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

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3 Responsibility under the ECHR

The purpose of this chapter is to examine the allocation of responsibility among states involved in Frontex operations for breaches of the ECHR committed in the course of the operations. Responsibility is analysed within the context of the law of international responsibility as applied by the ECtHR.

Section 3.1 provides an introduction, addressing two main issues. Section 3.1.1 sets out the legal framework for the analysis in this chapter. After providing an overview of the law of international responsibility and its sources, it discusses its applicability in the context of the ECHR. Section 3.1.2 then focusses on the extent of the scrutiny exercised by the ECtHR when conduct of the contracting parties is governed by EU law. It more specifically addresses the '*Bosphorus* doctrine', according to which the ECtHR may waive detailed scrutiny of conduct that is taken in strict compliance with obligations flowing from EU law, and examines the potential use of this doctrine in the context of Frontex operations.

Section 3.2 then concentrates on attribution of conduct, the only condition, other than the breach itself, for responsibility to arise. It first outlines the generally applicable rules on attribution of conduct in relation to states and international organisations respectively (Section 3.2.1). It then addresses the question of whether Frontex operations may be subject to specific attribution rules that are either applicable to the relationship between the EU and its member states more generally, or the relationship between Frontex and member states more specifically (Section 3.2.2).

Sections 3.3 and 3.4 focus on the central topic of this chapter, the allocation of responsibility as between the actors participating in joint operations. They maintain the distinction set out in more detail in Chapter 1, discussing, first, responsibility for the primary breach (Section 3.3) and, second, responsibility for associated conduct (Section 3.4).[420]

In this vein, **Section 3.3** analyses the responsibility of the host and participating states that arises directly from a human rights violation committed during an operation. All states involved are responsible insofar as they can be considered the 'authors' of the breach, i.e. insofar as the conduct in violation of the Convention is attributable to them. Hence, this section elaborates on the application of the rules on attribution of conduct to Frontex operations. More specifically, it discusses whether the authority the host state and Frontex exercise over personnel deployed during Frontex operations renders their

420 For more detail on this distinction see above 1.3.3.

conduct attributable to the host state and/or Frontex. The analysis is based on Articles 6 ASR and 7 ARIO, dealing with the attribution of conduct of organs lent by states to other states or international organisations respectively.

Section 3.4 examines the circumstances under which states that are not responsible for the primary breach in a specific case are responsible for conduct associated with the primary breach. The central question is whether contributing to, or not preventing, a violation of the ECHR, may render the facilitating actor responsible. This question is primarily discussed in light of obligations to protect that arise under the ECHR, in particular under the doctrine of positive obligations as developed by the ECtHR (Section 3.4.1). However, the analysis reveals that the Convention is limited in its applicability to participating states. Against this background, Section 3.4.2 examines a second form of associated responsibility, namely the rules on aid or assistance under general international law.

Section 3.5 summarises the findings of this chapter and illustrates their practical implications using the example scenarios introduced in Chapter 1.[421] In essence, the analysis shows that the host state is directly responsible for breaches of the ECHR committed during Frontex operations that result from conduct of local staff or standard team members. Participating states are directly responsible for breaches resulting from the conduct of personnel on large assets, vessels for example, they contributed. All other participating states incur no primary responsibility. Host states and states contributing large assets are also responsible for breaches of obligations to prevent, if they know or ought to know of an imminent violation but do not act upon that knowledge. In contrast, the Convention is not applicable to states that only contribute standard team members or minor technical equipment. Hence, they incur no associated responsibility under the Convention. However, the analysis shows that they may be responsible under the rules on aid or assistance, which may therefore complement the Convention in this respect.

3.1 Responsibility of EU member states for breaches of the ECHR

3.1.1 Responsibility for breaches of the ECHR

3.1.1.1 Conditions for responsibility under the law of international responsibility

Like any system of law, public international law has to address the responsibility of its subjects for breaches of their obligations. The law of international responsibility sets out the preconditions for responsibility of states and international organisations to arise and the consequences it triggers.

421 See above 1.3.1.

It is a set of so-called secondary rules applicable across the board no matter the origin or nature of the obligation breached.[422]

Responsibility arises for conduct qualified as an internationally wrongful act, i.e. conduct consisting of an action or omission that is attributable to a state or international organisation and constitutes a breach of an international obligation.[423] Thus, states and international organisations incur responsibility when two conditions are met:

1. Conduct is attributable to the state or international organisation.
2. That conduct is in breach of their obligations under international law.

'Attributable' means that the conduct of a physical person is characterised, from the point of view of international law, as an act of a specific state or international organisation.[424] This is crucial because states and international organisations are only responsible for their own conduct in violation of international law but, just like any other corporate entity, they can only act through natural persons. For that reason, there is a need to define the circumstances under which a person's conduct (legally) qualifies as the entity's conduct.[425] This is, essentially, the purpose the rules on attribution of conduct fulfil.[426]

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422 For a discussion of the categorisation of international responsibility as a system of secondary norms, see Eric David, 'Primary and Secondary Rules' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010); Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System' (2009) 78 Nordic Journal of International Law 53.

423 ILC, 'ASR' (n 58) art 2; calling these the *subjective* and *objective* elements of an internationally wrongful act, see Special Rapporteur Ago, 'Second Report on State Responsibility' (UN Doc A/CN.4/233, Twenty-Second Session 1970), 187–195; for more detail see Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010); C. F Amerasinghe, 'The Essence of the Structure of International Responsibility' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005).

424 Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 221; see also above 1.3.2.

425 Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 7; James Crawford and Jeremy Watkins, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 287; on the importance of the rules on attribution of conduct see Luigi Condorelli, 'L'Imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984/VI) 189 Recueil des Cours de l'Académie de Droit International 1.

426 Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution?: The International Court of Justice's Decision in *Bosnia* v. *Serbia*' (2008) 21 Leiden Journal of International Law 601, 602–603; James Crawford, *State Responsibility: The General Part* (Oxford University Press 2013) 45.

A breach capable of triggering international responsibility can be any conduct, whether action or omission, that is not in conformity with an obligation incumbent on the state or the international organisation. The significance of a provision and the gravity of a breach thereof are irrelevant in assessing *whether* responsibility arises, but may inform the form and amount of reparation due. In addition, serious breaches of obligations arising under peremptory norms may trigger a set of additional consequences.[427]

The two preconditions, attribution and breach, are sufficient for responsibility to arise. This means that international responsibility is 'objective' in that there is no requirement of fault.[428] Furthermore, responsibility arises regardless of another party's damage as a result of the breach. This in addition removes the need for proving causation, since the causality relationship constitutes a 'mere bridge' between the wrongful act and the injury.[429] Exceptionally, a primary obligation may itself include a requirement that fault or injury has to be proven. In those cases, the question of fault and/or damage forms part of the analysis of whether there was a breach of that provision.

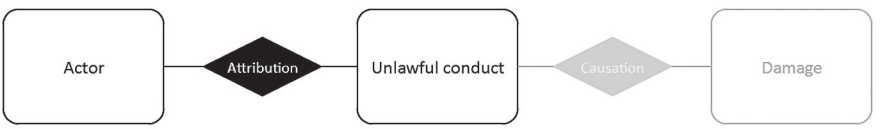

Figure 15: Conditions for responsibility to arise

3.1.1.2 Sources of the law of international responsibility

The law of international responsibility is reproduced in the outcome of the work of the International Law Commission (ILC) on the topic. From 1949, the ILC started to deal with state responsibility and in 2001 adopted the 'Articles on Responsibility of States for Internationally Wrongful Acts' (also 'Articles on State Responsibility', short 'ASR').[430] Due to the growing influence of international organisations, it was considered necessary to develop a framework regarding their international responsibility. This resulted in the adoption of the 'Articles on the Responsibility of International Organizations' (ARIO).[431] The responsibility of international organisations for internationally wrongful acts is essentially based on the law of state responsibility and largely governed by the same general rules. Only where the

427 ILC, 'ASR' (n 58) art 12 including the commentaries thereto; for the special set of consequences triggered by a violation of an obligation with *ius cogens*-character see arts 40, 41.
428 Crawford, *State Responsibility* (n 426) 61.
429 See also above 1.3.2; Julio Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005) 7.
430 ASR (n 58).
431 ILC, 'ARIO' (n 58).

characteristics of international organisations so required, were specific rules adopted. These specific rules include in particular the issue of attribution of conduct, the responsibility of a member state of the organisation in question for internationally wrongful acts committed by the organisation, and the remedies available to assure the responsibility of the international organisation.[432]

Both sets of articles were drafted in the form of treaties. Their form notwithstanding, they are not formally binding and represent evidence of law rather than sources of law within the meaning of Article 38(1) of the Statute of the International Court of Justice. As such, the rules contained in the ILC Articles are only binding if and to the extent that they are found in customary international law. It is important to note that the ILC's task goes beyond codification and encompasses the promotion of the progressive development of international law. The final documents produced by the ILC typically combine both, codification of customary international law and proposals for the progressive development of existing rules, being rarely explicit about where codification stops and progressive development starts. Whilst the ASR are considered either fully or at least in large parts a codification of the customary international law on state responsibility, the status as customary international law of the ARIO is disputed.[433] It would go beyond the scope of this study to establish the customary nature of every article dealt with. It is therefore based on the assumption that the ASR and the ARIO, in particular the rules on attribution of conduct, reflect customary international law.

The choice to draft the ASR and the ARIO in the form of treaties may encourage the application of rules of interpretation inspired by the Vienna Convention on the Law of Treaties (VCLT). However, given the ASR and the ARIO are not actually treaties, these rules may not always be the most suitable.[434]

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432 Ige Dekker, 'Making sense of accountability in international institutional law' (2005) 36 Netherlands Yearbook of International Law 83, 85.

433 Crawford, *State Responsibility* (n 426) 43; for a discussion of the status of the ARIO as customary international law see Gerhard Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification?: Some Critical Remarks' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011); for the criticism of lack of practice see for example José E Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility' (2011) 105 American Society of International Law Proceedings 344, 345–346; Kristen E Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 The Yale Journal of International Law Online 1, 8.

434 I would like to thank Professor Gregor Noll, who encouraged me to reflect more thoroughly on the question of interpretation of the ASR and ARIO; this question has indeed so far only received limited attention in literature, see Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 The British Yearbook of International Law 10, 11.

The focus of the VCLT on the ordinary meaning of the terms used rests on the basis that the language of a treaty reflects a final compromise reached by the contracting parties. This lends particular authority to the wording. In contrast, the ILC Articles represent the dominant view within the ILC, as an expert body, meaning that minority views may not be reflected in the text. Since the wording of the Articles does not have the same authority as the language of a treaty, the commentaries to and the development of the Articles bear more weight than they do in relation to treaties, where preparatory works only serve as supplementary means of interpretation.[435] It has thus been pointed out that 'the bare article must be read in the light of the accompanying commentary, and preferably alongside the preparatory work of the ILC such that the history of each provision may be traced with precision'.[436] Against this background, this chapter traces the meaning of the relevant Articles of the ASR and the ARIO taking into account not only their wording and the ordinary meaning of the terms, but also the commentaries to and the development of the provisions.

3.1.1.3 The law of international responsibility and the ECHR

To a large extent, the law of international responsibility is characterised by a 'one-size-fits-all' approach.[437] Unlike national law, it does not provide for distinct frameworks applicable to civil and criminal liability respectively, and for contractual and tort liability within the former. It by design applies to any breach of international law irrespective of the origin or nature of the obligation. As a result, responsibility can arise from a breach of a customary norm, general principles of law, or a treaty provision, no matter what the purpose of the treaty is and whether it is of a bilateral or multilateral nature.[438]

As a treaty entered into between subjects of international law, the ECHR constitutes part of the international legal order.[439] Thus, the law of international responsibility in principle also applies to a failure to comply with obligations arising from the ECHR.

435 For more detail see David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 The American Journal of International Law 857, 868–870; see also Gaja (n 434) 18–20.

436 Crawford, *State Responsibility* (n 426) 87.

437 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 486.

438 Crawford, *State Responsibility* (n 426) 51–54.

439 For a detailed account of the use of international law by the ECtHR see Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press 2010); Frédéric Vanneste, *General international law before human rights courts: Assessing the specialty claims of international human rights law* (Intersentia 2010).

However, the law of international responsibility is residual in character. This means that it applies by default, but only when and to the extent that a specialised subsystem of international law does not itself (explicitly or implicitly) spell out *leges speciales* that govern breaches thereof.[440] Specialised subsystems may in particular develop their own rules when the general ones are unsuitable.

In relation to questions of implementation of responsibility, the ECHR indeed provides for specific provisions that displace and complement the general rules. These are in particular Articles 33 and 34 ECHR which unequivocally grant all parties to the Convention, but also all individual victims the right to invoke any alleged breach of the Convention before the ECtHR and thereby displace and complement the general rules on implementation of responsibility.

The ECHR, however, remains silent on other aspects of the law of international responsibility. This is not uncommon. Indeed, rarely does a specialised subsystem deal extensively with responsibility arising from its breach and provide for an entire set of rules.[441] For the matters that remain unregulated, the general rules continue to be applicable, to the extent that they serve the purposes of the special regime.[442] This has been illustrated with the notion of a 'sliding scale of speciality'. At one end of the scale, a *lex specialis* may be designed only to replace a single provision of the general rules while leaving the application of the others untouched. On the other end of the scale, a *lex specialis* could exclude the application of the general regime of international responsibility altogether.[443]

The ECHR in particular contains no specific rules on attribution of conduct. In its case law, the ECtHR has filled this gap by referring to and applying the general rules on attribution of conduct.[444] In this light, the remaining part of

440 ILC, 'ASR' (n 58) art 55; ILC, 'ARIO' (n 58) art 64.

441 Subsystems of international law 'embracing, in principle, a full (exhaustive and definite) set of secondary rules', would be called a 'self-contained regime', see Bruno Simma, 'Self-Contained Regimes' (1985) 26 Netherlands Yearbook of International Law 111, 117; the term 'self-contained regime' is, however, frequently used more broadly, relating merely to 'branches of international law'. Human rights would, in those terms, be qualified as a self-contained regime. See for example Study Group of the ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (finalized by Martti Koskenniemi)' (UN Doc A/61/10, Fifty-Eighth Session, 2006), para 152(1).

442 Bruno Simma and Dirk Pulkowski, 'Leges Speciales and Self-Contained Regimes' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 148; Crawford, *State Responsibility* (n 426) 105.

443 Simma and Pulkowski, 'Of Planets and the Universe' (n 437) 490.

444 See for example ECtHR, *Jaloud v the Netherlands*, 20 November 2014, application no 47708/08, para 98; for more examples see in particular below 3.3.2.2 and 3.3.3.2.

this chapter starts from the assumption that the general rules on attribution of conduct are applicable by default to the ECHR, as long as the ECtHR does not develop a *lex specialis* in the context of specific attribution rules.[445]

3.1.2 Responsibility for conduct relating to EU law

This section explores the limits to responsibility (or its determination) under the ECHR when conduct is governed by EU law. It analyses these limits, first, in relation to conduct of the EU itself (Section 3.1.2.1), and, second, in relation to conduct of EU member states (Section 3.1.2.2). Finally, Section 3.1.2.3 examines the consequences this has for human rights responsibility in the context of Frontex operations.

3.1.2.1 Responsibility for conduct of the EU

3.1.2.1.1 Responsibility of the EU

The capacity of having rights and obligations under international law, i.e. international legal personality, is a precondition for incurring international responsibility.[446] As discussed in more detail in Chapter 2, Frontex itself does not possess international legal personality. However, since it is a Union body, its unlawful conduct may give rise to EU responsibility.

The EU is generally bound by international law and incurs responsibility for breaches thereof.[447] In the human rights context, this means that the EU has to abide by those human rights that qualify as general rules of inter-

445 See also Rick Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?' in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr* (Kluwer Law International 1998) 99; Malcolm D Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 157.

446 Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 6.

447 On the international responsibility of the EU see Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law' (n 25); for more detail on the EU's international responsibility see Andrés Delgado Casteleiro, 'The International Responsibility of the European Union: From Competence to Normative Control' (PhD thesis, European University Institute 2011); Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013), in particular the contribution by Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?'.

national law, being either custom or general principles.[448] Nonetheless, the major challenge is that international organisations are not usually signatories to the broad range of human rights treaties that have been enacted at the international level. More specifically, because the EU is not a party to the ECHR, the Convention obligations are not binding on the Union as a matter of international law. The ECtHR has accordingly on numerous occasions confirmed that the EU cannot be held responsible under the ECHR, quite simply because it is not a signatory to it.[449]

Closing this gap has been on the agenda for decades.[450] After numerous setbacks, the Lisbon Treaty on the EU side, containing an obligation for the EU to accede to the ECHR, and Protocol 14 on the ECHR side, creating the necessary preconditions within the ECHR framework, have finally paved the way for accession of the EU to the ECHR. The major change that accession would trigger is the ECHR becoming binding on the EU as a matter of international law. Consequently, individuals would be able to bring claims directed against the EU before the ECtHR, including for breaches that may be committed by Frontex. Starting in July 2010, the Steering Committee for Human Rights and the European Commission, representing the Council of Europe and the EU respectively, negotiated the instruments on EU accession to the ECHR, the draft outcome of which was presented in June 2013.[451]

448 For a discussion of human rights as general rules of international law see Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989) 12 Australian Year Book of International Law 82; for more detail on the application of international law to international organisations, see Henry Schermers and Niels Blokker, *International Institutional Law* (5th edn, Martinus Nijhoff Publishers 2011) paras 1572-1581.

449 See for example ECtHR, *Matthews v the United Kingdom*, 18 February 1999, application no 24833/94, para 32; ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, 30 June 2005, application no 45036/98, para 152.

450 For detail see Rick Lawson, 'A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention on Human Rights' in Filip Dorssement, Klaus Lörcher and Isabelle Schönmann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013).

451 CDDH ad hoc negotiation group and European Commission, 'Final Report to the CDDH, 10 June 2013, 47+1(2013)008rev2, Appendix I, Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (Fifth negotiation meeting on the accession of the European Union to the European Convention on Human Rights); for a discussion of the Draft Accession Agreement see Melanie Fink, 'Draft Agreement on Accession of the EU to the ECHR' in Niels Blokker and others (eds), *Vijftig: juridische opstellen voor een Leidse nachtwacht* (Boom Juridische uitgevers 2014); for more detail Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

However, this draft agreement was held incompatible with EU law by the CJEU in Opinion 2/13, which sent the drafters back to the drawing board and postponed accession to the more distant future.[452] Against this background, the analysis of this chapter is based on the presumption that the EU will not be a signatory to the ECHR in the foreseeable future. The concluding chapter, however, recommends to pursue accession in order to close some of the responsibility gaps identified in this study.[453]

3.1.2.1.2 Responsibility of EU member states

States are free to create and join international organisations and transfer competences to them. However, a transfer of powers to international organisations may also create an 'accountability gap'. The major reason is that individuals generally have fewer possibilities to invoke the responsibility of international organisations than that of states.[454] The conduct of all EU member states, for example, can be challenged before the ECtHR, whereas the EU's conduct cannot. The need to close this gap has triggered discussions of whether states can be held responsible for conduct of international organisations they are members of, despite their separate legal personalities.[455]

So far, the ECtHR has consistently dismissed actions directed against the conduct of international organisations as inadmissible, regardless of whether they were formally brought against the member states of those organisations. It has done so most frequently in cases against the United Nations, but has similarly declined its competence to hear claims against member states of other international organisations when conduct of the organisation itself was concerned.[456]

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452 CJEU, *Opinion 2/13 (Opinion Pursuant to Article 218(11) TFEU)*, 18 December 2014, ECLI:EU:C:2014:2454.

453 See below 5.4.2.1.

454 For an outline of the difficulties in holding international organisations to account see PACE, Committee on Legal Affairs and Human Rights, 'Accountability of international organisations for human rights violations' (Doc. 13370, 17 December 2013).

455 For a discussion of the downsides of such responsibility see in particular Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?' (2015) 12 International Organizations Law Review 319; discussing the extent to which national courts may fill this gap see August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013-2014) 10 International Organizations Law Review 572.

456 ECtHR, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, 2 May 2007, application nos 71412/01, 78166/01, para 149; see also ECtHR, *Berić and others v Bosnia and Herzegovina*, 16 October 2007, application nos 36357/04 and others, para 29; ECtHR, *Galić v the Netherlands*, 9 June 2009, application no 22617/07, para 37; ECtHR, *Blagojević v the Netherlands*, 9 June 2009, application no 49032/07, para 37; ECtHR, *Boivin v 34 Member States of the Council of Europe*, 9 September 2008, application no 73250/01; ECtHR, *Rambus Inc. v Germany*, 16 June 2009, application no 40382/04; ECtHR, *Beygo v 46 Member States of the Council of Europe*, 16 June 2009, application no 36099/06; ECtHR, *Klausecker v Germany*, 6 January 2015, application no 415/07.

In the case of *Connolly*, the same rationale was applied to the EU.[457] The case concerned a complaint by a former employee of the European Commission who alleged a violation of his rights of fair trial on the basis that he had not been permitted to submit written observations to the opinion of the Advocate General regarding his labour dispute with the European Communities. Aware that the EU was not a contracting party to the ECHR, he filed the application against 15 member states of the EU. The ECtHR declared the complaint inadmissible *ratione personae*, noting that only acts attributable to states were reviewable before the Court.[458]

Hence, member states of the EU have so far not been held responsible for acts of the EU by virtue of their membership alone.[459] In this vein, this study assumes that member states are only responsible for conduct attributable to them. However, two things should be noted.

First, member state conduct can consist of acts implementing EU law, but it can also be much broader and encompass various other forms of involvement. In *Kokkelvisserij*, for example, the applicant alleged a violation of his right to fair trial on the ground that he lacked opportunity to respond to the Advocate General's opinion rendered during a preliminary ruling procedure.[460] Notably, the Court was prepared to attribute the alleged shortcomings to the respondent state on the ground that the preliminary ruling had been sought by the Dutch courts and was thus inextricably linked to the national proceedings.[461] Moreover, in *Gasparini*, the Court found that even absent member state conduct, it would be able to hear complaints directed against a structural lacuna in the internal protection mechanism of the organisation concerned.[462] Unlike specific decisions of an international

457 ECtHR, *Connolly v 15 Member States of the European Union*, 9 December 2008, application no 73274/01; some authors, however, point out that the ECtHR shows more deference to the UN than other international organisations, in particular the EU, see Cedric Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 International and Comparative Law Quarterly 997, 1008–1009; suggesting that this would in any case be the preferred approach Tobias Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Human Rights Law Review 529.

458 ECtHR, *Connolly* (n 457).

459 See also Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 42–43; Maarten den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (ACIL Research Paper No 2012-04, SHARES Series, 2012), 32–33.

