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Frontex and the securitization of migration: Case T-31/18, between security and accountability

Prof. Francesco Cherubini
SUPERVISOR

Angelica Cangemi Matr. 105502
CANDIDATE

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Abstract:

Frontex is the European Union ('EU') agency in charge of ensuring the control of external borders of the Union. As such, it collaborates with member states' authorities to conduct operations aimed at patrolling borders and fighting against cross-border crimes, such as Joint Operation Triton 2017. Frontex is bound by the legal framework of the EU and as such it ought to respect obligations concerning transparency and fundamental rights.

In January 2018, Luisa Izuzquiza and Arne Semsrott complained to the Court of Justice of the EU after the agency refused to give them access to documents on Operation Triton 2017. The Court rejected the claim on the grounds that Frontex's actions, which aim at ensuring public security, might be compromised by granting public access to the documents requested. This decision contributes to entertain Frontex "culture of secrecy", which makes the agency's actions less traceable and thus makes it more difficult to hold Frontex accountable in cases of violation of its obligations. I build on the theory of securitization as developed by scholars of the Paris school to explain that this "culture of secrecy" is integrated through bureaucratic practices of Frontex agents. The latter conceive migrants as a potential threat to society needing to be surveilled, thus justifying intelligence and security operations that require secrecy. But this securitization leads to disregard for migrants' fundamental rights and difficulties in asserting Frontex's accountability in case of misconduct.

Keywords:

Securitization; Frontex; migration; CJEU; fundamental rights; transparency; accountability; Joint Operation Triton 2017; surveillance.

INTRODUCTION

On 17 February 2024, Fabrice Leggeri, director of the European Border and Coast Guard Agency (Frontex) from 2015 to 2022, announced its intention to join the French Rassemblement National's list for the European elections of 2024. In doing so, he declared being "determined to combat the migratory submersion"[1]. This strong statement, coming from the man that was at the head of the EU agency in charge of "management of the EU's external borders and the fight against cross-border crime"[2], exemplifies the depiction that is often made, especially in far-right discourses, of migrants as threats to the existence and survival of societies.

This security-related vision of migration is accompanied by the promotion of restrictive immigration policies, pushed by political actors ever since the 1980s. In the decades before, starting from the 1950s, migrants in Europe were quite welcomed as they constituted a cheap and flexible workforce, needed for the reconstruction subsequent to the end of the Second World war especially in countries like France, Germany or the Netherlands[3]. As the scholar Jef Huysmans puts it, migration was not really a discussed political topic, or at least it didn't "have the same connotations that it has had since the 1980s"[4]. It is in the 1980s, in the context of economic instability that had started in the late 1970s, that the departure from a "permissive" migration policy takes place, accompanied by a rhetoric that starts to frame migration as a potentially destabilizing factor to society[5].

Today, migration, which is a term used to generally define the phenomenon describing those who leave their country of origin to go live elsewhere, is at the heart of political discussions and agenda, and concerns an important number of people. In 2023, Frontex affirms it has detected "over 420 000 irregular border crossings"[6], where irregular means that the crossing of borders was not done through legal, supervised routes. The use of this term by the agency implies a will to emphasize the illegality of this action. Still, those that decide to migrate, even through irregular routes, are human beings, and as such hold fundamental rights that must be respected under any circumstance, including when trying to cross the EU border illegally. Frontex is also bound

[1] Le Monde.fr, *Former Frontex boss joins France's far-right party for the EU elections*.
[2] FRONTEX, T*asks & M*ission.
[3] HUYSMANS (2000).
[4] HUYSMANS (2000: 754).
[5] HUYSMANS (2000).
[6] FRONTEX, *Frontex Annual Brief: Comprehensive Overview and Outlook for 2024*.

to respect these rights, and to this effect, various mechanisms aiming at ensuring transparency and accountability of its actions have been put in place. Despite this, the agency has been called out on numerous occasions, notably by NGOs, for its disrespect of said measures.

Arne Semsrott and Luisa Izuzquiza brought a case before the Court of Justice of the European Union ('CJEU') in 2017 (Case T-31/18) after their request to access to Frontex's documents regarding one of their operations, Joint Operation Triton 2017, had been denied for "public security reasons"[7]. The decision of the General Court ('GC') of the CJEU to dismiss the applicants' claim raises questions as to whether security concerns can justify a lack of transparency, and, as a consequence, a difficulty to properly supervise and protect the respect of fundamental rights of migrants.

Thus, seeing this link being increasingly made between security and migration, we will investigate what factors explain the legitimization of Frontex's limited accountability in terms of respect of fundamental rights.

I argue that Frontex entertains a "culture of secrecy"[8], justified by the association of migration to a security threat, that allows it to bypass transparency mechanisms and avoid accountability for potential violations of fundamental rights. This association can be explained by securitization theories, i.e. theories that understand security as something that is socially constructed through the framing of an issue as an existential threat. I thus apply this theoretical framework to the specific Case T-31/18, as in my opinion securitization theories help explaining the decision of the GC, that justified Frontex refusal to publicly release the documents requested. This case will therefore help me explaining how this "culture of secrecy" is legitimized and how it might be problematic as it allows the protection of secrecy and security to prevail over the protection of the rights of migrants.

In my first chapter I will present the theories of critical security studies, especially the ones developed by the Copenhagen and the Paris schools, and explain their different visions of the securitization concept, and why I believe the Paris conception to be best suited to demonstrate my thesis. Then I will focus on Case T-31/18 and apply the theory just described to the vision of security that emerges from Frontex's actions

[7] Judgment of the General Court (First Chamber), 27 November 2019, Case T-31/18 *Luisa Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency (Frontex)*, para. 11.

[8] EUROPEAN PARLIAMENT (2011: 99).

in Operation Triton 2017 and from the decision of the GC in the case. Lastly, I will highlight how the decision of the GC upholds Frontex's *modus operandi* which, despite its obligations and its official statements, places higher importance on security and secrecy than on the respect of the fundamental rights of migrants, and explain why the agency is not held sufficiently accountable in case of violations.

CHAPTER 1 : CRITICAL SECURITY STUDIES AND SECURITIZATION

Section 1 : Critical security studies as a turning point in the conception of security

This section will focus on understanding the departure from traditional, state-centered security studies, stemming from the realist school of thought in International Relations, to critical security approaches that were introduced by multiple schools, notably the Copenhagen, Paris and Welsh ones.

1. A traditional, state-centric approach to security

Arnold Wolfers, realist scholar and first to give a definition of the term "National Security"[9], qualified it as an "ambiguous symbol" in his 1952 homonymous article[10]. Indeed, the comprehension of the word varies according to the different approaches to security studies that have developed through time.

The first, traditional, vision of security is associated with the realist school of international relations, which has been predominant until the second half of the twentieth century. Although realist scholars further divide themselves into different branches (namely classical, neoclassical and neorealism), they all consider nation-states to be the central actors of international relations, and thus see security as a goal in order to ensure state's survival. From this vision stems the idea that one of the main threats to a state is war[11], and menaces to security are only contemplated as being of military nature. Thus, security holds a crucial place in realist theories, although scholars disagree on what the ultimate goal a state leader should seek to achieve is: for defensive realists, or neorealists, it is indeed security; for offensive realists state leaders endlessly search for more power. Whatever the view, they agree on the idea that the solution to reach their goal is increase military capacities.

[9] BATTISTELLA, CORNUT and BARANETS (2019: 589).
[10] WOLFERS (1952).
[11] PEOPLES and VAUGHAN-WILLIAMS (2020).

This leads to another realist concept, namely the "security dilemma", proposed by John Herz[12]. The increase in military capacity of one state is perceived as a potential threat by other states, who might not understand whether it is carried out for offensive or defensive reasons, ending up in an endless escalation towards increased military assets and strength.

In conclusion, the concept of security, as traditionally defined by realists, only refers to the state's security, which leaders might feel threatened by other states, leading to an increase of military capacities. As neo-realist scholar Stephen Walt puts it, "security studies [are] 'the study of the threat, use, and control of military force'"[13].

2. The emergence of critical security studies

The first divergence from this state-centric conception of security emerged already in the 1950s, with the work of Karl Deutsch. He conceptualized the idea of a security community[14], in which security and peace can be achieved through institutional mechanisms of integration among political entities, which are not necessarily states.

But the actual birth of critical approaches to security is generally associated to the work of the Copenhagen school in the 1980s, and the success and contribution of other critical schools in the following decade. Following a conference in Toronto, in 1994, Keith Krause and Michael C. Williams publish the book "Critical Security Studies: Concepts and Cases" (1997), in which they discuss the common points of said critiques, the conceptions of the referent object of security and how it should be approached. Critical approaches aim at departing from a strictly military vision of security, focused on the state, by "broadening" and "deepening" its meaning[15]. They institutionalized around the work of three schools, namely the Copenhagen, Paris, and Aberystwyth (also known as Welsh or Critical Security) school. Apart from these schools, whose positions I will present in the following part, other scholars have engaged in discussions and analysis of critical security studies, drawing on previous works, and contributing to the development of research in this domain. For instance, Jef Huysmans developed the securitization concept of the Copenhagen school by taking into account elements of the Paris School (such as the important role of technology or knowledge from experts), as well as references to Foucault

[12] HERZ (1950).
[13] WALT (1991: 212).
[14] DEUTSCH, BURRELL, KANN et al. (1957).
[15] PEOPLES and VAUGHAN-WILLIAMS (2020: 17).

works on the power-knowledge nexus. He further applied these concepts to the development of security policies in the EU.

