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

Fink, M.

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**Author:** Fink, Melanie

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# 1 Introduction

## 1.1 SETTING THE SCENE: FRONTEX, JOINT OPERATIONS, AND LEGAL RESPONSIBILITY

In 2016, the United Nations High Commissioner for Refugees (UNHCR) reported 65 million forcibly displaced persons on the move, the highest number since World War II. Since 2011, this figure had been rising sharply, reaching new record-highs annually. Overwhelmingly, those that leave their countries of origin are hosted by neighbouring states.<sup>1</sup> Some, however, fleeing persecution, conflict, or poverty, intend to seek refuge in Europe. Estimates of the actual number vary significantly, but peaked in 2015 when over one million persons were reported to have arrived irregularly in Europe by land and sea, compared with 280,000 in 2014 and 390,000 in 2016.<sup>2</sup>

For the purposes of entering its territory, a large part of Europe is designed as ‘one single area’. Almost all European Union (EU, also ‘Union’) member states and four non-EU states have abolished checks at the borders between them, thereby creating the ‘Schengen area’. They have also set up common rules to control their external borders and agreed on a regime according to which refugees can lodge an asylum application in only one state.<sup>3</sup> Whilst entering the Schengen area without possessing the necessary documents had never been easy, crossing these borders, but also moving around within, became gradually more difficult from 2015 onwards. Irregular migrants increasingly encountered newly erected fences, border barriers, or temporarily reintroduced internal border controls, and found themselves stranded on Greek islands or along the way to central and northern European countries.<sup>4</sup>

Many persons, however, never arrive at the physical borders of the EU.

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1 UNHCR, ‘Global Trends: Forced Displacement in 2015’ (June 2016).

2 This data was retrieved from <http://migration.iom.int/europe> [last accessed April 2017].

3 See in particular Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L77/1; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L180/31 [the ‘Dublin III Regulation’].

4 The Guardian, “‘Prisoners of Europe’” (6 September 2016), <https://www.theguardian.com/world/2016/sep/06/prisoners-of-europe-the-everyday-humiliation-of-refugees-stuck-in-greece-migration>; BBC News, ‘Migrant crisis: Hungary’s closed border leaves many stranded’ (15 September 2015), <http://www.bbc.com/news/world-europe-34260071>; Austria, Germany, Denmark, Sweden and Norway temporarily reintroduced internal border controls as a result of the ‘refugee crisis’, see also 1.1.1 below.

Over the last two decades, the death toll of migrants attempting to reach European territory has increased consistently. Causes for loss of lives are diverse and include deaths from suffocation in trucks, containers or cargo holds, from excessive use of force, dehydration, hypothermia, or from lack of medical treatment. Most fatalities, however, occur in the Mediterranean in efforts to cross Europe's southern maritime border, often on unseaworthy or overloaded boats.<sup>5</sup> In October 2013, two devastating incidents, in which over 360 migrants drowned off the shores of the Italian island Lampedusa, sparked public outrage and increased awareness of migrant deaths in the Mediterranean. However, since then the death toll has continued to rise significantly. 2014 and 2015 were both considered the 'deadliest years' at the time, with an estimated 3,280 and 3,770 fatalities respectively. Yet, in 2016, this number rose to an all-time high of 5,098, despite a decrease in the overall number of irregular migrants making the crossing.<sup>6</sup>

### 1.1.1 'Reinforcing' Frontex: the European Border and Coast Guard Agency

This migration or refugee 'crisis', as it has been labelled since spring 2015, was perceived as a major threat to the functioning of the Schengen area.<sup>7</sup> On the one hand, states at the external borders affected, such as Greece or Italy, were accused of not complying with the common European rules requiring effective control of their stretches of the external border and registration of arriving irregular migrants. This prompted Austria, Denmark, Germany, Norway, and Sweden to temporarily reintroduce border controls at their Schengen-internal borders.<sup>8</sup> On the other hand, states in Northern and West-

5 In May 2015, a team of researchers at VU Amsterdam released the 'Death at the Borders Database', based on official death records of migrants who died along the southern European borders between 1990 and 2013 (recorded total 3188), see <http://www.borderdeaths.org/>; also, the NGO 'United' keeps a register of lives lost under circumstances (at times loosely) related to the crossing of borders in Europe; between 1993 and June 2015, it registered 22,394 deaths, <http://unitedagainstrefugeedeaths.eu/wp-content/uploads/2015/06/Listofdeaths22394June15.pdf>; similarly, 'Fortress Europe' reports 27,382 deaths between 1988 and February 2016, see <http://fortresseurope.blogspot.nl/p/la-strage.html>; on the factual and methodological difficulties in counting and recording migrant deaths, see Tamara Last and Thomas Spijkerboer, 'Tracking Deaths in the Mediterranean' in Tara Brian and Frank Laczko (eds), *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration 2014).

6 These are the numbers recorded by the 'Missing Migrants Project', launched by the International Organization for Migration in the aftermath of the 'Lampedusa shipwrecks', see <http://missingmigrants.iom.int/> [last accessed April 2017].

7 In the Rome Declaration of 25 March 2017, adopted at a meeting on the occasion of the 60th anniversary of the Treaty of Rome, the leaders of 27 EU member states indeed highlighted 'migratory pressures' among the 'unprecedented challenges' the EU is currently facing, see [http://www.consilium.europa.eu/press-releases-pdf/2017/3/47244656633\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2017/3/47244656633_en.pdf).

8 See also Council of the European Union, 'Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk', Brussels, 12 May 2016.

ern Europe without immediately affected external Schengen borders were accused of not sharing the responsibility of protecting individuals entitled to international protection.

Two response strategies were pursued in order to meet both concerns.<sup>9</sup> The first was reinforcing internal solidarity and responsibility through relocating persons in need of international protection from Italy, Greece, and Hungary to less affected EU member states.<sup>10</sup> This promise proved difficult to deliver. Even though a compromise was finally reached in September 2015, its implementation remained slow.<sup>11</sup>

The second response strategy enjoyed greater popularity among member states. Broadly speaking, it consisted of a wide range of measures aimed at joining efforts to prevent irregular migration.<sup>12</sup> The first to be implemented was the launch on 22 June 2015 of a Common Security and Defence Policy (CSDP) naval operation to identify, capture and dispose of vessels and assets used or suspected of being used by human smugglers or traffickers (EUNAVFOR MED, later named 'Operation Sophia' after the baby girl born on board one of the vessels during a rescue mission).<sup>13</sup> Moreover, in March 2016 a controversial agreement was reached between the EU and Turkey,

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9 For a more detailed overview and appraisal of the legal responses to the migration 'crisis' see Cathryn Costello and Minos Mouzourakis, 'The Common European Asylum System: Where did it all go wrong?' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014); Manfred Nowak and Antonia E Walter, 'The Crisis of the European Refugee Policy' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights: Yearbook 2016* (Intersentia; Neuer Wissenschaftlicher Verlag 2016).

10 See in particular, European Council, 'Special meeting 23 April 2015 - statement' (2015); European Commission, 'Communication: A European Agenda on Migration' (COM(2015) 240 final, 13 May 2015).

11 The Commission publishes regular report on the progress made, for the latest report see European Commission, 'Eleventh report on relocation and resettlement' (COM(2017) 212 final, 12 April 2017).

