the 'intangible', encompassing a diverse range of tools and measures. Furthermore, this term underscores the elusive nature inherent in the activities, actors, and objectives associated with hybrid warfare or hybrid threats. If put into simple terms, it is difficult to define what constitutes hybrid warfare and/or threat or where it starts and ends.<sup>32</sup> However, despite the ambiguity of terminology in defining hybrid warfare, instrumentalized irregular migration is recognized as one of the specific threats within the meaning of hybrid warfare. For example, the 2018 NATO Brussels Summit Declaration stresses the existence of a

dangerous, unpredictable, and fluid security environment, with enduring challenges and threats from all strategic directions; from state and non-state actors; from military forces; and from terrorist, cyber, and hybrid attacks,<sup>33</sup>

pointing to several specific threats, such as Russia's aggressive actions, the instability and continuing crises across the Middle East and North Africa, terrorism, irregular migration, human trafficking, the crisis in Syria, disinformation campaigns, malicious cyber activities, the proliferation of weapons of mass destruction and advanced missile technology, and others.<sup>34</sup>

Moreover, in its February 2022 resolution regarding the implementation of the common security and defence policy, the European Parliament identified the manipulation of migration flows at the EU's eastern external borders, along with disinformation campaigns, as a type of hybrid warfare designed to intimidate and destabilize the EU. It urged the Union to create

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31 Euractiv. The loaded language of von der Leyen's migration letter. 14 December 2023. Available online at: <https://www.euractiv.com/section/politics/news/the-loaded-language-of-von-der-leyen-s-migration-letter/> (last accessed 14 December 2023).

32 Punda, Shevchuk, Veebel, Viljar, *ibidem*, 120.

33 NATO 2018. The Brussels Summit Declaration. NATO Press Release 074, July 11. Available online at: [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2018\\_07/20180713\\_180711-summit-declaration-eng.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2018_07/20180713_180711-summit-declaration-eng.pdf) (last accessed 14 December 2023).

34 *Ibidem*.

appropriate legislation with necessary measures to effectively address and counteract the use of migration for political aims by third countries, to guarantee the secure defence of the EU's external borders, and to uphold human rights and dignity. Furthermore, the Parliament encouraged both the Union and its Member States to enhance their ability to detect hybrid threats.<sup>35</sup>

Finally, it is Frontex itself that in its 2022 Report mentioned among the challenges in the first place the 'hybrid aggression by Belarus through the creation of an artificial migration route' and the consequent Russian invasion of Ukraine 'which brought millions of refugees at the EU's doorsteps and border management challenges for years to come', including 'a rise in trafficking in human beings, especially children, as well as a rise of smuggling in weapons and other illegal goods'.<sup>36</sup> Now (first half of 2024), Frontex reports that 2023 has seen a significant rise in the number of irregular border crossings, which increased by 17% in the first 11 months to reach over 355,300, whereas this number has already surpassed the entire total for 2022, marking the highest value recorded since 2016.<sup>37</sup>

The above explanations might suggest that the characterization of the instrumentalization of migration flows as hybrid threats or components of hybrid warfare is uncontroversial. However, this is not entirely accurate. When the European Commission proposed a regulation (referred to as the Instrumentalization Regulation)<sup>38</sup> to tackle the instrumentalization of state-sponsored mass migratory movements, there arose concerns that the regulation's definition of instrumentalization was overly broad and vague from a legal perspective. Critics also contended that establishing a distinct legal framework for cases of instrumentalized irregular migration

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35 European Parliament resolution of 17 February 2022 on the implementation of the Common Security and Defence Policy – annual report 2021 (2021/2183(INI)), available online at: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0040\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0040_EN.html) (last accessed 29 February 2024).

36 Frontex, 2022 in Brief, available at: <https://www.frontex.europa.eu/publications/2022-in-brief-XZDZ71> (last accessed 14 December 2023).

