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Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

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Propositions relating to the dissertation

SYSTEMIC ACCOUNTABILITY OF THE EUROPEAN BORDER
AND COAST GUARD

The legal responsibility of Frontex for human rights violations

by Mariana Gkliati

1. In light of the turn in European politics towards intolerance, chauvinism, and securitisation, such priorities have profoundly influenced the EU's political agenda on migration, so that border control has become today's equivalent of migration management. The EU has chosen to perceive mobility as a threat and Frontex is in the epicentre of its response to forced migration.
2. With Frontex's mandate constantly growing, its budget now being counted in billions, and its reach even far beyond EU borders, questions of its responsibility become more urgent than ever.
3. Human rights are one, but certainly not the only, or the morally superior, form of talking about politics of dignity, emancipation, social justice or simply the human condition within society. Their persuasive power, however, can be used strategically to articulate such claims.
4. Human rights analysis should go further than the classic Kantian liberal-individualist conception of rights, with the individual in its center. It should integrate structuralist analyses, which focus on the holistic understanding of society, including the socio-economic, political or legal structures that fundamentally influence social action. Such legal analysis looks at systems and regimes that can fundamentally impact societal organisation.
5. Our traditional understanding of accountability, as *individualist accountability*, is no longer adequate when the problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner. That manner is *systemic accountability*.
6. Responsibility in EBCG operations is a matter of interaction between EU and international law. It should be dealt with in a legal pluralist environment, where EU law allows itself to be inspired by international law on responsibility. EU law constitutes a coherent legal order, but it does not exist in isolation. It belongs in a broader system, a common environment. Interaction of the different legal frameworks within it avoids fragmentation. It allows for complementarity and cross-fertilisation, that is vital for the protection of the rule of law.

7. EU law and the jurisprudence of the CJEU alone cannot provide a stable and authoritative answer to questions of attribution, the liability of agencies, and the responsibility of multiple actors. Therefore, the coherent framework on responsibility that international law has to offer proves valuable in examining the responsibility of Frontex.
8. If the CJEU aspires to become the human rights court of the EU, it does not suffice for it to use the EU Charter detached from the overall human rights framework. Adopting a protectionist stance, the Court risks being swept away by the rapid political and legislative developments of the expansive role of EU agencies, securitization, and externalisation. The Court needs not only to keep up, but be ahead of the developments, by adopting a dynamic interpretation of EU law and pro-actively covering the existing gaps.
9. The need for judicial review with enforceable consequences remains potent and urgent. *Systemic accountability* provides fertile ground for strategic litigation or impact litigation, that apart from serving the interests of the individual applicant, also aims at creating broader changes in society.
10. As systemic problems require structural solutions, *systemic accountability* cannot exist without solutions outside of courts. Enhancing the oversight of the European Parliament and the powers of the Frontex Fundamental Rights Officer, as well as increasing transparency are necessary steps in the process of *systemic accountability*.
11. Frontex can be found in breach of fundamental rights not only when it has actively violated them, but also when it knew of such violations and did not do enough to prevent them (complicity). The agency cannot lawfully offer its support to operations where fundamental rights are being systematically violated, or where the national legal framework by design creates risks for fundamental rights.
12. As long as access to the CJEU remains restricted to individuals and the accession of the EU to the ECHR remains an unenforceable obligation, accountability and the rule of law at the EU borders will keep being just out of reach.