12 See in particular references in n 10.

13 Council of the European Union, Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), 18 May 2015, OJ L122/31; in June 2016, the Council extended the mandate for another year and added two supporting tasks, namely (1) training of the Libyan coastguard and navy and (2) contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya, Council of the European Union, Decision (CFSP) 2016/993 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), 20 June 2016, OJ L162/18.

according to which irregular migrants newly arriving in Greece from Turkey are sent back to Turkey if they do not apply for asylum or do not qualify as refugees.<sup>14</sup>

Among the most important measures were those relating to reinforcing the effectiveness and solidarity of external border control. This was predominantly achieved through channelling more money to, and eventually considerably strengthening, Frontex.<sup>15</sup> Frontex is an EU agency that supports Schengen states in the management of their external borders *inter alia* by training border guards, conducting risk analyses, and organising joint return and border control operations. It was originally founded in 2005 as the 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', but is better known by its acronym 'Frontex', from the French *frontières extérieures* (engl. 'external borders').<sup>16</sup>

On 15 December 2015, the European Commission tabled a proposal to overhaul Frontex.<sup>17</sup> Within less than a year, the new European Border and Coast Guard Regulation ('EBCG Regulation') entered into force, replacing Frontex' legal basis. The 'reinforced' Frontex, officially renamed 'European Border and Coast Guard Agency' but still referred to by its 'old' name, was launched on 6 October 2016 at a border checkpoint at the Bulgarian external border with Turkey.<sup>18</sup> The new founding Regulation explicitly defines border management in Europe as a 'shared responsibility' between Frontex

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14 EU-Turkey Statement of 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>; It should be noted, however, that in the view of the CJEU, the statement was not entered into between the EU and Turkey, but rather between the EU member states and Turkey. In February 2017, the CJEU declared that it lacked jurisdiction to hear actions for annulment of the EU-Turkey statement brought by three asylum seeker because the statement did not constitute a measure attributable to an EU institution or body. Even if the statement qualified as an international agreement, the CJEU held, it would be one concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister, rather than by the EU. See CJEU, Case T-192/16 *NF v European Council*, 28 February 2017, ECLI:EU:T:2017:128.

15 For more detail on the expanding role of Frontex since its establishment see Jorrit J Rijpma, 'Frontex and the European system of border guards: The future of European border management' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 218–228.

16 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, [2004] OJ L349/1.

17 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 15 December 2015, COM(2015) 671 final.

18 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, [2016] OJ L251/1.

and the respective national authorities.<sup>19</sup> It significantly increased Frontex' response capacity through additional tasks, better access to human and technical resources, and significantly more financial means. The agency now for example avails itself of a 'rapid reaction pool' encompassing at least 1,500 officers that may assist member states on short notice in crisis situations.<sup>20</sup> Frontex' budget increased from EUR 143 million in 2015 to EUR 254 million in 2016, an amount that is envisaged to rise to EUR 281 million in 2017.<sup>21</sup> Whereas in 2015, Frontex availed itself of 309 staff members, this number is envisaged to gradually increase to an estimated 1000 persons by 2020.<sup>22</sup>

The EBCG Regulation, however, did not transform Frontex into a truly supranationalised European border authority. The character and role of the agency did not change in nature, only in scale.<sup>23</sup> Thus, despite the EBCG Regulation's emphasis on border management as a 'shared responsibility', the member states retain the primary duty to manage their respective segments of the external borders, in their own interest, but also the common interest of all member states. The agency, in turn, supports the member states by 'reinforcing, assessing and coordinating' their actions.<sup>24</sup>

#### 1.1.2 Joint operations and allocation of responsibility in multi-actor situations

One of Frontex' main tasks is the organisation and implementation of joint operations. Joint operations are launched in order to support one or more member states in external border management. Assistance may be rendered for purposes of border control (joint border control operations) or the return of third country nationals that have no right to stay (joint return operations). Both types of operation are characterised by the deployment of additional human and technical resources that are made available primarily by other

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19 Ibid art 5.

20 Ibid in particular art 20(5); for more detail see 2.3.2.1.2.

21 Frontex, 'Budget 2016' (24 December 2015); the data for 2017 was retrieved from Frontex' homepage, <http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/>.

22 Frontex, 'General Report 2015' (Warsaw 2016), 64; the data for 2020 was retrieved from Frontex' homepage, <http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/>.

23 See also Jorrit J Rijpma, 'The Proposal for a European Border and Coast Guard: evolution or revolution in external border management?' (Study for the LIBE Committee of the European Parliament, 2016), 32; Anna Mrozek, 'Same same but different?: The European Border and Coast Guard and the "new" Perspective of Joint Border Surveillance at the External Borders of the European Union' (2016) *Sonderband Zeitschrift für Europarechtliche Studien* 143, 154–155; Sergio Carrera and Leonhard den Hertog, 'A European Border and Coast Guard: What's in a name?' (CEPS Paper in Liberty and Security in Europe No. 88, March 2016), 16.

24 EBCG Regulation (n 18) art 5.



member states and operate under a specific ‘command regime’. Practically speaking, border guards and other experts as well as equipment, ranging from simple night vision devices to vessels or aircraft, from different states are deployed by the agency to another state in need of support in order to conduct border management tasks.

This set-up poses a fundamental question. If the responsibility for or implementation of border management is shared, is the responsibility for unlawful conduct associated with it too? More specifically, if unlawful activities are performed during joint operations, how is the responsibility for these distributed among the member states and the agency? It may be evident that the state whose stretch of the external border is concerned is responsible. However, it is unclear to what extent the organisational, financial, technical, or personal assistance makes other states and Frontex responsible too.<sup>25</sup>

Imagine the following scenario: During a border control operation at sea, as vessel forces a boat carrying migrants back to its place of origin. This is potentially in violation of the prohibition of collective expulsions, but probably also the prohibition of *refoulement*.<sup>26</sup> The operation is hosted by State A, coordinated and financed by Frontex, but the vessel in question and its crew are from State B. The incident is supervised by a nearby vessel of State C and a helicopter of State D. The crew on State B’s vessel did not decide alone to send the migrant boat back. In fact, representatives of A, B, C, D, and Frontex sat together and discussed possible courses of conduct, reaching the conclusion this was the way to proceed. Whilst each one of them may have contributed to the unlawful activity, their contributions vary in nature and degree. But which one leads to legal responsibility? In other words, who has to bear the consequences for and remedy the unlawful conduct (see also the illustration in Figure 1)?

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25 The lack of clarity in the allocation of responsibility has in particular been pointed out by PACE, Committee on Migration, Refugees and Displaced Persons, ‘Frontex: human rights responsibilities’ (Report, Doc. 13161, 8 April 2013), paras 39–49; see also Niels Blokker, ‘The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law’ (2016) 35 Yearbook of European Law 471, 481–482; Rijpma, ‘Frontex and the European system of border guards’ (n 15) 229; Rijpma, ‘The Proposal for a European Border and Coast Guard’ (n 23) 29; Efthymios Papastavridis, ‘The EU and the obligation of *non-refoulement* at sea’ in Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016) 238; Roland Pierik, ‘Shared Responsibility in International Law: A Normative-Philosophical Analysis’ in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 37, 54–58.