37 Frontex, Irregular border crossings into EU so far this year highest since 2016, News Release, 11 December 2023, available online at: <https://www.frontex.europa.eu/media-centre/news/news-release/irregular-border-crossings-into-eu-so-far-this-year-highest-since-2016-hZ9xWZ> (last accessed 14 December 2023).

38 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final, available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN&qid=1639757068345> (last accessed 29 February 2024).

poses various legal issues, particularly concerning adherence to the Rule of Law and the safeguarding of fundamental rights. Furthermore, scholars have critiqued the portrayal of migrants as tools for undermining social order and national security, arguing that it significantly contributes to their dehumanization.<sup>39</sup>

#### **4. Strengthening of Frontex – Challenges of ‘more Institutionalisation’**

Based on the explanations above, it can be argued that the EU and its Member States recognize, comprehend, and strive to counteract the exploitation of migration for political purposes by third countries (and other actors) as hybrid threats. To counteract migrant manipulation, the EU and its Member States have established, are further developing, and are planning a range of instruments at various levels. These instruments enable taking primary action of Member States (such as implementation of EU sanctions, implementation of European Integrated Border Management), implementation of joint actions and cooperation of Member States (e.g. CFSP sanctions, new Schengen governance model, etc.), taking EU primary action (e.g. Pact on migration and asylum, etc.), and provide EU complementary executive capacity (Frontex).<sup>40</sup> The comprehensive and prompt response of the EU and its Member States proved to be successful for example in the context of irregular migration from Belarus, in which it led to a significant decrease of irregular migrants’ numbers at the borders.<sup>41</sup>

The key operational role, from the EU institutional perspective, plays on the EU primary action level Frontex, the mandate of which, as it was explained above, has developed significantly in the last two decades. The general process of securitizing migration and the strengthening of institutional cooperation, especially through the subsequent enhancement of the European Border and Coast Guard Agency, have garnered considerable scholarly and public interest since their initiation. From its inception, Frontex’s operations have sparked widespread debate and faced intense scrutiny, particularly from advocates of human rights. Critique of Frontex’s practices became pronounced with the escalation of the migration crisis in

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39 Forti, “Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now”.

40 Dumbrava, *Future Shock 2023: Responding to the instrumentalisation of migration*. EPTHINKTHANK.

41 *Ibidem*.

2015, a period marked by the decision of the European authorities to augment the agency's mandate.<sup>42</sup> The reforms initiated in response to the 2015 migration crisis reflected and acknowledged the complex interplay between migration, security, and human rights. The legislative changes have not only transformed the operational landscape for the Agency but also prompted a re-evaluation of the EU's broader migration policy framework. As the Agency continued to evolve, the academic debate has been underscoring the importance of vigilance in monitoring the implementation of these reforms, ensuring they align with the EU's foundational principles and commitments to human rights.

Academic discourse also highlighted the need for a balance between enhanced security measures and the imperative to uphold human rights. Scholars have scrutinized the expanded powers of the Agency within the context of the EU's fundamental values, pointing out the potential for conflict between the securitization of migration and the protection of individual rights.<sup>43</sup> The introduction of the Fundamental Rights Officer and the Consultative Forum within Frontex, aimed at integrating human rights considerations into its operations, has been a focal point of analysis. These mechanisms, designed to monitor and ensure the respect for fundamental rights in all Agency activities, embody the EU's attempt to reconcile the demands of border security with its human rights obligations. However, the effectiveness of these measures in practice remains a subject of debate among scholars, who argue for the need for stronger oversight and accountability mechanisms to prevent human rights violations.

Moreover, persistent allegations regarding a disregard for human rights at the European Union's external frontiers, combined with identified irregularities in administration, gave rise to a pressure for a performance evaluation of Frontex. The European Court of Auditors scrutinized four

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42 In October 2020, the media accused the agency of involvement in violations of international law at the Greek-Turkish maritime border. Reports, including in the German weekly *Der Spiegel*, claimed that migrants trying to reach EU shores were being turned back without the right to claim asylum – an action referred to as “pushback,” which is illegal (see Christides, Lüdke, “Frontex Involved in Illegal Pushbacks of Hundreds of Refugees”).

