



Universiteit  
Leiden  
The Netherlands

## **Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law**

Fink, M.

### **Citation**

Fink, M. (2017, December 13). *Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law*. The Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. The Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University, Leiden. Retrieved from <https://hdl.handle.net/1887/58101>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/58101>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/58101> holds various files of this Leiden University dissertation

**Author:** Fink, Melanie

**Title:** Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law

Date: 2017-12-13

Frontex and Human Rights

*Responsibility in 'Multi-Actor Situations' under the ECHR  
and EU Public Liability Law*



# Frontex and Human Rights

*Responsibility in 'Multi-Actor Situations'  
under the ECHR and EU Public Liability Law*

PROEFSCHRIFT

ter verkrijging van  
de graad van Doctor aan de Universiteit Leiden,  
op gezag van Rector Magnificus prof.mr. C.J.J.M. Stolker,  
volgens besluit van het College voor Promoties  
te verdedigen op woensdag 13 december 2017  
klokke 10.00 uur.

*door*

Melanie Fink

geboren te Dornbirn, Oostenrijk

in 1985

Promotoren: Prof. dr. R.A. Lawson  
Prof. dr. M. Nowak (University of Vienna, Austria)  
Co-promotoren: Dr. J.J. Rijpma  
Prof. dr. S. Wittich (University of Vienna, Austria)  
Promotiecommissie: Prof. dr. C. Binder (Bundeswehr University Munich,  
Germany)  
Prof. dr. N.M. Blokker  
Prof. dr. E. Guild (Radboud University Nijmegen /  
Queen Mary University of London, United Kingdom)  
Prof. dr. S. Peers (University of Essex, United Kingdom)  
Prof. dr. A. Reinisch (University of Vienna, Austria)  
Prof. dr. R.C. Tobler

This thesis was written in the framework of a 'cotutelle de thèse' between Leiden University (Europa Institute) and the University of Vienna (Department for European, International and Comparative Law).

The research leading to this thesis received funding through:

- a DOC Fellowship of the Austrian Academy of Sciences;
- a Marietta Blau-Grant of the OeAD-GmbH (Austrian agency for international mobility and cooperation in education, science and research), financed by the Austrian Federal Ministry of Science, Research and Economy.

Lay-out: AlphaZet prepress, Waddinxveen  
Printwerk: Ipskamp Printing

© M. Fink 2017

*All rights reserved. No part of this thesis may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.*

# Acknowledgments

Writing this thesis was a challenging and rewarding experience. I was privileged to count on the intellectual and emotional support of many outstanding colleagues and friends, who encouraged me to start, motivated me to persevere, and pushed me to finish. I owe a debt of gratitude to all of them, but will limit myself to name a few for the extraordinary support they provided.

First of all, I would like to express my respect and gratitude to my supervisors Rick Lawson, Manfred Nowak, Jorrit Rijpma, and Stephan Wittich. I have benefited enormously from their generosity with time, insightful comments, and guidance. I thank them wholeheartedly for their unwavering support and availability. Jorrit, my supervisor, colleague, and friend, made sure that I remained on track from beginning to end. His encyclopedic knowledge of EU law, his mad skills to never stop asking questions, and his availability any day of the week and time of the day truly gave me confidence throughout the years of writing, and eventually the courage to call this manuscript finished.

I would also like to thank the members of the Reading Committee, Christina Binder, Niels Blokker, Elspeth Guild, Steve Peers, August Reinisch, and Christa Tobler. I am honoured they invested their time and mind to review this manuscript and I am grateful for their insightful comments.

This research would not have been possible without the generous funding of the Austrian Academy of Sciences and the Austrian agency for international mobility and cooperation in education, science and research. Their support allowed me not only to devote full-time to my research, but also provided the geographical mobility essential to carry it out.

My PhD journey started at the Department of European, International and Comparative Law of the University of Vienna and then took me to the Europa Institute of Leiden University and the Lauterpacht Centre for International Law of the University of Cambridge. I would like to thank all my colleagues for a most inspiring research environment and, most of all, for their humour, kindness, and friendship. I am particularly indebted to Stefaan Van den Bogaert, the Director of the Europa Institute, for welcoming me over and over again when I came back after every good bye and finally refused to leave.

