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Eurocentrism and Frontex Accountability for Human Rights Violations

Lorenzo Gasbarri
Ricercatore RTDb
Scuola Superiore Sant'Anna

Parole Chiave

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Abstract in inglese

This blogpost adopts a Eurocentric critic to the EU Responsibility to discuss the main venues to hold Frontex accountable for human rights violations. It first defines Eurocentrism, and then it tackles the cases against Frontex concerning actions for annulment, failure to act, and non-contractual liability.

1. Introduction

On 24 April 2024, the European General Court (EGC) rendered his decision in the case Naass and Sea-Watch versus Frontex, concerning the annulment of Frontex's rejection of the applicants' request for access to certain documents covering an aerial operation of 30 July 2021. The EGC largely confirmed the validity of Frontex's decision, based on the public security exception laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001 to justify refusing access to the requested document. However, it also contended that Frontex failed to justify its decision concerning some photographs, because it did not communicate

their existence despite falling within the scope covered by Sea-Watch's application.
This decision does not directly concern migration law, but it should be placed in the context of the various attempts to make Frontex accountable for its operations of border management. Indeed, Sea-Watch contended that the requested documents would prove the agency's involvement in human rights violations in the Mediterranean Sea. Similarly, all recent cases brought against Frontex explore all venues to make Frontex accountable in the absence of a viable human rights mechanism.
In this blogpost, I will adopt the lenses of the Eurocentric critique to the EU to briefly discuss the cases currently pending before the European Court of Justice (ECJ). I will first define Eurocentrism in the context of EU responsibility, and then I will tackle the cases against Frontex concerning actions for annulment, failure to act, and non-contractual liability.

2. Eurocentrism and EU Responsibility

To define "Eurocentrism", I rely on Sarah Nouwen's definition as «a set of assumptions about the superiority of European (or "western") ways of knowing and doing», reflected in the tendency to consider the EU as a role model of regional integration with a special place and special duties towards the rest of the world. Certain comments by the EU Commission to the 2011 International Law Commission's articles on the responsibility of international organizations (ARIO) present such features. For instance, in 2011, the EU Commission claimed that «[w]hile the European Union may currently be the only such organization that exhibits all the special internal and external features that have been described above, other regional organizations may sooner or later be in a position to make similar claims. To the extent that the draft articles [the ARIO], even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the European Union, it would seem particularly important for the draft to explicitly allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations ("*lex specialis*")» (p. 168).
In short, the EU presents itself as the one and only regional organization able to differentiate itself from other international organizations, requiring special norms of responsibility to address its characteristics. In the future, other organizations may follow EU's leadership to achieve similar qualities and corresponding benefits. In normative terms, the main outcome of Eurocentric narratives is that international responsibility towards third parties is subject to the internal division of competences decided by EU member states and ECJ (p. 167, 168). Under this proposal, responsibility is not attributed to the subject that materially commits the action identified with the test of attribution of conduct, as international law dictates (Chapter II), but it lies on the subject that is competent under EU law to perform a certain activity, either an EU organ or a Member State (p. 10). The EU is exclusively responsible for exclusive competences, while in areas of shared competences responsibility can be allocated

case by case on the basis of EU law. Of course, the ECJ assumes the monopoly of deciding over the division of competences. This proposal was rejected by the International Law Commission in the 2011 articles on the responsibility of international organizations.
As such, this mechanism informed by Eurocentrism leads to an internalization of accountability mechanisms under which the EU itself apportions responsibility, justified by the complexity of the EU system and its unique model of integration with its member states. *De facto*, it limits external forms of control over the activities of the organization. For instance, the Frontex complaints mechanism remains internal, non-judicial, and non-independent, falling short of the requirements for an effective remedy under Article 47 of the Charter of Fundamental Rights. Eurocentrism and internalization can also explain the failures of the accession process of the EU to the European Court of Human Rights, which remains the only effective solution to provide accountability for human rights violations.
In the context of Frontex, Melanie Fink defined EU accountability as "Blame-Shifting By Design" to stress that in multi-actors situation «there is always someone else to point the finger at». In the context of an outdated system of remedies which limits the relevance of national and international courts, the EU internal justice system remains as the only viable form of redress, but it is uncapable to deal with situations in which the EU and member states cooperate and may assume joint responsibility: an individual can either initiate proceedings before national courts for the responsibility of member states or before EU courts for the responsibility of the EU, in the absence of joint proceedings. Also, the lack of EU venues to challenge Frontex activities limits accountability systems to three options: an individual can either have certain acts annulled under Article 263 TFEU (such as in the recent case Naass and Sea-Watch versus Frontex), hold Frontex responsible for failing to act under Article 265 TFEU (such as in SS and ST versus Frontex), or seek non-contractual damages under Article 340 TFEU (WS and Others versus Frontex). These are not human rights mechanisms and could provide only limited forms of redress, reinforcing the impunity embedded in Eurocentrism. However, EU and member states bear human rights obligations (Chapter 3). These primary obligations are not affected by secondary norms of responsibility or by the lack of remedies. The failures of all actions brought against Frontex until now do nothing but reaffirming impunity and fostering the critiques of Eurocentrism.