460 ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*, 20 January 2009, application no 13645/05.

461 Ibid.

462 ECtHR, *Gasparini v Italy and Belgium*, 12 May 2009, application no 10750/03; the case, however, did not concern the EU.

organisation, these are 'created' by the member states when they set up the mechanism in question.[463]

Second, even though it has not done so yet, the possibility that the ECtHR may in future hold member states responsible for conduct attributable to the EU is by no means excluded. In *Senator Lines*, the applicant company complained of a violation of its Convention rights by the EU institutions in their application of EU competition law.[464] Senator Lines argued that the member states 'were individually and collectively responsible for the acts of Community institutions' and brought the case against all member states. The case was ultimately held inadmissible. However, it is remarkable that the Court did so on other grounds, not because the case concerned conduct attributable to the EU.

3.1.2.2 Responsibility for conduct of EU member states

The fact that member states remain responsible for their own conduct, even when they implement EU law, may result in a dilemma for the member state concerned. For example, in compliance with its obligations as a member of the EU, a state may be required to engage in conduct that is incompatible with the ECHR. The fundamental question is how to reconcile such competing commitments stemming from different legal systems.

In a complex line of case-law, the Court developed a tool for regulating the relationship between state obligations arising from the ECHR on the one hand and their membership of international organisations on the other. The following sections focus on those cases concerning state conduct in the context of their EU membership specifically.

3.1.2.2.1 Bosphorus: a 'conditional scrutiny waiver'

The leading case, *Bosphorus Airways v Ireland*, concerned the impoundment by Irish authorities of an aircraft that the applicant, a Turkish airline, had leased from the national airline of the former Yugoslavia.[465] The applicant company alleged that this violated its right to property under Article 1 of Protocol No 1 ECHR. Ireland was, however, under an obligation to impound the aircraft as a matter of EU law, which in turn implemented a series of UN Security Council sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the context of the then ongoing armed conflict.

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463 For more detail see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 33; Lock, 'Beyond Bosphorus' (n 457).

464 ECtHR, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, 10 March 2004, application no 56672/00.

465 ECtHR, *Bosphorus* (n 449); for a detailed appraisal of *Bosphorus* see Cathryn Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87.

The major distinction between *Bosphorus* and the cases mentioned in the previous section (e.g. *Connolly*) is that in *Bosphorus* it was undisputed that a member state measure itself was under review, not a member state's responsibility for an act of the EU.[466]

The ECtHR held that the Convention did not pose a bar to states transferring competences to international organisations. Even so, it also famously pronounced that states continue to be responsible under the Convention for the acts of their organs 'regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.'[467] Absolving states completely from their Convention responsibility in areas covered by a transfer of competences to an international organisation, the Court held, would be incompatible with the purpose and object of the Convention.[468]

However, acknowledging the legitimate aim of compliance with obligations flowing from membership of international organisations, the ECtHR considered that interference with Convention rights resulting from implementing such obligations would be justified, if the international organisation itself protects human rights 'in a manner which can be considered at least equivalent to that for which the Convention provides'.[469] The Court steps back from full scrutiny when a member state has done 'no more than implement legal obligations flowing from its membership of the organisation'. In those cases, the member state is presumed to have complied with its Convention obligations.[470] Conversely, when the organisation in question does not grant equivalent protection or the member state's acts go beyond what is strictly required by its international obligation, member states do not benefit from the presumption of compliance and are fully open to scrutiny. As an ultimate safeguard for the protection of human rights, the Court exercises full scrutiny 'if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[471]

Against this background, state measures are in principle fully open to scrutiny regardless of whether they are taken in the implementation of obligations arising from their membership in the EU. However, in the interest of international cooperation, the ECtHR reduces the intensity of its scrutiny

466 ECtHR, *Bosphorus* (n 449) paras 137, 153; this distinction is also expressly pointed out by Christina Eckes, 'Does the European Court of Human Rights Provide Protection from the European Community? - The Case of *Bosphorus Airways*' (2007) 13 European Public Law 47, 53–54.

467 ECtHR, *Bosphorus* (n 449) paras 152-153.

468 Ibid para 154.

469 Ibid para 155.

470 Ibid para 156.

471 Ibid para 156.

when states are faced with conflicting obligations.[472] It presumes human rights compliance and therefore waives more detailed scrutiny when two conditions are fulfilled. First, the impugned interference was a result of strict compliance with an obligation flowing from EU membership. Second, the EU itself must grant equivalent human rights protection.[473] This presumption may be rebutted if human rights protection is manifestly deficient in the specific case.

The following sections discuss when the ECtHR considers member states to have acted in strict compliance with their obligations under EU law, whether the EU's human rights protection may be considered as 'equivalent' to the Convention, and what the ECtHR would consider as protection that is 'manifestly deficient'.

3.1.2.2.2 Discretion

The first condition for the Court to waive detailed scrutiny is that the impugned interference was the result of strict compliance with an obligation flowing from EU membership. This is the case when the state in question did not enjoy sufficient discretion under EU law to choose an implementing measure that would respect both EU and ECHR law, in other words, when it was faced with conflicting obligations.

This condition was found to be fulfilled in a number of cases. In *Bosphorus*, for example, the Court noted that the provision in question was found in a regulation that was directly applicable, became part of the Irish legal order, and unequivocally obliged Ireland to impound the aircraft in question. This was all the more clear after the CJEU had rendered a preliminary ruling, which determined the Irish proceedings in a legally binding manner and left the Irish court with no discretion.[474] The impugned interference was thus not the result of an exercise of discretion by the Irish authorities.

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472 This rationale was particularly explicit for example in ECtHR, *Michaud v France*, 6 December 2012, application no 12323/11, para 104.

473 See also Steve Peers, 'Bosphorus - European Court of Human Rights' (2006) 2 European Constitutional Law Review 443, 452.

474 ECtHR, *Bosphorus* (n 449) paras 143-148; In this respect *Bosphorus* was in keeping with earlier decisions, in particular European Commission of Human Rights, *M. & Co. v Germany*, 9 February 1990, application no 13258/87, which concerned Germany's execution of a judgment of the CJEU. In that case, the European Commission of Human Rights found it could not subject Germany to scrutiny since it was faced with conflicting obligations under the ECHR and the EC (as opposed to *Bosphorus*, however, the complaint was held inadmissible altogether). See also Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 Common Market Law Review 629, 643; Esa Paasivirta and Pieter J Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 35 Netherlands Yearbook of International Law 169, 192–196.

The Court followed a similar line of reasoning in *Povse*.[475] The case concerned Austria's enforcement of an order to return Ms Povse to Italy to reside with her father, rendered by an Italian court. She and her mother alleged that Austria's enforcement of the order violated their right to private and family life. However, the Court found that the relevant provision of the regulation in question did not leave Austria any discretion and the national courts had additionally sought a preliminary ruling.[476] Consequently, the Court rejected the application as manifestly ill-founded.

A more recent example is the case of *Avotiņš*.[477] It concerned a Latvian national, who borrowed money from a company under an arrangement governed by Cypriot law, but failed to pay it back. In his absence, a Cypriot district court ordered him to fulfil his obligations. A Latvian court subsequently ordered the recognition and enforcement of the Cypriot court's decision, also without his presence. When Mr Avotiņš learned about the decisions issued against him, he appealed the Latvian (not the Cypriot) decision, but lost that case. Before the ECtHR, he argued that Latvia had infringed his right to a fair hearing under Article 6 ECHR by recognising and enforcing the Cypriot decision which itself violated his rights of defence. However, when Latvia ordered the enforcement of the Cypriot decision, it did so through the application of EU law, namely the Brussels I Regulation.[478] Thus, the main question revolved around whether Latvia, applying *Bosphorus*, could be presumed to have complied with the Convention. As regards the discretion enjoyed by the Latvian authorities, the Court noted that the provision applied by the Latvian court was contained in a regulation. Moreover, the provision itself clearly set out the instances under which a member state court could refuse to recognise and enforce a foreign judgment. As the CJEU had found in 'a fairly extensive body of case-law', this provision 'did not confer any discretion on the court from which the declaration of enforceability was sought.' The ECtHR thus did not consider the Latvian court to enjoy any margin of manoeuvre in the specific case.[479]

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475 ECtHR, *Povse v Austria*, 18 June 2013, application no 3890/11.

476 Ibid paras 79-82.

477 ECtHR, *Avotiņš v Latvia*, 23 May 2016, application no 17502/07.

478 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1; subsequently replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1.

479 ECtHR, *Avotiņš* (n 477) para 106; for more detail see also Lize R Glas and Jasper Krommendijk, 'From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 Human Rights Law Review 1, 14–17.

In a number of other cases, the Court has subjected member states to full scrutiny because the impugned conduct could not be considered the result of strict compliance with an obligation flowing from EU membership. These cases in some instances concern obligations that stem from primary EU law. In *Matthews*, for example, a resident of Gibraltar was refused registration as a voter for the European Parliament on the basis of the EC Act on Direct Elections of 1976.[480] She challenged the act alleging a breach of her right to vote. Instead of considering the act in question an obligation of the respondent state stemming from an act of the then European Community, the Court held that all the relevant instruments 'constituted international instruments which were *freely entered into* by the United Kingdom'.[481] The United Kingdom was therefore considered to be fully responsible for the consequences of those instruments.

More frequently, the cases where member states are subjected to full scrutiny concern the implementation of directives. In *Michaud*, for example, a French lawyer challenged the human rights compatibility of rules that, in implementation of a directive under EU law, obliged lawyers to disclose information on money laundering and terrorist financing.[482] The ECtHR specifically pointed out that, as opposed to regulations, directives are only binding on member states as regards the result to be achieved, but leave it to them to choose the means and manner of achieving it. As a consequence, it subjected France's conduct to full scrutiny.[483] Similarly, in *Cantoni* the Court held France responsible for its implementation of a directive, which would have granted it enough leeway for implementation in conformity with human rights.[484]

Whilst the ECtHR considers directives to by nature leave member states a margin of manoeuvre, a regulation may also afford sufficient discretion to EU member states for a member state to be subjected to full scrutiny. This was the case for example in *M.S.S. v Belgium and Greece*.[485] *M.S.S.* concerned the transfer of an asylum seeker from Belgium to Greece according to the 'Dublin Regulation', an EU Regulation that determines the EU member state

480 ECtHR, *Matthews* (n 449); the case was, however, rendered before *Bosphorus*.
481 Ibid para 33 [emphasis added].
482 ECtHR, *Michaud* (n 472).
483 Ibid para 113, no violation was, however, found.
484 ECtHR, *Cantoni v France*, 15 November 1996, application no 17862/91; see also Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law and Practice of International Courts and Tribunals 375, 379; discussing *Cantoni v France* see also Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 301–302.
485 ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, application no 30696/09.

responsible for examining an asylum application.[486] The applicants argued *inter alia* that the transfer infringed the prohibition of *refoulement*. The Court noted that the Regulation provided that each member state could decide to examine an asylum application regardless of whether such examination was its responsibility under the criteria laid down in the Regulation.[487] Belgium was thus not strictly obliged to transfer the applicant, but could have refrained from doing so. Even though the case concerned the implementation of a regulation, Belgium therefore enjoyed a margin of manoeuvre. As a result, the *Bosphorus* presumption did not apply and Belgium was subjected to full scrutiny.[488]

In sum, the assessment of whether or not a member state enjoys sufficient discretion to comply with the Convention is strict. There is only one situation where member states clearly enjoy no discretion, namely where a preliminary ruling requested by a member state sets out a particular course of conduct (e.g. *Bosphorus*; *Povse*).[489] With respect to obligations laid down in directives, member states will normally be considered to enjoy discretion within the meaning of the *Bosphorus* test (e.g. *Michaud*; *Cantoni*). In relation to regulations it depends on the specific provisions at stake (e.g. *Avotiņš*, as opposed to *M.S.S.*).

3.1.2.2.3 Equivalent protection

The second condition for the Court to waive detailed scrutiny is that human rights protection granted under EU law is equivalent to the protection afforded by the Convention. That requires sufficient substantive guarantees on the one hand, and effective mechanisms to monitor the observance of these guarantees on the other.[490]

Substantively, the ECtHR expressed the view in *Bosphorus* that the EU's human rights guarantees were equivalent to those of the Convention. This was so in particular because the respect for fundamental rights was a condition of legality of all Community acts. In that respect, the Court pointed out the 'special significance' of the Convention within the EU legal system and the CJEU's extensive reference to Convention provisions and ECtHR case law when carrying out fundamental rights review.[491] As the Court

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486 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1; in the meantime replaced by Dublin III Regulation (n 3).

487 ECtHR, *M.S.S.* (n 485) para 339.

488 Ibid para 340; Even though Switzerland is not an EU member state, the Court reached the same conclusion in a case against Switzerland similar to *M.S.S.*, see ECtHR, *Tarakhel v Switzerland*, 4 November 2014, application no 29217/12, paras 88-91.

489 ECtHR, *Bosphorus* (n 449); ECtHR, *Povse* (n 475).

490 ECtHR, *Michaud* (n 472) para 103; reiterated in ECtHR, *Avotiņš* (n 477) para 101.

491 ECtHR, *Bosphorus* (n 449) para 159.

later pointed out, this finding of substantive equivalence of the Union's fundamental rights protection applied all the more after the CFR attained the same legal value as the EU treaties.[492] The ECtHR also held that procedurally the EU legal order offers protection equivalent to the Convention. In that respect, it took account of the competences of the CJEU to control compliance with fundamental rights. It pointed out that individuals have considerably more limited access to the CJEU than to the ECtHR, but noted in particular the possibility of lodging actions for damages against Union bodies and the role national courts play in the protection of fundamental rights at the EU level.[493]

After the CJEU rejected the draft agreement on accession of the EU to the ECHR, there was some speculation as to whether the ECtHR would retain its 'friendly' approach towards the EU.[494] However, in the case of *Avotiņš*, the Court confirmed and reiterated that it considers human rights protection granted at EU level to be substantively and procedurally equivalent to the Convention.[495]

In some instances, protection under EU law may only be equivalent if the mechanisms in EU law to monitor the observance of fundamental rights have actually been used in a specific case. In *Michaud*, the relevant French court had indeed refused to request a preliminary ruling from the CJEU and had thus 'ruled without the full potential of the relevant international machinery for supervising fundamental rights'. As a consequence, the Court considered the protection afforded by EU law in the specific case not to be equivalent to the Convention.[496] This question was raised again in *Avotiņš*, where the Latvian court had not requested a preliminary ruling either. However, the ECtHR noted that it was necessary in this respect to take into account the specific features of the supervisory mechanism in question and the circumstances of each case.[497] In that light, it concluded that the applicant had not advanced any specific arguments as regards the interpretation of the Brussels I Regulation that would have required the Latvian courts to request a preliminary ruling from the CJEU. The failure to do so therefore did not call the finding of equivalent protection into question.[498]

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492 ECtHR, *Michaud* (n 472) para 106.
493 ECtHR, *Bosphorus* (n 449) paras 160-165; ECtHR, *Michaud* (n 472) paras 108-111; ECtHR, *Avotiņš* (n 477) para 104.
494 See for example Glas and Krommendijk (n 479) 9; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 Fordham International Law Journal 955, 991; Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) 35 Yearbook of European Law 145, 173–174.
495 ECtHR, *Avotiņš* (n 477) paras 102-104.
496 ECtHR, *Michaud* (n 472) paras 114-115.
497 ECtHR, *Avotiņš* (n 477) paras 109-111.
498 Ibid para 111.

3.1.2.2.4 Manifest deficiency

The presumption of human rights compliance is rebutted if human rights protection is shown to be manifestly deficient in a specific case. In those situations, the interest of international cooperation is outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights and the state in question is subjected to full human rights scrutiny.[499]

In this respect, the question arose whether the human rights protection under EU law could be considered manifestly deficient where the principle of mutual trust applies. Under that principle, applicable in particular in the Area of Freedom, Security and Justice (AFSJ), states are allowed, sometimes required, to assume that other EU member states comply with human rights, without verifying it in a specific case.[500] In *Avotiņš*, the Court stated that, in general, the creation of an AFSJ in Europe on the basis of mutual trust is 'wholly legitimate' from the standpoint of the Convention.[501] However, where member states are required to presume that fundamental rights have been observed by other member states, this could run counter to the ECHR. In particular, the Convention requires at least a review commensurate with the gravity of serious allegations of fundamental rights violations, in order to ensure that the protection of those rights is not manifestly deficient.[502] In that light, the Court noted that it was necessary under the Convention that the mutual recognition mechanisms are not applied automatically and mechanically so as to render the protection of the human rights manifestly deficient.[503] In *Avotiņš*, it concluded that it was the applicant himself who had failed to resort to the available remedies. The protection afforded under EU law was therefore not manifestly deficient in the specific case.[504]

3.1.2.3 Responsibility for conduct during Frontex operations

It follows from the above that member states are responsible for their conduct during Frontex operations that is in breach of the Convention. However, the ECtHR may limit this scrutiny if states act without discretion when they participate in Frontex operations, provided human rights protection granted by EU law is equivalent to the Convention and not manifestly deficient. Even though this has to be assessed for each situation specifically, some general observations can be made.

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499 ECtHR, *Bosphorus* (n 449) para 156; ECtHR, *Michaud* (n 472) para 103; ECtHR, *Avotiņš* (n 477) para 112.

500 For more detail see also below 4.4.1.2 and 4.4.4.3.

501 ECtHR, *Avotiņš* (n 477) para 113.

502 Ibid para 114.

503 Ibid para 116.

504 Ibid paras 117-125.

The most relevant obligations implemented during Frontex operations stem from the EBCG Regulation, the Schengen Borders Code, the Return Directive, and more specifically the Operational Plans drawn up for each operation. All of these are not only themselves subject to EU fundamental rights law, but they additionally reiterate the most important fundamental rights obligations.[505] This means that, as a matter of EU law, they have to be read and interpreted, where possible, so as to leave member states sufficient discretion to implement their obligations in conformity with human rights obligations. As a consequence, it is unlikely that the relevant EU law instruments compel a member state to infringe the ECHR. Since states will, therefore, as a rule not face conflicting obligations in the first place, they typically will not benefit from the conditional scrutiny waiver. Of course, this does not exclude the possibility that the aforementioned instruments could in a specific case compel a member state to adopt a course of conduct that would infringe the ECHR. Where this seems likely, it will be specifically pointed out in this chapter.[506]

However, obligations of participating states' officers may stem not only from the legal instruments mentioned above, but also more practically from binding instructions given by the officers of the host member state.[507] There are no indications in the EBCG Regulation or Operational Plans that team members are free to disregard such instructions when they conflict with human rights obligations. This raises the question of whether a participating member state whose personnel did nothing but follow such an instruction may benefit from the presumption of human rights compliance.

In the context of its *Bosphorus* doctrine, the Court has to date only considered obligations stemming from legislative or quasi-legislative instruments under EU law. It is thus uncertain whether obligations stemming from instructions such as those of a host state during Frontex operations could in principle trigger the application of the conditional scrutiny waiver. Whilst there does not seem to be any discretion in those cases, the key question may be whether human rights protection under EU law can be considered equivalent in that respect.

It should be borne in mind that human rights protection afforded under EU law is considered by the ECtHR as generally equivalent to the Convention. However, the substantive and procedural safeguards that have led the Court to this conclusion seem to apply predominantly to legislative or quasi-legislative acts. As opposed to instructions, they are, in particular, subject to a broad range of mechanisms to ensure their human rights compliance before they are adopted, and to monitor the observance of these guarantees

505 For more detail see above 2.4.1.3.
506 See in particular below 3.4.1.3.2.
507 See above 2.4.3.1.

once they are in force. As *Michaud* showed, the lack of theoretically existing human rights protection mechanisms in a specific situation may indeed call the general finding of equivalence of protection into question. In this light, it is doubtful whether conduct that implements a host state instruction would be presumed by the Court to comply with the Convention. Against this background, whilst conceivable, it is unlikely that participating states benefit from a scrutiny waiver even where their personnel strictly implement host state instructions.

In sum, state conduct during Frontex operations will generally be subjected to full scrutiny before the ECtHR.

3.2 Attribution of conduct: identifying the relevant rules

As explained in more detail in the previous section, states are responsible when (1) conduct that is attributable to them (2) is in breach of the ECHR. This section focusses on the rules on attribution of conduct, i.e. the rules that determine what qualifies as an act of a state in the eyes of international law.

The aim of this section is to outline the rules on attribution of conduct and identify those applicable to Frontex operations. For that purpose, Section 3.2.1 first sets out the basic framework regarding attribution of conduct to states and international organisations respectively and examines the possibilities for attribution to multiple entities. Section 3.2.2 then discusses the existence of a *lex specialis* as between the EU and its member states more generally and in the context of Frontex operations more specifically.

3.2.1 The rules on attribution of conduct

3.2.1.1 Attribution of conduct to states

The rules on attribution envisage that conduct of persons in a public function is state conduct, whereas conduct of private citizens is not.[508] Hence, states are not responsible for the acts of everyone within their territory or jurisdiction.[509] This rule of non-attributability of private conduct was explic-

508 Crawford and Watkins (n 425) 287.

509 See C. F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue égyptienne de droit international 91, 129; see also David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998) 126–127; Griebel and Plücken (n 426) 603; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 261, pointing out that 'it cannot be required of a State that it is in control of all the events which take place on its territory, short of obliging it to become a totalitarian State.'

itly included in the draft of the ASR at first reading. Article 11 of that draft stipulated that 'The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.'[510] Since this was, however, considered inherent in the rules on attribution as a whole, Article 11 does not feature in the final set of Articles.[511] In this light, one of the core functions of attribution rules is to delimit the public realm, for which the state bears responsibility, from the private realm.[512]

If only public conduct gives rise to state responsibility, the most important question is, what qualifies as 'public'. As a general rule, this covers anyone who is empowered to exercise public authority.[513] These are normally state organs, which is why Article 4 ASR provides as a starting point that the conduct of state organs is considered an act of the state in the eyes of international law.[514] State organs within the meaning of Article 4 ASR are those the state has designated as such under its national law.[515] Beyond that, the International Court of Justice (ICJ) has extended the rule of Article 4 ASR to persons that act in 'complete dependence' on the state, albeit emphasising that equating persons with state organs when they do not have that status under national law 'must be exceptional'.[516] The attribution rule in Article 4 ASR covers all state organs, thus all persons making up the organisation of the state whether exercising legislative, executive, or judicial functions for the central government or any of its territorial units, and irrespective of the

510 ILC, 'Report of the Twenty-Seventh Session: ASR, (former) Articles 10-15 as adopted at first reading' (UN Doc A/10010/Rev.1, 1975), 70.