43 See for example: Fink, *Frontex and Human Rights: Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*; Fink, “A ‘blind spot’ in the framework of international responsibility? Third-party responsibility for human rights violations: the case of Frontex”; Tassinari, “The Externalization of Europe’s Data Protection Law in Morocco: an Imperative Means for the Management of Migration Flows”; Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*.

out of the six principal functions delegated to the Agency, specifically, the monitoring of situations, analysis of risks, assessment of exposure, and the coordination of operational responses. In 2021, the Court issued a report, in which the Court attested to Frontex insufficient effectiveness by stating that

Frontex's support for Member States/Schengen associated countries in fighting against illegal immigration and cross-border crime is not sufficiently effective. We found that Frontex has not fully implemented its 2016 mandate and we highlighted several risks related to Frontex's 2019 mandate.<sup>44</sup>

The controversies around Frontex have continued despite the clear language of the report and specific recommendations made by the Court of Auditors. In February 2021 the European Parliament voted to set up a working group on Frontex to look into all aspects of its operation – including its respect for fundamental human rights. These developments were followed by the resignation on 29 April 2022 of Frontex Chief Fabrice Leggeri, who was not held to disciplinary responsibility.

#### 4.1. 'More Frontex' – Pig in a Poke?

If drawing lectures from the previous developments, especially the strengthening of Frontex in the aftermath of the 2015 migration crisis through Regulation (EU) 2019/1896, which transformed Frontex into the European Border and Coast Guard Agency and considerably increased its tasks, powers, responsibilities and budget, it seems that these developments went in the right direction in providing more security for the EU. Nevertheless, two issues remain problematic. First is the tension between state sovereignty and the continuing quest for effectiveness, which requires transferring powers to the EU level. This tension is inherent to Frontex's area of concern and continues to impact the way Frontex will be shaped in future.

In both 2016 and 2018, the majority of Member States refuted the proposition for Frontex to conduct completely independent controls at the external borders of the European Union. This action would transgress their national sovereignty. The reform of 2019 also failed to enhance

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<sup>44</sup> EU Court of Auditors. Frontex's support to external border management: not sufficiently effective to date. Special Report. August 2021. Available online at: <https://op.europa.eu/webpub/eca/special-reports/frontex-8-2021/en/> (last accessed 29 February 2024).

Frontex's capabilities specifically for the task of rescuing individuals at sea in the Mediterranean. Consequently, the Agency is perceived by numerous liberal critics as a representation of the European Union's illicit border policies, which infringe upon human rights and place refugees in increasingly precarious circumstances. Instead, the European Union should advocate for legal pathways of entry and equitable asylum procedures across all Member States.<sup>45</sup>

The second concern pertains to the protection and preservation of fundamental rights. Frontex's legislative framework has expanded the responsibilities and authorities of the agency, while also trying to ensure the appropriate balance by implementing stronger safeguards for fundamental rights and increasing liability and accountability. However, in recent years, the agency has faced accusations of non-compliance with its own regulations and involvement in pushbacks and violations of fundamental rights by the authorities of Member States at the external borders of the European Union, including in recent situations of migration flows orchestrated by third States as part of hybrid warfare.