While researching and writing this thesis I was lucky enough to be in the company of a number of extraordinarily kind, supportive, and funny friends from Vienna, Amsterdam, and all over the world. To my friends in Vienna, thank you for making me feel home whenever I am with you, whether that is on your beautiful Viennese rooftop terraces, or in the streets, parks, restaurants, and bars of Vienna. I sincerely appreciate your encouragement, humour, and friendship. To my friends in Amsterdam, thank you for not letting work stop me explore the city's treasures and distractions with you, and for being my family away from home. My dear Amsterdam butterflies, thank you for all those joyful moments spent in the air.

Reserving the most important for last, I wish to thank my whole family, but especially my parents Elke and Werner, their partners Andrea and Artur, my sister Anja with her lovely family, my brother Julian, and my grandparents Ilse and Ludwig. I thank you for all those moments full of laughter, food, and wine. But most of all I thank you for your unconditional support and love. You mean the world to me. Finally, I would like to express my gratitude, admiration, and love to my partner, João Pedro, for his tremendous support throughout this journey.

Melanie Fink

Leiden, 19 September 2017



# Concise Table of Contents

|                                                                                             |      |
|---------------------------------------------------------------------------------------------|------|
| LIST OF FIGURES AND TABLES                                                                  | XVII |
| LIST OF ABBREVIATIONS                                                                       | XIX  |
| 1 INTRODUCTION                                                                              | 1    |
| 1.2 Research question and scope                                                             | 10   |
| 1.3 Research design                                                                         | 15   |
| 1.4 Scientific relevance                                                                    | 25   |
| 1.5 Outline                                                                                 | 27   |
| 2 FRONTEX-COORDINATED JOINT OPERATIONS                                                      | 29   |
| 2.1 Frontex: an overview                                                                    | 30   |
| 2.2 Joint operations                                                                        | 43   |
| 2.3 Operational resources for joint operations                                              | 56   |
| 2.4 Implementing joint operations                                                           | 72   |
| 2.5 Conclusion                                                                              | 94   |
| 3 RESPONSIBILITY UNDER THE ECHR                                                             | 97   |
| 3.1 Responsibility of EU member states for breaches of the ECHR                             | 98   |
| 3.2 Attribution of conduct: identifying the relevant rules                                  | 117  |
| 3.3 Responsibility for the primary breach                                                   | 133  |
| 3.4 Responsibility for associated conduct                                                   | 168  |
| 3.5 Conclusion                                                                              | 201  |
| 4 LIABILITY UNDER EU LAW                                                                    | 213  |
| 4.1 Introduction to EU public liability law                                                 | 215  |
| 4.2 Liability for fundamental rights violations                                             | 231  |
| 4.3 Liability for the primary breach                                                        | 273  |
| 4.4 Liability for associated conduct                                                        | 321  |
| 4.5 Conclusion                                                                              | 357  |
| 5 CONCLUSION                                                                                | 369  |
| 5.1 Joint operations and legal responsibility under the ECHR<br>and EU public liability law | 370  |
| 5.2 Allocation of responsibility in multi-actor situations:<br>the general rules            | 373  |
| 5.3 Allocation of responsibility in multi-actor situations:<br>the case of Frontex          | 379  |
| 5.4 A way forward: obstacles and recommendations                                            | 394  |
| 5.5 Epilogue                                                                                | 405  |

|                                     |     |
|-------------------------------------|-----|
| REFERENCES                          | 407 |
| SUMMARY                             | 435 |
| ZUSAMMENFASSUNG (SUMMARY IN GERMAN) | 443 |
| SAMENVATTING (SUMMARY IN DUTCH)     | 451 |