511 For more detail see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing 2006) 44–45; de Frouville (n 509) 262–263; Condorelli and Kress (n 424) 232.

512 Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' (n 09) 110; Special Rapporteur Crawford, 'First Report on State Responsibility' (UN Doc A/CN.4/490, Fiftieth Session 1998), 33-34, para 154; Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 326.

513 Crawford, *State Responsibility* (n 426) 115; see also Condorelli and Kress (n 424) 229, calling this 'the "normal" basis for attribution'.

514 ILC, 'ASR' (n 58) art 4.

515 Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 239; Condorelli and Kress (n 424) 229; on the limits of the relevance of internal law in this context see Pierre-Marie Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 180–181.

516 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegowina v Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, 43, 392–393.

hierarchical position of the organ.[517] Notably, responsibility arises for *any* 'public conduct', i.e. attribution is not limited to the conduct of the leaders of the state or those who control its functioning.[518]

Also, persons not formally designated as state organs may be empowered to exercise public authority. The ASR envisage two such situations and establish the attribution of the conduct of those persons to the state. First, Article 5 ASR deals with private parties empowered by the law of a state 'to exercise elements of the governmental authority'. The decisive element is that they are endowed with functions akin to those normally exercised by organs of the state, regardless of whether this is permanent or temporary, or for very specific purposes.[519] Due to their similarity to persons formally appointed as state organs, they are sometimes referred to as *de facto* organs.[520] Second, Article 6 ASR deals with organs of a foreign state that are empowered to exercise governmental authority of another state. These 'transferred organs' are, under the strict conditions of Article 6 ASR, considered 'at the disposal' of the receiving state, rendering their conduct attributable to the latter.

Articles 4 to 6 ASR have in common that they concern persons that are empowered by law to exercise public authority for a state. The basis for attribution is the *de jure* relationship between the acting persons and the state in question.[521] The control that this relationship entails on the part of the state justifies it bearing responsibility for the conduct of these persons. In the case of Article 4 ASR, attribution is based on a notion of 'institutional control' the state has over the set-up of the state apparatus.[522] In the case of Articles 5 and 6 ASR, it is based on the 'normative control' the state exercises over the conduct of the persons. The *de jure* link to the state is sufficient to trigger attribution, meaning there is no need to (additionally) establish *de facto* control by the state over every one of their acts.[523] In this vein, Article 7 ASR clarifies that *ultra vires* conduct by state organs and persons empowered to exercise elements of governmental authority is also attributable. Only when they act in a private capacity is their conduct not attributable to the state.

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517 ILC, 'ASR' (n 58) art 4; for more detail see Momtaz (n 515) 239–243.

518 Crawford and Watkins (n 425) 288.

519 Momtaz (n 515) 245.

520 Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 International Organizations Law Review 397, 453.

521 It should be pointed out that for the sake of clarity this statement is slightly simplistic, since in the case of Article 4 ASR – as discussed above – in the absence of a *de jure* link complete *de facto* control may also lead to attribution.

522 Tzanakopoulos (n 459) 38.

523 This is explicitly pointed out in the ILC's commentaries to Article 5 ASR, see ILC, 'ASR' (n 58) art 5, comm (7). As a matter of clarification, it is important to point out that the designation as *de facto* organs of persons attributable under Article 5 ASR should not disguise that attribution does not depend on factual control. The term '*de facto* organ' is only used to illustrate the similarity and draw a parallel to persons formally designated as state organs.

Aside from some more specific cases of attribution of conduct, the rule of non-attributability of private conduct has one major exception.[524] Under the limited circumstances set out in Article 8 ASR, 'factual control' over private conduct also leads to attribution to the 'controlling' state. Attribution according to Article 8 ASR requires that the 'person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. Since this case concerns attribution of *prima facie* private conduct, it has been restrictively interpreted by the ICJ. In the case *Military and Paramilitary Activities in and against Nicaragua*, it held that for the purpose of attributing acts of private parties to a state, 'it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed', and hence coined the threshold of 'effective control'.[525]

In sum, attribution of conduct to states is based on a sufficiently close relationship between the state and the acting persons or their conduct.[526] This may vary in kind and degree. Responsibility arises on the one hand based on a *de jure* relationship, consisting of formal institutional ties between the state and the individual (Article 4 ASR) or the exercise of otherwise 'normative control' by the state (Articles 5 and 6 ASR). On the other hand, it may result from a *de facto* relationship between the state and the individual through the state's exercise of effective control over the impugned conduct (Article 8 ASR).[527]

524 These exceptions are conduct of agents of necessity (Article 9 ASR), conduct of insurrectional movements (Article 10 ASR), and conduct acknowledged and adopted by the state as its own (Article 11 ASR), for more detail see Becker (n 511) 66–77.

525 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits*, 27 June 1986, ICJ Reports 1986, 14, para 115; this was explicitly confirmed in 2007, ICJ, *Genocide Convention* (n 516) paras 403-407, where the ICJ dismissed the 'overall control-test' of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see ICTY (Appeals Chamber), Case IT-94-1-A *Prosecutor v Duško Tadić*, 15 July 1999, 38 ILM 1518, para 145; for a discussion see Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' [2007] Journal of International Criminal Justice 1; Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 The European Journal of International Law 649; Griebel and Plücken (n 426); Marko Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22 Leiden Journal of International Law 307.

526 Momtaz (n 515) 246; Christiane Ahlborn, 'To Share or Not to Share?: The Allocation of Responsibility between International Organizations and their Member States' (SHARES Research Paper 28, 2013, ACIL 2013-26), 6–7; discussing the prevalence of the control-test in this area see Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 Melbourne Journal of International Law 1.

527 Also distinguishing on the basis of *de jure* and *de facto* control, see for example Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' (n 509) 128; Condorelli and Kress (n 424) 229.

3.2.1.2 Attribution of conduct to international organisations

Considering there was no compelling reason to choose a fundamentally different approach to responsibility of international organisations, the ILC used the ASR as a 'source of inspiration' for the ARIO.[528] What has been said with respect to states therefore in principle also applies to international organisations. If an international organisation is to incur responsibility, it is necessary to establish a *de jure* or *de facto* relationship between the acting person on the one hand and the organisation on the other.

What is split into three different Articles in the ASR, is found in one single rule in the ARIO. This crucial Article 6 ARIO stipulates that conduct of an 'organ or agent of an international organization […] shall be considered an act of that organization under international law'. Similarly to Article 4 ASR, organs are those with a formal 'organic link' to the organisation. As is the case with states, organs are attributable regardless of their place and role within the organisation. This means that Article 6 ARIO extends beyond principal organs of an organisation to any other organ created by secondary law.[529] In addition, organs fully seconded to an international organisation by its member states are also attributable to it according to Article 6 ARIO.[530]

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528 ILC, 'Report of the Fifty-Fourth Session' (UN Doc A/57/10, 2002), 232, para 475, noting that the ASR 'should be regarded as a source of inspiration, whether or not analogous solutions are justified with regard to international organizations.'; as Special Rapporteur Gaja points out in his survey of the comments made by states and international organisations on the articles which were adopted by the ILC at first reading, this has been a recurrent theme of criticism, Special Rapporteur Gaja, 'Eighth Report on Responsibility of International Organizations' (UN Doc A/CN.4/640, Sixty-Third Session, 2011), 5, para 5; see, however, Moshe Hirsch, *The responsibility of international organizations toward third parties: some basic principles* (Martinus Nijhoff Publishers 1995) 11, who argues 'It is widely accepted that the principles of state responsibility are applicable, with some variation, by analogy, to the responsibility of international organizations.' (with further references); Clyde Eagleton, 'International organization and the law of responsibility' (1950) 76 Recueil des Cours de l'Académie de Droit International, 325; with respect to the ARIO see Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach"' (2012) 9 International Organizations Law Review 53; Niels Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously?' in Jan Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011); Alain Pellet, 'International Organizations are Definitely not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013); Arnold N Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 147–150.

529 Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 298.

530 ILC, 'ARIO' (n 58) art 7, comm (1).

Unlike Article 4 ASR, Article 6 ARIO in addition establishes the attribution of acts of 'agents' to the international organisation. The term 'agent' has been defined by the ICJ 'in the most liberal sense' and refers to 'any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.'[531] This definition of 'agent' is reiterated in Article 2(d) ARIO.[532] As is made clear in the ILC's commentaries on Article 6 ARIO, an 'agent', whose conduct is attributable to the organisation, can be *de jure* linked to the organisation, equivalent to Article 5 ASR, or *de facto* linked, like Article 8 ASR.[533]

Whilst Article 6 ARIO provides for the attribution of, on the one hand, persons with formal organic ties to the international organisation and, on the other, private persons normatively or factually linked to the organisation, it does not cover attribution of foreign organs, i.e. organs transferred by a state or another international organisation. This equivalent to Article 6 ASR is found in Article 7 ARIO, which explicitly deals with the attribution of conduct of persons with organic ties to a state or another international organisation. Article 7 ARIO provides that conduct of foreign organs over which an international organisation exercises 'effective control' (note: not 'normative control') is attributable to the latter. As will be discussed in more detail below, this means that Article 7 ARIO requires a *de facto* relationship to the international organisation, instead of a *de jure* relationship, which the parallel rule in Article 6 ASR requires.[534]

It is important to note in this context that international organisations are instruments of cooperation between states.[535] States closely interact with international organisations, take part in their decision-making and fulfil an important function in the implementation of those decisions.[536] In particular, as opposed to states, international organisations commonly do not possess the necessary administrative structures to implement their legislation and consequently often rely on organs of their member states for that purpose. Thus, attribution of conduct more generally, but the circumstances under which member state organs are attributable to an international organisation in particular, raise complex questions.[537]

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531 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (n 121) 177.

532 ILC, 'ARIO' (n 58) art 2(d).

533 Ibid art 6, comm (10-11).

534 See below 3.3.3.1.

535 Condorelli and Kress (n 424) 222.

536 See for example Tomuschat (n 425) 9–10; Jan Klabbers, 'Self-Control: International Organisations and the Quest for Accountability' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 77.

537 Tomuschat for example states that 'the problem of attribution plays for them [international organisations] an infinitely more important role than for states.', Tomuschat (n 425) 10.

In the case of the EU, for example, are member state organs 'entrusted with parts of the organization's functions' (see Article 6 ARIO) when they implement EU legislation? Exercising public authority of the EU could make them *de facto* EU organs or agents and render their acts attributable to the EU under Article 6 ARIO.[538] However, such situations have been excluded from the application of Article 6 ARIO. In his Seventh Report, Special Rapporteur Gaja expressed that Article 6 ARIO was not to be understood as making conduct of a member state organ in implementation of a strictly binding obligation attributable to the organisation in question, because this would 'conflict with the rule that conduct taken by any one of the State organs is attributed to the State, as set out in article 4 [ASR]'.[539] In this vein, the ILC explicitly points out that Article 6 ARIO does not apply to persons who still act 'to a certain extent as organ of the seconding State or as organ or agent of the seconding organization'. For those situations, the more specific rule of Article 7 ARIO was designed.[540] Conduct of national authorities thus remains such, even when it has its foundation in or is determined by the law of an international organisation.[541]

In light of the above, a combination of two factors prevents the conduct of member state organs being attributable to an international organisation when they implement the latter's decisions. First, Article 6 ARIO is not applicable to those situations because Article 7 ARIO covers it. Second, Article 7 ARIO defines effective (factual, not normative) control as a trigger for attribution. This approach has not been without criticism. It has, for example, been proposed that Article 6 ARIO be accorded a broader meaning, attributing conduct of member state organs to international organisations where the latter exercise a particularly high degree of normative control.[542]

538 This is argued by Pieter J Kuijper and Esa Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 International Organizations Law Review 111, 126–127; see also Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005) 412–414; Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452–455.

539 Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (A/CN.4/610, Sixty-First Session, 2009), para 33.

540 ILC, 'ARIO' (n 58) art 7, comm (1).

541 Tomuschat (n 425) 23; for detail see Tzanakopoulos (n 459) 34–37.

542 This argument is – in the context of EU Military Operations – made by Aurel Sari and Ramses A Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Bart van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).

Still, in its case law, the ECtHR follows the ILC's approach and conduct of member state organs remains attributable to the respective state even where they implement decisions of an international organisation.[543] As discussed in more detail above, the exercise of normative control by an international organisation may lead to a scrutiny waiver, but does not make the conduct attributable to the organisation in question.[544]

If the acts of member state organs are to be attributable to the EU when they implement EU law, this would require there to be a special rule governing the relationship between the EU and its member states.[545] This will be discussed in more detail below.[546]

3.2.1.3 Illustration

Table 3: Rules on attribution of conduct (overview)

	ASR (ATTRIBUTION TO STATES)		ARIO (ATTRIBUTION TO INT. ORG.)	
	ARTICLE	**CONTROL REQUIRED**	**ARTICLE**	**CONTROL REQUIRED**
ORGANS	4 ASR	Institutional control	6 ARIO	Institutional control
DE FACTO ORGANS	5 ASR	Normative control	6 ARIO	Normative control
LENT ORGANS	6 ASR	Normative control	7 ARIO	De facto control
PRIVATE CONDUCT	8 ASR	De facto control	6 ARIO	De facto control

3.2.1.4 Possibilities of attribution to multiple entities

In principle, nothing prevents a violation of international law from being attributed to more than one legal entity at the same time. As noted by the ILC, 'the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each

543 The ECtHR's case ECtHR, *Bosphorus* (n 449) is explicitly cited by Special Rapporteur Gaja in support of the view that normative control by an international organisation is insufficient to trigger attribution to the latter, see Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) para 33.

544 See above 3.1.2.2.

545 See also Talmon, who suggests that the then draft of Article 6 ARIO should be amended so as to provide for the possibility to attribute conduct of state organs to an international organisation when they perform the function of 'agents' of the international organisation, see Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538) 413–414.

546 See below 3.2.2.

of them.'[547] If that is the case, all of them are internationally responsible as 'co-authors'.[548]

The clearest illustration of attribution of conduct to a plurality of actors is situations where two or more distinct persons, acting on behalf of two or more different entities, collaborate as co-perpetrators of a single wrongful act. In other words, multiple organs attributable to different actors may violate an international obligation through joint conduct. For example, two or more states may join their troops and attack a third country in violation of the prohibition of the use of force. Such joint wrongful conduct engages the responsibility of each of them.

Another conceivable alternative to attribution of one wrong to several actors is the parallel application of two or more attribution rules with respect to one organ.[549] One person may simply act on behalf of two or more entities at the same time. When states or international organisations avail themselves of a common organ (also 'joint organ') its conduct 'cannot be considered otherwise than as an act of each of the States [or international organisations] whose common organ it is.'[550] A common organ can be formally established. However, even without a formal act, one person may simply act in the name of two or more entities simultaneously, due to the parallel application of two or more attribution rules with respect to a single course of conduct.[551] An example of a joint organ is the *Nauru* case, where the International Court of Justice addressed an alleged failure to rehabilitate land from which phosphate was extracted in Nauru while this was placed under UN Trusteeship. The trusteeship was exercised by 'the Administering Authority', which did not have international legal personality distinct from those of its constituent states, and consisted of New Zealand, the United Kingdom, and Australia.

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547 ILC, 'ASR' (n 58) art 47, comm (3).

548 The following categorisation is based on: Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 282–283; for detail see also Francesco Messineo, 'Attribution of Conduct' 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) 67–80.

549 For more detail see Messineo (n 548) 67–78; on common organs and examples in this respect see also Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 198–204.

550 ILC, 'Report of the Twenty-Sixth Session' (UN Doc A/9610/Rev.1, 1974), 277-278, para 2; also pointing out the possibility of a common organ simultaneously attributable to several entities see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (UN Doc A/CN.4/541, Fifty-Sixth Session, 2004), 4, para 6.

551 See also Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 193.

The Administering Authority was treated, by the Court, as a common organ of those three states and – though in the case at hand only Australia was sued – its conduct being potentially attributable to all of them.[552]

In line with the principle of independent responsibility, each state is separately responsible for the breach, even where it is committed by a joint organ.[553]

3.2.2 A special rule for Frontex operations?

3.2.2.1 A special rule for the European Union?

Throughout the drafting process of the ARIO, the European Commission made the case for a special rule of attribution of conduct governing the relationship between the EU and its member states. By reason of its specific characteristics, in the view of the Commission, the framework applicable to 'normal' international organisations must be adapted to the EU, or so-called 'regional economic integration organisations' more generally.[554] The main argument expressed was that the EU should be responsible for the conduct of member state organs in their implementation of EU law. Also, in literature, the idea that, whilst implementing EU law, member state organs 'act in the exercise of the authority of the Community' has 'from a standpoint of pure Community law' been argued to be 'certainly the right one.'[555] Several avenues were proposed to achieve this goal. The option favoured by the Commission was the inclusion of special attribution rules, making certain acts of member state organs attributable to the EU, or other rules for responsibility, rendering the EU responsible for acts of member state organs without changing attribution to the member states.[556]

552 ICJ, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections*, 26 June 1992, ICJ Reports 1992, 240; see also André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' (ACIL Research Paper No 2011-01, SHARES Series, 2011).

553 ILC, 'ASR' (n 58) art 47, comm (3); ILC, 'Report of the Twenty-Sixth Session' (n 550) 277-278, para 2; for more detail see Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 27).

554 Expressing this view at the very start of the ILC's work on the topic, see the statement of the representative of the European Commission to the Sixth Committee of the General Assembly on 27 October 2003, UN Doc A/C.6/58/SR.14, paras 13-14; see also the comments and observations submitted to the ILC, UN Doc A/CN.4/545, 25 June 2004, 22, para 5; this view was maintained until the last comments and observations were submitted, see UN Doc A/CN.4/637, 14 February 2011, 7-8.

555 Paasivirta and Kuijper (n 474) 192.

556 See for example the following statements of the European Commission: UN Doc A/CN.4/556, 32; UN Doc A/C.6/59/SR.21, para 18.

These proposals have not been followed by the ILC who considers its framework applicable to all international organisations, no matter their function, nature or size, just like the ASR are applicable to all states, no matter their size or place within the international community as a whole.[557] However, the ARIO start from the premise that they may be displaced by more specific rules and are hence residual in character.[558] Article 64 ARIO provides that where a special rule of international law governs the question of responsibility of an international organisation, it displaces the default regime. Article 64, as opposed to its parallel provision in the ASR, specifically mentions the possibility of the rules of an organisation working as *leges speciales*.[559] Such *leges speciales* may, broadly speaking, concern two distinct questions. The first is whether the rules of general international law are applicable to a breach of the law of the international organisation. Put simply, is the law of international responsibility applicable to breaches of EU law? The second, and the one of importance here, is whether with respect to a specific international organisation, special rules are applicable in the case of a breach of general international law. As such, the emergence of *leges speciales* may function as a tool to take account of the special characteristics of international organisations.[560] The question therefore arises whether and to what extent a special rule of attribution has emerged in relation to the EU whereby member state organs are attributable to the EU when they implement EU law.[561]

At the heart of the argument for a special rule with respect to the EU are the far-reaching competences accorded to it. Proposals for attribution rules brought forward in the context of the drafting process of the ARIO hence focussed on competence as a determinative for attribution.[562] In order to

557 ILC, 'ARIO' (n 58) art 1 in connection with art 2a; discussing this question see Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal?' (2012) 9 International Organizations Law Review 7.

558 Pronto (n 528) 151; Kristen E Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013); Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously?' (n 528) 334–336; see also above 3.1.1.3.

559 This seems to have been at least partly in order to accommodate the claims of the EU for special rules, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 451.

560 ILC, 'ARIO' (n 58) general comm (7); for a discussion see Pellet, 'International Organizations are Definitely not States' (n 528) 46–49.

561 The possibility of such a rule is explicitly mentioned by the ILC in its commentaries, ARIO (n 58) art 64, comm (2).

562 See for example the special attribution rule proposed by Paasivirta and Kuijper (n 474) 216, 'Without prejudice to Article 4, in the case of a REIO [regional economic integration organisations] the conduct of its member states and their authorities shall be considered as an act of the REIO under international law to the extent that such conduct falls within the competencies of the REIO as determined by the rules of that REIO.'

take into account the varying extent of normative control by different international organisations over their member states, it has been suggested that attribution of state organs' conduct be limied to areas of exclusive competence.[563] In areas of exclusive competence it is for EU law to regulate conduct of member states. From an EU law perspective, it seems that this should be mirrored in international law in that breaches resulting from such action would engage the EU's responsibility.[564] Along these lines, arguments in favour of a special rule have predominantly been made with reference to the WTO framework.[565] WTO dispute settlement bodies have indeed attributed conduct of member state organs to the EU, where they were considered to functionally act as EU organs.[566]

However, letting competence determine attribution creates some difficulties. For example, the focus on exclusive competence may be unjustified, since it does not seem necessary for the purposes of attribution to distinguish between shared and exclusive competences, given that shared competences also become exclusive once exercised. More importantly, however, competence entails a right to act. Attribution, in contrast, is not related to a legal entitlement of a state or an international organisation to engage in

563 Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452; Sari and Wessel (n 542) 130.

564 Sari and Wessel (n 542) 129; arguing along these lines see Paasivirta and Kuijper (n 474) 213; Andrés Delgado Casteleiro, 'The International Responsibility of the European Union - The EU Perspective: Between Pragmatism and Proceduralisation' (2012-2013) 15 Cambridge yearbook of European legal studies 563, 586, arguing 'Given that someone must have committed a wrongful act for the responsibility to arise and that the EU can only act if it has powers conferred upon it, any issue of responsibility for actions committed by EU Member States when implementing EU law must logically entail the responsibility of the EU.'

565 This example has also been invoked by the European Commission when arguing for a special attribution rule. See reference by representatives of the EU to WTO practice in statements on the ILC's work on responsibility of international organisations for example UN Doc A/CN.4/545, 29, at paras 5-7.

566 For a discussion of the WTO, investment law, law of the sea, and ECHR practice on attribution of conduct between the EU and its member states see Frank Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 The European Journal of International Law 723, 731–734; see also José Manuel Cortés Martín, 'European Exceptionalism in International Law?: The European Union and the System of International Responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 198, who seems to argue for an application of a *lex specialis* in relation to the EU beyond the WTO context; discussing in detail the international responsibility of the EU in the WTO context see Andrés Delgado Casteleiro and Joris Larik, 'The "Odd Couple": The Responsibility of the EU at the WTO' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013).

the impugned conduct but rests on control exercised over it.[567] If the division of competences is to have implications for international responsibility, it seems that this would be in the context of establishing whether a breach has occurred.[568] It may be argued that the obligations entered into only extend to the areas of competence. Where the EU is not competent, its conduct would accordingly not qualify as a breach since the relevant provisions are not applicable in the first place. Having said this, it seems that in any case, as will be discussed in more detail in the following section, the lack of competence could only have an impact on international responsibility if it was sufficiently obvious to the third party.[569] Beyond that, it constitutes an unreasonable burden on third parties to acquire detailed knowledge on the internal division of competences between an international organisation and its member states, which is not binding on them.[570]

Regardless of the suitability of competence as a criterion for attribution, as pointed out above, the argument of attribution of member state conduct to the EU has been put forward predominantly with respect to areas of exclusive competence. Its applicability to areas of shared competence is far from established, which makes the existence of a *lex specialis* in areas of EU com-

567 This is also illustrated with the rule in the law of international responsibility that acts of organs are attributable 'automatically' where they act *ultra vires*, see Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538) 409; for detail on the unsuitability of competence as an attribution rule see Joni Helioskoski, 'EU Declarations of Competence and International Responsibility' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013).