Section 2 : Focus on the schools of Copenhagen and Paris

After having established the origins of critical security studies, as opposed to traditional approaches to security, we now dwell on the differences brought forward by each school. We focus specifically on the Copenhagen and the Paris ones, and then explain why the latter is more suited for the analysis of the meaning of security that I want to carry out throughout my thesis.

1. The Copenhagen school

The first contribution from the Copenhagen school, whose most influential scholars include Barry Buzan, Ole Wæver and Jaap de Wilde, is the sectoral analysis of security developed by Buzan. In fact, his book People, States and Fear (1983) broadens the understanding of the concept of security (and the threats thereto)[16]. The context of the end of the Cold War allowed to consider threats of non-military nature, thus leading him to distinguish four other sectors in which we can think of security: political, economic, environmental, and societal.

The latter sector, societal security, is very relevant in the context of studying how migration issues have been constructed as a threat. Focusing on society, understood as being "about identity, the self-conception of communities and those individuals who identify themselves as members of a particular community"[17], Buzan develops the idea that there might be threats understood as undermining the cohesion and identity of this community. Jef Huysmans applies this concept to migration, explaining this idea of possible threats to the societal security reinforces a "them and us"[18] rhetoric, which sees migrants as responsible for "weakening national tradition and societal homogeneity"[19]. This discourse, of xenophobic nature, has strong political implications, as it "reproduces a myth that a homogenous national community or Western civilization existed in the past and can be re-established today through the exclusion of those migrants who are identified as cultural

[16] PEOPLES and VAUGHAN-WILLIAMS (2020: 17).
[17] BUZAN, WÆVER and DE WILDE (1998: 119).
[18] HUYSMANS (2000: 757).
[19] HUYSMANS (2000: 758).

aliens"[20], which has often been used by populist, right-wing parties. This discourse participating in the framing of migration as a threat is part of the process of securitization developed by the Copenhagen school.

Developed by Ole Wæver, the securitization process, which explains how an issue can be framed and perceived as a threat to security, is another crucial contribution of the Copenhagen school to the critical conception of security. The concept describes how an issue can be placed on a spectrum going from "non-politicized" (where the state and governmental institutions are not expected to act), to "politicized", meaning "managed within the standard political system", to "securitized"[21], where it is framed as an existential threat to a community and hence need to be treated through exceptional measures, going beyond standard political procedures. Securitization is therefore the process that allows for an issue to shift from one side to the other of this spectrum, it is "the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics"[22].

According to the Copenhagen school, this process is double-staged: first, the securitizing actor must portray the issue as an existential threat to the referent object. This is done through speech acts, a linguistic concept borrowed from the work of John L. Austin, and thanks to the creation of discourses emphasizing the existential nature of the security threat that the issue constitutes. The second stage of the process is the acceptance of the security threat by the audience. Indeed, for securitization to work, audiences to which the discourse is addressed must be convinced of the threatening nature of the issue. This is because, if not, they will not accept the exceptional nature of the measures put in place to face the issue. Indeed, the Copenhagen school preconizes working as much as possible in the realm of normal politics, in order to avoid taking advantage of extraordinary measures that might allow to bypass regular mechanisms of control of democratic practices and respect of human rights. This concept highlights how security issues are socially constructed by agents working in the security realm.

Although this allows for a widening of the concept of security outside of the traditional vision, Critical scholars (from the Welsh school) argue that this vision is still limited, in the sense that it continues to conceive the state as the main referent object of the threat[23]. In-

[20] HUYSMANS (2000).
[21] COLLINS (2022: 133).
[22] BUZAN, WÆVER and DE WILDE (1998: 23).
[23] PEOPLES and VAUGHAN-WILLIAMS (2020).

deed, diverging from the Copenhagen vision, the Aberystwyth or Critical Security School (with capital C, as opposed to *critical* intended in a larger sense, in opposition with the *traditional* vision), frames security as a concern for human beings as a whole, and not simply as components of states[24]. Thus, Critical scholars such as Ken Booth view security as emancipation from constraints on human beings. This emancipation-oriented vision of security, influenced by the German school and Marxist thought, is described by Booth himself as follows:

> "'Security' means the absence of threats. Emancipation is the freeing of people (as individuals and groups) from those physical and human constraints which stop them carrying out what they would freely choose to do. War and the threat of war is one of those constraints, together with poverty, poor education, political oppression and so on. Security and emancipation are two sides of the same coin. Emancipation, not power or order, produces true security. Emancipation, theoretically, is security"[25].

Hence, it is clear that despite wanting to distinguish themselves from traditional security approaches, critical schools of security have diverging visions. Another distinction from the Copenhagen school is that of the Paris school, that shares the idea of a securitization process but places emphasis on another aspect that might be relevant to explain how an issue is securitized, namely bureaucratic practices.

2. The Paris school

The Paris school, and its scholars such as Didier Bigo, distance themselves from the Copenhagen conception of securitization as exclusively focused on discursive acts. Their contribution to critical theories focuses on the context of securitization, built by the practices of bureaucrats and every-day professionals working in the domain of security. Indeed, for Bigo, paying exclusive attention to the speech acts decontextualizes the social universe of the security actors by only focusing on the "exceptional event"[26], the speech. He explains that "instead of transforming any discourse into a performative speech act, it is necessary to understand how the series of discourses are usually forged as forms of *ex post facto* justification of the everyday practices that enact a governmentality of fear and unease"[27]. Thus, Bigo highlights that securitization can be explained by professional socialization, that permits integration of a security framework by actors of everyday border patrols and security professionals. Through interviews and empirical observations, he looks at professional habitus and the way practitioners speak

[24] *Ibidem*.
[25] BOOTH (1991: 319).
[26] BIGO (2014: 211).
[27] *Ibidem*.

of their work and daily security practices, highlighting how they speak of their competences as stemming from previous experiences that lead them to develop a knowledge, a sort of "intuition", even referring to it as "art"[28]. The operators interviewed belong to three distinct social universes: the one concerned with patrolling and containment; filter and separate (legal from illegal travelers); and virtual universe of computer analysts, big data, computerization of borders.

This view of securitization described by Didier Bigo and the Paris school is heuristic to the research question. Indeed, the first universe refers to military professionals operating at the borders, in patrolling operations, seeing their mission simply as "protecting international order" and containing turmoil by ensuring respect and "protec[tion] of legal rules"[29]. For the professionals of the second universe, filtering and sorting out 'illegal' migrants, it is a question of protecting internal security of the entity – in this case the EU - by differentiating the "safe" migrants, from "suspects", "non-genuine travelers" that try to "mask their true identity" to enter[30].

The Paris school's concept of securitization is therefore more appropriate for this case study, as it concentrates on bureaucratic practices, that translate the vision of professional agents working in the field of security of the EU, such as those involved in the Frontex Triton 2017 operation. It is by examining the practices of Frontex agents, the goals and objectives of their daily work, rather than by looking at official discourses from political actors that are distant from the reality of border control procedures and operations, that we can best highlight the securitization process framing migrants as a security threat to the EU. To achieve this, we will look for elements, mostly found in official reports of the Operation, that translate this common vision shared by Frontex agents. This includes searching for surveillance and intelligence practices, that are listed among the objectives of the Operation and distinguish Frontex agents from normal bureaucrats. But also looking at their involvement in activities aimed at developing and sharing this security-oriented vision with other professionals (through workshops or other projects). By stressing that practitioners involved in the Triton 2017 operation (and overall EU security actors) share this vision of their work being essential to the protection of EU borders from the entrance of migrants they perceive as a threat, we will also be able to clarify how the General Court's decision in Case T-31/18 (that makes security prevail over human rights) is justified and legitimized. Hence,

[28] *Ibidem*.
[29] BIGO (2014: 212).
[30] *Ibidem*, p. 215.

the Paris school, focusing on bureaucratic practices is more helpful in enlightening my point.

CHAPTER 2 : OPERATION TRITON 2017 AND THE SECURITIZATION OF MIGRATION BY FRONTEX AS SHOWN IN CASE T-31/18

Section 1 : Frontex role in Operation Triton 2017

We will start this section by defining the normative framework relevant to the birth of Frontex and the regulation by which the agency is bound, as well as the legal framework that is pertinent to our case study, specifically measures regarding the right to freedom of information and transparency. Then we will focus on Operation Triton 2017 and its objectives.

1. Frontex legal framework

European Union agencies distinguish themselves from primary European institutions as the first are "creatures of secondary Union law"[31]. Indeed, agencies of the EU are permanent bodies set up through legislative acts of the Union, namely regulations[32]. Their powers and tasks are defined in their constituent acts, but they generally enjoy "a certain degree of organizational and financial autonomy"[33]. Frontex was first established in October 2004, through Council Regulation (EC) No 2007/2004, as the "European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union".