# Table of Contents

|                                                                                   |      |
|-----------------------------------------------------------------------------------|------|
| LIST OF FIGURES AND TABLES                                                        | XVII |
| LIST OF ABBREVIATIONS                                                             | XIX  |
| 1 INTRODUCTION                                                                    | 1    |
| 1.1 Setting the scene: Frontex, joint operations, and legal responsibility        | 1    |
| 1.1.1 'Reinforcing' Frontex: the European Border and Coast Guard Agency           | 2    |
| 1.1.2 Joint operations and allocation of responsibility in multi-actor situations | 5    |
| 1.2 Research question and scope                                                   | 10   |
| 1.2.1 Main research question                                                      | 10   |
| 1.2.2 Scope of the research                                                       | 11   |
| 1.2.2.1 The operations and actors                                                 | 11   |
| 1.2.2.2 The legal framework                                                       | 12   |
| 1.2.3 The research question in detail                                             | 15   |
| 1.3 Research design                                                               | 15   |
| 1.3.1 General approach                                                            | 15   |
| 1.3.2 Attribution and causation                                                   | 21   |
| 1.3.3 Bases for responsibility: primary and associated responsibility             | 22   |
| 1.4 Scientific relevance                                                          | 25   |
| 1.5 Outline                                                                       | 27   |
| 2 FRONTEX-COORDINATED JOINT OPERATIONS                                            | 29   |
| 2.1 Frontex: an overview                                                          | 30   |
| 2.1.1 Origin, establishment, and tasks                                            | 30   |
| 2.1.1.1 The 'Schengen area': common rules governing external border control       | 30   |
| 2.1.1.2 Operational implementation of the common rules                            | 32   |
| 2.1.1.3 Establishment and development of Frontex                                  | 33   |
| 2.1.1.4 Tasks of Frontex                                                          | 35   |
| 2.1.2 Legal personality                                                           | 37   |
| 2.1.3 Internal organisation                                                       | 40   |
| 2.1.3.1 Governing bodies                                                          | 40   |
| 2.1.3.2 Staff                                                                     | 41   |
| 2.1.3.3 Fundamental rights bodies                                                 | 42   |

|         |                                                                                |    |
|---------|--------------------------------------------------------------------------------|----|
| 2.2     | Joint operations                                                               | 43 |
| 2.2.1   | Joint border control operations                                                | 44 |
| 2.2.1.1 | Activities during operations                                                   | 44 |
| 2.2.1.2 | Types of operation                                                             | 47 |
| 2.2.1.3 | Examples of joint border control operations<br>implemented by Frontex          | 49 |
| 2.2.2   | Joint return operations                                                        | 51 |
| 2.2.3   | Joint operations hosted by third states                                        | 53 |
| 2.3     | Operational resources for joint operations                                     | 56 |
| 2.3.1   | Financial resources                                                            | 56 |
| 2.3.2   | Pooling of human and technical resources                                       | 58 |
| 2.3.2.1 | Human resources                                                                | 58 |
| 2.3.2.2 | Technical resources                                                            | 61 |
| 2.3.2.3 | Availability of pooled resources                                               | 63 |
| 2.3.3   | Deployment of human and technical resources                                    | 64 |
| 2.3.3.1 | Deployment of human resources                                                  | 64 |
| 2.3.3.2 | Deployment of technical resources                                              | 68 |
| 2.3.3.3 | Operational Resources Management System<br>(OPERA)                             | 70 |
| 2.3.3.4 | Overview: personnel deployed during<br>operations                              | 70 |
| 2.4     | Implementing joint operations                                                  | 72 |
| 2.4.1   | Applicable rules during joint operations                                       | 72 |
| 2.4.1.1 | Generally applicable rules                                                     | 72 |
| 2.4.1.2 | Operation-specific rules: the Operational Plan                                 | 73 |
| 2.4.1.3 | Fundamental rights                                                             | 75 |
| 2.4.2   | Coordination structures during joint operations                                | 77 |
| 2.4.2.1 | Coordination structures located in the host state                              | 77 |
| 2.4.2.2 | Coordination instruments provided by Frontex                                   | 78 |
| 2.4.3   | Authority over deployed resources                                              | 80 |
| 2.4.3.1 | Command and control arrangements                                               | 80 |
| 2.4.3.2 | Disciplinary authority, criminal jurisdiction,<br>and civil liability          | 86 |
| 2.4.4   | Responding to fundamental rights-related incidents                             | 88 |
| 2.4.4.1 | General rules on incident reporting                                            | 88 |
| 2.4.4.2 | Dealing with fundamental rights-related<br>incidents                           | 89 |
| 2.4.4.3 | Suspension, termination, or withdrawal of<br>financial support                 | 92 |
| 2.5     | Conclusion                                                                     | 94 |
| 3       | RESPONSIBILITY UNDER THE ECHR                                                  | 97 |
| 3.1     | Responsibility of EU member states for breaches of the ECHR                    | 98 |
| 3.1.1   | Responsibility for breaches of the ECHR                                        | 98 |
| 3.1.1.1 | Conditions for responsibility under the law of<br>international responsibility | 98 |