568 Helioskoski (n 567) 191-196, in particular 193; the question of competence is indeed commonly discussed within the context of establishing a breach of an obligation, see for example Stephan Wittich, 'International Investment Law' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 837–838; Hirsch (n 528) 20–24.

569 This may be the case when declarations of competence have been made beforehand, in detail on the potential effects of such declarations see Helioskoski (n 567).

570 Hirsch (n 528) 14–15, who argues 'The powers of an international organization (express and implied), in accordance with its constituent treaty, do not restrict its international responsibility toward third parties. To concede the opposite conclusion would unreasonably undermine the security of legal relations between international organizations and third parties; the latter should not have to worry about the organization's powers under its internal law, which is *res inter alios acta* for them.'; see also Maurits J Dolmans, *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States* (Asser Instituut 1985) 75–79.

petence outside the WTO context unlikely at best.[571] Either way, such a rule would not apply to the ECHR context. As is clear from *Bosphorus* and subsequent case law, the ECtHR does not consider acts in implementation of EU law as attributable to the EU. It rather attributes them to the member states according to the general rules of attribution of conduct, taking account of the 'normative control' exercised by an international organisation over state conduct by limiting its scrutiny when certain conditions are fulfilled.[572] It should be noted that it seems that the drafters of the Draft Agreement on Accession of the EU to the ECHR were also of the view that member state conduct in implementation of EU law would not be attributable to the EU. Article 1(4) of that agreement envisaged the attribution of acts, measures, or omissions of organs of an EU member state to that state, irrespective of whether a member state enjoys any discretion in implementing EU law. Conversely, acts, measures and omissions of the EU institutions, bodies, offices, or agencies, or of persons acting on their behalf, were considered to be attributable to the EU.[573]

3.2.2.2 Responsibility allocation arrangements in the EBCG Regulation

Article 42 EBCG Regulation lays down rules regarding civil liability for acts committed by members of teams deployed during Frontex operations. Essentially, Article 42 sets out that where members of the teams are operating in a host member state, 'that Member State shall be liable in accordance with its national law for any damage caused by them during their operations'.

Rules similar to Article 42 are commonly found in contribution agreements or arrangements that regulate the relationship among different entities that deploy their forces in the context of a multinational operation. Contribution agreements in particular deal with modalities of contribution, requirements that personnel or equipment are expected to meet, and liability for damage

571 Jean D'Aspremont, 'A European Law of International Responsibility?: The Articles on the Responsibility of International Organizations and the European Union' (SHARES Research Paper 22, 2013, ACIL 2013-04), 8, 12, who argues that the relevance of special rules would be confined to the WTO context but that no general *lex specialis* exists; see also the argument brought forward by Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452, who points out that internal rules cannot establish *leges speciales*; following this view see Cortés Martín (n 566) 197; see also Sari and Wessel (n 542), who conclude that no *lex specialis* exists with respect to EU Military Operations; also Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 343, apply the general rules on responsibility of international organisations to the EU, but seem to be of the view that conduct of member state organs implementing Union law could be attributable to the Union by virtue of Article 6 ARIO (on page 349).

572 See above 3.1.2.2.

573 Draft Agreement on the Accession of the EU to the ECHR (n 451); Cannizzaro (n 484) 359–360.

caused by members of the multinational force.[574] An example is the model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations.[575]

One question such rules trigger is whether they are intended as attribution rules for the purposes of international responsibility. Two considerations speak against assuming such an intention with respect to Article 42. First, the explicit reference to liability 'in accordance with [the host state's] national law' suggests that the arrangement was not supposed to determine the legal situation under international law. Second, in particular from the second paragraph onwards, Article 42 indicates that the predominant concern was to allocate responsibility as between the participating states and not necessarily attributing conduct to either of them. This was also pointed out by the ILC with respect to the similarly worded model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations.[576]

The second question is to what extent they are actually capable of qualifying as attribution rules. Article 64 ARIO specifies that *leges speciales* 'may be contained in the rules of the organization applicable to the relations between an international organization and its members.'[577] On this account, the key question is whether Article 42 is a rule of an international organisation for the purposes of Article 64 ARIO. Article 2(b) ARIO contains a non-exhaustive list of what qualifies as 'rules of the organization', including the constituent instruments and rules adopted in accordance with those instruments, such as decisions, resolutions and other acts of the international organisation, as well as established practice of the organisation.[578] This shows that rules of international organisations cover a broad range of rules neither purely international nor entirely comparable to internal law of states.[579]

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574 See for example United Nations, 'Model Contribution Agreement between the United Nations and the Participating States contributing Resources to a United Nations Peace-Keeping Operation' (UN Doc A/50/995, 9 July 1996).

575 See also ILC, 'ARIO' (n 58) art 7, comm (3); see ILC, 'Report of the Fifty-Sixth Session' (UN Doc A/59/10, 2004), 111, para 3, 110, para 2; ILC, 'Report of the Sixty-First Session' (UN Doc A/64/10, 2009), 62-63, para 2; United Nations (n 574).

576 ILC, 'ARIO' (n 58) art 7, comm (3), pointing out that '[t]he agreement appears to deal only with distribution of responsibility and not with attribution of conduct'; see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; ILC, 'Report of the Sixty-First Session' (n 575) 62-63, para 2.

577 It should be noted that Article 42 EBCG Regulation, if accepted, would displace rules contained in the ARIO but also in the ASR. The latter, however, does not contain an equivalent reference in the relevant Article 55 ASR. For the present purposes, it is assumed that rules of an organisation are capable of displacing the ASR to the same extent that they can do so in the context of the ARIO.

578 For a detailed account regarding the origin of the definition see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 403–405.

579 For more detail see ibid 407–418, with further references; Pronto (n 528) 155–156.

It has been suggested that, whilst those of internal character are relevant in determining whether a person is considered an organ of an organisation, only rules that are international in character can qualify as *leges speciales* within the meaning of Article 64 ARIO.[580] In the context of the EU it has been argued in particular that the rules on allocation of competence were 'internal' in character and could accordingly not function as attribution rules.[581] The same rationale would apply to rules contained in secondary law.

In any event, even if rules contained in secondary law qualify as *leges speciales* for the purposes of Article 64 ARIO, their applicability would seem to be confined to the relationship between the international organisation and its member states (or between the member states themselves). From the perspective of third parties they constitute *res inter alios acta* and can for that reason not govern the relationship between an international organisation and/or its member states on the one side and a third party on the other.[582] This was also pointed out by the ILC with respect to the model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations. It found that 'this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.'[583] In this light, as long as they are not replicated in an instru-

580 Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 401; also of this view D'Aspremont (n 571) 9; Cortés Martín (n 566) 197; as Ahlborn mentions, however, the qualification of certain rules of international organisations as internal is not universally accepted, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 419–420 and references therein.

581 D'Aspremont (n 571) 9; Wittich (n 568) 840–841.

582 Marten Zwanenburg, 'Toward a more mature ESDP: Responsibility for violations of international humanitarian law by EU crisis management operations' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Institute 2008) 406, who points out that 'it could be argued that provisions on claims in an agreement between the EU and a troop-contributing state are *res inter alios acta* for third parties'; see also see also Wittich (n 568) 840–841; Boon, 'The Role of Lex Specialis in the Articles on the Responsibility of International Organizations' (n 558); Pronto (n 528) 156.

583 ILC, 'ARIO' (n 58) art 7, comm (3); see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3, 110, para 2; ILC, 'Report of the Sixty-First Session' (n 575) 62-63, para 2; Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 13, para 43; the drafting Committee pointed out that these considerations would even apply to a case where a third party knew of the arrangement, ILC, Summary record of the 2810th meeting (UN Doc A/CN.4/SR.2810, 2004) 137-138, para 17; see also the clarification by Ago in ILC, Summary record of the 1263rd meeting (UN Doc A/CN.4/SR.1263, 1974), 60, para 14, 'If two States had concluded a special agreement governing their respective international responsibilities, that agreement was not binding on third States, which were not obliged to apply to one of those States rather than to the other.'

ment applicable to third parties, Article 42 EBCG Regulation is not capable of regulating attribution of conduct with effect for third parties.[584]

In conclusion, irrespective of whether Article 42 EBCG Regulation was intended as an attribution rule and is capable of qualifying as such, it cannot have effect as between the actors participating in a Frontex operation on the one hand and an individual lodging a complaint before the ECtHR on the other. For that reason, it does not displace the general regime of attribution of conduct in that respect. Of course, Article 42 EBCG Regulation remains relevant as a rule for the allocation of responsibility, e.g. for the purposes of reimbursement as between the entities participating in Frontex operations after one actor has been held responsible under the ECHR.

3.3 Responsibility for the primary breach

This section analyses the allocation of responsibility among the host and participating states for human rights violations that may occur during Frontex operations. It is concerned with the responsibility for the primary breach, i.e. the responsibility that arises directly from a human rights violation committed during an operation.[585]

For example, when a multinational team of border guards uses excessive force against an individual during Frontex operations, which state is responsible for that violation under the ECHR? Similarly, when migrants are expelled in violation of the prohibition of *refoulement* during a Frontex operation, is the host state or are participating states, alone or together, responsible for these Convention violations?

Where such breaches occur, the states involved are responsible insofar as the course of conduct at the origin of the breach is attributable to them. In other words, those that can be considered the authors of a violation, bear responsibility for it. This section discussion how the rules on attribution of conduct apply to Frontex operations, i.e. under what circumstances the host and participating states can be considered the authors of a Convention violation that occurs during a Frontex operation. As set out in the previous section, attribution of conduct during Frontex operations is determined according to the general attribution rules as expressed in the ASR and ARIO. These therefore form the basis of the analysis in this section.

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584 The same conclusion is reached by Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 255, who argues that '[t]hese rules are only binding as between Member States and do not prejudice claims brought by a national of a third state.' He also argues that the rules in any case do not touch upon human rights claims.

585 For the distinction between primary and associated responsibility see above 1.3.3.

Section 3.3.1 sets out the starting point and explains the approach and structure chosen for the purposes of the remainder of this section. Sections 3.3.2 and 3.3.3 form the core analysis regarding attribution of conduct during Frontex operations, dealing with attribution of conduct to the host state and attribution of conduct to the EU respectively. Finally, Section 3.3.4 summarises the conclusions reached.

3.3.1 Attribution of conduct during Frontex operations: the starting point

The main body of personnel deployed during Frontex operations includes:[586]

- host state officers ('local staff'),
- persons deployed as standard team members by participating states,
- persons deployed as standard team members by Frontex,
- persons deployed as team members on large euqipment, and
- Frontex staff deployed to exercise coordinating and similar tasks.

Local staff and team members contributed by participating states are, generally speaking, state organs and attributable to their 'home' states on the basis of Article 4 ASR. Exceptionally, they may not formally be incorporated into the state administration, but otherwise authorised by law to conduct border management tasks. Since such powers qualify as 'governmental authority' for the purposes of Article 5 ASR, conduct of those persons is attributable to the respective state by virtue of Article 5 ASR.[587] Thus, the conduct of local staff or team members of participating states is, as a starting point, attributable to the respective state.

Personnel contributed by Frontex may include personnel with coordinating tasks or personnel deployed as team members. The former are largely regular Frontex staff members.[588] The latter are always seconded national experts (SNEs).[589] Under Article 6 ARIO both types of personnel are attributable to the EU. Regular Frontex staff simply because Article 6 ARIO does not only cover staff within the main institutions of an international organisation, but also extends to personnel within subordinate bodies, such as Frontex.[590]

586 For a more detailed overview of personnel deployed during Frontex operations see Table 2.

587 ILC, 'ASR' (n 58) art 5, comm (2).

588 The 'Coordinating officer' that is deployed for each joint operation indeed *has to* be a Frontex staff member, see EBCG Regulation (n 18) arts 22, 32(2), 58(2).

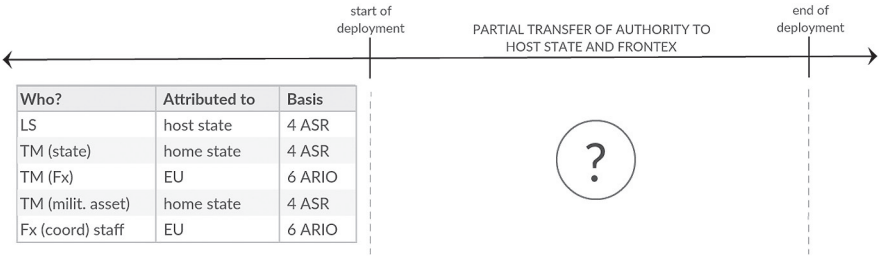
589 Ibid arts 20(11), 58(4).

590 See above text to n 529; see also Wessel and den Hertog (n 571) 348, who argue that 'In view of the Union rules on "internal" responsibility, there are good reasons to interpret the term "organs and agents" as "institutions, bodies, offices and agencies and their servants" as used is in the TFEU.'; similarly Ramses A Wessel, 'Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy' (2011) 3 Amsterdam Law Forum 34, 36.

SNEs are attributable to the EU because Article 6 ARIO also covers member state officials' conduct when they are fully seconded to the organisation.[591]

In this light, the starting point must be that the conduct of personnel deployed during Frontex operations is attributable to their respective contributing entity, commonly according to Articles 4 ASR, or 6 ARIO.

However, for the duration of their deployment, they are subject to a specific command regime detailed in the EBCG Regulation and the respective Operational Plans.[592] In essence, authority over them is not only exercised by their respective 'home' entities, but partly also by the host state of an operation as well as by Frontex. This transfer of authority concerns in particular all personnel deployed as 'team members' who at least partially receive their orders from the host state. The crucial question this raises, is how the transfer of authority affects attribution of their conduct. In the eyes of international law, do they act in the name of the host state or Frontex, instead of, or in addition to their home entity?



Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	home state	4 ASR
TM (Fx)	EU	6 ARIO
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

LS...'Local staff', TM...'Team member', Fx...'Frontex'

Figure 16: Attribution of conduct of human resources used for Frontex operations (starting point)

The law of international responsibility sets out the conditions under which organs of one state or international organisation can be considered 'transferred' to another and become attributable to the receiving state or international organisation. The relevant rules are found in Articles 6 ASR and 7 ARIO respectively. These provisions therefore form the focus of the following sections (see Table 4).

591 ARIO (n 58) 86; similarly see the position of INTERPOL during the drafting process of the ARIO, in ILC, comments and observations received from governments and international organisations, 12 May 2005, UN doc A/CN.4/556, 40, para 24.

592 For more detail see 2.4.3.1.

Table 4: Rules on attribution of conduct (provisions relevant for Frontex operations)

	ASR (ATTRIBUTION TO STATES)		ARIO (ATTRIBUTION TO INT. ORG.)	
	ARTICLE	CONTROL REQUIRED	ARTICLE	CONTROL REQUIRED
ORGANS	4 ASR	Institutional control	6 ARIO	Institutional control
DE FACTO ORGANS	5 ASR	Normative control	6 ARIO	Normative control
LENT ORGANS	**6 ASR**	**Normative control**	**7 ARIO**	**De facto control**
PRIVATE CONDUCT	8 ASR	De facto control	6 ARIO	De facto control

Section 3.3.2 discusses whether, according to Article 6 ASR, conduct of deployed 'team members' is attributable to the host state. After elaborating on the general requirements for attribution under Article 6 ASR (Section 3.3.2.1), it analyses how Article 6 ASR has been interpreted by the ECtHR (Section 3.3.2.2) and applies those rules to the context of Frontex operations (Section 3.3.2.3).

Section 3.3.3 focusses on Article 7 ARIO, discussing whether conduct of personnel involved in Frontex operations is attributable to the EU. Like the preceding section, it first sets out the threshold of Article 7 ARIO (Section 3.3.3.1), analyses its reception by the ECtHR (Section 3.3.3.2), and applies it to Frontex operations (Section 3.3.3.3). Even though the EU cannot be held responsible under the ECHR, it is necessary to determine whether conduct during Frontex operations is attributable to it. If that is the case, states are presumed here to bear no direct responsibility for it under the ECHR and it falls outside the ECtHR's jurisdiction.[593]

3.3.2 Attribution of conduct to the host state

3.3.2.1 Article 6 ASR

3.3.2.1.1 The threshold of Article 6 ASR

Article 6 ASR deals with the situation where an organ of one state is placed at the disposal of another. It sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

593 See above 3.1.2.1.

Attribution under Article 6 ASR rests on three conditions: First, the person placed at the disposal of another state must be an organ of the sending state.[594] Other than persons having the status of an organ according to Article 4 ASR, this includes so-called *de facto* organs that, in accordance with Article 5 ASR, are empowered by the law of the sending state to exercise elements of its governmental authority.[595]

Second, transferred organs are attributable to the receiving state if they exercise 'functions embodying genuine elements of [its] governmental authority'.[596] This requires that they perform functions of a public character, excluding the secondment of technicians, advisors, or experts who act in a personal capacity.[597] The precise meaning of 'governmental authority' has predominantly been addressed with respect to Article 5 ASR, where the content of the powers, the way they are conferred on the person, the purposes for which they are to be exercised, and the extent to which the person is accountable to government for their exercise were pointed out as relevant factors.[598] Examples of governmental authority in this context include powers of detention or immigration control.[599] In the context of Article 6 ASR, more emphasis has been placed on the question for which state, the receiving or the sending state, the powers are exercised, instead of focussing on a definition of governmental authority. In that light, conduct is not attributable to the receiving state when a transferred organ continues exercising governmental authority for the sending state.[600] This aspect is, however, mainly addressed through the third requirement.

The third condition for attribution is that the organ is 'placed at the disposal' of the receiving state.[601] The formulation 'placed at the disposal' is accorded a specific meaning in the context of Article 6 ASR and implies that the transferred organ acts 'with the consent, under the authority of and for the purposes of the receiving State.'[602] It thus encompasses three elements: First, the transferred organ exercises functions of the receiving state and in that sense 'performs duties which normally fall to the organs of the beneficiary

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594 ILC, 'ASR' (n 58) art 6, comm (5).
595 ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 18.
596 Ibid 288.
597 Ibid 288.
598 ILC, 'ASR' (n 58) art 5, comm (6); see further Dupuy (n 515) 182–183; Crawford, *State Responsibility* (n 426) 129–132; Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2012) 210–221.
599 ILC, 'ASR' (n 58) art 6, comm (2).
600 ILC, 'Report of the Twenty-Sixth Session' (n 550) 288-289, paras 11-12; 290, para 18.
601 ILC, 'ASR' (n 58) art 6, comm (2).
602 Ibid art 6, comm (2); Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 44, para 220.

State.'[603] This excludes not only state organs that continue to act for the purposes of the sending state, but even those who act for shared purposes.[604] Second, the transferred organ acts with the consent of the receiving state, excluding the application of the attribution rule to situations of territorial occupation.[605]

The decisive element is the third, which requires that the transferred organ is 'genuinely and exclusively under the authority' of the receiving state.[606] This entails the organ acting 'in conjunction with the machinery' of the receiving state, in other words under the control of the receiving state by way of being subject to its laws and instructions.[607] The idea that the transferred organ had to act 'in accordance with the instructions' of the receiving state even featured as an explicit condition for attribution in Special Rapporteur Ago's first proposal of then Article 9 ASR.[608] Importantly, this does not mean that the harmful conduct has to be specifically controlled or commanded by the receiving state, but describes the requirement that the organ is subject to the receiving state's authority in that it would have to obey orders if given by the latter.[609] In this light, what is crucial in the context of Article 6 ASR is the establishment of a functional, or institutional, link between the organ in question and the structure or authority of the receiving state.[610] In this vein conduct in excess of authority or contravention of instructions is also attributable.[611]

Notably, in the drafting process of what became Article 6 ASR, the focus shifted from the power of the receiving state to issue instructions to the absence of such power for the sending state. In 1974, the ILC accordingly noted that 'the organ shall act in conjunction with the machinery of [the

603 ILC, 'Report of the Twenty-Sixth Session' (n 550) 288, paras 7-8; see also Special Rapporteur Ago, 'Third Report on State Responsibility' (UN Doc A/CN.4/246, Twenty-Third Session 1971), 269, para 203; ILC, 'Report of the Fiftieth Session' (UN Doc A/53/10, 1998), 84, para 412; ILC, 'ASR' (n 58) art 6, comm (1-2).

604 ASR (n 58) art 6, comm (4).

605 Ibid art 6, comm (4).

606 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268-269, para 202; pointing out that interest and consent are not enough but that 'authority' is decisive, see ILC, 'Report of the Twenty-Sixth Session' (n 550) 288, para 7.

607 ILC, 'Report of the Twenty-Sixth Session' (n 550) 287, para 5; 288, paras 7-8; ILC, 'Report of the Fiftieth Session' (n 603) 84, para 412, referring to control 'at least at the level of policy if not of detail'; ILC, 'ASR' (n 58) art 6, comm (2).

608 See the several mentions of 'in accordance with the instructions' of the receiving state in Ago's third report, Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 269, para 202; 270, para 206; 272, para 209; see his first proposal at 274, para 214.

609 ILC, 'Summary record of the 1262nd meeting' (UN Doc A/CN.4/SR/1262, Twenty-Sixth Session 1974), 55, para 15.

610 ILC, 'ASR' (n 58) art 6, comm (4); for more detail see Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 199-200, 204; Messineo, 'Attribution of Conduct' (n 548) 89–91.

611 ILC, 'ASR' (n 58) art 7, which is also applicable to Article 6 ASR situations.

receiving] State and under its exclusive direction and control, not on instructions from the sending State.'[612] This formulation was retained in the ILC's commentaries to the final draft of Article 6 ASR.[613] Thus, it is important that the receiving state's authority is exclusive, ruling out in particular the possibility for the sending state to issue instructions to the transferred organ.[614] It is worth mentioning that, as Ago pointed out, 'exclusivity' of authority in this context does not exclude the possibility that persons, independently of their function within the receiving state, continue to act as organs of their home state.[615] If the authority of the receiving state is exclusive with respect to the functions in the context of which the breach was committed, the conduct in question is attributable to the receiving state and triggers its responsibility.