3. Actions for annulment

Access to information is the essential prerequisite for accountability. Particularly in the context of blame shifting and complex chains of command, information on what happens in each case is pivotal to give victims a chance of redress. In Naass and Sea-Watch versus Frontex, the Applicants sought to receive information on the alleged Frontex involvement with a Libyan operation within the Maltese search and rescue zone, on 30 July 2021. The rejection of the request by Frontex is justified by EU law and the public security exception

laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001.
The applicants argued that Frontex is required to explain why disclosure of information «could specifically and actually» undermine public security and that the associated risk must be «reasonably foreseeable and not purely hypothetical» (para. 36). However, the Court contended that the «applicants have not put forward any plea or argument challenging the reasoning or merits of the contested decision» (para. 53). Finally, it partially annulled Frontex decision for what concerns two documents containing more than 100 photos, because «Frontex did not mention the existence of the photographs in question in the initial decision or in the contested decision. By failing to mention the existence of those photographs, no justification for the refusal of access was communicated to the applicants»(para. 79).
At the moment of writing, it is not known whether Sea-Watch had access to the photographs following the decision. However, it is clear that the Applicants' argument failed in achieving transparency of Frontex's operations. In the absence of direct information and evidence is extremely difficult to prove a failure to act or liability for damages.

4. Failure to Act

An action under Article 265 TFEU for failing to act is another unproper way to seek Frontex accountability in the absence of an effective judicial venue. In the case SS and ST versus Frontex, the Applicants claimed that the human rights violations occurring during Frontex's activities in the Aegean Sea compel the application of Article 46(4) of the 2019 European Border and Cost Guard Regulation, requiring to «withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she [Frontex Executive Director] considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist».
The rejection of the Applicants requests by the Executive Director of Frontex, contending that the agency's activities in the Aegean Sea region had been carried out in strict compliance with the applicable legal framework, led them to bring a case before EU Court for failure to act.
The EGC had an easy job to declare the action inadmissible considering that «the conditions for admissibility of an action for failure to act, laid down by Article 265 TFEU, are not satisfied, in principle, where the institution called upon to act has defined its position on that call to act before the action was brought» (para. 22). As such, the rejection of the request by Frontex Executive Director cannot be considered a failure to act.

5. Non-Contractual damages

Finally, the last way to partially make Frontex accountable is through an action for damages under Articles 268 and 340 TFEU. In the case WS and Others versus Frontex and Hamoudi versus Frontex the Applicants requested compensation for the damage allegedly suffered by them following Frontex's failure to comply with its obligations. In WS and Others, the Court rejected the claim on the basis that the applicants have not adduced evidence of a sufficiently direct causal link between the damage and the conduct. The blame shifting exercise points at the fact that «Frontex's task is only to provide technical and operational support to the Member States and not to enter into the merits of return decisions» (para. 64) and that «Member States alone are competent to examine applications for international protection» (para. 65). In Hamoudi, the Court rejected the claim because the Applicant had not demonstrated an actual damage. The Court accepted Frontex defence that the evidence provided were not enough to identify the applicant during the incident that caused the damage (para. 61).

The two cases reflect the challenges faced by alleged victims to make Frontex accountable before EU Courts in the absence of a human rights' judicial mechanism. They are under appeal before the ECJ, but their reasonings exclude almost any prospect of making Frontex accountable. In particular, the requirement of exclusive causation and ignoring the criteria on the dual attribution of conduct of both Frontex and EU member states make for daunting prospects. Also, the lack of transparency on Frontex operations and the rejection of requests of access to information make almost impossible to adequately prove the violations.

These cases perfectly represent the inadequacy of EU courts to address human rights violations. Recent proposals to look at international responsibility to bridge the accountability gap clash against the absence of external courts. There is little doubt that Frontex could be held liable under ARIO, in which neither causality nor damage are elements of international responsibility. Under customary international law, responsibility only consist of attribution of conduct and violation of an obligation (Article 4). Conversely, WS versus Frontex follows the competence model, which attributes responsibility not based on the attribution of conduct but based on where the competence lies, either on the EU or its member states. The question is not who committed the act but who has the competence to perform the act. This model excludes an external factual analysis which could lead to dual attribution. It is Eurocentric, as it is based on alleged institutional characteristics that makes the EU a *primus inter pares*.

6. Conclusion

Eurocentrism informs the perception of the EU as the best model of regional integration towards which other international organizations may aspire to. This narrative is embedded in normative claims concerning EU international responsibility and affects the possibility to hold it accountable for human rights violations. The internalization of accountability

mechanisms and their inadequacy to tackle breaches of obligations by EU organs are most manifested in Frontex impunity. Only external and independent judicial review can effectively address this chronic issue and reject competence-based models that differ from international law.

In this context, the International Law Commission launched in 2022 the project Settlement of disputes to which international organizations are parties and asked governments and international organizations to provide inputs by answering a questionnaire. Differing from other regional international organizations, the European Union did not submit comments yet. Hopefully, it will not lose the chance of contributing to this extraordinarily important project with its extended experience.

RESEARCH MATERIALS

Books and journal:

- SMH. NOUWEN, *Exporting peace? The EU mediator's normative backpack*, in *European Law Open*, n.1, 2022.

- M. FINK, *Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System*, in *EJIL: Talk!*, 26 November 2020.

- P. PALCHETTI, *Unique, Special, or Simply a Primus Inter Pares? The European Union in International Law*, in *European Journal of International Law*, n. 4, 2018.

- M. GKLIATI, *Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law*, in *European Papers*, 2 maggio 2024.

Case law

- ECJ, Judgment of 24 April 2024, *Marie Naass and Sea-Watch eV v. European Border and Coast Guard Agency (Frontex)*, T-205/22, ECLI:EU:T:2024:266.

- General Court of the EUm Order of 7 April 2022, *SS and ST v. Frontex*, T-282/21.

- General Court of the EU, Order of 13 December 2023, *Alaa Hamoudi v. Frontex*, T-136/22, ECLI:EU:T:2023:821.

- General Court of the EU, Judgment of 6 September 2023, *WS and others v. Frontex*, T-600/21, ECLI:EU:T:2023:492

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