Frontex role is to help EU and Schengen countries (as well as other countries with whom it has signed specific agreements) in managing EU external borders. Indeed, Frontex and the member states' authorities in charge of border management form the so-called European Border and Coast Guard ('EBCG'). Although "member states retain the primary responsibility for management of their respective segments of external borders"[34], Frontex is in charge of coordinating and supervising member states' actions, by monitoring external borders and assessing

[31] SCHÜTZE (2021: 124).
[32] KARAMANIDOU and KASPAREK (2020).
[33] FINK (2017: 37).
[34] *Ibidem*, p. 35.

potential threats that might require it to provide support to member states in need.

At the time of Joint Operation Triton 2017, Frontex was regulated by Regulation (EU) 2016/1624 (that changed its name and established it as the "European Border and Coast Guard Agency"). With this new regulation, Frontex powers were strengthened, in terms of its financial and human resources, expanding, among other things, its role in control of return operations. According to Article 1 of Regulation 2016/1624, this management includes

> "addressing migratory challenges and potential future threats at th[e] borders, thereby contributing to addressing serious crime with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights […]"[35].

The latest amendment dates back to 14 November 2019, leading to the entry into force of Regulation (EU) 2019/1896 which is still valid to this day.

Among the ways in which Frontex can intervene there are Joint Operations ('JO'). These are aimed at helping member states in managing external borders and might consist in border control operations (like JO Triton), or joint return operations. The agency organizes and coordinates the work of member states, and assists them by putting extra resources (both technical and human) at disposal when the host state is in need. Control operations are launched in order to "detect, prevent and respond to irregular migration flows"[36] by ensuring checks and controls at the external borders of the territories. All details of the missions, including division of tasks, rules and participation, are developed in the Operational Plan of each Operation, which is produced in consultation with the member state (or states) concerned.

As mentioned in Article 1 of Regulation 2016/1624, the agency must act in respect with fundamental rights and comply with human rights provisions set out in EU law and in relevant international law. Frontex obligations concerning the respect of fundamental rights will be better developed in the last chapter. In this chapter I will focus on a more specific aspect of those rights that is key to the understanding of Case T-31/18. Indeed, among the rights and responsibilities that Fron-

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[35] Regulation of the European Parliament and of the Council, 14 September 2016, (EU) 2016/1624 *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 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*.
[36] FINK (2017: 44).

tex must respect are also those pertaining to the public access to documents, communication and transparency.

Article 8(3) of Regulation 2016/1624 indicates that

> "[Frontex] shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public relevant information including [an] annual activity report […] and ensure […] in particular that the public and any interested party are rapidly given objective, comprehensive, reliable and easily understandable information with regard to its work. It shall do so without revealing operational information which, if made public, would jeopardize attainment of the objective of operations"[37].

More specifically, Article 74(1) of the Regulation states that Frontex is subject to Regulation (EC) No 1049/2001 of the European Parliament and the Council on public access to European Parliament, Council and Commission documents when handling applications for access to documents held by it, and paragraph 2 of the same Article reiterates in this respect the obligations of making public relevant information and the possible limitations thereto set out in Article 8(3)[38].

2. Operation Triton

Joint Operation Triton was launched on November 1st, 2014.

As explained on the European Commission website, JO Triton was a "Frontex coordinated joint operation, requested by the Italian authorities"[39]. It was indeed established after the end of the Italian Navy search and rescue operation Mare Nostrum, which had been launched one year before, after several tragedies at sea. However, it appeared from the outset that unlike Mare Nostrum, whose mandate included search and rescue operations, Triton was primarily, and particularly initially, a border control mission with a much smaller area of operation and fewer operational and budgetary means. With Mare Nostrum, the Italian navy patrolled an area of 70,000 Km^2 covering the search and rescue zones of Libya, Malta and Italy (Figure 1) with five vessels, six aircrafts and 700-1000 military personnel[40] for an estimated cost of 9 million Euros per month. When Triton was launched, its geographical scope was limited to 30 miles from the Italian coast (Figure 2) and its budget was about one third of the budget of Mare Nostrum.

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[37] Regulation (EU) 2016/1624.
[38] Regulation of the European Parliament and of the Council, 30 May 2001 (EC) 1049/2001, *regarding public access to European Parliament, Council and Commission documents*.
[39] EUROPEAN COMMISSION, *Frontex Joint Operation "Triton" – Concerted efforts to manage migration in the Central Mediterranean*.
[40] MARINA MILITARE ITALIANA, *Mare Nostrum Operation*.

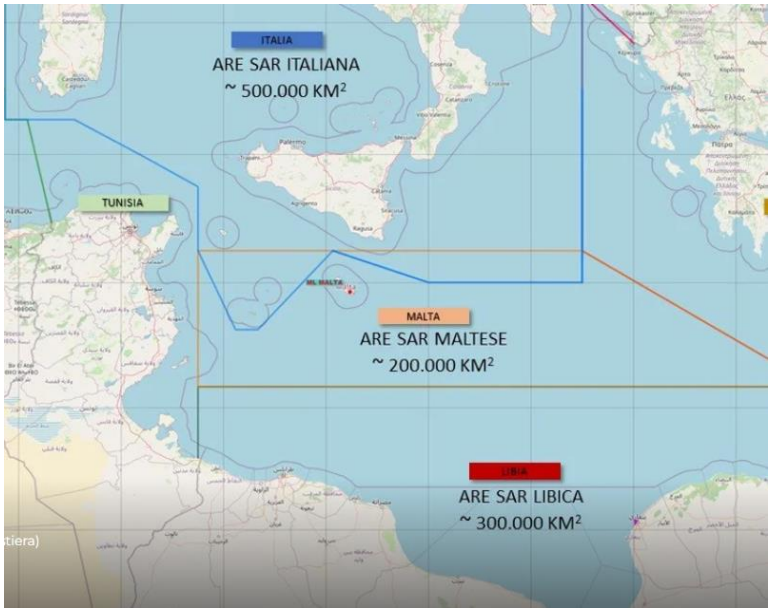

Figure 1. SAR zones of Italy, Malta and Libya covered by Mare Nostrum[41]

Figure 2. The original scope of action of Triton[42]

As a consequence of the limited search and rescue capacities, in the first months of operation of Triton an increase of deaths at sea was registered, leading to strong criticism against the EU from public opin-

[41] DI BENEDETTO (2023).
[42] ROBINSON (2015).

ion and human rights watchdogs. Amnesty International, in its 2015 report "Europe's sinking shame – The failure to save refugees and migrants at sea" reported for instance that "during the whole of 2014, when Mare Nostrum was operational, the death rate among those making the crossing was about 1 in 50. In the first three and half months of 2015, it was 1 in 23"[43]. This led to successive reviews and expansions of the mandate of Triton, of its geographical area of action and of its budget until 2017 (for 2017 its budget was of 45 million Euros).

The Operation eventually took place in the territorial waters of Italy and in the search and rescue (SAR) zones of Malta and Italy as, in the words of the agency, "The Central Mediterranean is the most affected by migratory flows"[44]. Amongst the multiple aims of Operation Triton the first mentioned is "enhanc[ing] border security", through surveillance methods that might help intercept unauthorized crossings of both people and objects, collecting information on smuggling networks, and by "identify[ing] possible risks and threats" related to cross-border crimes; exchange of information and *savoir-faire* among the member states and agency's officials, and overall supporting Italy in its coast guard functions and migration management also feature prominently[45]. 28 other states[46] took part in the operation, by providing either personnel or equipment. The operation was extended until 31 January 2018, when it was called off and replaced with Operation Themis.

Section 2 : Case T-31/18 and the broadening of the definition of public security

Concerns and questions about Frontex mode of action, the adequacy of available means, the type of activities conducted, and the treatment of migrants encountered at sea led to increased demands of access to documents on Operation Triton. In particular, Luisa Izuzquiza and Arne Semsrott, members of a German NGO promoting freedom of information, FragDenStaat, implemented these demands, but saw their request refuted by the agency, leading them to bring the case before the CJEU. We will now dwell on the facts of this case, examining in the

[43] AMNESTY INTERNATIONAL (2015).
[44] FRONTEX, *Joint operation Triton (Italy).*
[45] FRONTEX, *Frontex evaluation report - JO Triton 2017*.
[46] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Sweden, Switzerland, Slovakia, Slovenia, Spain, United Kingdom.

first place the facts of Case T-31/18, with the information brought forward by the applicants and the answers and justifications by Frontex, as well as the legal framework of the case. We will then focus on the response of the General Court ('GC') of the CJEU, that dismissed the claims of the applicants, and how this decision entails a broadening of the definition of "public security" as set out in previous case law.

1. Case T-31/18

On 1st September 2017 Arne Semsrott and Luisa Izuzquiza requested, through an e-mail addressed to Frontex, access to "documents regarding information on name, type and flag of the vessels deployed under Joint Operation Triton 2017 between 1st June and 30th August 2017"[47]. Said request was made on the basis of Article 6(1) of aforementioned Regulation (EC) 1049/2001, which states that

> "Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application."

The following week, on September 8, the agency sent a negative response to the request justifying its refusal of providing the documents on the basis of Article 4(1)(a) of Regulation 1049/2001 which mentions possible grounds for exceptions to access to a document, among which, notably, is protection of the public interest as regards "public security"[48].