Against this background, persons sent to another state to perform diplomatic or consular functions are clearly not 'put at the disposal' of the receiving state.[616] A point that has been particularly emphasised is that organs sent in order to assist another state in military operations, for example in order to fight off an armed attack by a third state, are also not attributable to the receiving state since they remain under the authority of their home state for which reason they cannot be considered genuinely 'placed at the disposal' of the receiving state.[617] Also 'ordinary situations of inter-State cooperation or collaboration' that do not entail a transfer of authority are not covered by Article 6 ASR.[618]

The threshold of Article 6 ASR for the conduct of a 'lent' organ to be attributed to the receiving state may be summarised as follows (see also Figure 17): The person is (1) an organ of the sending state, (2) exercises governmental authority of the receiving state, and (3) is placed at the receiving state's disposal. The organ is considered to be placed at the receiving state's disposal if it acts (a) for the purposes, (b) with the consent, and (c) under the exclusive authority, i.e. subject to the laws and instructions, of the receiving state.

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612 ILC, 'Report of the Twenty-Sixth Session' (n 550) 287, para 5.

613 ILC, 'ASR' (n 58) art 6, comm (2).

614 This was clarified by Special Rapporteur Ago, see ILC, 'Summary record of the 1262nd meeting' (n 609) 55, para 15.

615 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, para 201; this situation has to be distinguished from person acting as 'joint organs', discussed above in 3.2.1.4.

616 ILC Report, *Twenty-Sixth Session* (UN Doc A/9610/Rev.1, 1974) 287, para 4; ILC, 'ASR' (n 58) 44.

617 Special Rapporteur Ago, *Third Report on State Responsibility* (UN Doc A/CN.4/246, 1971) 269, para 202; ILC Report, *Twenty-Sixth Session* (UN Doc A/9610/Rev.1, 1974) 287, para 4.

618 ILC, 'ASR' (n 58) 44.

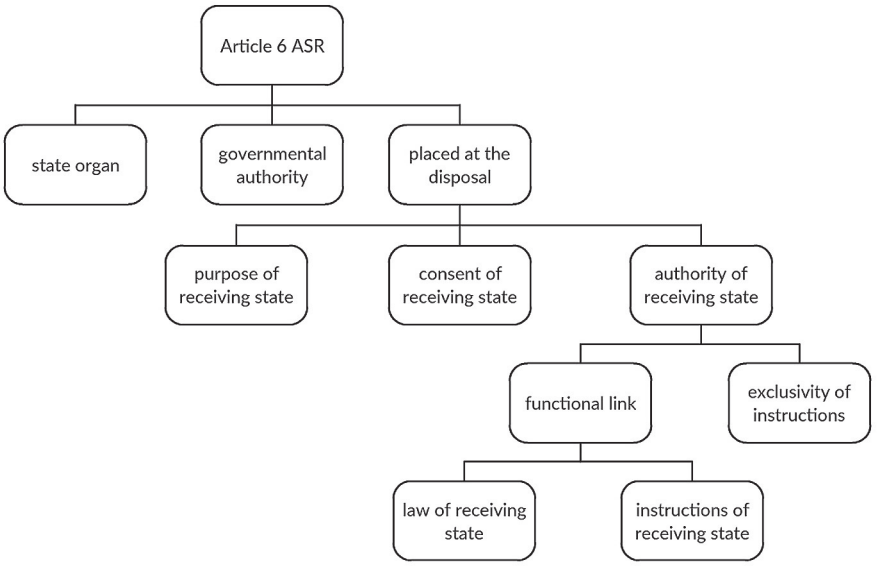

Figure 17: Article 6 ASR: overview of requirements for attribution

3.3.2.1.2 Article 6 ASR and attribution to the home entity

If the threshold of Article 6 ASR is met, how does this 'transfer' affect the relationship between the organ and its original 'home' entity? Two possibilities are conceivable. The first is that the organ's conduct is simultaneously attributable to the receiving state (on the basis of Article 6 ASR) and the sending ('home') state (in particular on the basis of Article 4 ASR). That would make them joint organs of the receiving and the sending state, in which case their wrongful conduct engages the responsibility of both.[619] The second is that the application of Article 6 ASR 'breaks' the link between the transferred organ and its former home entity. In that case, as organs of the receiving state only, the organ's conduct may only engage the receiving state's responsibility.

Article 6 ASR does not generally bar the possibility of a person being an organ of the sending and the receiving state at the same time. It is indeed not at all unlikely that an organ is transferred only with respect to specific purposes, but continues to act for its home state independently of its function within the receiving state.[620] This means that a person may act as an organ for the receiving state on one occasion and for the sending state on another.

619 For more detail on 'joint organs' see above 0.

620 See also Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, para 201.

However, when acting for the purposes of the receiving state, the transferred organ does so under the *exclusive* authority of that state. That conduct is therefore regarded under international law as an act of the receiving, but not of the sending state.[621] Thus, with respect to *a single course of conduct*, the organ will only be acting for one of the two states. In this light, Special Rapporteur Ago pointed out that the case of a transferred organ should not be 'confused with that of a "joint" organ [whose actions] are acts of each of the two States at the same time and may consequently involve the international responsibility of both of them.'[622]

Also, the overall function of Article 6 ASR confirms that its application breaks the link between the transferred organ and its former home entity. Whereas most attribution rules, e.g. Articles 4, 5, 8 ASR and 6 ARIO, delimit the public from the private sphere for the purpose of responsibility, Articles 6 ASR and 7 ARIO delimit 'two public spheres' from each other. They hence serve to allocate responsibility among several public actors, which speaks against a simultaneous application of Article 4 ASR and Article 6 ASR.

The rule of exclusive attribution to the receiving state is confirmed in case law. In the *Genocide Convention* case, the ICJ noted that 'the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.'[623] It is also the dominant view expressed in literature, where the treatment of acts of organs of a state that are put at the disposal of another state has indeed been considered as illustrative of attribution as an 'exclusive operation'.[624]

621 ILC, 'ASR' (n 58) art 6, comm (2).

622 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, n 401.

623 ICJ, *Genocide Convention* (n 516) 204, para 389.

624 Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 27) 10; see also Crawford, *State Responsibility* (n 426) 132; den Heijer, *Europe and Extraterritorial Asylum* (n 584) 82; den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 20–22; Messineo, 'Attribution of Conduct' (n 548) 83–84; Francesco Salerno, 'International Responsibility for the Conduct of "Blue Helmets": Exploring the Organic Link' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 420, who argues that 'The purpose of the rule is clear: when State organs placed at the disposal of another State exercise their public functions under the exclusive governmental authority of the receiving State, their conduct must be attributed exclusively to the latter, because the receiving State's chain of command is the only one international law takes into account.'; Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' (n 549) 198, argues that attribution of conduct of the Coalition Provisional Authority in Iraq to the UK on the basis of Article 6 ASR would exclude attribution to other actors involved.

3.3.2.2 *Article 6 ASR in the case law of the ECtHR*

Owing to the stringent requirements of Article 6 ASR, it only applies to exceptional situations.[625] The Strasbourg organs, the European Commission of Human Rights and the ECtHR, followed this strict approach.[626]

In 1977 the European Commission of Human Rights dealt with measures taken by the Swiss police in Liechtenstein. The case of *X and Y v Switzerland* concerned a German national who was banned from entering Liechtenstein territory by the Federal Aliens' Police of Switzerland.[627] The question arose whether the measure complained of was attributable to Switzerland or Liechtenstein. At the time, Liechtenstein was not a contracting party to the Convention. Thus, in case of attribution to Liechtenstein, the Convention would be inapplicable. Conversely, the responsibility of Switzerland could only be engaged if the measures were attributable to it.[628]

The entry ban was based on a Swiss law, applicable in Liechtenstein by virtue of a treaty in force between the two states, which covered Swiss laws and decrees concerning the entry, exit, residence, and establishment of foreigners more generally. The same treaty rendered the Swiss authorities competent in matters of the aliens' police, and excluded Liechtenstein's authorities from overruling entry bans such as the one issued in the case at hand.[629] Switzerland argued that the acts were attributable to Liechtenstein since it had only 'delegated certain functions of the aliens' police to the Swiss authorities' but had thereby 'not generally renounced its sovereignty' in those matters. The Swiss authorities, in their view, only performed an ancillary function based on the treaty between the two states.[630] The European Commission of Human Rights disagreed. It observed that the entry ban was exclusively in conformity with Swiss law and that Switzerland exercised its own jurisdiction in Liechtenstein.[631] Consent alone, and the fact that Swiss authorities acted in the interest of Liechtenstein as well, did not make the measures complained of attributable to Liechtenstein. Since the Swiss Federal Aliens' Police exercised Swiss public authority, it had not been genuinely and exclusively placed at the disposal of Liechtenstein.[632]

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625 Crawford calls the situation of Article 6 ASR 'extremely narrow' yet in practice not uncommon, see Crawford, *State Responsibility* (n 426) 132; also the ILC in its commentaries points out that Article 6 deals with a 'limited and precise situation', ILC, 'ASR' (n 58) art 6, comm (1).

626 Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 22.

627 European Commission of Human Rights, *X and Y v Switzerland*, 14 July 1977, application nos 7289/75 and 7349/76.

628 Ibid 71.

629 Ibid 72; this was clarified by the respondent state, see 67-68.

630 Ibid 62.

631 Ibid 73.

632 See also Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 224; ILC, 'ASR' (n 58) art 6, comm (7).

In *Drozd and Janousek v France and Spain*, the ECtHR accepted a transfer of organs.[633] In that case, the two applicants had been convicted for an armed robbery by an Andorran court. At the time of their application to the ECtHR, they were serving their fourteen years' imprisonment in France. The Andorran court that had convicted the applicants was composed of French and Spanish judges seconded by France and Spain respectively.[634] Because Andorra was not a contracting party to the Convention, only if and to the extent that the complaints related to acts attributable to Spain and/or France, would the Convention be applicable.

The ECtHR distinguished between the judicial process and the detention resulting from the conviction.[635] With regard to the former it denied its competence to hear the claim since the acts in question were not attributable to either of the respondent states. It observed:

> Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.[636]

Whilst the Court was not asked to pronounce on the question of attribution to Andorra, it seems that the measures complained of were not attributable to France or Spain precisely because of the rule underlying Article 6 ASR. It may on these grounds be assumed that the conduct relating to the judicial process was attributable to Andorra.[637] With respect to the subsequent detention in France, the Court found itself competent to hear the claim but denied France's responsibility.[638]

In *Drozd and Janousek*, attribution of the Andorran court's acts to Andorra excluded simultaneous attribution of the same acts to France or Spain. A minority found it 'difficult to accept that there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects […] those States participate in

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633 ECtHR, *Drozd and Janousek v France and Spain*, 26 June 1992, application no 12747/87.

634 They were directly or indirectly appointed by the two co-princes of Andorra, the President of France and the Bishop of Urgel in Spain and for the purpose of serving in the Andorran courts acquired Andorran nationality, see Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 226.

635 This is also explicitly pointed out by ibid 45, para 226.

636 ECtHR, *Drozd and Janousek* (n 633) para 96.

637 Den Heijer, *Europe and Extraterritorial Asylum* (n 584) 84.

638 ECtHR, *Drozd and Janousek* (n 633) para 110; The Court found that France could not be required 'to impose its standards on third States or territories'. France was consequently not obliged to verify whether the proceedings which led to the conviction were compatible with all the requirements of Article 6 ECHR, unless the conviction was the result 'of a flagrant denial of justice'.

its administration.'[639] They were not convinced by the majority's distinction between the acts of the Spanish and French authorities in their capacity as Andorran organs on the one side and their acts as Spanish and French organs on the other.[640] They rather considered that 'the Co-Princes should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights […].'[641] However, this seemed to be based on the historically unique position of Andorra and its specific relationship with the two respondent states rather than on a more general rejection of the exclusivity of attribution under Article 6 ASR.[642]

More recently, the Court discussed the question of a transfer of organs in *Jaloud v the Netherlands*.[643] At a checkpoint in Iraq, a patrol of six Dutch soldiers shot Mr Jaloud, a passenger in an approaching car that had refused to stop. In his application to the ECtHR, Jaloud's father argued that the investigation carried out was insufficient to meet the Netherlands' procedural obligations under Article 2 ECHR, guaranteeing the right to life. The Court eventually agreed with the applicant and found the Netherlands responsible for failures in investigating the incident.[644] However, at the heart of the case was the preliminary question of whether the Convention was applicable at all.

The Dutch soldiers were present as part of the 'Stabilization Force in Iraq' under a UN Security Council mandate. They belonged to a unit that was under UK command. In light of this, the Dutch government argued that the events that led to the death of Mr Jaloud did not fall within its jurisdiction according to Article 1 ECHR, and that the Convention was therefore inapplicable.[645] For the Convention to be applicable with respect to the Netherlands, the Court had to satisfy itself that the Netherlands exercised either effective control over the area in question, or, more relevant in this case, authority and control over the victim, Mr Jaloud.[646] That was only possible,

639 Ibid Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann.
640 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 226.
641 ECtHR, *Drozd and Janousek* (n 633) Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann; for more detail see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 22.
642 The case was decided before a treaty in 1993 settled Andorra's status as a state, see Messineo, 'Attribution of Conduct' (n 548) 85–86.
643 ECtHR, *Jaloud* (n 444).
644 Ibid paras 183-228.
645 For detail see ibid paras 112-120.
646 These general rules are reiterated in ibid para 139.

however, if the Dutch soldiers were attributable to the Netherlands in the first place, not to the UK in particular.[647]

The Court observed that the Dutch soldiers were at the relevant time under the operational command of the UK and took their day-to-day orders from a UK officer. However, it pointed out that the Netherlands continued to have authority regarding 'the formulation of essential policy', it 'assumed responsibility for providing security in [the] area, to the exclusion of other participating States', and 'retained full command over its contingent there'.[648] That being so, the Court, explicitly invoking Article 6 ASR, found that the Dutch troops were not 'placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State'.[649] Since the powers the Dutch soldiers exercised (in the name of the Netherlands) were sufficient for the establishment of jurisdiction within the meaning of Article 1 ECHR, the Convention was applicable to the Netherlands.[650]

It thus seems that the operational command exercised by the UK over the Dutch soldiers was not sufficient on its own for the purposes of attributing their conduct to the UK, in particular because the UK's authority over the Dutch soldiers was not exclusive. In this light, the Court in *Jaloud* appears to have continued to adopt a particularly strict approach towards attribution of conduct of lent organs.[651]

3.3.2.3 Article 6 ASR in the context of Frontex operations

As explained above, the starting point is that personnel deployed during Frontex operations act in the name of the entity that has contributed them.[652] However, the authority transferred to the host state over person-

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647 The Court itself was, however, not entirely clear on the relationship between its analysis of the attribution of conduct and the establishment of jurisdiction for the purposes of Article 1 ECHR. For a discussion see Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?' (2014) 53 Military Law and the Law of War Review 287; Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62 Netherlands International Law Review 407; Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v. the Netherlands*' (2015) 19 Journal of International Peacekeeping 174.

648 ECtHR, *Jaloud* (n 444) paras 146-149.

649 Ibid para 151, even though the Court in this respect explicitly invoked Article 6 ASR, it implicitly also relied on Article 8 ASR by referring to para 406 of ICJ, *Genocide Convention* (n 516).

650 ECtHR, *Jaloud* (n 444) para 152.

651 See also Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands' (n 647) 307–310, who argues that the Court thereby construed Article 6 ASR too narrowly and inconsistently with its earlier case law. It would, in his view, 'impose a regime of strict liability on contributing States', which 'finds little support in practice'.

652 See above 3.3.1.

nel deployed as 'team members' raises the question whether Article 6 ASR renders their conduct attributable to the host state whilst they exercise their tasks and powers during joint operations. This section analyses whether 'team members' may be considered 'transferred' to the host state according to Article 6 ASR. If that is the case, their conduct in violation of human rights triggers the host state's responsibility.

As described in the previous sections, an organ can be considered 'lent' to another state for the purposes of Article 6 ASR when the person is (1) an organ of the sending state, (2) exercises governmental authority of the receiving state, and (3) is placed at the receiving state's disposal (see also Figure 17). Border management is undeniably a task that involves the exercise of governmental authority.[653] Two key questions thus remain to be analysed in the following sections. First, are team members organs of another state? Second, can they be considered 'placed at the disposal' of the host state? Beyond consent – team members clearly do not operate against the will of the host state – the latter question rests on two conditions: acting for the purposes and under the exclusive authority of the host state.

3.3.2.3.1 Are team members state organs?

Whereas it is clear that team members contributed by participating states are organs of other states and as such fulfil the first requirement for the application of Article 6 ASR, this is more complex with respect to team members contributed by Frontex.[654] They are not organs of another state, but of another international organisation. Since Article 6 ASR is limited to interstate cooperation, the question is whether it can be applied, by analogy, to organs of international organisations lent to states.

In 1971 Special Rapporteur Ago considered that assistance in the form of lent organs may obviously also be 'provided not by another State but by an international organization or institution'.[655] In this vein, Article 6 ASR (then Article 9 ASR), as adopted on first reading, explicitly covered organs lent to states by international organisations.[656] It read:

> The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

653 As discussed above, powers relating to immigration control are considered an exercise of governmental authority, see in the context of Article 5 ASR, ILC, 'ASR' (n 58) art 5, comm (2).

654 As discussed above, the term 'organ' in Article 6 ASR also covers persons attributable by virtue of Article 5 ASR, see ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 18.

655 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 267, para 200.

656 See also, ILC, 'Report of the Twenty-Sixth Session' (n 550) 286, para 1, 'An analogous situation may arise where an organ is "lent" to a particular State, not by another State, but by an international organization.'

Upon reconsideration of the Articles, Special Rapporteur Crawford suggested omitting the reference to international organisations. Accepting that such situations were conceivable in theory, he found that there were few or no convincing examples of that in practice. Moreover, he considered that this would raise a range of complex questions, including with respect to the responsibility of the member states of the organisation. In his view, those difficulties outweighed the 'very limited clarification' that the inclusion of organs lent by international organisations would have offered.[657] Also pointing out that such situations were extremely rare, this suggestion was taken up by the ILC and the reference to international organisations deleted.[658]

The situation was not meant to be left unregulated altogether. A saving clause was introduced to allow discussion of the matter at a later stage.[659] Article 57 ASR for that purpose sets out that the ASR are 'without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.' The idea was to deal with those matters in a separate set of Articles. Yet, when the ARIO were adopted, the question of attribution of organs lent by international organisations to states remained open. Article 7 ARIO, which deals with the transfer of organs in the context of international organisations, is limited to organs lent to international organisations by states and other international organisations. However, no rule is provided for the transfer of organs from an international organisation to a state.

Importantly, in the drafting process the view was never expressed that the transfer of organs by international organisations to states required a different approach to the transfer of organs from one state to another. The decision to leave the former question open was based on the rare occurrence and complexity of the situation, rather than a rejection of the rule underlying Article 6 ASR. For the same reasons, closing that gap did not seem a priority during the drafting process of the ARIO. It may thus be assumed that Article 6

657 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 46, paras 228-229, 231.

658 It was noted during the discussion: 'There had been no objection to the elimination of the case of international organizations in article 9. It was evident that the situation contemplated in that article was extremely rare.', ILC, 'Summary record of the 2558th meeting' (UN Doc A/CN.4/SR/2558, Fiftieth Session 1998), 268, para 50; see also ILC, 'ASR' (n 58) art 6, comm (9), noting that the situation of international organisations lending organs to states 'is even more exceptional than the inter-State cases to which article 6 is limited.'

659 ILC, 'Report of the Fiftieth Session' (n 603) 85, para 424; see also ILC, 'ASR' (n 58) art 6, comm (9).

ASR applies by analogy to the transfer of organs by international organisations to states.[660]

3.3.2.3.2 Do team members act for the purposes of the host state?

According to Article 5(2) EBCG Regulation, 'Member States shall ensure the management of their external borders, *in their own interests and in the common interest of all Member States*'.[661] In this vein, when fulfilling border management tasks during Frontex operations, member states do not do so *exclusively* for the purposes of the host state.

However, they do act *predominantly* for the purposes of the host state. It is important to recall in this respect that the external borders continue to be borders of each member state, who are primarily responsible for the management of their respective sections.[662] In this light, it may be assumed that team members deployed during Frontex operations serve the purposes of the host member states within the meaning of Article 6 ASR.

3.3.2.3.3 Do team members act under the exclusive authority of the host state?

An organ acts under the exclusive authority of the receiving state when it is subject to the laws and instructions of the receiving state, not the instructions of the sending state.

The EBCG Regulation provides that, while performing their tasks and exercising their powers, team members 'shall comply with Union and international law and shall observe fundamental rights and the *national law of the host Member State*'.[663] In addition, it allocates the power to issue instructions to team members deployed during joint operations to the host state and establishes the concomitant obligation of team members to abide by those instructions.[664] Only two limits to this power are envisaged in the EBCG Regulation. First, the host state has to follow Frontex' views on these instructions, but only 'to the extent possible'.[665] Second, the instructions have to comply with the Operational Plan, which, however, the host state

660 See also Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 200–201, noting, however, that 'a more specific provision in this respect would have been welcome.'; Messineo, 'Attribution of Conduct' (n 548) 88, arguing 'It should be added that the same rule in Article 6 of the ARSIWA also applies by analogy to the rare situation of an organ or agent of an international organisation transferred to a state for the exercise of governmental authority thereof.'

661 EBCG Regulation (n 18) art 5(2) [emphasis added].

662 Schengen Borders Code (n 3) art 1; EBCG Regulation (n 18) art 5(1), recital (6); see also above 2.1.1.2 and 2.1.1.4.

663 EBCG Regulation (n 18) art 40(2) [emphasis added].

664 Ibid arts 21(1), 40(3).

665 Ibid art 21(2).

itself has to agree to beforehand.[666] Home states, in contrast, essentially retain no more than the possibility of prohibiting certain uses of force before deployment and the authority to take disciplinary measures.[667] In sum, the EBCG Regulation subjects team members to the exclusive authority of the host state.

However, as explained in detail in Chapter 2, the Operational Plans set out a more detailed, more elaborate, and far more complex regime of authority over deployed resources.[668] In essence, there are multiple layers of authority that are exercised by different participating actors. As a result, the power of the host state to issue instructions to team members is less comprehensive in reality than it is by design.