Further fundamental rights concerns are connected to EU's attempt to externalize migration control. The Regulation (EU) 2019/1896 removed the territorial limitations of Frontex joint operations, which can now be conducted in any third state.<sup>46</sup> The consequent negotiation of agreements with Senegal and Mauritania has enabled Frontex to extend direct operational support to these nations. This support aims at managing migration flows, combating illegal migration, migrant smuggling, and trafficking. However, effective implementation of such tasks requires broad executive powers to be granted to EU and Member State border guards. In addition to that, conducting operations on the territory of third states is connected with a shift of authority to issue commands for team members of a joint operation – in this case to Mauritania and Senegal. Considering the comparatively lower levels of protection of fundamental rights in these two countries, the shift of authority in the chain of command presents heightened risks to monitoring and ensuring adherence to fundamental rights. Compounded by limited avenues for redress and the extensive immunity afforded to team members, individuals affected by extraterritorial border enforcement

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45 Bossong, Raphael, *ibidem*.

46 See for analysis of relevant provisions, Coman-Kund, "The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...".



activities face obstacles in seeking justice. The reliance on Frontex's internal complaints mechanism, flawed in addressing grievances, potentially fosters an environment of impunity where the agency may evade responsibility for potential rights infringements.<sup>47</sup>

#### 4.2. The *WS and Others v Frontex Case* – the Question of Frontex's Accountability for Human Rights Violations before the CJEU

The quest for holding Frontex (and the EU) accountable for damages caused to individuals by alleged violations of various fundamental rights that Frontex as the European Union's border management and return-related operational arm is bound to respect, protect and fulfil, is strong. Despite the voices requiring balance between security and human rights accompanied the institutionalisation of EU border management from its outset, although with different intensity, it was only on 6 September 2023, when the General Court as the first instance jurisdiction of the Court of Justice of the European Union (CJEU) handed down the very first ruling which concerned the non-contractual liability of Frontex.

The case of *WS & Others v Frontex*<sup>48</sup> involves multiple Syrian individuals (children included) who, in October 2016, reached the Greek islands in the Aegean in pursuit of international protection. Following their unsuccessful efforts to request asylum on the Greek islands, they were swiftly deported to Turkey through a joint return operation facilitated and carried out by Frontex and Greece. Subsequently, they travelled from Turkey to Iraq.

The applicants submitted that their removal was executed without a proper assessment of their asylum applications or consideration of their individual circumstances, violating their fundamental rights under international and European Union law. They claimed that Frontex, through the joint return operation, infringed upon their right to seek asylum, the principle of non-refoulement, the right to protection against collective expulsion, the rights of the child, prohibition of degrading treatment,

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<sup>47</sup> Meijers Committee, Standing committee of experts on international immigration, refugee and criminal law. Comment on Frontex's Status Agreements with Senegal and Mauritania, CM2307, June 2023. Available online at: <https://www.commissie-meijers.nl/wp-content/uploads/2023/06/CM2307.pdf> (last accessed 14 December 2023).

<sup>48</sup> T-600/21 *WS and Others v Frontex*, ECLI:EU:T:2023:492; it might be noted that another action for damages against Frontex, with a different factual situation (pushbacks at the Aegean Sea) is still pending before the General Court – the case T-136/22 *Hamoudi v Frontex*, ECLI:EU:T:2023:821.

the right to good administration and to an effective remedy.<sup>49</sup> The applicants asked the Court to find that Frontex is responsible under Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, for material and non-material damages that they suffered as a result of Frontex' failure to comply with its legal obligations.

In its judgment, the General Court examined the legality of Frontex's involvement in the return operation, scrutinizing whether the agency's actions complied with its obligations under international and EU law, particularly concerning fundamental rights protections enshrined in the EU Charter of Fundamental Rights of the EU and EU secondary legislation.