In its reply, the agency indicated that disclosing the documents requested by Izuzquiza and Semsrott would undermine the efficiency of the operation, as it would allow, when combined with other documents released publicly (for instance on websites such as www.marinetraffic.com) for "criminal networks involved in migrant smuggling and trafficking of human beings"[49] to find out the areas in which EBCG boats are patrolling (as well as the times of the operation), thus adapting their behavior to this information in order not to be caught. According to Frontex, the reveal of said information and the

[47] Judgment of the General Court (First Chamber), 27 November 2019, Case T-31/18 *Luisa Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency (Frontex)*, para. 10.
[48] Article 4(1)(a) of Regulation 1049/2001: "The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: - public security, - defence and military matters, - international relations, - the financial, monetary or economic policy of the Community or a Member State".
[49] Judgment *Izuzquiza and Semsrott v Frontex*, para. 12.

consequences just mentioned would threaten member states' "internal and public security"[50], thus justifying its refusal to disclose the information.

The applicants then sent a confirmatory application, asking the agency to reconsider the decision and claiming that similar information to the one requested (namely regarding previous Frontex operations and information on Operation Triton of the previous months) had already been disclosed by the agency, through its official channels and on social media (mostly Twitter). The agency, however, confirmed its refusal on 10 November, leading the two activists to bring the case before the Court of Justice of the EU on 20 January 2018, requesting the Court to annul the decision and make the agency pay the costs.

Five pleas were brought forward by the applicants. The first emphasized the infringement of Article 4(1)(a) in that Frontex did not examine separately each "different documents containing the requested information in order to determine whether they fell within the scope of the exception concerning public security"[51], nor did it justify the refusal with concrete reasons; the second alleged that the decision was based on inaccurate facts; since the vessels could not be monitored by publicly accessible means; the third advanced that disclosing information concerning the vessels deployed during a period in the past did not automatically produce adverse effects for border surveillance; the fourth noted that part of the information was already published; and the last claimed that that the risk generated by the disclosure of said information did not justify the refusal to "communicate information relating to the type or the flag of the vessels concerned"[52].

The General Court delivered the judgement on 27 November 2019, rejecting all pleas of the applicants and requiring them to bear the costs, not only of their part, but also of Frontex.

2. The decision of the General Court and the broadening of the definition of "public security"

In its reasoning explaining the rejection of the applicants' pleas, the GC recalled that derogations from the principle of the widest possible public access to documents must be interpreted and applied strictly, that any refusal must be accompanied by an explanation of how disclo-

[50] *Ibidem*.
[51] *Ibidem*, para. 42.
[52] *Ibidem*, paras. 39-40.

sure of that document could specifically and actually undermine the interest protected, and that the risk must be reasonably foreseeable and not purely hypothetical[53].

As regards more specifically the protection of the public interest with respect to public security, defense and military matters, the GC referred to its case-law indicating that, given the particularly sensitive and essential nature of the public interests at stake, the institution concerned enjoyed a broad margin of appreciation in determining the existence of a risk, and that, as a consequence, the review by the GC of the legality of such decision was limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there had been a manifest error of assessment or a misuse of powers[54].

The GC considered then that in exercising its margin of appreciation in applying the exceptions referred to in the first indent of Article 4(1)(a) of Regulation 1049/2001 Frontex had provided plausible explanations demonstrating the existence of a foreseeable, and not merely hypothetical, risk to public security[55].

The decision on this case rests mainly on what is intended when speaking of "public security"[56], as mentioned in Article 4(1)(a) of Regulation 1049/2001 as a possible ground to justify an exception to the right of access to a document. Indeed, by rejecting all pleas of the applicants, and therefore justifying Frontex decision to refuse the access based on "public security" concerns, the GC came back on the shaping of the meaning of this term, which had been established through previous case law. The evolution of such case law and how this new decision broadened the meaning of "public security" is very well presented in the comment to Case T-31/18 by Timo Knäbe and Hervé Yves Caniard[57].

As they recall, the question of linking public security to public access to documents had been examined in Case T-174/95 (*Svenska Journalistförbundet v Council of the European Union*), in which the CJEU had stated that the "concept could equally well encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities"[58]. In Case C-266/05 (*P. Jose Maria Sison v Council of the European Union*) the

[53] Judgment *Izuzquiza and Semsrott v Frontex*, paras. 61-62.
[54] *Ibidem*, paras. 63-65.
[55] *Ibidem*, para. 74.
[56] *Ibidem*, para. 11.
[57] KNÄBE and CANIARD (2021).
[58] KNÄBE and CANIARD (2021: 343).

holding of personal information regarding a person suspected of terrorism by public authorities had been justified in order to protect the success of the strategies in the fight against terrorism, thus introducing the notion of a strategy linked to the refusal of divulgation of public information[59]. These cases highlight how the CJEU had been able to define the meaning of the "public security" justification by fixing some limits to its application. In its decision in Case T-31/18, the GC introduced a new dimension to this limit. Indeed, it stated that the localization of vessels by traffickers caused by the disclosure of public documents could threaten public security, as "traffickers do not hesitate to attack vessels, sometimes using military weapons, or to undertake manoeuvres capable of endangering crews and equipment"[60]. In this reasoning, the threat to public security is not intended as being a direct risk for the state general well-functioning. It is, instead, intended in a more extensive way, considering the Union as supporting its member states in protecting their interior security, notably the lives of individuals living in it[61]. Indeed, here the ships' crews are seen as exercising sovereign functions of the state (as they help in the fight against smugglers and criminals), leading to the decision of the GC to extend the scope of "public security" to the extent of protecting them from possible attacks and violence exerted by said smugglers.

Now that we have defined what is intended as a threat to "public security" and how the meaning has been extended by the CJEU in its decision concerning Case T-31/18, we can analyze this enlarged meaning in the light of securitization theories (as defined by the Paris school) and see how Frontex's actions in the context of Operation Triton 2017 match the Paris school definition of securitization.

Section 3 : Frontex bureaucrats and the securitization of migration through the Paris school approach

In the first chapter we defined the process of securitization as the process through which an issue is increasingly framed as a threat to security. The securitization of an issue entails the use of securitizing practices to tackle it, which might be practices typically used to counter threats (for instance of military or defense nature), or means of exceptional nature, intended as going out of the ordinary normal realm of

[59] *Ibidem*.
[60] Judgment *Izuzquiza ans Semsrott v Frontex*, para. 73.
[61] KNÄBE and CANIARD (2021).

practices[62]. The enlargement of what is intended as "public security", and thus, of what is included in the exception to access to public documents, following the decision of the CJEU, can be intended as an extraordinary practice, and hence a securitizing practice. Indeed, it is not only giving a new, unprecedented understanding of security, but this new conception literally broadens the outline of the realm of public security, encompassing protection of individuals employed in official operations such as JO Triton 2017. We will now apply the framework of securitization theories, analyzing first the discourse around migration in Frontex report on Operation Triton 2017, and then proving how this discourse is the reflection of the vision integrated by Frontex bureaucrats, as explained by the Paris school of securitization.

1. A securitization discourse depicting migration as a threat…

This decision of the General Court can be read as a confirmation of a vision, shared by Frontex and border management operators, that sees migration management as a security issue needing to be treated in particular ways, thus necessitating specific knowledge and capacities. This corresponds to the concept of securitization as defined by the Paris school, where the focus is put on bureaucrats working in the security realm that have integrated a security-oriented vision of their work and that share it with their peers. It may be interesting to note how this vision, expressed in official documents and translated into technical analyses and operational conclusions, appears in contradiction with the one expressed in documents addressed to the general public and press statements, where the humanitarian dimension of the operation is put into greater evidence (see Chapter 3, section 1, part 2). By looking at the objectives and the mechanisms put in place by Operation Triton 2017 officials, I will highlight how this Operation and overall its way of managing border surveillance and migration is increasingly securitized, in line with the Paris school theories.

Frontex official evaluation report of Joint Operation Triton 2017 starts with a brief risk assessment in order to highlight factors that, in their opinion, justify the creation of this operation, namely the fact that "Italy's external sea borders in the south and the east have been one of the main sea areas affected by irregular migration"[63]. It adds that "criminals acting in different countries of departure coordinate their activities, for example with regard to acquiring vessels, hiring skippers and/or smuggling drugs"[64]. The document goes on identifying "push

[62] LÉONARD (2010).
[63] FRONTEX, *Frontex evaluation report - JO Triton 2017*, p. 3.
[64] *Ibidem*.

factors"[65] that have increased the number of 'irregular' migrants to leave their home countries (for example unstable or unsafe situations, presence of extremist groups, etc.). This depiction sets right away a context of insecurity, justifying the need to help Italy in its border control management and in handling migration flows through this Joint Operation.

The report then lists the objectives and achievements of the Operation. First, "enhancing border security"[66], which consists in increasing surveillance, and aims at scouting for people that might be involved in criminal networks, smuggling or trafficking both humans and merch. The high number of references to "crimes" and illegal activities in the text of the report show how migrants are perceived as potentially dangerous because of their possible involvement in such activities. This vision is somehow contradictory, as the report states at the same time that the operation "tak[es] into account that some situations may involve humanitarian emergencies and distress situations at sea" and, in the following sentence, that it "tak[es] measures against persons who have crossed the border illegally"[67]. The incongruity lies in the fact that migrants traveling through the Central Mediterranean region and in Italy's waters, on unauthorized boats, like the one searched and controlled by Frontex are, by definition, in an illegal situation (as they are not traveling through authorized routes and most of the time don't have the necessary documents to legally enter the state). Hence it seems difficult to simultaneously take measures against these people while wanting to pursue a humanitarian approach.