During Frontex operations, instructions may essentially be issued at two levels. One is the 'operational level', i.e. the Joint Coordination Board (JCB), where the course of action to be taken by operational resources is decided and instructions regarding their deployment and tasks are determined. The other is the 'implementation level', i.e. the team leaders and commanding officers, who direct the units on the ground in order to achieve the course of action as defined by the Joint Coordination Board. It is important to note that in this light, only the instructions given by the Joint Coordination Board are based on real decision-making regarding the course of conduct to be taken. Thus, these are the instructions most relevant for the purposes of Article 6 ASR.

This raises the question of who can be considered the author of the instructions coming from the Joint Coordination Board. It is useful to recall in this context that the Joint Coordination Board meets within the International Coordination Centre (ICC), which is established by the host state in cooperation with Frontex and commonly located in the premises of the respective authority of the host state. It is led by a host state officer (the ICC Coordinator), who chairs the meetings, and ensures the daily running of the operation. However, decisions within the Joint Coordination Board are taken in different 'configurations' depending on the operational resources concerned.

Decisions that concern standard team members but no large assets contributed by a participating state are taken under the lead of the chair of the Joint Coordination Board, a host state officer. Even though all members of the Joint Coordination Board may be present and consulted, none of them can formally 'block' the decision. The instructions are passed on to the team members through team leaders, also host state officers. Against this background, standard team members can be considered to act exclusively under the instructions of the host state.

666 Ibid art 21(1-2).
667 Ibid arts 21(5), 40(6).
668 See above 2.4.3.1.3.

Decisions that concern team members deployed on large (often military) assets, e.g. vessels or aeroplanes, *require* that the National Official of the respective participating state is consulted. Whilst formally they have no explicit right to block decisions, in practice decisions are not taken until consensus is reached.[669] The Joint Coordination Board's instructions are passed on to the asset concerned by the National Official via the Commanding Officer, who is of the nationality of the respective asset. In this light, the authority to issue instructions to team members deployed on large assets is *shared* between the host state and the relevant participating state.

3.3.2.3.4 Conclusion

All team members contributed to Frontex operations by participating states or Frontex are 'state organs' for the purposes of Article 6 ASR. For the duration of their deployment, they exercise the host state's governmental authority. They act with the consent of and for the purposes of the host state.

Standard team members are also subject to the exclusive authority of the host state. They are therefore 'placed at the disposal' of the host state within the meaning of Article 6 ASR. As a consequence, if their conduct during Frontex operations violates human rights, the host state is responsible.[670] As described in more detail above, the application of Article 6 ASR breaks the original link with the home entity.[671] Since there is thus no simultaneous application of Article 6 ASR on the one hand, and Articles 4 ASR and 6 ARIO on the other, standard team members are organs *only* of the host state, not joint organs of the home and the host state. In this vein, their conduct is attributable *only* to the host state.

In contrast, team members deployed on large assets are under the shared authority of the host state and their home state. Hence, whilst they are *also* under the authority of the host state, this authority is not exclusive. If the requirement of exclusivity is understood strictly, the threshold of Article 6 ASR is therefore not met. Both the drafting history and commentaries to Article 6 ASR and the stringent approach adopted by the ECtHR, suggest that the lack of exclusivity indeed bars the 'transfer' of an organ within the meaning of Article 6 ASR. As a result, the conduct of team members deployed on large assets remains attributable to their respective home entities under Article 4 ASR. If they commit a human rights violation during Frontex operations, their home states are responsible.

669 For detail see above 2.4.3.1.

670 Reaching the same conclusion see also Mungianu, *Frontex and Non-Refoulement* (n 62) 70–73; den Heijer, *Europe and Extraterritorial Asylum* (n 584) 255–256.

671 See above 3.3.2.1.2.

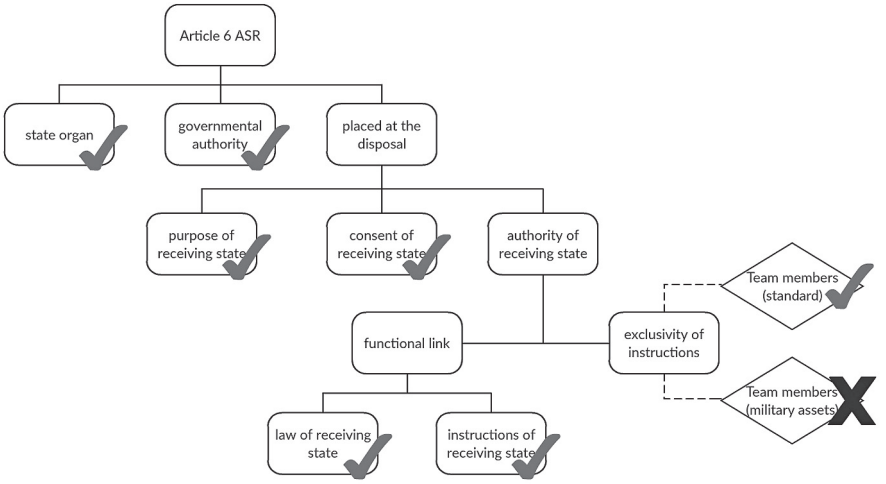

Figure 18: Article 6 ASR: application to Frontex operations

3.3.3 Attribution of conduct to the EU

3.3.3.1 Article 7 ARIO

3.3.3.1.1 The threshold of Article 7 ARIO

Article 7 ARIO deals with the situation where a state or an international organisation lends its organs to another international organisation. It is not applicable to organs fully seconded to international organisations, who are attributable to the international organisation as organs or agents according to Article 6 ARIO.[672] Article 7 ARIO instead concerns instances where states retain certain powers over their organs, such as disciplinary powers and criminal jurisdiction.[673] A transferred organ's conduct is attributable to the receiving international organisation under the following conditions:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

672 Critical on the distinction between organs fully seconded to an international organisation and otherwise put at its disposal see Aurel Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 International Organizations Law Review 77; Sari and Wessel (n 542) 132.

673 ARIO (n 58) art 7, comm (1); see also Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) 9, para 24.

When comparing Article 7 ARIO to its twin provision, Article 6 ASR, two differences are evident. First, Article 7 ARIO makes no reference to the exercise of governmental authority by the transferred organ. This was deliberately omitted since it seemed unsuitable for international organisations.[674] Instead, Special Rapporteur Gaja had proposed replacing it with a reference to the exercise of an organisation's functions, but this was not retained in the final text.[675] As opposed to Article 6 ASR, attribution under Article 7 ARIO is accordingly not limited to a specific type of act. Any act of a transferred organ can in principle be attributed to the receiving international organisation.[676] Second, even though the threshold of 'being placed at the disposal' of the receiving international organisation also features in Article 7 ARIO, it was considered necessary to further clarify what this entails. For this reason, the text of Article 7 ARIO explicitly requires the exercise of 'effective control' by the organisation over the impugned conduct.[677]

'Effective control' as a threshold for attribution of conduct of organs transferred by states to international organisations is generally accepted. However, its precise meaning, in particular the nature and extent of control required, has given rise to some controversy.[678] The ILC's commentaries

674 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 13, para 47; ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; ARIO (n 58) art 7, comm (4).

675 The Special Rapporteur proposed the following wording for then Article 5: 'The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization *for the exercise of one of that organization's functions* shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.', see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 50 [emphasis added].

676 Blanca Montejo, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 392–393.

677 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48.

678 Crawford, *State Responsibility* (n 426) 203, argues: 'It is generally accepted that the standard of effective control as identified in DARIO Article 7 is the preferred method for the determination of responsibility as between a state and an international organization.'; see also Hirsch (n 528) 64; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harvard International Law Journal 113, 140–141; Bérénice Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping' (2012) 25 Leiden Journal of International Law 521, 526–527; Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 202; within the ILC, see ILC, 'Summary record of the 2800th meeting' (UN Doc A/CN.4/SR.2800, Fifty-Sixth Session 2004), 69, para 15; see however Brownlie in ILC, 'Summary record of the 2803th meeting' (UN Doc A/CN.4/SR.2803, Fifty-Sixth Session 2004), 90, para 36, who argued for more convergence with the ASR and thus a broader test of 'authority'.

define it as factual control that is exercised over the specific impugned conduct, assessed taking full account of the factual circumstances of a situation.[679] As such, effective control can be distinguished from both institutional control and normative control, both of which are neither required nor decisive under Article 7 ARIO.[680]

Even though the notion of effective control is not a concept of military command and control, it was primarily developed in the context of military operations, in particular UN peace operations.[681] Since the UN does not have its own military forces, it has to rely on contributions by states in order to conduct peace operations. This normally involves the transfer by states of a certain degree of authority over the deployed personnel to the UN, whilst retaining other powers, in particular in relation to discipline and criminal jurisdiction over troop members. Even though there may be divergence between peace operations as well as between different national contingents, UN-led operations commonly involve a transfer of operational control and/or command to the UN, exercised through a UN representative.[682] However,

679 ARIO (n 58) art 7, comm (4), see ILC, 'Summary record of the 2803th meeting' (n 678) 111, para 3; the fact that it entailed control over the specific conduct by the organ, not its general conduct was emphasised in the discussions, see ILC, 'Summary record of the 2810th meeting' (UN Doc A/CN.4/SR.2810, Fifty-Sixth Session 2004), 137, para 15; see also Hirsch (n 528) 64–65.

680 Tzanakopoulos (n 459) 40, who, however, makes the case for – under certain circumstances – considering normative control as effective control (40-45); on this proposition see also Tomuschat (n 425) 30.

681 Special Rapporteur Gaja, ‚Seventh Report on Responsibility of International Organizations' (n 539) 9, para 25; Hirsch (n 528) 66, points out: 'The most frequent utilization of the instrument of disposal of state organs is made by the various U.N. peace-keeping forces (though other international organizations also use this means).'

682 It is important to note that there is a major distinction in this context between UN-led and UN-mandated operations. With respect to the latter the command and control structure remains with the states. Hilaire McCoubrey and Nigel D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth 1996) 142–144; Gill (n 361) 48–49; Dannenbaum (n 678) 144; Cathcart (n 366) 235; Patrick C Cammaert and Klappe Ben, '6.5 Authority, Command, and Control in United Nations-led Peace Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 160–161; Michael Bothe, 'Peacekeeping' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1191; Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces' (1976) 32 Revue égyptienne de droit international 57, 64; Robert C Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff Publishers 1991) 111–119; Hirsch (n 528) 66; for detail see Finn Seyersted, 'United Nations Forces: Some Legal Problems' (1961) 37 British Yearbook of International Law 351, 356–404; the UN Principles and Guidelines on Peacekeeping Operations ('Capstone Doctrine') point out that only operational control, not however operational command is delegated to the UN, United Nations, Department of Peacekeeping Operations, 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008), 68; Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 1, 7.

the internal command structure within the national contingents is typically not replaced and tactical command and control is exercised by the National Officers over their own national contingents.[683]

It has been noted that the command and control arrangements during UN peace operations 'are significantly less neat and tidy' in practice than their legal set-up.[684] Thus, because contributing states retain a considerable degree of authority over their contingents in practice, it has been argued that national contingents 'find themselves serving two masters', the UN and their respective home state.[685] Nevertheless, operational command and/or control has commonly been considered decisive with respect to Article 7 ARIO, and conduct during UN-led peace operations has been argued to be attributed to the UN or to both, the relevant state and the UN, on that basis.[686] It should be borne in mind though that the 'effective control' test is applied with respect to the specific impugned conduct rather than the general command and control relationship between the entity and the individual, which is why attribution always depends on the circumstances of each case.

In simplified terms, this means that attribution, and as a consequence responsibility, lies with the entity that gives orders at the operational level.[687] Beyond this, there is very little clarity as to what else may amount to effective control.

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683 Gill (n 361) 49–50; Siekmann (n 682) 111–113; on the limits posed by the authority exercised at the national level see Dannenbaum (n 678) 144–148; for a definition of operational command/control and tactical command/control see above 2.4.3.1.1.

684 McCoubrey and White (n 682) 145, who explain the practical difficulties on 144-147; on the relationship with respect to command and control between the UN and the troop-contributing states in practice Leck (n 682) 7–12; Dannenbaum (n 678) 148–151; more generally see Siekmann (n 682) 98–119.

685 Dannenbaum (n 678) 148.

686 Pointing out that operational command and/or control is decisive: see reference in the commentaries to the UN Secretary-General's statement, ARIO (n 58) art 7, comm (9); see also the reference to operational control when the ILC distances itself from the 'ultimate control' standard, ibid art 7, comm (10) and ILC, 'Report of the Sixty-First Session' (n 575) 67, para 9; see also Marko Milanović and Tatjana Papić, 'As bad as it gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law' (2009) 58 International and Comparative Law Quarterly 267, 287; Montejo (n 676) 393–394; arguing for attribution to the UN, or both the UN and the contributing state, on that basis: Amrallah (n 682) 65-68, 74; Bothe (n 682) 1185; Hirsch (n 528) 67, Dannenbaum (n 678); Leck (n 682); Gill (n 361) 55–56, emphasises, however, that it depends on a case-by-case analysis; also Messineo argues for attribution to both the UN and the contributing state. He does so, however, on the basis of a parallel application of Article 4 ASR and Article 6 ARIO, Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 223–230; for a more detailed analysis, including practice, see Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers 2005) 51–129; Seyersted (n 682) 404–435, in particular 428-429.

687 Milanović and Papić (n 686) 282.

The notion of effective control is also commonly discussed within the framework of Article 8 ASR. Article 8 deals with the attribution of conduct of private persons or groups of persons to states. It specifies that conduct of private persons is attributed to a state when they are 'in fact acting on the instructions of, or under the direction or control of' that state. In the *Nicaragua* case, the ICJ coined the threshold of 'effective control', understood as requiring specific directions on the part of the state.[688]

Article 8 ASR fulfils what has been identified above as a key role for rules on attribution, namely 'distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility'.[689] If a state exercises effective control, conduct that would otherwise be considered 'private' gives rise to international responsibility. On these grounds, the ICJ emphasised the importance of a strict approach to Article 8 ASR.[690] Article 7 ARIO, in contrast, serves to allocate responsibility between two subjects of international law, in other words between 'two public sectors'.[691] The same concerns that mandate a strict approach to Article 8 ASR hence do not apply to Article 7 ARIO. Against this background, despite the similarity between the thresholds of the two Articles, nothing in principle speaks against applying a more lenient approach to Article 7 ARIO. However, the relationship between Article 6 ASR, Article 7 ARIO and Article 8 ASR remains particularly complex and Article 7 ARIO assumes somewhat of a middle position between Article 6 ASR and Article 8 ASR.[692]

In this manner, it has been argued that beyond 'giving orders', the possibility for the entities involved to prevent the unlawful outcome may also impact attribution of conduct. More specifically, Dannenbaum, for example, argues that the following question should determine attribution of conduct in this context:

> [G]iven the command and control authority and responsibility with which each entity was endowed, and given the de facto actions that each took, which entity was positioned to have acted differently in a way that would have prevented the impugned conduct?[693]

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688 See references in n 525.

689 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 33-34, para 154.

690 ICJ, *Genocide Convention* (n 516) 406.

691 These different purposes between Article 8 ASR and Article 7 ARIO are emphasised by the ILC, see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 4; ILC, 'Report of the Sixty-First Session' (n 575) 63-64, para 4; see also in the final commentaries, ARIO (n 58) art 7, comm (5); this is confirmed in literature Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (n 526) 25; Dannenbaum (n 678) 154–155; Kjetil M Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 European Journal of International Law 509, 515; Messineo, 'Attribution of Conduct' (n 548) 91–96, who discusses the notion of 'effective control' in Article 7 ARIO in more detail.

692 Crawford, *State Responsibility* (n 426) 203; Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 456–457; Montejo (n 676) 390–392.

693 Dannenbaum (n 678) 154, 157.

This relevance of the ability to prevent has also been advanced by other authors and gained support from the Dutch Court of Appeal in *Nuhanović v the Netherlands* and *Mustafić v the Netherlands*, later confirmed by the Dutch Supreme Court.[694] Crawford notes that 'it is too early to determine whether [this] liberal conception of control […] can be considered a legitimate addition to the law of state responsibility.'[695] It seems nonetheless that the power to prevent may at least be indicative of who exercises effective control in situations where no orders have been given.[696]

3.3.3.1.2 Article 7 ARIO and attribution to the home entity

If the threshold of Article 7 ARIO is met, like Article 6 ASR, it raises the question of how this 'transfer' affects the relationship between the organ and its original 'home' entity. Is the transferred organ a 'joint organ' between the sending state and the receiving international organisation, or is its conduct exclusively attributable to the international organisation?

Since Article 6 ASR and Article 7 ARIO have similar purposes, it would seem that Article 7 ARIO would also 'break' the link between the transferred organ and its original 'home' state.[697]

However, as opposed to Article 6 ASR, Article 7 ARIO does not require exclusivity of control over the conduct in question. What matters is the extent of effective control, which is a question of degree.[698] This, as Special Rappor-

694 See for example Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678) 528, 531-532, who argues that the effective control goes beyond direct orders (528) and that in the absence of such, it is relevant who could have prevented the relevant conduct (531-532); Sigmar Stadlmeier and Elisabeth Lischka, 'Attribution of Human Rights Violations committed during Multinational Military Operations' in Gerhard Hafner, Franz Matscher and Kirsten Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte: Liber Amicorum Wolfram Karl* (Facultas 2012) 396; Hoffmeister (n 566) 745; The Hague Court of Appeal, *Nuhanović v the Netherlands*, judgment of 5 July 2011, ILDC 1742 (NL 2011); on the same day it rendered its judgment in *Mustafić v the Netherlands*; for a discussion see Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678); André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (ACIL Research Paper No 2011-11, SHARES Series, 2011); confirmed in Supreme Court of the Netherlands, *the Netherlands v Nuhanović* (case no 12/03324), judgment of 6 September 2013.

695 Crawford, *State Responsibility* (n 426) 209.

696 Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678) 531–532; Nollkaemper, 'Dual Attribution' (n 694).

697 On Article 6 ASR see above 3.3.2.1.2; see also Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538).

698 This was emphasised in distinguishing it from Article 6 ASR, see ARIO (n 58) art 7, comm (4); ILC, 'Report of the Sixty-First Session' (n 575) 63, para 3; ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; more clearly pointing out the difference in the requirement of exclusivity see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48; ILC, 'Summary record of the 2800th meeting' (n 678) 68, para 9.

teur Gaja noted, may 'also leave the way open for dual attribution of certain conducts.'[699] It is indeed conceivable that two entities simultaneously exercise effective control over the impugned conduct. In this vein, if the sending state and the receiving international organisation both exercise effective control, the conduct in question is attributable to both of them and triggers the responsibility of both.[700]

3.3.3.2 Article 7 ARIO in the case law of the ECtHR[701]

The application of Article 7 ARIO by the ECtHR has given rise to substantial controversy. In particular, the ECtHR seems to have applied diverging approaches in two cases concerning UN-authorised military operations, namely *Behrami* on the one hand and *Al-Jedda* on the other.

At the centre of *Behrami* were the international civil and security presences in Kosovo (UNMIK and KFOR respectively) that had been established under UN auspices after the NATO air strikes on Kosovo in 1999. In *Behrami and Behrami* v *France* and *Saramati* v *France, Germany and Norway* the ECtHR had to examine whether it was competent to scrutinise the respondent states' participation therein.[702]

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699 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48; he later noted that this may be particularly true outside the military context, see Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) 9, para 25.

700 This view is also expressed by, Ömer F Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the «Effective Control» Standard' (2014) 61 Netherlands International Law Review 1, 10–14; Crawford, *State Responsibility* (n 426) 204; Boris Kondoch, '30. The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 523; Bothe (n 682) 1193; Salerno (n 624) 417; Ahlborn, 'To Share or Not to Share?' (n 526) 10, who considers that 'multiple attribution of conduct seems to be compelling in cases of peacekeeping'; Leck (n 682) 17; Dannenbaum (n 678); Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 653–654; of a different view, however Hoffmeister (n 566) 727, who considers that rules on attribution always distribute responsibility either to the state or the organisation; Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 208–209, he argues that 'the difference between Article 7 ARIO and Article 6 ASR seems to have occurred more by accident than by design.' He therefore suggests interpreting effective control as a criterion of exclusivity, in order to achieve best possible convergence with Article 6 ASR.

701 This section is partially based on two earlier publications, Melanie Fink, 'Allocating Responsibility through Attribution' in Matthias C Kettemann (ed), *Grenzen im Völkerrecht* (Jan Sramek 2013); Melanie Fink, 'The European Court of Human Rights and State Responsibility' in Christina Binder and Konrad Lachmayer (eds), *The European Court of Human Rights and Public International Law* (Facultas 2014).

702 ECtHR, *Behrami* (n 456).

The first application, *Behrami and Behrami*, concerned a group of boys playing in the municipality of Mitrovica in March 2000. They encountered undetonated NATO bombs, one of which exploded killing Gadaf Behrami and seriously injuring Bekim Behrami. Their father complained that France, who led the Multinational Brigade in charge of Mitrovica, had not respected the provisions of Security Council Resolution 1244 on mine clearance. In the second application, Ruzhdi Saramati complained about being under arrest between July 2001 and January 2002. He brought the case against Norway, France, and Germany as he was arrested and detained initially on the orders of a Norwegian commander, then on the order of a French commander. As the alleged involvement of German officers could not be verified, Saramati later withdrew his complaint against Germany. In both cases, the respondent states disputed the Court's jurisdiction *ratione loci* and *ratione personae*. The arguments revolved around the issue of whether the applicants fell under the respondent states' jurisdiction according to Article 1 ECHR.