|         |                                                                      |     |
|---------|----------------------------------------------------------------------|-----|
| 3.1.1.2 | Sources of the law of international responsibility                   | 100 |
| 3.1.1.3 | The law of international responsibility and the ECHR                 | 102 |
| 3.1.2   | Responsibility for conduct relating to EU law                        | 104 |
| 3.1.2.1 | Responsibility for conduct of the EU                                 | 104 |
| 3.1.2.2 | Responsibility for conduct of EU member states                       | 108 |
| 3.1.2.3 | Responsibility for conduct during Frontex operations                 | 115 |
| 3.2     | Attribution of conduct: identifying the relevant rules               | 117 |
| 3.2.1   | The rules on attribution of conduct                                  | 117 |
| 3.2.1.1 | Attribution of conduct to states                                     | 117 |
| 3.2.1.2 | Attribution of conduct to international organisations                | 121 |
| 3.2.1.3 | Illustration                                                         | 124 |
| 3.2.1.4 | Possibilities of attribution to multiple entities                    | 124 |
| 3.2.2   | A special rule for Frontex operations?                               | 126 |
| 3.2.2.1 | A special rule for the European Union?                               | 126 |
| 3.2.2.2 | Responsibility allocation arrangements in the EBCG Regulation        | 130 |
| 3.3     | Responsibility for the primary breach                                | 133 |
| 3.3.1   | Attribution of conduct during Frontex operations: the starting point | 134 |
| 3.3.2   | Attribution of conduct to the host state                             | 136 |
| 3.3.2.1 | Article 6 ASR                                                        | 136 |
| 3.3.2.2 | Article 6 ASR in the case law of the ECtHR                           | 142 |
| 3.3.2.3 | Article 6 ASR in the context of Frontex operations                   | 145 |
| 3.3.3   | Attribution of conduct to the EU                                     | 151 |
| 3.3.3.1 | Article 7 ARIO                                                       | 151 |
| 3.3.3.2 | Article 7 ARIO in the case law of the ECtHR                          | 157 |
| 3.3.3.3 | Article 7 ARIO in the context of Frontex operations                  | 162 |
| 3.3.4   | Interim conclusion                                                   | 165 |
| 3.4     | Responsibility for associated conduct                                | 168 |
| 3.4.1   | Responsibility for violations of obligations to protect              | 169 |
| 3.4.1.1 | Positive obligations under the ECHR: an overview                     | 170 |
| 3.4.1.2 | Protecting individuals from interference by third parties            | 172 |
| 3.4.1.3 | Responsibility for failures to protect during Frontex operations     | 181 |
| 3.4.2   | Responsibility for rendering aid or assistance                       | 188 |
| 3.4.2.1 | Derivative responsibility under international law                    | 189 |
| 3.4.2.2 | Responsibility for rendering aid or assistance                       | 191 |

|         |                                                                         |     |
|---------|-------------------------------------------------------------------------|-----|
| 3.4.2.3 | Aid or assistance in the context of Frontex operations                  | 194 |
| 3.4.3   | Interim conclusion                                                      | 197 |
| 3.5     | Conclusion                                                              | 201 |
| 4       | LIABILITY UNDER EU LAW                                                  | 213 |
| 4.1     | Introduction to EU public liability law                                 | 215 |
| 4.1.1   | What is public liability?                                               | 215 |
| 4.1.2   | Liability of the European Union and Union bodies                        | 216 |
| 4.1.2.1 | Legal basis                                                             | 216 |
| 4.1.2.2 | Judicial competence and admissibility                                   | 218 |
| 4.1.2.3 | Conditions for liability of the European Union                          | 219 |
| 4.1.3   | Liability of EU Member States                                           | 223 |
| 4.1.3.1 | Legal basis                                                             | 223 |
| 4.1.3.2 | Judicial competence and admissibility                                   | 224 |
| 4.1.3.3 | Conditions for liability of EU member states                            | 225 |
| 4.1.4   | Analysing public liability law                                          | 226 |
| 4.1.4.1 | Union and member state liability as a single system of public liability | 226 |
| 4.1.4.2 | Case law in the area of public liability                                | 228 |
| 4.2     | Liability for fundamental rights violations                             | 231 |
| 4.2.1   | Unlawfulness: the character of the rule infringed                       | 232 |
| 4.2.1.1 | Individual rights, direct effect, and public liability                  | 233 |
| 4.2.1.2 | Individual rights in public liability law                               | 236 |
| 4.2.1.3 | Fundamental rights as sources of 'individual rights'                    | 239 |
| 4.2.2   | Unlawfulness: the nature of the breach                                  | 244 |
| 4.2.2.1 | Discretion and its limits                                               | 244 |
| 4.2.2.2 | The obviousness and reprehensibility of the breach                      | 246 |
| 4.2.2.3 | The interplay between the factors determining seriousness               | 254 |
| 4.2.2.4 | Interim conclusion: the 'reasonable unlawful interpretation'            | 260 |
| 4.2.2.5 | The seriousness of fundamental rights violations                        | 261 |
| 4.2.3   | Damage and causal link                                                  | 268 |
| 4.2.3.1 | Damage                                                                  | 268 |
| 4.2.3.2 | Causation                                                               | 271 |
| 4.3     | Liability for the primary breach                                        | 273 |
| 4.3.1   | How to approach questions of allocation of liability                    | 274 |
| 4.3.1.1 | Attribution, causation, and allocation of liability in EU law           | 274 |
| 4.3.1.2 | The approach of the CJEU                                                | 275 |
| 4.3.1.3 | The approach adopted for the purposes of this study                     | 276 |