26 See below, text to n 33–36.



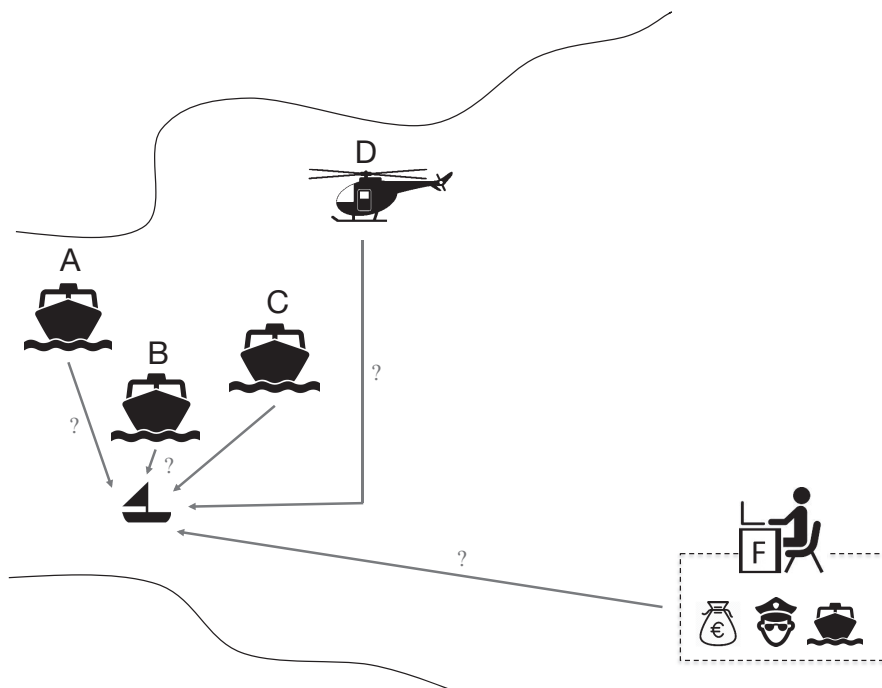


Figure 1: The challenge of allocating responsibility during Frontex operations

Difficulties in allocating responsibility are not unique to Frontex, but exist more generally when multiple actors contribute to a harmful, and perhaps unlawful, outcome (*'multi-actor situations'*).<sup>27</sup> It is not always clear what exactly each actor contributed and what types of contribution to an unlawful outcome are capable of leading to legal responsibility. Moreover, what if none of the contributions is sufficient to trigger legal responsibility, but the outcome as a whole is, had it been the result of the conduct of only one actor? What if they can do more harm together than each one of them alone?

27 See in particular André Nollkaemper, 'Introduction' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 4–6; André Nollkaemper, 'The Problem of Many Hands in International Law' (SHARES Research Paper 72, 2015, ACIL 2015-15); for a conceptualisation of the variety of what is here referred to as 'multi-actors situations', see André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (ACIL Research Paper No 2011-07, SHARES Series, 2011); André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015).

The lack of clarity in the distribution of responsibility has a number of drawbacks. On the one hand, it may negatively affect the performance of obligations.<sup>28</sup> Legal responsibility not only reinstates the balance between the perpetrator and the victim of a wrong, e.g. through compensation, it also seeks to discourage unlawful behaviour in the first place.<sup>29</sup> The latter aim of legal responsibility is particularly important when harm cannot, by its very nature, be fully made good by financial means, as is regularly the case with respect to infringements of a person's dignity or physical integrity. Importantly, if it is uncertain whether they will ever be called to account for unlawful behaviour, or if it is possible to perpetually shift the blame to others, this may weaken the incentives for public actors to ensure their own compliance with legally binding rules.<sup>30</sup>

On the other hand, lack of clarity in the distribution of responsibility weakens the position of the victim of a breach. The reason is that bringing legal action requires knowledge of the role each actor played with respect to a specific injury, and the extent to which this is relevant to responsibility.<sup>31</sup> This is even more so where cooperation among the potential wrongdoers spans multiple and overlapping legal regimes. In those cases, the specific obligations and the possibilities for a person to invoke violations thereof often differ depending on the actor in question, e.g. whether it is a state or an international organisation, and what commitments they have entered into respectively. As a consequence, invoking responsibility often presupposes knowing who is responsible, because it defines what obligations apply and where a complaint may be lodged.

In the case of Frontex, clarifying the allocation of legal responsibility among the actors involved in joint operations is particularly crucial because border control and return operations inherently touch upon a broad range of human rights. This is so regardless of whether states conduct these operations alone, jointly, or with the assistance of international or supranational

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28 André Nollkaemper, 'Shared Responsibility for Human Rights Violations: A relational account' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017) 30.

29 Lewis A Kornhauser, 'Incentives, Compensation, and Irreparable Harm' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 121; Anne van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 160, noting that the additional third objective of securing international cooperation is often neglected in legal literature.

30 Similarly see also Kornhauser (n 29) in particular 121-123.

31 Nollkaemper, 'Shared Responsibility for Human Rights Violations' (n 28) 30; in this vein see also Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen: Verwaltungskooperation - materielle Rechtsgrundlagen - institutionelle Kontrolle* (Nomos 2014) 408-410.

organisations. Therefore, when implementing joint operations, the member states and Frontex inevitably engage in human rights sensitive activities.<sup>32</sup>

By design, border control operations monitor entry and exit to state territory which includes the detection and prevention of unauthorised border crossings. Return operations enforce decisions by national authorities that a specific person is not entitled to stay on their territory and has to be (forcibly) removed. Even though states are generally free to deny persons entry to their territory or send them away if they have no right to stay, at the same time it touches upon some of the most fundamental rights of individuals. Some persons, for example, have a right to remain on a state's territory once they have entered, despite having done so without the required documents. This obviously concerns refugees, who have a right not to be expelled to territories where they would face persecution.<sup>33</sup> Beyond that however, all individuals have a right not to be sent back to a state where they would face especially serious maltreatment, such as torture or other inhuman or degrading treatment or punishment (the prohibition of *refoulement*).<sup>34</sup> In addition, regardless of whether they enjoy a right to stay in a particular case, individuals have a right for their specific situation to be assessed before they are returned. This safeguard, known as the prohibition of collective expulsions, more specifically requires that individuals get the chance to submit arguments against their removal.<sup>35</sup> Importantly, this has been interpreted as not only prohibiting expulsion *sensu stricto* from the territory of a state, but also expulsions during border control operations, where the persons have technically not crossed the border yet.<sup>36</sup> Finally, as law enforcement activities, border control and return by their nature often have to be enforced

32 Rijkma, 'Frontex and the European system of border guards' (n 15) 228; Rijkma, 'The Proposal for a European Border and Coast Guard' (n 23) 29.

33 See in particular the Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 and Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267, art 33(1).

34 See in particular Charter of Fundamental Rights of the European Union, [2007] OJ C303/1, art 19(2); in the context of the ECHR the protection from *refoulement* was developed by the ECtHR in particular under Article 3 ECHR, see ECtHR, *Soering v The United Kingdom*, 7 July 1989, application no 14038/88, para 91; in later cases, it was confirmed that this also covers expulsion of refugees, see ECtHR, *Cruz Varas v Sweden*, 20 March 1991, application no 15576/89; ECtHR, *Vilvarajah and Others v The United Kingdom*, 30 October 1991, application nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/8.

35 See in particular Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art 4 of prot no 4; CFR (n 34) art 19(1); Notably, the ECtHR found Italy in breach of this provision twice, see ECtHR, *Hirsi Jamaa and Others v Italy*, 23 February 2012, application no 27765/09; ECtHR, *Sharifi and Others v Italy and Greece*, 21 October 2014, application no 16643/09. In a more recent case, *Khlaifia*, the Court clarified that the provision does not necessarily require a state to conduct individual interviews, as long as persons have possibilities to submit arguments against their removal, e.g. during identification procedures. See ECtHR, *Khlaifia and Others v Italy*, 15 December 2016, application no 16483/12, paras 247-251.

36 ECtHR, *Hirsi* (n 35) paras 176-178.

against the will of the persons concerned and may include coercion or the use of physical force. Such measures are particularly sensitive to a person's human dignity and physical integrity.

Against this background, it is imperative to clarify the allocation of legal responsibility among the actors involved in joint operations in order to ensure individual victims of human rights violations can make use of their right to an effective remedy. This is even more so in light of the reinforcement of Frontex which may aggravate the existing challenges by broadening the scope of the agency's powers and competences.<sup>37</sup>

## 1.2 RESEARCH QUESTION AND SCOPE

### 1.2.1 Main research question

This study examines the legal responsibility of public actors involved in Frontex operations for human rights violations that may occur in the context of joint operations (see Figure 2). It centres on the allocation (also: distribution) of responsibility among them, determining to what extent each of their contributions may trigger responsibility.

In this light, it answers the following research question:

*How is legal responsibility for human rights violations that may occur in the context of Frontex-coordinated joint operations allocated among the actors involved?*

This study neither claims nor assumes that human rights violations occur in all joint operations. However, in light of the human rights sensitivity of the activities involved in border control and return operations, human rights violations *may* occur. Thus, for the purposes of examining legal responsibility, this study assumes the occurrence of a human rights violation. It goes without saying that this assumption does not remove the necessity, nor diminish the importance or difficulty, of ascertaining in each specific case *whether* an infringement occurred in the first place. However, it is outside the scope of this study to discuss the human rights compatibility of EU external border management generally, or of specific practices particularly.