Indeed, the action itself of defining these people as 'illegal' or 'irregular' is a securitization move, as migrants are associated to illegal, criminal, or dangerous threats, and thus does not follow a humanitarian vision. Furthermore, wanting to "take measures" against them is problematic as when the boats are stopped at sea, they carry people fleeing from different home situations. Most of them will request asylum in the country of arrival and, if the request is accepted, they will obtain the status of refugees, which ensures a right, under the Geneva Convention relating to the Status of Refugees of 1951, to the principle of non-refoulement, meaning they cannot be sent back to their home countries because they face serious threat of persecution. Thus, taking actions against people travelling on boats stopped by Frontex, even if they are travelling illegally, is a way to prevent them from demanding asylum and therefore impeding their concrete protection, using the argument that they are irregular and are therefore portrayed as a threat. In the

[65] *Ibidem.*
[66] *Ibidem.*
[67] *Ibidem*, p. 5.

"operational results" part of the report[68], the terms "illegal" and "irregular" to define the people that have been stopped by Frontex and their activities is employed 8 times, accompanied by a large use of words such as "incidents", "crimes" etc. This securitizing speech contributes to create a *de facto* sense of insecurity, aimed at justifying their intelligence, security and military practices, especially when pairing this term with an enumeration of crimes and "incidents".

2. … that is in reality the expression of Frontex bureaucrats' vision, following the Paris conception of securitization

Although the aforementioned points may seem to be more relevant in light of the Copenhagen school conception of security, that focuses on how migrants are portrayed as a threat through discursive acts (which include for instance defining them through security terms such as "illegal" or "irregular"), the report highlights, more importantly, the existence of a bureaucratic *savoir-faire*, as well as of a common vision shared by Frontex operators. It is truly through this common vision that the operators working in the agency have integrated the idea of migrants as illegal and potentially threatening and needing to be controlled. In fact, the discourse and the use of these expressions are more the consequence of this shared vision and context, which the Paris approach can well explain, than a conscious will to frame them as a threat. This is even more true when thinking that the report of the Operation will more likely only be read by people working in the sector or interested in it, that they might want to try to convince through it, and not by the general public. Hence, it is interesting to focus on how these visions are shared and promoted among bureaucrats, as it is highlighted by some of the objectives mentioned in the report.

Indeed, the report includes many goals that aim at developing a shared approach both among Frontex workers and member states' civil servants. For instance, the list of goals pursued to "establish and exchange best practices" mentions the creation of "workshops, meetings and networking events" delivered by Frontex to member states operators, as well as focusing on incrementing activities "related to administrative solutions, standardization, fleet management and operational technologies as well as technical solutions/best practices"[69]. This all refers to creating common practices, bureaucratic and administrative

[68] *Ibidem*, p. 8.
[69] *Ibidem*, p. 6.

habits, that match the idea of a professional socialization mentioned by Didier Bigo (see Chapter 1).

The most clear and explicit example of this lies in the creation of the "Frontex staff exchange" mission. According to the report, "the core idea was to activate the specialized staff of M[ember] S[tates] authorities, develop their abilities and to bring an added value from the know-how of this network of practitioners"[70]. This is an evident example of securitization according to the Paris approach, as there is a clear will to homogenize, through such exchanges, the daily tasks of practitioners with a view to integrate and disseminate the same ideas and approach: "as a result, the involved officers learned from each other, exchanged experiences, shared best practices and gradually harmonized the operational procedures"[71]. This is done through the implementation of workshops, observation visits, teaching of Frontex's work and explaining daily tasks. The member states' operators are taught to perform tasks such as "fingerprinting, document checking, screening, debriefing"[72], even interviewing migrants, which are all tasks stemming from a security approach, and relevant to the "second universe" as defined earlier by Didier Bigo, where professionals see themselves as crucial figures needed to filter the "legal" passengers from the "illegal"[73] ones to ensure the protection of the borders.

Thus, the report of Operation Triton, which is the official document presenting the goals, objectives and results of the Operation, truly demonstrates the existence of a securitization vision developed and incorporated by Frontex bureaucrats, that is transmitted to other operators in the states involved in the Joint Operation, and that leads to seeing migrants as potentially threatening and thus as needing to be controlled and eventually filtered.

[70] *Ibidem*, p. 7.
[71] *Ibidem*.
[72] *Ibidem*.
[73] BIGO (2014: 211).

CHAPTER 3 : CASE T-31/18 AND THE LACK OF ACCOUNTABILITY FOR DISRESPECT OF FUNDAMENTAL RIGHTS

In the past chapter, we have underlined the consequences of the decision of the General Court ('GC') in Case T-31/18, that broadened the definition of "public security", and we highlighted how this can be explained through the securitization process as defined by the Paris School. We now focus on the consequences of this securitization, and more specifically on how this leads to a justification of Frontex's lack of transparency that hinders the control and accountability of fundamental rights violations, and especially of the rights of migrants.

Section 1 : Frontex and JO Triton responsibilities concerning respect of fundamental rights

Before dwelling on how Frontex is able to discard human rights through the primacy of security and the establishment of a "culture of secrecy"[74] that blurs the lines of its actions and responsibilities, we shall look at the legal framework of Frontex in terms of fundamental rights provisions, and the statements concerning protection of human rights in the context of Operation Triton 2017.

1. Fundamental rights provisions in Frontex legal framework

As mentioned in Article 1 of Regulation 2016/1624, which was in place at the time of Operation Triton 2017, Frontex is responsible for the respect of fundamental rights. Indeed, as an EU agency it ought to respect Article 6 of the Treaty on European Union ('TEU'), that refers to the Charter of Fundamental Rights of the European Union (that holds the same value as the Treaties), as well as the European Convention for the Protection for Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights ('ECHR'), a convention of the Council of Europe that has not been ratified by the EU yet, although the "Union shall accede [to it]" according to Art. 6(2) of the TEU[75]. Despite being bound by these norms, Frontex first Regula-

[74] EUROPEAN PARLIAMENT (2011: 99).
[75] Article 6 of the Treaty on European Union:

tion 2007/2004 did not explicitly refer to any commitment to respect fundamental rights. Indeed, the first Regulation simply stated that "[the] Regulation respects the fundamental rights and observes the principles recognized by Article 6(2) of the TEU and reflected in the Charter of Fundamental Rights of the European Union"[76].

Numerous criticisms led Frontex to grant a more distinguished place to the protection of fundamental rights in its framework[77]. Indeed, Regulation 1168/2011, revising the first Regulation, introduced among other things a *Fundamental Rights Strategy* to "monitor the respect for fundamental rights" (Art. 26a), as well as other monitoring mechanisms to achieve said goal[78]. But despite such more stringent obligations, concerns were still raised about possible violations during Frontex operations[79], leading to a further strengthening of fundamental rights provisions in the following Regulation 2016/1624. The 2016 Regulation, which was applicable at the time of Joint Operation Triton 2017, states that Frontex

> "should fulfil its tasks in full respect for fundamental rights, in particular the Charter of Fundamental Rights of the European Union ('the Charter'), the European Convention for the Protection of Human Rights and Fundamental Freedoms, relevant international law, including the United Nations Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Relating to the Status of Refugees and obligations related to

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1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

[76] Council Regulation, 26 October 2004, (EC) 2007/2004, *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*.
[77] KARAMANIDOU and KASPAREK (2020).
[78] Regulation of the European Parliament and of the Council, 5 October 2011, (EU) 1168/2011, *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*.
[79] KARAMANIDOU and KASPAREK (2020).

access to international protection, in particular the principle of non-refoulement, the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue"[80].

2. Operation Triton 2017 and statements concerning the defense of fundamental rights

Apart from the legal framework by which Frontex is bound, and that ought to be respected in the context of Joint Operations, JO Triton mandate contained further specifications regarding the respect of fundamental rights. The official website of the European Commission specified, before the launch of the Operation, that "Triton will be operating in full respect with international and EU obligations, including respect of fundamental rights and of the principle of *non-refoulement* which excludes push backs"[81]. The same was also stated in the evaluation report of the Operation, which added that they "[took] into account the recommendations of the Frontex Consultative Forum"[82].

Among the objectives stated, and most publicized in official documents, there is indeed to carry out "Search and Rescue" ('SAR') operations which aim at "render[ing] assistance to persons found in distress at sea, whenever and wherever required"[83]. This objective is even defined as a "priority" of the Operation, leading Frontex "vessels and aircrafts [to be regularly] redirected by the Italian Coast Guard to assist migrants in distress"[84]. A quantitative analysis presented by Eugenio Cusumano emphasizes the importance put on humanitarian commitment in Operation Triton's official statements[85]. Indeed, in its factsheets and press preleases, the verb "rescue" is repeated 148 times, with a notable superiority of "words from the humanitarian category" over the "border control" category, as presented hereby in figure 3[86].

[80] Regulation (EU) 2016/1624, Preamble 47.
[81] EUROPEAN COMMISSION, *Frontex Joint Operation "Triton" – Concerted efforts to manage migration in the Central Mediterranean.*
[82] FRONTEX, *Frontex evaluation report - JO Triton 2017*, p. 4.
[83] *Ibidem*. p. 5.
[84] FRONTEX, *Joint operation Triton (Italy).*
[85] CUSUMANO (2019).
[86] *Ibidem*.