|         |                                                                             |     |
|---------|-----------------------------------------------------------------------------|-----|
| 4.3.2   | Towards a categorisation of multi-actor situations in EU law                | 278 |
| 4.3.2.1 | The starting point                                                          | 278 |
| 4.3.2.2 | A tentative categorisation of multi-actor situations in EU law              | 283 |
| 4.3.3   | Independent application of Union legislation by member states               | 286 |
| 4.3.3.1 | Liability of the Union for unlawful Union legislation                       | 287 |
| 4.3.3.2 | No liability of member states for application of unlawful Union legislation | 289 |
| 4.3.3.3 | Liability of member states for unlawful application of Union legislation    | 291 |
| 4.3.4   | Cooperative application of Union law                                        | 293 |
| 4.3.4.1 | Non-binding advice, recommendations, and opinions                           | 294 |
| 4.3.4.2 | Legally binding instructions                                                | 296 |
| 4.3.4.3 | The pivotal role of the legal room for manoeuvre                            | 299 |
| 4.3.5   | Finding the competent court                                                 | 301 |
| 4.3.5.1 | The starting point: procedure follows substance                             | 301 |
| 4.3.5.2 | Exhaustion of local remedies                                                | 305 |
| 4.3.6   | Interim findings: identifying the rules on allocation of liability          | 308 |
| 4.3.6.1 | Allocation of liability between the Union and its member states             | 308 |
| 4.3.6.2 | Allocation of liability between member states                               | 310 |
| 4.3.6.3 | Possibilities of joint or concurrent liability                              | 310 |
| 4.3.6.4 | Overview                                                                    | 311 |
| 4.3.7   | Allocation of liability during Frontex operations                           | 312 |
| 4.3.7.1 | Frontex: normative control over conduct during joint operations?            | 314 |
| 4.3.7.2 | Member states: normative control over conduct during joint operations?      | 316 |
| 4.3.8   | Interim conclusion                                                          | 317 |
| 4.4     | Liability for associated conduct                                            | 321 |
| 4.4.1   | Associated obligations under EU law                                         | 322 |
| 4.4.1.1 | Obligations to supervise                                                    | 322 |
| 4.4.1.2 | Obligations to protect                                                      | 324 |
| 4.4.2   | Conditions for liability for associated conduct                             | 327 |
| 4.4.2.1 | Conferring rights on individuals                                            | 328 |
| 4.4.2.2 | Sufficiently serious breach                                                 | 331 |
| 4.4.2.3 | Causal link                                                                 | 336 |
| 4.4.3   | Joint or concurrent liability                                               | 338 |
| 4.4.3.1 | Court competence                                                            | 339 |
| 4.4.3.2 | The impact of parallel proceedings                                          | 340 |