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<sup>37</sup> See also Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 29; the need to complement the reinforcement of the agency with strengthened fundamental rights protection seems to be acknowledged in the EBCG Regulation (n 18) recitals (14) and (48).



Figure 2: Definition of legal responsibility

1.2.2 Scope of the research

1.2.2.1 The operations and actors

The subject matter studied comprises joint operations that are coordinated by Frontex (see Figure 3). This includes border control operations that take place at land, sea, and air borders of the ‘Schengen area’ and return operations.<sup>38</sup> They are referred to as ‘Frontex operations’, ‘Frontex-coordinated operations’, or ‘joint operations’ interchangeably.

A broad range of parties may be involved in joint operations. There are public actors, ranging from Frontex, EU member states, and non-EU Schengen states to third states, but also private actors that provide specific contracted services. This study is exclusively concerned with the relationship among the principal public actors, i.e. Frontex and Schengen states, when they participate in or host a joint operation.

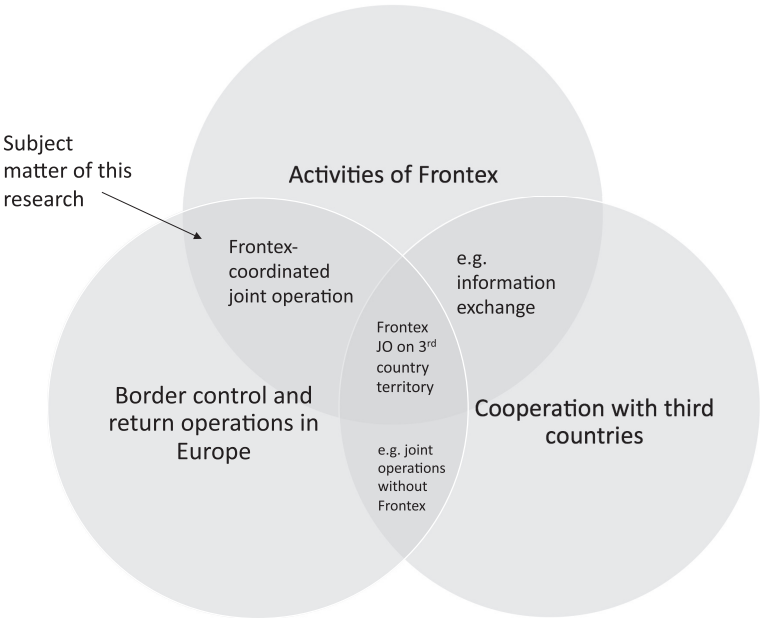


Figure 3: Operations within the scope of this research

38 For more detail on the ‘Schengen area’ see 2.1.1.1.

### 1.2.2.2 The legal framework

There are numerous forms of legal responsibility that potentially arise as a result of a breach of human rights during Frontex operations. These include responsibility under general international law or specific international human rights regimes, under EU law, and under national legal systems of the states involved. This study cannot meaningfully address them all. The choice of forms of legal responsibility to be analysed is guided by two principal criteria.

First, the study is limited to forms of legal responsibility that can be established before courts following an action by an individual. Individual complaints mechanisms are a powerful tool to compel public authorities to comply with their legal obligations, especially when there is a lack of political will to ensure the protection of these rights. Beyond their relevance for ensuring protection in the specific case at hand, successful claims may also trigger broader policy changes.

Second, responsibility regimes that are in principle capable of addressing questions of allocation of responsibility are chosen over others that are not. The fundamental question examined in this study is not so much the *existence* of responsibility, but its *allocation*. Not all responsibility regimes are equally susceptible of addressing this question. National law, for example, may contain rules on and mechanisms to establish the legal responsibility of a specific state that was involved in a Frontex operation, but it cannot usually comprehensively determine how this responsibility relates to the potential responsibility of other actors involved.

Two responsibility regimes have been identified that fulfil both criteria and are, *prima facie*, applicable in the context of Frontex operations. The first is legal responsibility under the European Convention on Human Rights (ECHR, also 'Convention'). All principal actors participating in joint operations except Frontex (or the EU) are bound by the ECHR and incur responsibility according to the same rules for breaches thereof.<sup>39</sup> This responsibility may be invoked before the European Court of Human Rights (ECtHR) by anyone who is a victim of a violation, provided all available local remedies have been exhausted.<sup>40</sup>

The second regime is liability under EU law for breaches of fundamental rights guaranteed under EU law, in particular the Charter of Fundamental Rights of the European Union (CFR).<sup>41</sup> This requires more detailed explana-

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39 See also below 2.4.1.3.

40 ECHR (n 35) art 34.

41 It should be noted that for the purposes of this study 'human rights' and 'fundamental rights' are used as synonyms. However, the expression 'human rights' will be preferred over 'fundamental rights', unless reference is made specifically and exclusively to the rights protected within the EU legal order.

tion. The CFR applies without restriction to the conduct of EU bodies and to member states when they implement EU law.<sup>42</sup> However, in EU law, no fundamental rights specific complaints mechanism exists, which means that victims of fundamental rights violations must have recourse to the general remedies available against breaches of Union law by public authorities. In light of the analysis in this study, Chapter 5 indeed identifies a need to adapt EU public liability law in accordance with the requirements of fundamental rights law, and alternatively recommends to set up a fundamental rights complaints procedure under EU law.<sup>43</sup>

There are two principal direct remedies available to individuals against acts of Union bodies, including Frontex: legality review and action for damages. Whereas the former, if successful, results in annulment of the contested act, the latter aims at compensation for the damage suffered by the violation. Legality review is governed by Article 263 Treaty on the Functioning of the European Union (TFEU).<sup>44</sup> However, it is limited to acts of the Union 'intended to produce legal effects vis-à-vis third parties'. Moreover, as 'non-privileged' applicants, individuals' standing is reduced to situations where they can be shown to be the addressees of, or directly (and individually) concerned by an act. In parallel to the legality review, EU law allows individuals to challenge inaction by EU bodies under similar conditions (Article 265 TFEU). Even though the Court has taken a flexible approach in the past as to what constitutes a 'legal act' for the purpose of the action for annulment, it offers very limited prospects of success for individuals whose rights may have been breached during Frontex operations.<sup>45</sup> Importantly, the execution of border control or return operations, and more specifically the activities of Frontex in that respect, predominantly consist of 'purely factual conduct' rather than legally binding acts and is thus commonly not open to challenge under Articles 263 and 265 TFEU.<sup>46</sup>

However, factual conduct can be challenged in the context of an action for damages, providing individuals with the possibility to recover loss they have suffered as a result of conduct of EU bodies (Article 340 TFEU). Under

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42 See also below 2.4.1.3.

43 See below 5.4.2.1.

44 Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C326/47.

45 Discussing the meaning of an 'act' within the context of annulment actions see for example CJEU, Case 60/81 *IBM v Commission*, 11 November 1981, ECLI:EU:C:1981:264, para 9.