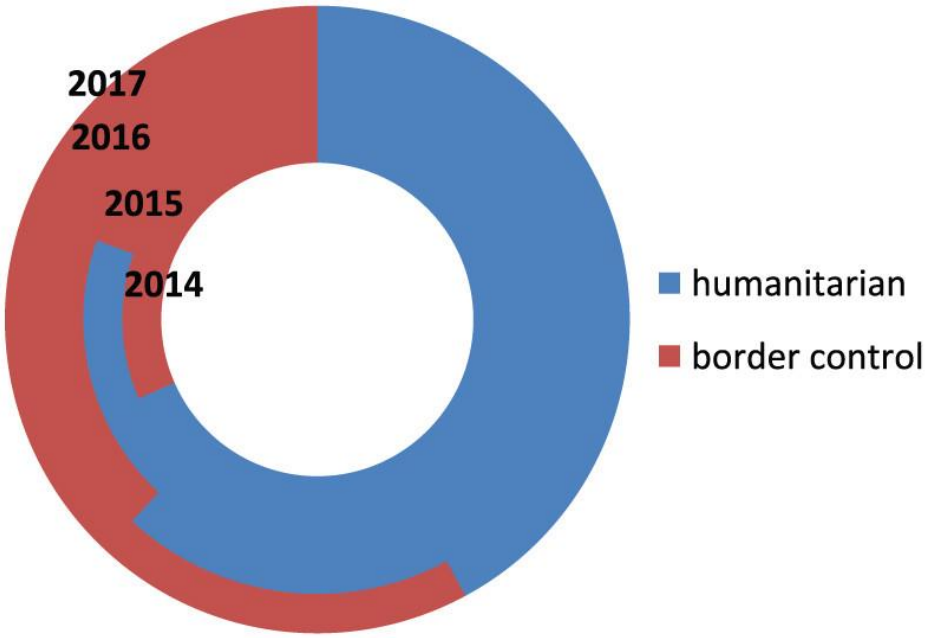

Figure 3: Triton's rhetoric until June 2017[87]

The same paper highlights how, despite these promising statements, the reality of the actions pursued during the Operation did not reflect this commitment, as a result of probably intentional choices to avoid such rescuing missions. Indeed, Triton's involvement in SAR operations decreased during the time it was in place, resulting in only 13% of total SAR missions[88]. Furthermore, agents of Operation Triton might have deliberately "redirected [Frontex's assets] outside of their operational area"[89], resulting in being "too far north to allow for a systematic, proactive involvement in SAR"[90]. The paper explains this choice was consciously made as a way to avoid being too close to Libyan waters because, according to Frontex statements, the possibility of SAR operations there would be a "pull factor", increasing the number of crossings once smugglers would make the population aware of the situation. Similar statements are not only false, since as numerous studies have highlighted there is no such thing as a pull factor, but even dangerous as they delegitimize the work of NGOs (that have seen their funds cut down)[91]. It may be argued that this intentionally moving away from SAR operations is a consequence of Frontex associating migrants

[87] *Ibidem*.
[88] *Ibidem*.
[89] FRONTEX, *Risk analysis for 2016*, cited in CUSUMANO (2019).
[90] *Ibidem*.
[91] CUSUMANO (2017).

to threats (and thus dealing with them in a security framework), allowing the agency to avoid accountability on the grounds of "public security", as will then be legitimized by the decision of the GC in Case T-31/18.

Section 2 : Frontex and Case T-31/18: the primacy of a "culture of secrecy"

Next to Frontex's surveillance practices at sea, this section looks at how the CJEU's securitizing move allows the agency to justify some practices regarding access to documents in the name of a necessary "culture of secrecy"[92].

1. Surveillance technologies employed by Frontex

Frontex has stated on multiple occasions its willingness to comply with human rights standards. However, this willingness is somewhat challenged by the rise of surveillance technologies Frontex has acquired and used in its operations.

In parallel to its statements on fundamental rights, the agency has, in fact, put in place innumerable surveillance and intelligence mechanisms to collect information relevant to achieve the objectives announced in its operations regarding the fight against cross-border crimes, smugglers, human traffickers, and the crossing of EU borders by irregular migrants.

In the context of Operation Triton, around summer 2015, considered the "peak summer season", Frontex expanded its assets, deploying "12 patrol boats, 9 debriefing and 6 screening teams, 6 offshore patrol vessels, 3 airplanes, and 2 helicopters"[93]. These surveillance and intelligence activities were facilitated by the European Border Surveillance System ('EUROSUR') framework, which "covers most aspect of border management, including land maritime and air border surveillance, but also checks at border crossing points, border operations and integrated planning"[94]. The technological advance of patrolling surveillance methods employed, allows to get images of people on a vessel, making it possible to perhaps distinguish whether it could be transporting migrants or be involved in human trafficking. Other available data that

[92] EUROPEAN PARLIAMENT (2011: 99).
[93] FRONTEX, *Frontex expands its Joint Operation Triton*.
[94] EUROPEAN COMMISSION, *Eurosur*.

could indicate suspicious behavior include the speed at which the vessel is going, but also its exact direction and position[95]. Information collected, especially through the Vessel Detection Service, can be shared among member states (and their respective National Coordination Centre) and Frontex, in the context of the EUROSUR framework, and thanks to the EUROSUR Fusion Services[96].

This capacity to potentially detect criminal activities through intelligence practices encourages the development of mechanisms of surveillance of all movements in the area of interest, and of intelligence strategies[97]. But these technologies could be equally, and probably better, suited to perform rescue operations and helping vessels in distress, rather than for the purpose of automatic and generalized surveillance mechanisms, as put forward by Maria Jumbert[98]. Indeed, although Frontex states that "saving lives should remain an absolute priority", scholars such as Jumbert highlight the "mismatch between the information sought to 'control' borders"[99] that Frontex technologies are not suited for, despite border control being its main goal, and how they could be better used in SAR operations.

The involvement of "debriefing teams" (which are teams of intelligence experts) in Operation Triton, contributes to this effort of information collection and intelligence analysis, thus confirming the intention of the operation to focus on surveillance[100]. Operation Triton 2017 report mentions their work under the title "Identify possible risks and threats" and explains that to achieve this, debriefing teams carry out interviews with migrants with the purpose of collecting relevant information[101]. It is however difficult to obtain information on how such interviews are conducted, whether migrants are informed of their rights, whether they can dispose of an interpreter, or be assisted by a lawyer, whether their dignity is respected during these interviews, and to what extent these interviews are necessary to the success of the Operation. This question is of crucial importance considering that migrants are

[95] JUMBERT (2018).
[96] "Frontex shares information collected from satellites and other surveillance tools such as the ones used by the European Maritime Safety Agency and the EU Satellite Centre with Member States. No Member State alone could afford the space-based surveillance services and other platforms offered by the EUROSUR Fusion Services. Thanks to these services, each Member State has access to advanced technologies, avoiding duplication and at lowering costs.", EUROPEAN COMMISSION, *Eurosur*.
[97] JUMBERT (2018).
[98] *Ibidem*.
[99] *Ibidem,* p. 674.
[100] FRONTEX, *Frontex evaluation report - JO Triton 2017*.
[101] "Carrying out debriefing activities to obtain operational information and personal data related to perpetrators of cross-border crimes through interviewing migrants, to be further processed and analyzed", *ibidem,* p. 6.

already in a vulnerable situation. Thus, this surveillance framework should be coupled with clearly established mechanisms ensuring respect of fundamental rights of migrants and accountability in case of violations. However, as we will see in the next part, this is far from being the norm, considering notably the great challenges in terms of transparency of the agency's actions and access to their documents.

2. Lack of transparency and the "culture of secrecy" of Frontex

The decision of the General Court in Case T-31/18, rejecting applicants claim for Frontex to give them access to documents, is an important step proving there is an ongoing securitization process, as explained in the previous chapter. But the impact of this decision is bigger than simply demonstrating the existence of securitization. Indeed, this decision contributes to the creation and legitimization of a culture of secrecy of the agency, where its lack of transparency is increasingly justified by security concerns. This is further demonstrated in certain practices by Frontex, which we highlight hereafter in order to point out the agency's intention to hinder access to their documents. This demonstrates the relevance of the Paris variant of securitization, whereby this process unfolds by removing security policies out of sight from media or political oversight: securitization proceeds through professional, quite invisible routines, practices by officials on the ground, in the implementation phase.

Indeed, Frontex has significantly changed its procedures for access to documents through Freedom of Information ('FOI') requests. This has been underlined by scholars such as Lena Karamanidou and Bernd Kasparek that focus on Frontex relation to transparency. For instance, in 2020 the agency modified the procedure to demand access to documents. This procedure, which was previously carried out through general public portals such as asktheeu.org, was transferred to a Frontex portal, making it less accessible and less "user-friendly"[102]. Furthermore, messages with dissuasive intentions have been shared on multiple occasions to individuals compiling FOI requests. Some of those warned them about potential consequences of sharing the document with third parties, including in terms of copyright violations, although said consequences were not clearly defined. A report of Frontex transparency state conducted by Luisa Izuzquiza and Arne Semsrott right after Case T-31/18 and Operation Triton mentions that some people, after requesting documents, were shown the following message, asking to pay a fee of 20 cents per page:

[102] KARAMANIDOU and KASPAREK (2020).