The Court dismissed the action and rejected the claim with the argument that since Frontex does not have the competence either as regards the assessment of the merits of the return decisions or as regards applications for international protection, and, as a result, Frontex's alleged conduct could not directly cause the damage allegedly suffered, the EU agency cannot be held liable for any damage connected with the return flight of the applicants to Turkey, which is the sole responsibility of the host Member State, as it can be followed from Article 42(1) and (2) of Regulation 2016/1624.<sup>50</sup>

The above-mentioned argumentation reiterated the problematic narrative that Frontex only acts as coordinator and facilitator in joint operations with Member States, and that any wrongdoing is attributed exclusively to the Member State in charge. The judgment has been criticised for allowing Frontex to escape accountability and understating its role in the joint action with Member States on the EU external borders.<sup>51</sup>

### 4.3. The (accountability) Saga Continues

Despite the Court's rejection of the claim and the argument that Frontex cannot be held liable for fundamental rights violations as it merely acts as a coordinator and facilitator, providing 'technical and operational

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49 T-600/21 *WS and Others v Frontex*, ECLI:EU:T:2023:492, para. 57.

50 *Ibidem*, para. 66.

51 Possible pathways of how to establish accountability of Frontex in this case were explored by scholars, see for example: Molnár, "The EU General Court's Judgment in *WS & Others v Frontex*: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?".

support'<sup>52</sup> in joint return operations, some scholars adopted a more positive interpretation of the ruling. The court's decision to deem the lawsuit permissible implies that instances of factual wrongdoing by Frontex can be redressed through claims for compensation. This development represents a significant advancement in the European Union's framework for safeguarding fundamental rights.<sup>53</sup> Moreover, the case, which forms a part of broader strategy of strategic litigation to hold the Agency accountable, highlighted the need to clarify legal questions connected with shared EU administration (in this case the question of shared EU non-contractual liability in the context of shared border management), as their occurrence is likely to increase vis-à-vis the continuing expansion of Frontex's mandate and competences. With the Court's argument that the responsibility for respecting human rights lies solely with the Member States, the main question remains: to whom and for which activities can Frontex be held accountable?<sup>54</sup>

In addition to the allegations of fundamental rights violations, Frontex has been accused of failing to fulfil its obligations regarding transparency, accountability, and the use of force as outlined in its own rules. Furthermore, the agency has faced criticism for delays in implementing the responsibilities set out in its revised mandate, particularly in relation to the recruitment of fundamental rights monitors. The role of the former executive director, Fabrice Leggeri, has also been repeatedly questioned, particularly regarding his failure to initiate a comprehensive assessment by the agency on the measures taken to prevent violations of fundamental rights. Moreover, concerns have been raised regarding data protection. The European Data

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52 T-600/21 *WS and Others v Frontex*, ECLI:EU:T:2023:492, para. 64.

53 Ziebritzki, "A Hidden Success: Why the EU General Court's Frontex Judgment is Better Than it Seems".

54 The *WS and Others v Frontex case* holds significant importance due to its unique nature. After extensive deliberation among experts and practitioners regarding the accountability of Frontex for its infringements on fundamental rights, two main strategies have emerged. While some argue for pursuing the annulment procedure under Art. 263 TFEU or the closely related action for failure to act under Art. 265 TFEU, others propose utilizing the action for damages under Art. 340(2) TFEU. Both approaches have recently been presented before the CJEU. The scholarly reaction to the judgement of the General Court on 6 September 2023 was largely characterized by a sense of dissatisfaction. De Coninck (De Coninck, "Shielding Frontex: On the EU General Court's "WS and others v Frontex", for example, interpreted the ruling of the General Court as contributing to the systematic protection of Frontex from any accountability for its involvement in human rights violations, while Christopher Paskowski (Paskowski, "Verwaltung ohne Verantwortung: Zur Abweisung der ersten Schadensersatzklage gegen Frontex durch das EuG") observed the perpetuation of an "administration without responsibility".