46 Jorrit J Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions: the case of Frontex' in Madalina Busuioc, Martijn Groenleer and Jarle Trondal (eds), *The agency phenomenon in the European Union* (Manchester University Press 2012) 96; Rijpma, 'Frontex and the European system of border guards' (n 15) 239; discussing the limits of these actions in the context of Frontex operations see also Izabella Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) 7 *Silesian Journal of Legal Studies* 45, 70–72; Papastavridis, 'The EU and the obligation of non-refoulement at sea' (n 25) 260–261.



circumstances such as Frontex operations, the action for damages is in practice the most important, or indeed the only, substantive remedy under EU law to invoke rights that may have been violated by an EU body.<sup>47</sup> The right to compensation for damages is indeed recognised as a fundamental right itself in Article 41(3) CFR.<sup>48</sup>

Whilst the action for damages therefore provides the only individual complaints mechanism where Frontex violates fundamental rights during joint operations, it is not *per se* susceptible of addressing questions of allocation of liability. That is until the Court of Justice of the European Union (CJEU), starting with the case of *Francovich* in 1991, set out that as a matter of Union law, member states are liable for any breaches thereof.<sup>49</sup> In the following years, it gradually aligned the conditions governing liability of member states and Union bodies.<sup>50</sup> The thereby created 'EU public liability law' is in principle capable of addressing questions of allocation of liability, in particular because its rules apply to states and Union bodies alike and may be interpreted by a common court, the CJEU, in a binding manner.

The choice of these two legal frameworks imposes limitations on this study. Most obviously, a state may be responsible for breaches of national human rights law under responsibility mechanisms provided and governed by national law. However, given that EU law forms part of the legal systems of the member states, national responsibility mechanisms and accompanying remedies they provide for individual victims can also be used to invoke violations of *EU law*. National mechanisms may in particular, with respect to breaches of national or EU human rights law, set out different, less onerous conditions for responsibility. This is indeed not unlikely, given that, as will be explained in more detail in the course of this study, EU liability law imposes a high threshold for liability to arise. Thus, it is important to note that even if a state is found in this study not to incur legal responsibility for certain breaches, this does not exclude the possibility that the same state may be otherwise held responsible in the context of national responsibility mechanisms that will not be studied here.

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47 In this vein see also Pekka Aalto and others, 'Article 47 - Right to an Effective Remedy and to a Fair Trial' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1219; similarly also AG Geelhoed, Opinion in CJEU, Case C-234/02 P *Mediator v Lamberts*, 23 March 2004, ECLI:EU:C:2004:174, para 107, who argued that due to the lack of appeal possibilities, 'the compensation procedure under Article [268 TFEU] is particularly important' and 'the only way in which a citizen affected by the conduct of the Ombudsman can assert his right to proper legal protection'.

48 It is important to note that Article 41(3) is not limited to damages for violations of fundamental rights. It can hence not be considered a fundamental rights specific remedy.

49 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, 19 November 1991, ECLI:EU:C:1991:428.

50 For more detail see below 4.1.4.1.

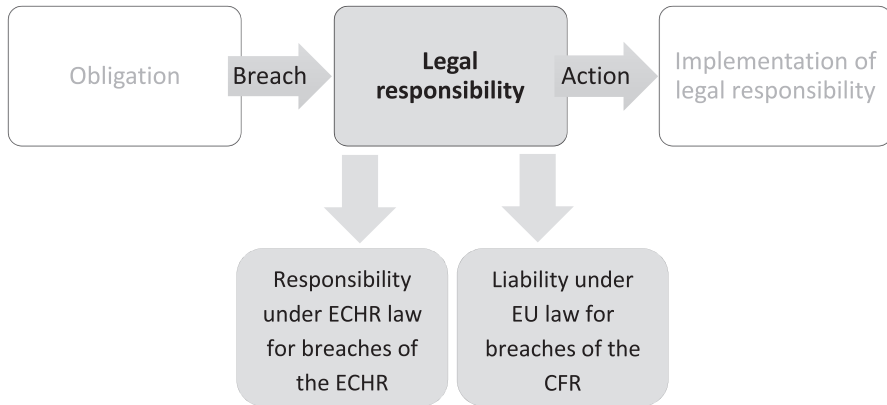


Figure 4: Forms of legal responsibility studied

### 1.2.3 The research question in detail

In light of the previous sections, the main research question can be divided into two sub-questions.

*(1) How is responsibility for violations of the ECHR that may occur during Frontex-coordinated joint operations allocated among the states involved according to ECHR law?*

*(2) How is liability for violations of the CFR that may occur during Frontex-coordinated joint operations allocated among Frontex and the EU member states involved according to EU public liability law?*

For the purpose of this study, the term ‘responsibility’ is used when referring to legal responsibility under international law, including the ECHR, whereas the term ‘liability’ is used when speaking of EU public liability law.

## 1.3 RESEARCH DESIGN

### 1.3.1 General approach

The aim of this study is to clarify the allocation of responsibility among actors involved in Frontex operations. It seeks to achieve this aim by addressing the two main factors causing ambiguity.

The **first factor** concerns the question of the precise powers of Frontex and the states involved respectively.<sup>51</sup> The extent and nature of each actor's contribution and the authority they exercise over the resources deployed, are all relevant in determining the existence and degree of their legal responsibility. In this light, this study first examines the detailed roles and powers of Frontex and the states involved during joint operations, focussing on the decision-making processes and chains of command.

These questions are only marginally addressed in the EBCG Regulation. Thus, this part of the analysis also relies on information and documents requested from the agency.<sup>52</sup> The requests for access to documents included all Handbooks to Operational Plans, and the Operational Plans as well as their Annexes for a total of 16 joint sea, land, air, and return operations. The operations were chosen based on *inter alia* their duration, their budget, and the level of state participation. With respect to all 16 joint operations, further information was requested regarding the fundamental rights related incidents that occurred during the operations, the number of irregular migrants deterred from continuing their journey to or entering the EU, and the number of asylum applications lodged with the competent member state authority during the operations. With few exceptions, the requests were successful. Most of them, however, only partially. The most frequent grounds for refusal of access were that disclosure would undermine public security or the protection of personal data.<sup>53</sup> On the basis of the analysis in this study, it is recommended in Chapter 5 to make the crucial documents fully and unconditionally publicly available.<sup>54</sup>

In addition to the EBCG Regulation and documents requested from the agency, the analysis of the involved actors' powers also relies on qualitative empirical research. On the one hand, four semi-structured interviews were conducted at Frontex' headquarters in Warsaw. These interviews included a total of six officials from four different organisational units within the

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51 The fact that the tasks and responsibilities of Frontex and the member states respectively are not entirely clear was pointed out for instance by Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010) 232–236; Violeta Moreno-Lax, 'Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean' (Reflexive Governance in the Public Interest Working paper series, REFGOV-FR-28, 2010), 4; Steve Peers, Elspeth Guild and Jonathan Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 1: Visas and Border Controls* (Martinus Nijhoff Publishers 2012) 119.

52 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43; applicable to Frontex by virtue of EBCG Regulation (n 18) art 74(1).

53 These grounds for refusal are recognised in Regulation (EC) No 1049/2001 (n 52) art 4(1).

54 See below 5.4.1.1.

agency.<sup>55</sup> On the other hand, the qualitative empirical research consisted of a field visit to the Military Airbase Pratica di Mare where the International Coordination Centre for Joint Operation Triton is located.<sup>56</sup>

The **second factor** causing ambiguity concerns the more general difficulties in allocating responsibility in multi-actor situations.<sup>57</sup> This study determines the general rules that govern responsibility in a multi-actor context under ECHR and EU law respectively, with a view to applying them to the context of Frontex operations. In this respect, it relies on doctrinal legal analysis.

In the context of the ECHR, the analysis is based on the law of international responsibility as applied by the ECtHR. For the purposes of this study, the law of international responsibility is understood as encompassing the rules reproduced in the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organizations (ARIO) formulated by the International Law Commission in 2001 and 2011 respectively.<sup>58</sup> The analysis is predominantly concerned with determining the relevant rules, their content, and their application to Frontex operations.

In the context of EU public liability law, the analysis is based on the Treaties as well as the CJEU's case law as regards the liability of Union bodies and member states. It develops general rules on allocation of liability from that case law and applies them to Frontex operations.

The findings are summarised in a table at the end of each relevant section (see Table 1; for the distinction between primary and associated responsibility referred to in this table see 1.3.3 below).

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55 The interviews at Frontex' headquarters were conducted on 3 and 4 September 2015. Interview Reports are on file with the author.