|         |                                                                                      |     |
|---------|--------------------------------------------------------------------------------------|-----|
| 4.4.4   | Liability for associated conduct in the context of joint operations                  | 341 |
| 4.4.4.1 | Associated liability of Frontex                                                      | 342 |
| 4.4.4.2 | Associated liability of participating states                                         | 346 |
| 4.4.4.3 | Associated liability of the host state                                               | 349 |
| 4.4.5   | Interim conclusion                                                                   | 352 |
| 4.5     | Conclusion                                                                           | 357 |
| 5       | CONCLUSION                                                                           | 369 |
| 5.1     | Joint operations and legal responsibility under the ECHR and EU public liability law | 370 |
| 5.1.1   | Joint operations, deployed resources, and transfer of authority                      | 370 |
| 5.1.2   | Preconditions for legal responsibility under ECHR and EU law                         | 372 |
| 5.2     | Allocation of responsibility in multi-actor situations: the general rules            | 373 |
| 5.2.1   | Allocation of primary responsibility under ECHR and EU law                           | 374 |
| 5.2.2   | Allocation of associated responsibility under ECHR and EU law                        | 376 |
| 5.3     | Allocation of responsibility in multi-actor situations: the case of Frontex          | 379 |
| 5.3.1   | Primary responsibility of host states, participating states, and Frontex             | 380 |
| 5.3.2   | Associated responsibility of host states, participating states, and Frontex          | 383 |
| 5.3.3   | Summary of findings                                                                  | 386 |
| 5.3.4   | Responsibility in Examples 1-4                                                       | 388 |
| 5.4     | A way forward: obstacles and recommendations                                         | 394 |
| 5.4.1   | Determining responsibility                                                           | 394 |
| 5.4.1.1 | The authority regime                                                                 | 394 |
| 5.4.1.2 | EU public liability law                                                              | 396 |
| 5.4.2   | Incurring responsibility                                                             | 399 |
| 5.4.2.1 | General aspects                                                                      | 399 |
| 5.4.2.2 | Addressing multi-actor situations                                                    | 400 |
| 5.4.3   | Implementing responsibility                                                          | 403 |
| 5.5     | Epilogue                                                                             | 405 |
|         | REFERENCES                                                                           | 407 |
|         | SUMMARY                                                                              | 435 |
|         | ZUSAMMENFASSUNG (SUMMARY IN GERMAN)                                                  | 443 |
|         | SAMENVATTING (SUMMARY IN DUTCH)                                                      | 451 |



# List of Figures and Tables

*All Figures and Tables were developed by the author.*

## LIST OF FIGURES

|                                                                                                   |     |
|---------------------------------------------------------------------------------------------------|-----|
| Figure 1: The challenge of allocating responsibility during Frontex operations                    | 7   |
| Figure 2: Definition of legal responsibility                                                      | 11  |
| Figure 3: Operations within the scope of this research                                            | 11  |
| Figure 4: Forms of legal responsibility studied                                                   | 15  |
| Figure 5: Actor, unlawful conduct, damage, and their relationship                                 | 22  |
| Figure 6: Allocation of responsibility: primary responsibility                                    | 22  |
| Figure 7: Allocation of responsibility: associated responsibility                                 | 24  |
| Figure 8: Allocation of responsibility: aid or assistance                                         | 24  |
| Figure 9: Staff development 2005-2020                                                             | 42  |
| Figure 10: Budget development and distribution 2005-2016 (in Mio EUR)                             | 57  |
| Figure 11: Pooling and deployment of human resources                                              | 65  |
| Figure 12: Pooling and deployment of technical resources                                          | 68  |
| Figure 13: Principal actors and applicability of European human rights law                        | 76  |
| Figure 14: Command and control arrangements during joint operations                               | 86  |
| Figure 15: Conditions for responsibility to arise                                                 | 100 |
| Figure 16: Attribution of conduct of human resources used for Frontex operations (starting point) | 135 |
| Figure 17: Article 6 ASR: overview of requirements for attribution                                | 140 |
| Figure 18: Article 6 ASR: application to Frontex operations                                       | 151 |
| Figure 19: Attribution of conduct of human resources used for Frontex operations (result)         | 166 |
| Figure 20: Discretion and its limits in public liability law                                      | 245 |
| Figure 21: Clarity of the rule/complexity of the situation and seriousness of the breach          | 253 |
| Figure 22: Relationship between factors determining seriousness (phase two)                       | 256 |
| Figure 23: Relationship between factors determining seriousness (phase three)                     | 261 |
| Figure 24: Approaching questions of allocation of liability in EU law                             | 277 |
| Figure 25: Allocation of liability flowchart                                                      | 312 |
| Figure 26: Relevant rule applicable in the context of Frontex operations                          | 313 |
| Figure 27: Analysing associated liability in EU law                                               | 328 |