According to the ECtHR, it was undisputed that it was the international presences (instead of the Federal Republic of Yugoslavia) who controlled Kosovo within the meaning of Article 1 ECHR.[703] This being the case, it decided to examine the compatibility *ratione personae* of the applicants' complaints with the Convention and discussed the attribution of the impugned conduct in that context.[704]

The Court first observed that the arrest and detention of Saramati came within the security mandate of KFOR whereas the supervision of demining activities fell within the mandate of UNMIK.[705] It then attributed the acts at stake in both cases to the UN. Regarding UNMIK, the Court held that, as a subsidiary organ of the UN, it was 'institutionally directly and fully answerable to the UNSC [United Nations Security Council]' and therefore attributable to the UN.[706] Attribution of the acts of KFOR proved to be more complex. The Court held that for the acts to be attributable to the UN, 'the key question is whether the UNSC retained *ultimate authority and control* so that operational command only was delegated.'[707] The 'ultimate authority and control' test in the Court's view served to establish whether the UNSC retained sufficient control over the acts such that the delegation of powers complied with the requirements under the UN Charter.[708] Factors it considered included the fact that Resolution 1244 imposed sufficiently defined limits on the exercise of the delegated powers and that the Resolution required

703 Ibid paras 69-70.
704 Ibid para 72.
705 Ibid para 127.
706 Ibid paras 142-143.
707 Ibid para 133 [emphasis added].
708 The Court – for this test – relies on language used by Sarooshi, see Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999).

the leadership of KFOR to report to the Security Council.[709] Having outlined the chain of command in relation to KFOR, the Court held that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN'.[710] Since all the acts complained of were therefore attributable to the UN, the Court denied its competence *ratione personae*.[711]

Many commentators took issue with the Court's application of the rules on attribution of conduct in *Behrami*, in particular in relation to the conduct of KFOR.[712] Apart from the question of whether the Court's assumption of a 'delegation' of Chapter VII powers is accepted or not, the most criticised move was the Court's decision to link the notion of delegation to the assessment of attribution of conduct. What the Court assessed was whether the Security Council retained as much control as was necessary to lawfully delegate powers, a question of internal institutional law of the UN. However, the crucial question in relation to international responsibility is whether it retained sufficient control to attribute conduct to the UN. The distinction is crucial because different thresholds of control apply to the legality of delegation and attribution of conduct. Whilst the institutional relationship between the international presences and the UN – in the form of a retention of ultimate authority and control by the UN – is relevant for internal institutional purposes, it is the factual relationship – effective control over the impugned conduct – that is decisive for the purpose of attribution. Linking these two questions, the Court attributed conduct of KFOR to the UN by analysing the legality of the Security Council's delegation of powers under Chapter VII.[713]

Not only scholars disagreed with the ECtHR's application of the attribution rules – the ILC also distanced itself from such an interpretation of Article 7 ARIO. It noted that 'when applying the criterion of effective control, "opera-

709 ECtHR, *Behrami* (n 456) para 134.

710 Ibid para 141.

711 Ibid para 149.

712 Francesco Messineo, 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to Un-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 Netherlands International Law Review 35, 41–43; Larsen, 'Attribution of Conduct in Peace Operations' (n 691) 512–525; Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*' (2009) 11 International Community Law Review 155, 165–172; Dannenbaum (n 678) 151–156; Vanneste (n 439) paras 170-171; Damien van der Toorn, 'Attribution of Conduct by State Armed Forces Participating in UN-authorised Operations: The Impact of *Behrami* and *Al-Jedda*' (2008) 15 Australian International Law Journal 9, 18–23; Milanović and Papić (n 686) 281–289, who also argued that the Court was also not correct in assessing whose mandate it was, as this was irrelevant for the purpose of attribution, see 274.

713 Milanović and Papić (n 686) 281; see also van der Toorn (n 712) 18; Breitegger (n 712) 167–168.

tional" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.'[714] It is important to note that the ECtHR did not seem, at least not explicitly, to intend to depart from the rules on attribution under general international law. The Court referred extensively to the ASR and the ARIO in the section on 'Relevant Law and Practice' and explicitly pointed out the 'effective control' test in Article 7 (then Article 5) ARIO.[715]

The ECtHR confirmed its decision in *Behrami* in subsequent cases.[716] The case of *Al-Jedda*, however, marked a new development.[717] The case concerned Mr Al-Jedda, who was born an Iraqi national and later acquired British citizenship, which he lost again as a consequence of the events that were the subject matter of the judgment of the ECtHR. Between October 2004 and December 2007, when travelling to Iraq, he was arrested and detained in a detention centre in Basra, Iraq, run by British forces, on account of being suspected of involvement in terrorist activities. However, no criminal charge was ever brought against him. Having unsuccessfully challenged the legality of his detention in the United Kingdom, Al-Jedda brought the case before the ECtHR and argued a violation of Article 5 ECHR.

Relying on the Court's decision in *Behrami*, the United Kingdom *inter alia* argued that at the relevant time its forces were part of a multi-national force authorised by the UN Security Council and operating under the 'ultimate authority' of the UN. Hence, in the UK's view, Al Jedda's detention was attributable to the UN and outside the UK's jurisdiction.[718] Against the backdrop of the criticism of the Court's decision in *Behrami*, *Al-Jedda* was considered an opportunity for the Court to re-evaluate its ultimate authority and control test.[719]

Examining whether the applicant's detention was attributable to the UK or the UN, the Court took into account the particular facts of the case including 'the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question'.[720] Three resolutions were of relevance in this context. At the time of the invasion of Iraq by US and UK forces on 20 March 2003, there was indeed no UN Security Council resolution authorising the invasion itself or the setting up of a security regime after the displacement of the Iraqi

714 ARIO (n 58) art 7, comm (10).
715 ECtHR, *Behrami* (n 456) paras 28-34.
716 ECtHR, *Berić* (n 456), here the Court used the threshold of 'effective overall control' (not 'ultimate authority and control'), see para 27; ECtHR, *Gajic v Germany*, 28 August 2007, application no 31446/02; ECtHR, *Kasumaj v Greece*, 5 July 2007, application no 6974/05.
717 ECtHR, *Al-Jedda v the United Kingdom*, 7 July 2011, application no 27021/08.
718 Ibid paras 64-68.
719 See also the judgments of the Court of Appeal of The Hague, Netherlands, 5 July 2011, Nuhanovic and Mustafic v The Netherlands, LJN:BR5388; ILDC 1742 (NL 2011).
720 ECtHR, *Al-Jedda* (n 717) para 76.

government. The first relevant resolution was Resolution 1483 of 22 May 2003, adopted shortly after major combat operations had been completed, in which the Security Council recognised the US and the UK, forming the 'Coalition Provisional Authority'), as 'Occupying Powers' in Iraq.[721] More significant, and central to the Court's analysis, was UNSC Resolution 1511, adopted on 16 October 2003. That resolution contained a Security Council authorisation to maintain security in Iraq and called for UN member states to contribute *inter alia* military assistance, under the UN mandate, to the multinational force in Iraq.[722]

Importantly, the Court found that the acts of the soldiers of the multinational force did not, as a result of the authorisation contained in Resolution 1511, become attributable to the UN, nor cease to be attributable to the troop-contributing nations. In essence, the resolution in question did not change the command structure over the force. It was still exercised by the troop contributing states, rather than the UN itself. The Court specifically noted that the periodic reports to the Security Council regarding the activities of the multi-national force did not confer on the UN 'any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.'[723] This situation, according to the Court, did not change with the adoption of Resolution 1546 of 8 June 2004 as it merely 'reaffirmed the authorisation for the Multi-National Force established under Resolution 1511' and did not indicate 'that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously'.[724]

The Court then, unconvincingly as many authors noted, distinguished the case from *Behrami*, pointing out the UN's different role in Kosovo where it had authorised the deployment of the international presence from the start.[725] Having distinguished the two cases, the Court noted that it appeared to be common ground between the parties that the test to be applied in order to establish attribution was that set out by the ILC in Article 7 ARIO (then Article 5) and the commentaries thereto, i.e. that the conduct of an organ 'lent' by a state to an international organisation should be attributable to the latter if the organisation exercises effective control over that

721 Ibid para 78.
722 Ibid para 79.
723 Ibid para 80.
724 Ibid para 81.
725 Ibid para 83; putting forward the view that the situations in *Behrami* and *Al-Jedda* were, for the purposes of attribution of conduct, not distinguishable see Kjetil M Larsen, '"Neither Effective Control nor Ultimate Authority and Control": Attribution of Conduct in *Al-Jedda*' (2011) 50 Military Law and the Law of War Review 347, 357–358; Francesco Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*' (2011) 50 Military Law and the Law of War Review 321, 333–336; Messineo, 'The House of Lords in Al-Jedda and Public International Law' (n 712) 43–47; Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 The European Journal of International Law 121, 136.

conduct. In light of its analysis of the resolutions in question, the Court concluded that the UN Security Council 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.'[726]

Two conclusions may be drawn from the Court's reasoning in *Al-Jedda*. The first is that, regrettably, it is not at all clear whether the ultimate authority and control test, the effective control test, or a combination of the two determines attribution of conduct of organs 'lent' by states to international organisations.[727] The second is that, by explicitly considering the effective control test, the Court in *Al-Jedda* nonetheless brings the threshold for attribution significantly closer to the one set out in Article 7 ARIO.[728] *Al-Jedda* may indeed be the closest the Court could have been expected to come to overruling *Behrami*. It has been argued, in this vein, that 'the practical result of *Al-Jedda* is that *Behrami* should no longer be considered "good law" when it comes to the attribution of conduct during UN-authorized peace support operations.'[729]

Against this background, the following sections work on the assumption that the effective control primarily test determines attribution. Yet, in light of the ambiguities left by the ECtHR, the potential consequences of the ultimate authority and control test will also be identified.

3.3.3.3 Article 7 ARIO in the context of Frontex operations

During Frontex operations, not only the host state, but also Frontex, exercise a certain degree of authority over the personnel involved. This raises the question whether Article 7 ARIO renders their conduct attributable to the EU whilst they exercise their tasks and powers during joint operations. In this vein, the following paragraphs analyse whether personnel deployed during Frontex operations may be considered 'transferred' to the EU according to Article 7 ARIO. If that is the case, their conduct in violation of human rights does not necessarily trigger the (primary) responsibilityof the states involved under the ECHR.[730]

726 ECtHR, *Al-Jedda* (n 717) para 84.

727 See also Larsen, '"Neither Effective Control nor Ultimate Authority and Control"' (n 725) 356; Frederik Naert, 'The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: An Introduction and Some Reflections' (2011) 50 Military Law and the Law of War Review 315, 317.

728 Naert, 'The European Court of Human Rights' Al-Jedda and Al-Skeini Judgments' (n 727) 317; den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 37.

729 Messineo, 'Things Could Only Get Better' (n 725) 323, see also 337-340.

730 For more detail see above 3.1.2.1.

Article 7 ARIO has mainly been discussed with respect to operations under UN auspices, but may also apply to EU-led operations.[731] In the context of the EU, Article 7 ARIO has predominantly sparked debates on attribution of conduct during military crisis management operations in the framework of the CSDP. The CSDP is part of the Common Foreign and Security Policy (CFSP) and allows the Union to engage in missions outside its territory for peacekeeping, conflict prevention, and strengthening international security.[732] Because it thereby draws on the capabilities provided by states, including their personnel, questions regarding attribution of conduct similar to those in relation to UN peace operations arise.[733] Responsibility for the conduct of CSDP operations lies with the Council.[734] Under its authority, the Political and Security Committee exercises political and strategic control over operations.[735] A single military chain of command is established running through EU-designated commanders at the strategic, operational and tactical levels.[736] On this basis, the EU has commonly been considered to exercise effective control over conduct during CSDP operations, making such conduct attributable to it by virtue of the rule underlying Article 7 ARIO.[737]

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731 Pieter J Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 54.

732 Consolidated version of the Treaty on European Union, [2012] OJ C326/13, art 42(1).

733 For more detail see Gloria Fernández Arribas, 'International Responsibility of the European Union for the Activities of its Military Operations: The issue of effective control' (2013-2014) 18 The Spanish Yearbook of International Law 33, 46–48.

734 TEU (n 732) art 43(2).

735 EU Concept for Military Command and Control (n 362) para 8.

736 Ibid para 9; see also Sari and Wessel (n 542) 137–138; Frederik Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 319–321.

737 Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 515–516; Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' (n 736) 335; Frederik Naert, 'Accountability for Violations of Human Rights Law by EU Forces' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Institute 2008) 379–381; also, Sari and Wessel argue that 'the EU acquires a "particularly great degree of control" over national contingents participating in its missions, albeit be it on a temporary basis, and […] the contingents are completely dependent in their action upon the EU during their assignment.' On that basis they, however, do not attribute conduct to the EU according to the rule underlying Article 7 ARIO, but rather consider EU military missions *de facto* organs of the EU under Article 6 ARIO, Sari and Wessel (n 542) 140; similarly Wessel and den Hertog (n 571); see also Fernández Arribas (n 733) 56–57, who, however, points out that it depends on the facts of a specific case; also Tsagourias seems to lean towards attribution to the EU, even though not excluding attribution to the member states, Nicholas Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in Martin Trybus and Nigel D White (eds), *European Security Law* (Oxford University Press 2007) 121–123; for more detail see also Zwanenburg, 'Toward a more mature ESDP: Responsibility for violations of international humanitarian law by EU crisis management operations' (n 582) 403–412.

Frontex assumes a crucially different role in the context of joint operations form that of EU bodies in relation to CSDP operations. As discussed in detail in Chapter 2, Frontex finances operations, sets out the framework within which all activities have to take place (in particular by drafting the Operational Plans), guides the host state in implementing it (e.g. through its views on instructions issued by the host state), and supervises the states involved in all their activities during joint operations. Importantly, however, within the chain of command, Frontex itself may at no point directly issue (operational) instructions to the deployed personnel.

Against this background, Frontex may be considered to exercise ultimate authority and control. However, effective control would require a more direct role by the agency in determining conduct during joint operations, in particular by issuing instructions to deployed personnel. Whilst Frontex does not currently have this possibility, it is better equipped with the means to prevent a wrongful outcome. For example, as explained in more detail in Chapter 2, the Executive Director can, in some instances even must, withdraw financial support of, suspend, or terminate joint operations when human rights violations occur.[738] This may be relevant because such a possibility can exceptionally, especially when no orders were given in a specific case, qualify as 'effective control'.[739] However, it is unclear, first, what weight the ECtHR would give to a possibility to prevent for the purposes of attributing conduct, and, second, how the host state's (greater) possibilities to prevent would affect the assessment.

In this light, it is safe to conclude, for current purposes, that Frontex cannot usually be considered to effectively control the conduct of personnel deployed during joint operations.[740] The threshold of Article 7 ARIO is thus not met and deployed personnel cannot be considered transferred to the EU.

It should be noted that this conclusion is reached on the basis of the current role Frontex assumes with respect to operations it coordinates. However, in light of Article 7 ARIO, it seems that only a shift of command and control to the EU level, and thus a truly 'supranationalised' system of European

738 See above 2.4.4.3.

739 Nollkaemper, 'Dual Attribution' (n 694) 6–7, he argues (page 17): 'Given the unique facts, and given the fact that attribution was based on the active involvement of the Netherlands in the evacuation process (a mere possibility to intervene would not have been enough) and that the case rests largely on the fact that the mission de facto had been completed, one should be very cautious in using the judgment as a possible basis for other claims in regard to liability of troop contributing countries.'

740 Reaching the same conclusion see also Mungianu, *Frontex and Non-Refoulement* (n 62) 68–70; Papastavridis, 'The EU and the obligation of non-refoulement at sea' (n 25) 256–257; see, however, Majcher (n 46) 58–64, who argues that in some cases conduct in violation of human rights during joint operations may be attributable to both the host state and Frontex.

border guards, would meet the requirements of Article 7 ARIO.[741] Provided member states were to continue to exercise control alongside the EU, conduct during such operations would in that case be attributable to both.[742]

3.3.4 Interim conclusion

This section has analysed the responsibility of home and participating states that arises directly from a human rights violation committed during an operation. The key question addressed was under what circumstances the host and participating states can be considered the authors of a Convention violation that occurs during a Frontex operation.

It results from the analysis that conduct of local staff and standard team members contributed by states or Frontex is attributable to the host state. The host state consequently bears responsibility if their conduct during Frontex operations breaches the Convention. The local staff are attributable to the host state under Article 4 ASR, i.e. simply because they have been designated as state organs by the host state itself. Team members are exclusively attributable to the host state under Article 6 ASR. Under that provision, the conduct of an organ of a state that is 'lent' to another state is attributable to the receiving state to the extent that the organ acts under the receiving state's genuine and exclusive authority. With respect to team members, this threshold is met essentially because they are subject to the laws and instructions of the host state whilst they are deployed.

Moreover, their conduct is not attributable to the EU by virtue of Article 7 ARIO because the transfer of authority to Frontex is not sufficient for that rule to apply. In particular, the mere fact that an international organisation finances certain activities or renders other forms of assistance does not make these activities attributable to it. Article 7 ARIO would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU.

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741 See also Unisys, 'Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union: Final Report Version 3.00' (16 June 2014), 25, where it is indicated that its proposal may involve 'an important change both in terms of responsibility and liability when centralising the competence for such specific operations exclusively at EU level'. Coming to the same conclusion see Rijpma, 'Frontex and the European system of border guards' (n 15) 239, who argues that 'a genuine transfer of executive power to an EU body would, in case of violations of fundamental rights, place the responsibility for such violations squarely with the EU and from that point of view would bring clarity to the legal twilight within which Frontex currently operates.'

742 On the possibility of multiple attribution in such situations see also above 3.3.3.1.2.

It also results from the analysis that, in contrast to the conduct of standard team members, the conduct of all other personnel deployed during Frontex operations remains attributable to their home entities. Hence, Frontex coordinating staff remain attributable to the EU under Article 6 ARIO. Most importantly, however, team members deployed on large assets, such as vessels or aeroplanes, also remain attributable to their original home state under Article 4 ASR.

The reason for the continued attribution of their conduct to their original home entities is that none of these persons can be considered 'placed at the disposal' of the host state or the EU. Article 6 ASR, which would make their conduct attributable to the host state, does not apply with respect to their conduct. Frontex coordinating staff are simply not subject to the instructions of the host state. Team members deployed on large assets are. Yet, the authority the host state exercises over them is not sufficiently exclusive because of the continued powers the respective contributing states retain within the chain of command. Article 7 ARIO, which would make their conduct attributable to the EU, is not applicable for the same reasons already pointed out with respect to standard team members, i.e. Frontex is not vested with sufficient powers to determine their conduct.

The result of the analysis is therefore as follows (see also the illustration in Figure 19):

- Host state officers ('local staff') remain attributable to the host state under Article 4 ASR, making the host state responsible for their conduct.
- Persons deployed as standard team members by participating states and persons deployed as standard team members by Frontex are attributable to the host state under Article 6 ASR, making the host state responsible for their conduct.
- Persons deployed as team members on large assets remain attributable to the contributing state under Article 4 ASR, making that state responsible for their conduct.
- Frontex staff deployed to exercise coordinating roles remain attributable to the EU under Article 6 ARIO, making no state directly responsible for their conduct under the ECHR.

Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	home state	4 ASR
TM (Fx)	EU	6 ARIO
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	host state	6 ASR
TM (Fx)	host state	6 ASR
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

LS...'Local staff', TM...'Team member', Fx...'Frontex'

Figure 19: Attribution of conduct of human resources used for Frontex operations (result)

It should be borne in mind that local staff as well as persons deployed as team members are more likely to directly commit a human rights violation than Frontex staff. This is simply because, as explained in more detail in Chapter 2, they fulfil the core border management tasks and are availed of executive powers.[743] In this vein, it can be concluded that overall the host state is responsible for human rights violations that occur during Frontex operations. The most important exception is violations committed by team members on large large assets, such as vessels, which engage the responsibility of the respective contributing state.

As set out in more detail above, one violation may also be attributable to more than one entity at the same time.[744] Hence, in the context of Frontex operations, if two or more persons attributable to different entities realise a human rights violation through joint conduct, that violation engages the responsibility of both or all of them.

In practice, this means that when a team member, for example, uses excessive force, the human rights infringement is exclusively attributable to the host state (State A in Example 1). In this vein, the host state is exclusively responsible under the ECHR. However, the situation is more complex when large assets deployed by a participating state is involved in a human rights violation. For instance, in Example 2, a vessel deployed by State B to a sea border operation hosted by State A, hands over migrants on an intercepted boat to the authorities of a third state and thereby infringes the prohibition of *refoulement*. Because of the powers State B retains over its vessel, the impugned conduct is attributable to State B, not to State A. Thus, State B is responsible under the ECHR for the infringement of the prohibition of *refoulement* in Example 2. In contrast, if the vessel in question is contributed to the operation by State A itself, it is State A who is responsible.

The findings of this section are summarised in Table 5.

743 See above 2.3.3.1.
744 See above 0.

Table 5: Summary of findings (1)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	*Chapter 3.4*	*Chapter 3.4*	*Chapter 4.3*	*Chapter 4.4*
Host state	Responsibility for breaches by local staff and standard team members				
Participating state (minor technical equipment)	No responsibility				
Participating state (standard team member)	No responsibility				
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed				

3.4 Responsibility for associated conduct

As the previous section revealed, when ECHR violations occur during Frontex operations, only the state who exercised the most far-reaching authority over the acting individual bears responsibility as the 'author' of the breach.

In this manner, the host state turns out to be responsible for most human rights infringements no matter whether they originate in the conduct of its own local officers, or officers deployed as border guards, return specialists, or other experts. For instance, in Example 1, it is an officer that State C contributed who uses excessive force, but State A who bears responsibility for it. In contrast, where infringements originate in the conduct of personnel on a vessel or aeroplane contributed by a participating state, the respective state is responsible for them. In this vein, in Example 2, State B is responsible for the violation of the prohibition of *refoulement* that was committed by the vessel it contributed to the joint operation. However, State A, the host state, not only led the operation, but was also involved in the decision-making that led to the breach. The question thus is, does it bear responsibility for facilitating, or not preventing, the breach committed by State B?

But infringements that occur outside the mandate of a specific operation also raise similar questions. For example, whilst it is clear that the host state is responsible for setting up and maintaining migrant reception facilities that meet minimum human rights standards, the question arises whether a participating state may be responsible for knowingly bringing a migrant to a facility that does not meet these requirements (see Example 3). Similarly, whilst it is clear that a host state of a return operation is not directly responsible for return decisions adopted by participating states, the question arises whether the host state may be responsible for executing such decisions (Example 4).

Against this background, this section analyses the circumstances under which states that are not responsible for the primary breach in a specific case, are nonetheless responsible for conduct associated with the primary breach. The central question is whether contributing to, or not preventing, a violation of the ECHR may render the facilitating actor responsible. More specifically, in light of the findings of the previous section, the questions that form the focus of this section are the following:

- Is the host state responsible *in addition to the respective participating state* for breaches committed by them (e.g. in Examples 2 and 4)?
- Are participating states responsible *in addition to the primarily responsible state* for breaches attributable to the host or other participating states (e.g. in Examples 1 and 3)?

These questions are analysed in light of the obligations to protect individuals from human rights interference by others as developed by the ECtHR (Section 3.4.1). However, as the analysis will reveal, these obligations are not fully applicable to all relevant situations during Frontex operations. Section 3.4.2 thus offers an analysis of a second form of associated responsibility, namely the rules on aid or assistance under general international law, examining whether these may fill the 'gap' left by the doctrine of positive obligations.