56 The field visit took place from 23 to 24 November 2015. A Field Visit Report is on file with the author.

57 The lack of clarity in allocating responsibility in multi-actor situations in the law of international responsibility and its implementation have been pointed out, for example, by John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale Journal of International Law* 225; and more recently by Nollkaemper, 'Introduction' (n 27) 12–16.

58 ILC, 'Report of the Fifty-Third Session: Articles on Responsibility of States for Internationally Wrongful Acts' (UN Doc A/56/10, 2001), hereinafter 'ASR'; ILC, 'Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations' (UN Doc A/66/10, 2011), hereinafter 'ARIO'.

Table 1: Summary of findings (preview)

	ECHR			CFR	
	Primary responsibility	Associated responsibility (obligations to protect)	Associated responsibility ('complicity')	Primary liability	Associated liability
Frontex/EU	Chapter 3.3	Chapter 3.4	Chapter 3.4	Chapter 4.3	Chapter 4.4
Host state					
Participating state (minor technical equipment)					
Participating state (standard team member)					
Participating state (large assets, e.g. vessels, aircraft)					

As indicated earlier, the purpose of this study is not to enquire whether and to what extent human rights violations occur during Frontex operations. Rather, the aim is to determine the allocation of legal responsibility if they do occur. This exercise is necessarily theoretical. In particular, in the case of an actual human rights violation, the responsibility of all parties involved will have to be assessed with due regard to their role and contribution in the specific circumstances of the situation.

Having said this, it is nonetheless useful to illustrate the theoretical findings by explaining how they would apply to a specific situation. Four hypothetical scenarios are used to focus the reader’s attention on the potential practical implications of the results of this study. These are briefly set out in the following and will be referred to throughout the study.

Whilst the scenarios are hypothetical, they are based on situations that have in the past given rise to human rights concerns. Detail is omitted in favour of simplicity. The examples are chosen with a view to illustrating diverse sets of circumstances. However, the choice should not be understood to suggest that the practices mentioned occur on a regular basis or that these violations have been alleged more frequently than others. In the interest of clarity, in all four of the examples, State A refers to the host state of an operation. States B, C, and D refer to states participating to varying degrees therein: State B refers to states contributing large assets (e.g. vessels, aeroplanes), State C refers to the ‘standard’ participating state who, for example, contributes border guards or other experts to a border control operation or participates in a return operation, and State D refers to states contributing minor technical equipment (e.g. night vision devices).

**EXAMPLE 1: EXCESSIVE USE OF FORCE**

A Frontex operation, hosted by State A, is ongoing at A's land border. A team of border surveillance officers, including officers of A, but also of State C, spot a large group that has just crossed the border. Upon request, the persons detected are unable to show the necessary documents. When the border guards try to apprehend them, the situation gets out of hand and they have to use force in order to transfer them to a local reception facility. During an ensuing screening interview, one of the migrants plausibly claims that he had been subjected to excessive force by C's officer in violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR, Article 4 CFR).

**EXAMPLE 2: REFOULEMENT AT SEA**

A Frontex operation, hosted by State A, is ongoing at A's sea border. A vessel contributed to the operation by State B (variation: by State A itself) is patrolling the operational area, when it observes a suspicious boat. Once the boat is within sight, it can be confirmed that the boat carries a large number of migrants accompanied by smugglers. The vessel attempts to intercept the boat by the repeated use of light and sound signals but the boat refuses to comply. After warning shots into the air, a crew member fires shots at the engine of the boat, immobilising it. The boat is towed to the territorial waters of a third state and handed over to its authorities in violation of the prohibition of *refoulement* and the prohibition of collective expulsions (Article 3 ECHR, Article 4 Protocol No. 4 ECHR, Article 19 CFR).

**EXAMPLE 3: INHUMAN CONDITIONS IN RECEPTION FACILITIES**

A Frontex operation, hosted by State A, is ongoing at A's external borders. As part of this operation, a team of border surveillance officers including officers of A, but also of State C, apprehends a group of persons that had previously been dropped off by a smugglers' boat. The group is transferred to a local reception facility. On site, screening and debriefing experts deployed by Frontex conduct interviews with migrants in order to identify their country of origin and collect intelligence regarding the routes and practices of human smugglers. Frontex has an 'office' in the area, from where a Frontex representative coordinates local activities. The conditions in the reception facility had been deteriorating for a while. The most pressing problem is that A's authorities have run out of money to buy sufficient food for everyone. Even though forcing persons to stay there violates the prohibition against treating them in an inhuman or degrading manner, the team, including officers of A and C, transfer the apprehended migrants to that facility (Article 3 ECHR, Article 4 CFR).

*Note: Setting up and maintaining migrant reception facilities is outside the mandate of Frontex operations. The responsibility of states for human rights violations directly resulting from the conditions in reception facilities is thus outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may also be responsible.*

#### EXAMPLE 4: REFOULEMENT AND RETURN OPERATIONS

State A organises a return operation. The destination is State Z (who is not a Schengen state). Persons that have been identified as nationals of Z and have received individual return orders qualify as 'returnees'. 10 returnees are already in State A. Participating states escort returnees to A, bringing the total number to 30. A Frontex project manager travels with them. Before take-off, it becomes apparent that three returnees escorted from participating State C had been presented with a return order immediately after their arrival. They convincingly argue that they would be at risk of being subjected to torture if returned (Article 3 ECHR, Article 19 CFR).

*Note: The adoption of return decisions is outside the mandate of Frontex operations. The responsibility arising directly from the adoption of a return decision is thus outside the scope of this study. However, joint return operations involve the execution by a host state of return decisions issued by a participating state. This raises the question whether actors involved in Frontex return operations may be responsible for returning a person in violation of the prohibition of refoulement in the implementation of another state's return decision.*

Establishing clarity in the allocation of responsibility for human rights violations that may occur during Frontex operations in itself strengthens the position of individual victims. Knowing the roles of each actor involved, their powers and authority, the command structures they follow, and the rules on allocation of responsibility applicable in that context, individuals are better placed to take legal action if their rights have been violated. To some extent, the same is true for ensuring compliance with human rights obligations on the part of the actors involved. The more clarity there is, the smaller the scope for 'blame-shifting' from one to another, which may function as an incentive for compliance with the obligations in the first place. Thus, the main part of this study is concerned with establishing clarity in the allocation of responsibility in the context of Frontex operations.

However, whilst clarity itself has a positive impact, it is also true that some solutions will be more beneficial to both the position of the individual and the performance of the obligations than others. For example, allocating responsibility only to the host state of a joint operation may not significantly encourage the other states and Frontex, to ensure they comply with their obligations. In contrast, if responsibility is distributed among all of them according to the degree of their involvement, this may incentivise performance of their obligations to a larger extent, and additionally equips individual victims with a broader range of possibilities for taking legal action. In addition, the latter solution may indeed correspond better to reality. If a human rights violation originates in cooperative action, the most useful approach appears to be to compel all of those involved to halt and remedy the unlawful conduct. Without discussing this aspect in more detail, this study proceeds from the assumption that when multiple actors cooperate in



what leads to a human rights violation, all of them should bear responsibility, at least to a degree proportional to their contributions.<sup>59</sup>

### 1.3.2 Attribution and causation

Each legal system defines the conditions under which responsibility arises for breaches of its rules. Hence, different forms of legal responsibility arise under different conditions. However, a number of components are common to many of them. It is regularly required that a *breach* of a binding obligation occurs. Sometimes, victims need to show that they have suffered *damage*. An actor commonly incurs legal responsibility if it can be established, first, that the conduct at the origin of the breach in question is *attributable* to it and, second, that it was that breach that *caused* the damage.

For the purposes of this study, ‘attribution’ is understood as the link between the actor and the allegedly unlawful conduct (see Figure 5). This link is particularly important when the responsibility of a legal entity like a state or an international organisation is at stake. Every breach ultimately originates in the behaviour of individuals. Also in the context of Frontex operations, alleged breaches of human rights obligations are realised by one or more persons deployed during operations. The rules on attribution of conduct define the circumstances under which a person’s conduct (legally) qualifies as the entity’s conduct.