## LIST OF TABLES

|                                                                                       |     |
|---------------------------------------------------------------------------------------|-----|
| Table 1: Summary of findings (preview)                                                | 18  |
| Table 2: Personnel during joint operations                                            | 71  |
| Table 3: Rules on attribution of conduct (overview)                                   | 124 |
| Table 4: Rules on attribution of conduct (provisions relevant for Frontex operations) | 136 |
| Table 5: Summary of findings (1)                                                      | 168 |
| Table 6: Summary of findings (2)                                                      | 201 |
| Table 8: Categorisation of multi-actor situations in EU law: starting point           | 284 |
| Table 9: Cases concerning allocation of liability in EU law                           | 286 |
| Table 10: Categorisation of multi-actor situations in EU law: situation 1             | 286 |
| Table 11: Categorisation of multi-actor situations in EU law: situation 2             | 293 |
| Table 12: Summary of findings (3)                                                     | 320 |
| Table 13: Summary of findings (4)                                                     | 356 |
| Table 14: Summary of findings (final)                                                 | 387 |

## List of Abbreviations

|                                 |                                                                                                     |
|---------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>AFSJ</b>                     | Area of Freedom, Security and Justice                                                               |
| <b>ARIO</b>                     | Articles on the Responsibility of International Organizations                                       |
| <b>ASR</b>                      | Articles on Responsibility of States for Internationally Wrongful Acts                              |
| <b>CFI</b>                      | Court of First Instance                                                                             |
| <b>CFR</b>                      | Charter of Fundamental Rights of the European Union                                                 |
| <b>CFSP</b>                     | Common Foreign and Security Policy                                                                  |
| <b>CJEU</b>                     | Court of Justice of the European Union (comprising <i>inter alia</i> the ECJ and the General Court) |
| <b>CSDP</b>                     | Common Security and Defence Policy                                                                  |
| <b>EBCG</b>                     | European Border and Coast Guard                                                                     |
| <b>EBCGT</b>                    | European Border and Coast Guard Teams                                                               |
| <b>EBGT</b>                     | European Border Guard Teams                                                                         |
| <b>ECHR (also 'Convention')</b> | European Convention on Human Rights                                                                 |
| <b>ECJ</b>                      | (European) Court of Justice (one of the courts of the CJEU)                                         |
| <b>ECtHR</b>                    | European Court of Human Rights                                                                      |
| <b>EEAS</b>                     | European External Action Service                                                                    |
| <b>ERIT</b>                     | European Return Intervention Teams                                                                  |
| <b>EU (also 'Union')</b>        | European Union                                                                                      |
| <b>ICC</b>                      | International Coordination Centre                                                                   |
| <b>ICJ</b>                      | International Court of Justice                                                                      |
| <b>ILC</b>                      | International Law Commission                                                                        |
| <b>JCB</b>                      | Joint Coordination Board                                                                            |
| <b>JO</b>                       | Joint Operation                                                                                     |
| <b>OLAF</b>                     | European Anti-Fraud Office                                                                          |
| <b>OPCOM</b>                    | Operational Command                                                                                 |
| <b>OPCON</b>                    | Operational Control                                                                                 |
| <b>OPlan</b>                    | Operational Plan                                                                                    |
| <b>RABIT</b>                    | Rapid Border Intervention Team                                                                      |
| <b>SCIFA</b>                    | Strategic Committee on Immigration Frontiers and Asylum                                             |
| <b>SNE</b>                      | Seconded National Expert                                                                            |
| <b>TACOM</b>                    | Tactical Command                                                                                    |
| <b>TACON</b>                    | Tactical Control                                                                                    |
| <b>TEP</b>                      | Technical Equipment Pool                                                                            |
| <b>TEU</b>                      | Treaty on European Union                                                                            |
| <b>TFEU</b>                     | Treaty on the Functioning of the European Union                                                     |

|             |                                          |
|-------------|------------------------------------------|
| <b>UN</b>   | United Nations                           |
| <b>UNSC</b> | United Nations Security Council          |
| <b>VCLT</b> | Vienna Convention on the Law of Treaties |

**Note:** The research for this thesis was completed in April 2017. Subsequent developments are therefore not reflected in this study. This dissertation is written in UK English and was submitted to language review.