Protection Supervisor (EDPS) reprimanded Frontex for migrating to the cloud without conducting a proper data protection assessment, and several media outlets have accused the agency of collecting intrusive personal data from migrants, refugees, and NGO staff.<sup>55</sup>

## 5. Conclusions

The evolving (and ever-expanding) mandate of Frontex in the context of using migration as an instrument of hybrid warfare presents a nuanced picture of the European Union's border management strategy. The facts on the ground indicate that more institutionalisation of external border protection as a security measure to mitigate risks following from (often instrumentalised and orchestrated) migration flows constitutes a suitable answer. Finally, the number of irregular border crossings has been reported by Frontex to be the highest since 2016.<sup>56</sup> While the institutionalization and strengthening of Frontex are indeed seen as necessary responses to complex security challenges at the EU's borders, the contribution has shown that these developments continue to raise significant questions regarding the balance between security and fundamental rights. It is clear that 'more institutionalization', referring to the strengthening of both the mandate and operational capacities of Frontex, must, from the outset of creating respective policies that later translate into applicable legal frameworks, strive for a proper balance with fundamental rights. Furthermore, the implementation of mechanisms ensuring this balance must be monitored.

The contribution also provided an overview and short analysis of the EU General Court's judgment in the case of *WS & Others v Frontex*. This case only underscores the ongoing debate about Frontex's accountability and the extent of its responsibility in upholding fundamental rights. The General Court's decision, which rejected the claims against Frontex, highlights the legal complexities surrounding the agency's role and the delineation of accountability between Frontex and Member States. Consequently,

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55 See the press release of the European Parliament on Frontex: MEPs want an effective border agency compliant with fundamental rights of 14 December 2023, available online at: <https://www.europarl.europa.eu/news/en/press-room/20231208IPR15787/frontex-meps-want-an-effective-border-agency-compliant-with-fundamental-rights> (last accessed 9 February 2024).

56 Frontex, Irregular border crossings into EU so far this year highest since 2016, News Release, 11 December 2023, available online at: <https://www.frontex.europa.eu/media-centre/news/news-release/irregular-border-crossings-into-eu-so-far-this-year-highest-since-2016-hZ9xWZ> (last accessed 14 December 2023).

developing Frontex as a tool to counter the instrumentalization of migration requires addressing its operational limitations, improving its effectiveness, and enhancing coordination to bring desired outcomes. As *Bossong*<sup>57</sup> underlines, all further endeavours to reform Frontex should, therefore, prioritize two fundamental principles: upholding the rule of law and ensuring access to effective legal remedies for individuals in states of arrival. However, it is crucial that the expansion of Frontex is not misused to expedite return operations at the expense of fundamental rights. One may be reminded that the pressure from Member States to utilise EU mechanisms for this purpose might be strong, but an expedite reaction of the EU responding to this pressure may not bring suitable solutions. An example of such initiative is the Instrumentalization Regulation,<sup>58</sup> which has received widespread criticism as not only being

ineffective in addressing attempts of third countries to coerce the EU and its Member States while disregarding the structural factors that contribute to using such coercive diplomatic tools and the EU's own role in it,

but also because its potential to become

a tool that Member States can exploit to circumvent their obligations under refugee, EU asylum, and EU and international human rights law and deter access to their territory.<sup>59</sup>

Instead, Frontex should concentrate on fulfilling its core mission, which is to promote professional standards and adopt innovative technological methods for border control. It is imperative that this be carried out with utmost transparency and accountability, not only for irregular migrants and asylum seekers but also for both the EU's own border guards and its collaboration with national border police forces, both within and beyond Europe. In times of persistent high migration pressure, this standard is not

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57 *Bossong, ibidem.*

58 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalization in the field of migration and asylum, COM/2021/890 final, available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN&qid=1639757068345> (last accessed 29 February 2024).

59 Gkliati, "Let's Call It What It Is: Hybrid Threats and Instrumentalization as the Evolution of Securitisation in Migration Management", 573.

impractical, but rather serves as a necessary foundation for the sustainable long-term integration of European security authorities.

Moreover, the case emphasizes the importance of transparency, accountability, and effective legal remedies in EU border management. As Frontex's role evolves in response to dynamic security challenges, ensuring that its operations adhere to the standards of legality and respect for human rights will be crucial for maintaining the legitimacy and effectiveness of the EU's border security framework.

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