‘Causation’ is understood as the link between the allegedly unlawful conduct and the damage suffered (see Figure 5). Rules on causation establish whether the unlawful conduct in question was actually the (main) source of the undesired outcome.

Attribution and causation are often key to determining the allocation of responsibility in the context of multi-actor situations. If a breach occurs but many actors were involved, the rules on attribution of conduct define ‘in whose name’, from a legal perspective, the breach in question was committed. If several actors commit breaches, the rules on causation establish whose breach may be considered a sufficiently direct source of the undesired outcome. However, the relevance of the concepts of attribution and causation for the allocation of legal responsibility varies among legal systems. Because damage is not required for responsibility to arise under international law, for example, neither is causation.<sup>60</sup> In contrast, damage, and

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59 On the advantages of ‘shared responsibility’, see Nollkaemper, ‘Shared Responsibility for Human Rights Violations’ (n 28) 37–38; for a more detailed discussion from *inter alia* normative, political, and economic perspectives see in particular the contributions in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015).

60 For more detail see 3.1.1.1.

thus also causation, play a more substantial role in EU liability law where they both form indispensable conditions for liability.<sup>61</sup>

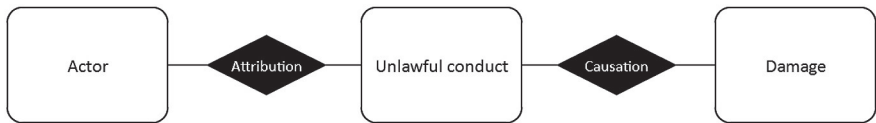


Figure 5: Actor, unlawful conduct, damage, and their relationship

1.3.3 Bases for responsibility: primary and associated responsibility

Responsibility under ECHR and EU law is studied in the framework of two different conceptual bases. The first is the responsibility that arises directly from a human rights violation committed during an operation. For instance, in Example 1, this is the responsibility for having used excessive force. Similarly, in Example 2, it concerns the responsibility for having handed over the migrants concerned to third state authorities. This will be referred to as ‘primary responsibility’ or ‘direct responsibility’ interchangeably. It arises for what will be called a ‘primary’ breach, violation, or infringement. In the examination of the allocation of direct responsibility, questions of attribution of conduct commonly dominate the analysis (see Figure 6).

In both Examples 3 and 4, the respective primary violations occur outside the mandate of Frontex operations and are hence outside the scope of this study when it comes to the analysis of primary responsibility.

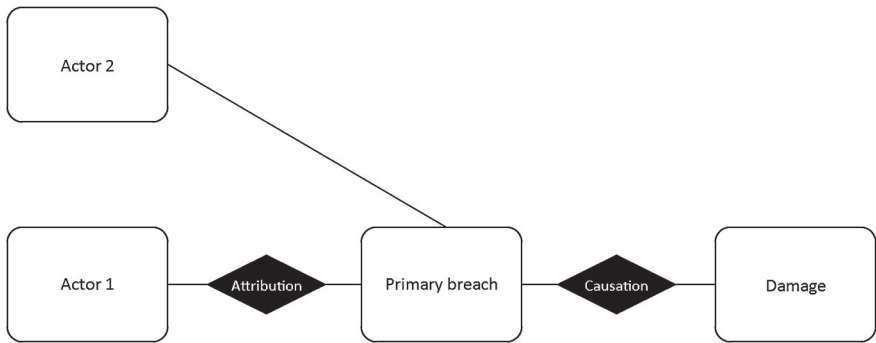


Figure 6: Allocation of responsibility: primary responsibility

61 For more detail see 4.1.2.3, 4.1.3.3.

The second conceptual basis in the framework in which responsibility is studied concerns responsibility that arises for *conduct associated with the primary violation*. This will be referred to as ‘associated responsibility’ or ‘indirect responsibility’ interchangeably. Associated conduct may be assistance rendered by one actor to another in breach of human rights. It can also be a failure to protect an individual from suffering interference with their rights, in particular due to insufficient or outright lack of supervision, or refraining from preventing another actor from breaching human rights. For the current purpose, the actor contributing to or failing to prevent the primary breach is referred to as the *facilitating actor*.

Questions of indirect responsibility that arise in the context of Frontex operations may be grouped into two different categories. One is where a human rights violation occurs *during* a joint operation, but not all actors involved incur primary responsibility for it. Consider, for instance, Example 1 above. If State A was considered responsible for the primary breach, the question arises whether State C and Frontex additionally incur responsibility for not having protected the victims from being maltreated. Similar questions arise in relation to Example 2.

The other is where a human rights violation occurs *outside the mandate* of a Frontex operation, but the implementation of the joint operation has an impact on it. In Example 3, for instance, the responsibility arising directly from the conditions in the reception facilities is outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may incur responsibility for having failed to protect individuals from being placed in a reception facility where the conditions do not meet minimum human rights standards. Similarly, in Example 4, the responsibility for the adoption of a return decision is outside the scope of this study. However, joint return operations involve the execution of return decisions. This raises the question whether actors involved in Frontex operations may be responsible for implementing a return decision that violates the prohibition of *refoulement*.

Commonly, associated responsibility only arises if there is an obligation prohibiting the contribution to, or requiring the prevention of a breach by another actor (see Figure 7). In that event, the primary actor and the facilitating actor both incur responsibility for realising a single undesired outcome by breaching different obligations. Whilst the primary obligation on the one hand, and the obligation to prevent or not to contribute to the primary violation on the other, are two separate obligations, they *can* (but do not have to) arise from a single provision. Obligations to protect, for example, in particular as part of positive obligations arising under human rights law, are often implicit in the same provision breached by the primary actor.

In Example 1, for instance, if State C incurs responsibility for not having protected the victim from being maltreated, its responsibility arises on the basis of the same provision as State A’s responsibility, i.e. Articles 3 ECHR and 4 CFR.

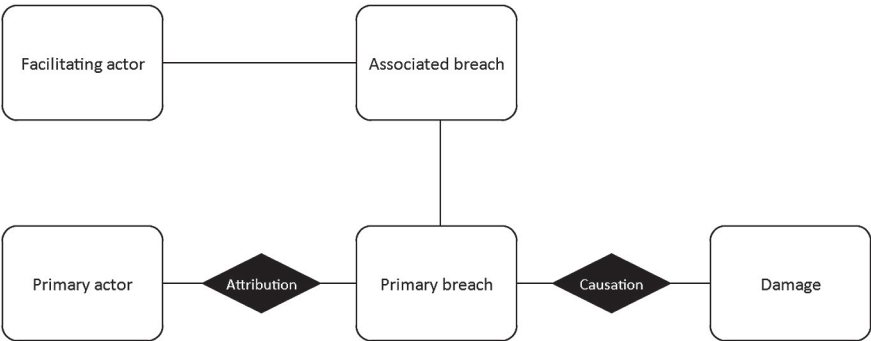


Figure 7: Allocation of responsibility: associated responsibility

Under public international law, an additional basis for responsibility exists, which is studied in Chapter 3 in the context of the ECHR. Often referred to as ‘complicity’, responsibility may under certain circumstances arise, even in the absence of a more specific obligation, if a state or an international organisation renders aid or assistance in the commission of the primary breach (see Figure 8).