> "By adhering to the principle of good administration and in the interest of transparency, we would like to inform you that the redaction required from Frontex under Article 4 of Regulation (EC) 1049/2001 and the hardcopies that are going to be produced in its course, oblige us to charge 20 cent per page plus postage"[103].

Although this is not a large amount of money, the idea of having to pay to access documents might dissuade users from demanding it. This is even more true when considering the decision in Case T-31/18, where pleas of the applicants were not only discarded, but applicants were also asked to bear the costs (including those of the defendants). This amount of money was originally set at 24.000€, and then reduced to 10.520,76€[104]. As this amount, even revisited, is clearly not affordable by everyone, this might dissuade individuals from undertaking similar actions and therefore creating obstacles to the right to access to information and to justice. It therefore creates a distinction between those who can afford to ask for transparency and those who cannot.

The actions just described seem to intentionally aim at dissuading users from trying to follow said procedures. Izuzquiza and Semsrott also highlight how Frontex is the only EU agency that requires proof of identity to access the request form. These documents include

> "a qualified e-signature in line with the eDIAS Regulation; an ID card/passport/residence permit in the EU (for a natural person); or registration of the entity in an EU Member State and a proxy authorizing the requester to act on behalf of this entity (for a legal person)"[105].

This procedure deters potential applicants, as it is both time-consuming and potentially more difficult to follow.

On top of what has been said regarding the possible difficulties encountered by applicants, Izuzquiza and Semsrott's report on Frontex's transparency also highlights how even once the request has been sent, access is often denied. Indeed, in 2017, out of the 108 requests made, full access was granted only to 13,9% of them, partial access to 60,2% and refusal to 19,4% (cf. figure 4)[106]. It may also be noted that the number of requests being granted full access drastically diminished with the increase of operational activities of Frontex over time. As a comparison, the two activists indicate that another EU agency, the European Asylum Support Office, granted full access to 39,1% of requests and denied only 4,3% of them.

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[103] SEMSROTT and IZUZQUIZA (2018).
[104] Order of the General Court, 26 March 2021, Case T-31/18 dep., *Luiza Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency (Frontex)*, para. 41.
[105] SEMSROTT and IZUZQUIZA (2018).
[106] *Ibidem*.

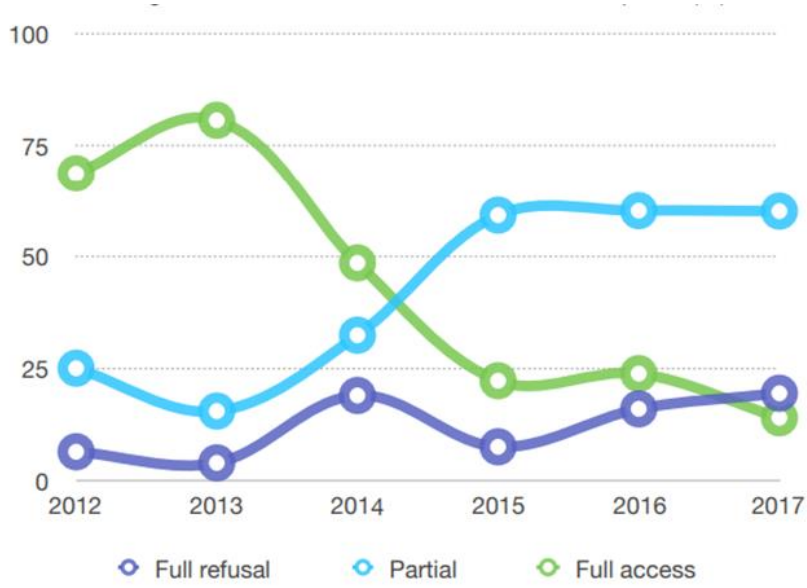

Figure 4: Outcome of access to document requests (%)[107].

Lastly, the report emphasizes how the agency has not published any review or list of the exact number and type of assets deployed in its operations, including operation Triton. Indeed, Frontex unveils information on its official platforms, such as its social networks (Twitter for instance), but only sporadically and with limited content or details.

These concerns about the way Frontex manages requests for public access to documents have also been examined by the European Ombudsman, the European body in charge of "investigating complaints about maladministration by EU institutions"[108]. The Ombudsman found, for instance, a maladministration practice on how the agency dealt with requests for public access to documents, specifically on the fact that it does not respect the statutory time-limit set to deal with a request[109]. Frontex failed to accept the recommendation made by the Ombudsman to remedy to this situation.

Thus, despite its obligations on transparency, Frontex still hinders right of access to documents by making the request procedure more challenging and discouraging users from entering the procedure.

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[107] *Ibidem.*
[108] EUROPEAN OMBUDSMAN, *Role and Strategy*.
[109] EUROPEAN OMBUDSMAN, 15 March 2024, Case OI/4/2022/PB, *The time taken by the European Border and Coast Guard Agency (Frontex) to deal with requests for public access to documents*.

Section 3 : A "culture of secrecy"[110] that helps discarding fundamental rights, through primacy of security

These actions by Frontex, as well as the decision by the GC, are proof of the success of securitization of migration. Indeed, with its decision on Case T-31/18, broadening the meaning of security, and making this security aspect prevail over transparency of the agency's actions, the CJEU has justified the culture of secrecy fostered by Frontex. The procedures aimed at hindering requests of access to documents were legitimized by the linkage created between transparency and security, where the latter prevails over the former and thus justifies this climate of secrecy surrounding the agency's actions. This transparency-security nexus and the meaning given to it by Case T-31/18 is intentional and has even been praised by the representatives of the defendant, Timo Knäbe and Hervé Caniard, in their commentary on the case: "the CJEU's balancing of these interests can be considered a success"[111]. This situation however raises many concerns, mainly on the fact that by making security and secrecy prevail over transparency, it also discards the rights of migrants.

1. The origins of the "culture of secrecy"

Through the securitization process defined earlier, migration is considered as a potential threat, with "irregular migration" placed on the same level as other criminal activities that Frontex operations aim at fighting (see the objectives of Operation Triton defined in the previous chapter). Although the operation states its commitment to respect fundamental rights ("saving lives at sea" is stated in the operational results of the report on JO Triton 2017)[112], it is difficult to assess to what extent they maintain their promise and enquire over the ways this protection of fundamental rights is ensured. Indeed, without an easy access to official documents, one can only rely upon the statements and information provided by Frontex itself, which keeps the capacity to control what is being released. In the words of Lena Karamanidou and Bernd Kasparek, "Frontex attitudes to information and communication thus enable them to maintain secrecy over its activities and avoid accountability"[113].

[110] EUROPEAN PARLIAMENT (2011: 99).
[111] KNÄBE and CANIARD (2021: 344).
[112] FRONTEX, *Frontex evaluation report - JO Triton 2017*.
[113] KARAMANIDOU and KASPAREK (2020: 82).

Case T-31/18 is not the only one in which the agency refused to grant access to its documents. As indicated above, the European Ombudsman website is full of requests, inquiries and recommendations regarding access to Frontex documents. Despite not always finding maladministration in the way the agency acted, it shows the existence of a blur around its activities, that are persistently difficult to be monitored. This situation has been described by the European Parliament as a "culture of secrecy"[114].

The Committee on Civil Liberties, Justice and Home Affairs Department of the European Parliament produced a report on the "Implementation of the EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies"[115], highlighting how this problem has structural roots stemming from the initial division of EU legal framework in pillars and the mixed supranational and intergovernmental nature of the EU system. The report speaks of a "legacy of the pillar divide"[116] of the EU. The Lisbon Treaty put an end to the *three pillars* system, and created, in the Title V of the TFEU, the Area of Freedom, Security and Justice, incorporating parts of the former Third Pillar and of the First Pillar. As the old system encountered notable deficiencies, especially within the Third Pillar with little accountability by the European Parliament, weak judicial control, and lack of transparency, due to its intergovernmental nature, this new system was expected to overcome past difficulties and install a more "Community [based] method of cooperation"[117] in these fields. The report sheds light on the "legacy" of the pillar system and how, contrary to what was expected, the old intergovernmental perspective persisted:

> "it appears as if the old third pillar spirit is not only very much present but it is also now contaminating other (formerly considered) first pillar areas, such as for instance those of external border controls and migration/asylum policies as well as agencies such as Frontex. The 'depillarization' emerging from the Lisbon Treaty is allowing for the extension of the police and insecurity-led (intergovernmental) approach to spread over the entire EU's AFSJ"[118].

Further than simply recognizing the persistence of this approach, the report explains how this vision is anchored in the "mentalities" of the actors (such as Frontex), that keep working with methods of "internal security policing" in "secretive, police and insecurity-led" activities

[114] EUROPEAN PARLIAMENT (2011: 99).
[115] *Ibidem.*
[116] *Ibidem,* p. 98.
[117] *Ibidem,* p. 97.
[118] *Ibidem,* p. 98.

allowing them to obtain a certain amount of autonomy from "democratic, political and legal accountability"[119].

This idea can be explained through securitization as described by the Paris school, where agents now working with Frontex have internalized old methods and way of thinking, transposing them into this new framework, leading the agency (whose initial goal was simply help with management of external borders) to resemble a "police and intelligence" actor. The consequence of such a process is that the management of external borders has assimilated migration to suspicious, potentially threatening criminal activities, that need to be controlled and managed through specific means of actions, out of the "regular" realm of politics (surveillance and police practices, that include and even justify the need of secrecy and intelligence practices).