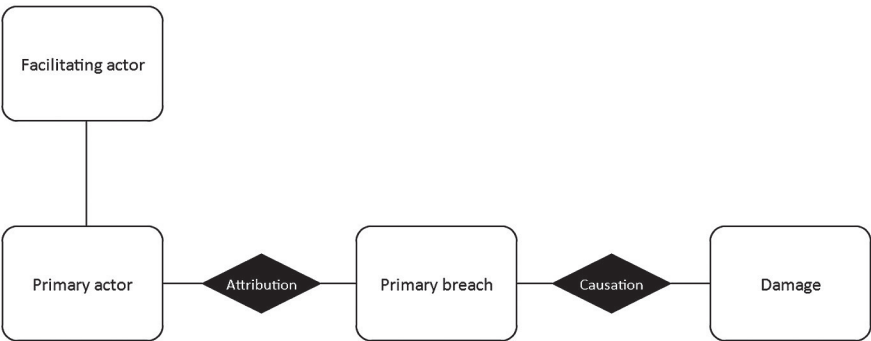


Figure 8: Allocation of responsibility: aid or assistance

#### 1.4 SCIENTIFIC RELEVANCE

As a whole, this study brings clarity to the allocation of responsibility during Frontex operations. In doing so, it provides a tool for, on the one hand, individuals to find the correct respondent and forum to file a complaint and, on the other hand, those who decide on such allegations.

The scientific contribution of this study is twofold. First, it provides a detailed examination of the powers and legal responsibility of each actor involved in Frontex operations. Frontex itself has been the subject of extensive research. Research has been conducted in particular on the nature of the agency, its mandate and tasks, and its accountability, but also on aspects of legal responsibility for the agency's potential unlawful conduct.<sup>62</sup> This study builds on this research in two ways. On the one hand, it narrows the lens to zoom in on the question of legal responsibility, allowing a more detailed analysis of this particular aspect. On the other hand, within the question of legal responsibility, it broadens the scope of previous research by examining it from the perspective of legal frameworks beyond general public international law, addressing in particular the question of liability under EU law.

Second, many of the challenges discussed in this study are inherent in multi-actor situations. In this vein, the scientific contribution of this study goes beyond the specific case of Frontex operations and provides a legal framework for addressing allocation of legal responsibility in multi-actor situations generally. Despite the ever-increasing cooperation between international actors, the principles governing the allocation and sharing of responsibility among multiple actors who contribute to an undesired outcome in fact remain relatively undeveloped. This is true for both ECHR and EU law, albeit to different extents.

In the area of international responsibility questions arising from the involvement of multiple potential wrongdoers have received considerable attention.<sup>63</sup> Research interest has focussed on questions of attribution of conduct relating to the cooperation between states and international organisations,

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62 See for example the following comprehensive studies: Jorrit J Rijpma, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (PhD thesis, European University Institute 2009); Lehnert (n 31); Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016).

63 See in particular the SHARES Project, a research project at the University of Amsterdam, <http://www.sharesproject.nl/>; in that context three edited volumes, discussing a broad range of questions regarding 'shared responsibility' were published, André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014); Nollkaemper, Jacobs and Schechinger (eds) (n 59); André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).

predominantly in the context of multinational contingents participating in operations organised by international organisations.<sup>64</sup> Also the notion of ‘complicity’, i.e. responsibility for rendering aid or assistance in the commission of an internationally wrongful act, has recently received particular attention.<sup>65</sup> This study adds to the existing research by providing an in-depth discussion (based on Article 6 of the Articles on the Responsibility of States for Internationally Wrongful Acts) of the attribution of conduct among states when they jointly conduct law enforcement operations. In addition, it discusses the potential application of the concept of ‘complicity’ in the context of the ECHR.

In the area of EU law, public liability law in general has been extensively studied.<sup>66</sup> However, two aspects have rarely been addressed. The first is the question of liability for fundamental rights violations. Even though fundamental rights have continuously gained significance within the EU legal order, the potential of liability for breaches thereof has not been subject to in-depth treatment.<sup>67</sup> The second is the issue of allocation of liability in multi-actor situations. Literature addressing the topic is scarce and largely focusses on joint or concurrent liability of the Union and its member states, and the procedural (im)possibility of implementing it.<sup>68</sup> This study aims to fill this gap by extensively discussing, on the one hand, the liability under EU law of the EU and its member states for fundamental rights violations and, on the other, the allocation of liability among them.

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64 For recent comprehensive works see Francesco Messineo, ‘The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices’ (PhD thesis, University of Cambridge 2012); Bérénice Boutin, ‘The Role of Control in Allocating International Responsibility in Collaborative Military Operations’ (PhD thesis, Universiteit van Amsterdam 2015); Moritz P Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press 2017).

65 Among many, see Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011); Miles Jackson, *Complicity in International Law* (Oxford University Press 2015).

66 For a recent comprehensive treatment see Pekka Aalto, *Public liability in EU law: Brasserie, Bergaderm and beyond* (Hart Publishing 2011).

67 It has been discussed by Angela Ward, ‘Damages under the EU Charter of Fundamental Rights’ (2012) 12 ERA Forum 589; and by Nina Póttorak, ‘Action for Damages in the Case of Infringement of Fundamental Rights by the European Union’ in Ewa Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2016).

68 For a more extensive treatment of the topic of allocation of liability in other languages see Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht: Eine Untersuchung der Mehrpersonenverhältnisse* (Springer 2005); see also Léontin-Jean Constantinesco, *Les problèmes résultant de la responsabilité extra-contractuelle concomitante de la Communauté et d’un État membre* (Office des publications officielles des Communautés européennes 1980).

## 1.5 OUTLINE

The study consists of five chapters:

- Chapter 1: Introduction
- Chapter 2: Frontex-coordinated joint operations
- Chapter 3: Responsibility under the ECHR
- Chapter 4: Liability under EU law
- Chapter 5: Conclusion

**Chapter 2** centres on the distribution of roles and authority among the host state, the participating states and Frontex in the context of joint operations. It elaborates on the pooling of operational resources prior to launching operations, the process of deployment, the coordination bodies and instruments established for joint operation, the respective authority exercised by the actors involved over the deployed operational resources, and the procedures in place for dealing with fundamental rights-related incidents. Chapter 2 therefore provides the basis for the application of the general rules on allocation of legal responsibility to Frontex operations in the subsequent chapters.

**Chapter 3** examines the allocation of responsibility under ECHR law among states involved in Frontex operations for breaches of the ECHR that may occur during operations. It is divided into four main sections. The first sets out the ‘basics’ of the law of international responsibility, its relationship with the ECHR, and its application to the EU member states when they act within EU law. The subsequent section elaborates on the conditions for responsibility. Given that responsibility is analysed on the basis that violations do indeed occur, the focus is on the question of attribution of conduct, the only other precondition for responsibility to arise. The third and fourth sections of Chapter 3 analyse primary and associated responsibility respectively. The former is dominated by a discussion of attribution rules and their application to the relationship between the actors involved in joint operations. Finally, the analysis of associated responsibility discusses responsibility for breaches of obligations to protect under the ECHR on the one hand, and responsibility for rendering aid or assistance in the absence of such obligations on the other.

**Chapter 4** examines the allocation of liability under EU law among Frontex and EU member states involved in Frontex operations for breaches of the CFR that may occur during operations. It follows the same structure as Chapter 3. In this vein, it opens by setting out the ‘basics’ of EU public liability law. Subsequently, it elaborates on the conditions for liability and their application to the context of fundamental rights violations. The third and fourth sections address primary and associated liability respectively, both first identifying general rules from the case law of the CJEU and then applying them to the context of Frontex operations.



**Chapter 5** summarises the main findings and their practical implications. Moreover, it sets out the obstacles to determining, incurring, and implementing responsibility identified in this study, and puts forward recommendations on how to address them. In essence, this study revealed that only the host state is comprehensively responsible for human rights violations that may occur during Frontex operations. Whilst Frontex and highly involved participating states are partly responsible too, some contributions to human rights violations during joint operations remain below the threshold required for responsibility to arise under both the ECHR and EU public liability law. The reason for this is essentially that neither of these responsibility mechanisms systematically appreciates the fact that several public actors can do more together than each of them alone. Assuming that international cooperation continues to intensify, it is ever more urgent to address this shortcoming by developing clear and comprehensive rules on allocation of responsibility that take into account the effects of cooperative action.