All this is done at the expense of migrants, who have been subject to these police-framed modes of action, and see their rights as human beings outweighed by the primacy of security questions.

2. The rights of migrants entering the EU: how the "problem of many hands" hinders their protection

After having established what are the responsibilities of Frontex with regard to respect of human rights, and how it manages to avoid transparency and accountability by securitizing migration and associating it to a security threat, we shall look at what are the existing legislative frameworks protecting migrant's rights. The complexity of said frameworks helps Frontex avoiding responsibilities for violations of fundamental rights and constitutes an example of what political philosopher Dennis Thompson calls 'the problem of many hands', which we will further clarify in this paragraph.

One of the reasons for Frontex's limited accountability is that, despite the existence of the guarantees set out in the treaties and in the specific legislative framework of Frontex, it is difficult to clearly protect the rights of migrants and identify who is responsible in case of a breach, especially when this happens during operations such as JO Triton, in which multiple governmental and supranational powers, and legal regimes, are involved. As this last section will demonstrate, the multiplicity of actors involved and the complexity of the applicable legal and operational framework makes it difficult for individuals, and especially migrants trying to enter EU territory and probably not famil-

[119] *Ibidem*, p. 98.

iar with such framework, to know what rights they are entitled to and to whom they should file their complaints in case of breaches. The judicial procedures available remain complex and not always easily accessible, contributing to the difficulties in making human rights of migrants properly respected.

The first difficulty in the definition of the applicable legal regime comes from the term of "migrant" itself. The Convention Relating to the Status of Refugees, also known as the 1951 Refugee Convention, was established to protect from their own governments; as the definition states, they face a "well-founded fear of persecution"[120] at home, and thus need the special protection granted by this Convention. Unlike the term "refugee", the term "migrant" has no universally accepted definition and does not come with a statute granting specific rights or protection. There is no such thing as an international treaty codifying the "rights of migrants". Thus, a migrant in the eyes of the law, and until the moment in which the status of refugee is eventually granted to him/her, is simply seen as a human being, and as such is protected by human rights norms that concern everyone.

These norms are set out in a multitude of human rights legal instruments, with different scope, some universal and other regional, some being legally binding and other setting standards and recommendations. The three main human rights frameworks applicable to migrants entering EU territory, are those of the European Union, the Council of Europe and the international human rights treaties[121].

The Charter of Fundamental Rights of the EU has already been mentioned, as being one of the legal instruments directly binding for Frontex. All human rights stated in it, are applicable to "irregular" migrants, unless explicitly stated otherwise. This includes a right to human dignity (Article 1), the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security (Article 6), the principle of non-discrimination (Article 21), but also social or economic rights including right to education (Article 14), to fair and just working conditions (Article 31), health care and social security and social assistance (Articles 34 and 35, although they must be in accordance with national laws). These provisions

[120] Definition of a refugee according to the 1951 Refugee Convention: "A person who […] owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."
[121] MERLINO and PARKIN (2011: 1).

being applicable to EU institutions, they can only account for the actions of member states while implementing EU law, meaning in domains in which the EU has been granted competences by the Treaties[122].

To this EU framework add the legal instruments for protection of human rights provided by the Council of Europe, the main ones being the European Convention of Human Rights ('ECHR') and the European Social Charter. Indeed, although the EU has not acceded to the ECHR, meaning its institutions and bodies cannot be held responsible for potential breaches, all of the 27 EU member states are singularly part of the ECHR. The first section of the Convention lists all human rights which must be ensured by the High Contracting parties to everyone within their jurisdiction (Article 1), including the right to life (Article 2), prohibition of torture (Article 3), of slavery and forced labor (Article 4), the right to a fair trial (Article 6), which may apply to the lack of procedural safeguards for migrants facing justice, and right to "respect for private and family life" (Article 8), which has been invoked to limit refusal of entry or expulsion from member states of migrants that could not join their families[123]. The European Court of Human Rights, in Strasbourg, is responsible for observing the engagements undertaken by the parties. Thus, anyone, including migrants, can lodge a complaint before the Court if they think their rights have been violated by one of the High Contracting parties (after having exhausted national judicial remedies), and the judgements of the Court are legally binding upon the state declared responsible for the violation.

Lastly, rights of migrants – setting outside the question of the possible status of refugee – are protected by International human rights law, which has been developed to defend every person, for being a human. Apart from the Geneva Convention on the Status of Refugees, this international law framework includes the International Bill of Human Rights established by the United Nations, which encompasses the Universal Declaration of Human Rights (1948) and two covenants: the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights (1966). The Universal Declaration, which is composed of 30 articles stating "rights and freedoms" entitled to "everyone […] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[124] is considered non-binding. The two Covenants, on the other hand, are legally binding for states that ratified them, including all member states of the European Union. The monitoring of the correct execution of the obligations set out in these treaties is

[122] *Ibidem*, p. 3.
[123] *Ibidem*, p. 5.
[124] United Nations, 1948, *Universal Declaration of Human Rights*, Article 2.

ensured by the respective committees of experts, to which the states parties must submit reports on the implementation of the treaties, and which will issue reports and comments. In addition to the International Bill of Human Rights, the UN developed six thematical international treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) adopted in 1990 and entered into force in 2003. The latter, however, has not been ratified by any EU member state, which makes it inapplicable to migrants and their families in EU member states. Finally, the UN also has developed specific conventions dealing, among other things, with the rights of people at sea, namely the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue.

Therefore, migrants' rights are protected by human rights provisions and treaties. However, the identification of who is responsible when a breach of such treaties occurs is still difficult, especially when said breach happens in the context of a Frontex Joint operation, which involves both an EU agency and member states. Indeed, as just described, some of the legal instruments available have only been ratified by the member states, and not by the EU, whereas others are part of the EU legal framework and thus concern in principle only its institutions and agencies, but may nonetheless concern member states when the breach occurs while implementing EU law. To this must be added the difficulties encountered in getting access to Frontex documents, leading to lack of information on the actual conduct of the agency in its operations and the amount of responsibility of each participant.

The complexity of the legal framework and the coexistence of different actors makes the identification of responsibilities in cases of human rights violations in Frontex Joint Operations particularly difficult, as the thesis by Melanie Fink on Frontex responsibilities in "multi-actor situation" clearly assesses[125]. This exemplifies the aforementioned "problem of many hands", resulting from a combination of complex structures, unclear definition of tasks and responsibilities, and lack of transparency, which makes it impossible to identify the specific responsibility of each actor in a given situation[126]. This is precisely the case of Frontex Joint Operations where – assuming that a violation is identified – the different actors involved can hide behing this unclear and untransparent definition of responsibilities to deny their own responsibility and try to locate it with other actors. In turn, this renders vain any attempt to properly establish accountability for

[125] FINK (2017).
[126] GKLIATI and KILPATRICK (2022).

violations, makes it difficult to prevent such violations occurring again in future and, ultimately, hinders the effective protection of the rights of migrants.

CONCLUSION

The decision of the General Court on Case T-31/18 to discard the applicants' claim legitimized the lack of transparency of Frontex by accepting that "public security" (which included security of public agents working on Frontex vessels) is a valid reason to maintain secrecy over its operations. This decision can be explained by the securitization theory as described by the Paris school. Indeed, the General Court's decision justifies Frontex vision that associates migrants to potential smugglers and cross-border criminals constituting a threat to the EU.

The decision seems to place higher importance on the protection of Frontex's work, which aims at defending the borders from these potential threats, than on transparency and accountability, which are nonetheless among the core principles of European institutions. Indeed, it is though mechanisms of transparency, such as FOI requests, that the actions of EU agencies and institutions might be overseen by the general public and the competent authorities, allowing to hold Frontex accountable in case of violations of its obligations.

Frontex officials, as highlighted by the reports, have integrated practices pertaining to the domain of intelligence and surveillance, which imply secrecy and collection of information from the migrants tracked down in their operations: those practices fall into the description of the securitization process defined by the Paris school that focuses on bureaucratic actions and *savoir faire*. The reports on the agency's operations highlight how these practices are developed and shared among border-controls officials and are at the heart of the work and objectives of Frontex.

The problem of these operations is that by securitizing migrants, and framing them as potential threats that must be put under surveillance, the agency tends to disrespect fundamental rights of migrants, that should be treated as every other human being, and not as "illegal" or dangerous threats to the security of the community. By justifying practices that hinder the principle of transparency (namely the fact that Frontex is allowed not to share its documents on the grounds of "public security"), the CJEU implied that the agency should conduct these intelligence and security-oriented operations with little or no scrutiny. By allowing the development of a "culture of secrecy" around Frontex actions, and blurring the lines of what is necessary to protect security and what is not, Frontex practices and actions become increasingly obscure and uncontrollable by third parties. Therefore, in case of violations of fundamental rights of migrants and of human rights principles by which

Frontex is bound through its legal framework, it will be hard to hold the agency accountable. This adds up to the fact that rights of migrants are protected by a complex legal framework, which makes allocation of responsibility in case of breach difficult to determine, thus creating a gap in the mechanisms that are supposed to ensure that migrants' rights, as human beings, are respected at all times.

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