3.4.1 Responsibility for violations of obligations to protect

In order to protect an individual from human rights interference by others, it may sometimes be sufficient to *abstain* from adopting a certain course of conduct. An example is the prohibition of *refoulement*, dicussed in more detail below, which prohibits states from exposing individuals to certain known risks to their rights by expelling them. However, in many situations, that will not be sufficient. The effective protection of an individual often requires a state to actively interfere with the course of conduct of the direct perpetrator. Thus, before looking in more detail at the obligations states have under the Convention to protect individuals from human rights interference by others, the following gives a brief overview of positive obligations under the ECHR more generally.

3.4.1.1 Positive obligations under the ECHR: an overview

Human rights are generally understood to encompass state obligations of a negative and positive nature. An obligation is 'negative' when it requires a state to abstain from action that would unduly interfere with the exercise of a right. Positive obligations, in contrast, are commonly considered to require member states to take action.[745]

Some Convention provisions explicitly contain aspects of positive obligations. Under Article 6 ECHR, for example, a state has to set up courts where fair and public hearings can be held, inform a person promptly of the accusations against him, and provide legal assistance and interpreters to those in need.[746] More importantly, however, the ECtHR has long held that Convention rights also contain implied positive obligations. The overarching rationale the Court relied on was that the protection of Convention rights needs to be 'practical and effective', not 'theoretical or illusory'.[747]

The foundations for the development of the doctrine of positive obligations was laid in *Marckx* and *Airey*, both decided in 1979. *Marckx v Belgium* concerned Ms Marckx and her daughter, who complained that Belgian law established no automatic family bond between unmarried mothers and their children.[748] Discussing whether Belgium had thereby breached their right to private and family life (Article 8 ECHR), the Court noted that the objective of that provision was essentially that of protecting the individual against arbitrary interference by public authorities, thus compelling the state to *abstain* from such conduct. However, it found that 'in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'.[749] Four months later, the Court decided the case of *Airey v Ireland*, brought by Ms Airey who sought to separate from her abusive husband.[750] This possibility was available by law, but practically too expensive for Ms Airey. The Court found in particular that Ireland had breached its positive Convention obligation to make separation 'effectively accessible, when appropriate, to anyone who may wish to have recourse thereto'.[751]

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745 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 562–563; for more detail on the definition of positive obligations and the (difficult) distinction between negative and positive obligations, see Malu Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017) 41–46.

746 Another example is Article 3 of Protocol No 1 to the ECHR, which requires states to hold free elections at reasonable intervals.

747 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 221.

748 ECtHR, *Marckx v Belgium*, 13 June 1979, application no 6833/74.

749 Ibid para 31.

750 ECtHR, *Airey v Ireland*, 9 October 1979, application no 6289/73.

751 Ibid para 33.

Whilst *Marckx* and *Airey* left no doubt that states, beyond abstaining from arbitrarily interfering with Convention rights, may be required 'to take action', it is the extent of these positive obligations that raises the most complex questions. It is beyond the scope of this study to provide a detailed analysis of the Court's case law in this area.[752] However, the following paragraphs outline some of the most important duties states may incur under the doctrine of positive obligations.

In essence, positive obligations may require substantive or procedural action. Substantively, state parties may have to enact the laws or otherwise put in place the administrative framework necessary for the enjoyment of a specific right. This was the case, for example, in *Marckx*, but also in *Goodwin v the UK*, where the Court found that states were required to establish legal recognition of post-operative transsexuals.[753] Moreover, states may have to take other, more practical, steps to safeguard the rights of individuals. For example, a state may have to inform individuals of certain risks its authorities are aware of. This was held in *L.C.B. v the United Kingdom*, where an applicant who had been diagnosed with leukaemia argued that the authorities should have identified the extent of her father's exposure to radiation during the UK's nuclear tests on Christmas Island and warned her father to monitor her health accordingly. However, in that specific case, the Court found that the United Kingdom could not reasonably be considered to have failed to take action, in particular because of the insufficient information available to the authorities at the time.[754] Another example is *Öneryıldız v Turkey*, a case concerning an explosion at a public refuse tip operated by local authorities that claimed the lives of several persons living in the area.[755] The Court noted that the Turkish authorities knew or ought to have known that the refuse tip presented a real and immediate risk to persons living in the area. They therefore had a positive obligation under Article 2 ECHR to take such 'preventive operational measures as were necessary and sufficient to protect those individuals'.[756] Since appropriate steps had not been taken, the Court found Turkey to have violated the Convention.

752 For a detailed analysis of positive obligations in the context of the ECHR see in particular Mowbray (n 747); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016).

753 See above text to n 748-749; ECtHR, *Christine Goodwin v the United Kingdom*, 11 July 2002, application no 28957/95.

754 ECtHR, *L.C.B. v the United Kingdom*, 9 June 1998, application no 23413/94, paras 36-41.

755 ECtHR, *Öneryıldız v Turkey*, 30 November 2004, application no 48939/99.

756 Ibid para 101.

Procedurally, states are obliged to set up a domestic system to adequately respond to interference with the rights of individuals and provide remedies for them. In *McCann v the United Kingdom*, for example, the Court noted that the prohibition of arbitrary killing by state agents would be practically ineffective, if no procedure existed for reviewing the lawfulness of the use of lethal force by state authorities. Thus, the protection of the right to life also requires 'that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State'.[757] Also, in *Jaloud v the Netherlands*, discussed in more detail above, the Court found the respondent state to have breached its positive procedural obligations under Article 2 ECHR.[758] Similarly, *Assenov and Others v Bulgaria* concerned a positive duty under Article 3 ECHR to investigate the alleged beating of Mr Assenov whilst in police custody.[759] The Court held that where an individual raises an arguable claim that he has been seriously ill-treated by state authorities, Article 3 ECHR requires that there should be an effective official investigation capable of leading to the identification and punishment of those responsible.[760] Since the investigation carried out by the authorities in the case of Mr Assenov was insufficient, the respondent state was found to have violated its positive obligations under the Convention.[761]

3.4.1.2 Protecting individuals from interference by third parties

This section elaborates on the circumstances under which a state is required under the Convention to protect individuals from interference by others, whose acts are not attributable to it.[762] Generally speaking, apart from negative duties which will be discussed here, all positive duties described in the previous section also apply to situations where the risk or interference does not emanate from the respondent state's authorities, but from someone else. This includes, as will be explained, duties to adopt legislative or other rules, or to set up a domestic system to adequately respond to and sanction interference with the rights of individuals. However, the obligation most relevant to Frontex operations is the duty to take practical or operational measures to prevent interference from third parties. This will therefore form the focus of this section.

757 ECtHR, *McCann and Others v the United Kingdom*, 27 September 1995, application no 18984/91, para 161.

758 For more detail see above 3.3.2.2, in particular n 644.

759 ECtHR, *Assenov and Others v Bulgaria*, 28 October 1998, application no 24760/94.

760 Ibid para 102.

761 Ibid paras 103-106.

762 For a detailed study of state's obligations to prevent gross human rights violations committed by third parties see Nienke van der Have, 'The Prevention of Gross Human Rights Violations Under International Human Rights Law' (PhD thesis, University of Amsterdam 2017).

In principle, obligations to protect individuals may arise when interference stems from private parties, or from other public actors, i.e. states or international organisations. As will be shown in more detail in this section, the Court does not draw a general conceptual distinction between these two situations. Both will therefore be addressed in the following.

3.4.1.2.1 Interference by private parties

It is useful to recall at this point that conduct by private parties can as such only be the subject of a complaint before the ECtHR if it is attributable to a state and as such qualifies as 'state conduct'. Positive obligations, however, may require states to protect individuals from harm inflicted by private parties. Thus, whilst not making states directly responsible for human rights interference by private parties, a violation of positive obligations triggers responsibility of states for *their own failure* in not preventing it.[763]

Also in this context, positive obligations may be of a substantive or a procedural nature. Procedurally, states are required to set up efficient and independent judicial systems, in the context of which, for example, the cause of a murder can be established and the guilty parties punished.[764]

Substantively, states may be required to adopt specific legislative or other measures, including criminal law provisions, so as to afford individuals sufficient protection from interference by private parties. This was the case in *X and Y v the Netherlands*.[765] In *X and Y*, the Court noted that Convention obligations 'may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*'.[766] It found the Netherlands to have indeed violated Article 8 ECHR because its criminal law did not provide for the possibility of instituting proceedings against the perpetrator of a sexual assault committed against X.[767] In *A v the United Kingdom*, the Court reached a similar conclusion on the basis of Article 3 ECHR.[768] The Court stated that Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[769] Since

763 Pointing out the parallel functions of attribution rules and positive obligations in this area see Monica Hakimi, 'State Bystander Responsibility' (2010) 21 The European Journal of International Law 341, 347–349.

764 See for example ECtHR, *Opuz v Turkey*, 9 June 2009, application no 33401/02, para 150.

765 ECtHR, *X and Y v the Netherlands*, 26 March 1985, application no 8978/80.

766 Ibid para 23 [emphasis added].

767 Ibid paras 24-30; see also *M.C. v Bulgaria*, where the Court held Bulgaria responsible under Articles 3 and 8 ECHR because its criminal law, combined with the application and investigation in the case at hand, did not provide sufficient protection against rape, ECtHR, *M.C. v Bulgaria*, 4 December 2003, application no 39272/98, paras 148-187.

768 ECtHR, *A v the United Kingdom*, 23 September 1998, application no 25599/94.

769 Ibid para 22.

English law allowed as a defence to a charge of assault on a child that the treatment in question amounted to 'reasonable chastisement', the respondent state's law could not be considered to offer adequate protection to the applicant against treatment or punishment contrary to Article 3 ECHR.[770]

Importantly, substantive positive obligations of states in relation to interference by private parties not only involve the adoption of appropriate rules, but may also require states to otherwise intervene preventatively, if the protection of an individual so requires. In *Osman v the United Kingdom*, for example, the Court confirmed this in relation to Article 2 ECHR.[771] The case concerned a father who was shot by his son's teacher. The Court analysed whether the respondent state had violated the right to life by failing 'to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[772] Taking into account the difficulties in policing modern societies, the unpredictability of human conduct, and the limited availability of resources, the Court noted that positive obligations to prevent offences against individuals arise only to the extent that they do not impose an impossible or disproportionate burden on the authorities.[773] Against this background, it found that it was necessary that

> the authorities knew or ought to have known […] of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[774]

After a detailed examination, the Court found that on the facts of the case it could not be said that the authorities knew or ought to have known that the lives of the Osman family were at real and immediate risk. Consequently, it concluded that there had not been a Convention violation.[775]

In other situations, however, the Court has held the respondent states responsible for failing to step in to protect individuals from interference by other private parties. This was the case for example in *Opuz v Turkey* in relation to *inter alia* Articles 2 and 3 of the Convention.[776] The case concerned victims of domestic violence, which eventually resulted in the death of the applicant's mother. The Court essentially reiterated the principles set out in *Osman*.[777] In light of the facts of the case, the Court found that the lethal attack on the applicant's mother was indeed foreseeable for the state, who would incur responsibility if it failed 'to take reasonable measures which

770 Ibid paras 23-24.
771 ECtHR, *Osman v the United Kingdom*, 28 October 1998, application no 23452/94.
772 Ibid para 115.
773 Ibid para 116.
774 Ibid para 116.
775 Ibid paras 117-122.
776 ECtHR, *Opuz* (n 764); another examples is ECtHR, *Kılıç v Turkey*, 28 March 2000, application no 22492/93, paras 62, 76.
777 ECtHR, *Opuz* (n 764) paras 128-130.

could have had a real prospect of altering the outcome or mitigating the harm'.[778] Since Turkey had failed to display the diligence required for the protection of the rights of the applicants, e.g. placing the perpetrator in detention, ordering protective measures, or issuing injunctions, it was responsible under the Convention.[779]

Another example is *Z and Others v the United Kingdom*, a case concerning children that had been neglected and abused by their parents.[780] The Court reiterated that Article 3 ECHR required states to take reasonable steps to prevent ill-treatment by private individuals of which the authorities had or ought to have had knowledge.[781] In light of the seriousness of the abuse and the length of time that passed until the children were removed from their parents' care, the Court found that the United Kingdom had failed to live up to its protective duties under Article 3 ECHR.[782] Similarly, positive obligations of state parties to intervene in protection of individuals against other private parties have also been found to arise *inter alia* in the context of Article 8 ECHR (*López Ostra v Spain*), Article 9 ECHR (*Gldani v Georgia)*, and Article 11 ECHR (*Plattform Ärzte für das Leben v Austria*).[783]

3.4.1.2.2 Interference by other states or international organisations

The obligations to protect individuals from interference by others are not limited to acts of private parties. They also require states to offer protection against human rights violations by other states or international organisations.[784] Thus, responsibility may arise where a state fails to prevent a violation that is attributable to another state or international organisation.

The obligation to protect individuals from abuses by other states is particularly well developed in the area of the prohibition of *refoulement*.[785] The prohibition of *refoulement* essentially forbids the expulsion of an individual to another state where especially serious maltreatment would be inflicted upon the person. Whilst it is thus strictly speaking an obligation to *abstain* from taking action, i.e. a negative obligation, it is in many ways similar to

778 Ibid paras 133-136.
779 Ibid paras 137-149, 158-176.
780 ECtHR, *Z and Others v the United Kingdom*, 10 May 2001, application no 29392/95; other examples include ECtHR, *E. and Others v the United Kingdom*, 26 November 2002, application no 33218/96, paras 88-101; ECtHR, *Đorđević v Croatia*, 24 July 2012, application no 41526/10.
781 ECtHR, *Z and Others* (n 780) para 73.
782 Ibid paras 74-75.
783 ECtHR, *López Ostra v Spain*, 9 December 1994, application no 16798/90; ECtHR, *Gldani Congregation of Jehova's Witnesses and Others v Georgia*, 3 May 2007, application no 71156/01; ECtHR, *Plattform "Ärzte für das Leben" v Austria*, 21 June 1988, application no 10126/82.
784 Hakimi (n 763) 342.
785 Den Heijer, ‚Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 27.

positive obligations. In particular, responsibility of the expelling state in these cases does not arise for the abuse inflicted on an individual by another state but for a failure to protect by expelling an individual despite the risk of such maltreatment.[786]

The prohibition of *refoulement* has been developed from, and is usually associated with Article 3 ECHR, the prohibition of torture or cruel, inhuman, or degrading treatment or punishment. Starting with *Soering v the United Kingdom*, the Court relied on the overriding importance and absolute character of Article 3 ECHR when it held that a state party may incur responsibility, 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[787] In the recent case of *Ilias and Ahmed v Hungary*, for example, the Court found that Hungary had *inter alia* breached Article 3 ECHR, when it expelled two Bangladeshi asylum-seekers from Hungary to Serbia under a procedure that was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment.[788]

In addition to Article 3 ECHR, other Convention provisions may engage an expelling state's responsibility for exposing an individual to certain risks in a receiving state. Where a risk to the right to life is at stake, this may raise an issue under Article 2. Execution of the death penalty might additionally engage responsibility under Article 1 of Protocol 6 or Article 1 of Protocol 13 (the abolition of the death penalty). In *Bader and Kanbor v Sweden*, holding that the applicant's deportation would expose him to a real risk of being executed and therefore to treatment contrary to Articles 2 and 3, the Court for the first time found a violation other than under Article 3 in the context of *refoulement*.[789] In exceptional cases, where the individual 'has suffered or risks suffering a flagrant denial of a fair trial in the requesting country', Article 6 can also pose a bar to expulsion.[790] Similarly, Article 8 may under certain

786 Hakimi (n 763) 343.

787 ECtHR, *Soering v The United Kingdom* (n 34) para 91; for a more detailed discussion of the ECtHR's application of Article 3 ECHR in *refoulement* cases see Cornelis W Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 238–246; in later cases the Court confirmed that the protection from *refoulement* also applies to refugees, see ECtHR, *Cruz Varas v Sweden* (n 34); ECtHR, *Vilvarajah and Others v The United Kingdom* (n 34); the source of ill-treatment in the receiving state is thereby irrelevant, see ECtHR, *H.L.R. v France*, 29 April 1997, application no 24573/93, para 40.

788 ECtHR, *Ilias and Ahmed v Hungary*, 14 March 2017, application no 47287/15, paras 112-125.

789 ECtHR, *Bader and Kanbor v Sweden*, 8 November 2005, application no 13284/04; with further references see Maarten den Heijer, 'Whose Rights and Which Rights?: The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10 European Journal of Migration and Law 277, 280–281.

790 ECtHR, *Soering v The United Kingdom* (n 34) para 113.

circumstances prohibit expulsion where there are sufficiently adverse effects on the expelled individual.[791]

Among Schengen states, the prohibition of *refoulement* has been particularly relevant in the context of the Common European Asylum System. More specifically, several applications were brought against transferrals from one state to another under the 'Dublin system', according to which refugees can lodge an asylum application in only one state. Most notably, the case of *M.S.S. v Belgium and Greece* concerned an Afghan asylum seeker who entered the EU irregularly through Greece and travelled to Belgium, where he lodged his asylum application.[792] In accordance with EU law, Belgium transferred the applicant back to Greece. In doing so, the Court found that Belgium had failed to sufficiently protect the applicant and had thus violated Article 3 ECHR. First, the transfer of the applicant to Greece put him at risk of 'indirect' or 'chain' *refoulement*.[793] Due to the inherent deficiencies in the Greek asylum procedure, there was no guarantee that the asylum application would be seriously examined by the Greek authorities. Hence, the applicant was at risk that he would be expelled by Greece back to a country where he would face treatment contrary to Article 3 ECHR. Crucially, this situation was not only well known to the Belgian authorities, but they would also have had the possibility of refusing transfer to Greece.[794] Second, Belgium furthermore violated Article 3 ECHR by knowingly exposing the applicant to detention and living conditions in Greece that amounted to degrading treatment.[795]

The case of *Tarakhel v Switzerland* concerned similar challenges.[796] The applicants, an Afghan family, had requested an interim measure before the ECtHR, in order to suspend the enforcement of their planned transfer from Switzerland to Italy under the 'Dublin system'. In view of the situation as regards the reception system in Italy and the 'special protection' that asylum seekers require, the Court found that a transfer to Italy by the respondent state without having first obtained individual guarantees from the Italian authorities specific to the applicants' situation would violate Article 3 ECHR.[797]

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791 For more detail see den Heijer, 'Whose Rights and Which Rights?' (n 789); Hélène Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 Refugee Survey Quarterly 39.

792 ECtHR, *M.S.S.* (n 485); see also above text to n 485-488.

793 On 'indirect' or 'chain' *refoulement* see also ECtHR, *T.I. v The United Kingdom*, 7 March 2000, application no 43844/98.

794 ECtHR, *M.S.S.* (n 485) paras 344-361.

795 Ibid paras 365-368.

796 ECtHR, *Tarakhel* (n 488).

797 Ibid paras 106-122.

It is noteworthy that the principle of mutual trust applicable under EU law does not release states from their obligations under the ECHR. This applies, as discussed above in the context of *Avotiņš*, when states are called upon to implement a decision of another EU member state.[798] It applies equally, however, in situations where states are required to protect individuals from risks they would be exposed to if returned to another EU member state. In *Tarakhel*, the Court pointed out that the presumption that other states participating in the 'Dublin system' complied with human rights was rebutted in the event that there were 'substantial grounds' for believing that the returnee faces a 'real risk' of being subjected to treatment contrary to Article 3 ECHR in the receiving state. The Court highlighted that the fact that another 'Dublin state' was the source of the risk to an individual, could not alter the level of protection guaranteed by the Convention or the Convention obligations of the state ordering the person's removal. In particular, it did not exempt states 'from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established'.[799]

Whilst the case law with respect to the obligation to protect individuals from interference by other states is most developed in the area of the prohibition of *refoulement*, state parties to the ECHR are also required to otherwise intervene for the protection of an individual's rights against another state or international organisation.

An example is *Ilaşcu v Moldova and Russia*.[800] The applicants in *Ilaşcu* were arrested and later convicted by a Court they claimed had no jurisdiction. What is important here is that this occurred in Transdniestria, a region that is *de jure* within Moldovan state territory, but *de facto* ruled by the authorities of the 'Moldavian Republic of Transdniestria'. They brought the case against both Russia and Moldova. In relation to Russia, it suffices to note that the applicants came within Russia's jurisdiction, essentially because Transdniestria was under its effective authority, and the Court found Russia's responsibility to be engaged.[801] More importantly here, is that Moldova was also found responsible. Whilst the Court acknowledged that Moldova did not exercise control over Transdniestria, it still had a positive obligation to take measures available to it to secure for the applicants the rights guaranteed by the Convention. The Court indeed found Moldova's responsibility to be

798 ECtHR, *Avotiņš* (n 477), in more detail on the question of mutual trust in that case see above 3.1.2.2.4.

799 ECtHR, *Tarakhel* (n 488) paras 103-104.

800 ECtHR, *Ila□cu and Others v Moldova and Russia*, 8 July 2004, application no 48787/99.

801 For the Court's findings on Russia's jurisdiction see ibid paras 392-394.

engaged for having failed to do so in relation to the breaches emanating directly from the authorities of the 'Moldavian Republic of Transdniestria' and/or Russia.[802]

The question of state obligations in relation to human rights infringements directly committed by other states notably also arose in cases dealing with extraordinary rendition.[803] This includes in particular *El-Masri v Macedonia*, the first decided by the ECtHR, but also *Al Nashiri v Poland*, *Husayn (Abu Zubaydah) v Poland*, and *Nasr and Ghali v Italy*.[804] The case of *El-Masri* concerned the extraordinary rendition of Mr El-Masri from Macedonia to Afghanistan by the CIA. In the process, the applicant was detained incommunicado over a period of over 20 days in a hotel in Skopje, subsequently handed over to CIA agents at Skopje airport, where he was subjected to torture, and then flown to Afghanistan and detained in a CIA-run facility, where he suffered ill-treatment for another four months.

Macedonia was held responsible for having breached Articles 3, 5, 8, and 13 ECHR. Most importantly for the current purposes, Macedonia was *inter alia* held responsible under Article 3 ECHR for the torture the applicant suffered at Skopje airport at the hands of CIA agents before his expulsion. In that respect, the Court emphasised that the acts complained of were carried out within the jurisdiction of the respondent state and in the presence of its officials. In this vein, the Court confirmed that Macedonia was 'responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[805] Having established that the acts of these foreign officials amounted to torture, the Court held Macedonia responsible for the violation of the applicant's rights at Skopje airport since it had not only failed to take any measures to prevent the human rights infringements from occurring, but had also actively facilitated them.[806]

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802 Ibid in particular paras 322-352; this was essentially reiterated in ECtHR, *Catan and Others v Moldova and Russia*, 19 October 2012, application nos 43370/04, 8252/05 and 18454/06, in particular para 110. In that case, however, Moldova was found to have complied with its positive obligations (see in particular paras 147-148).

803 On this practice see in particular Manfred Nowak, '"Extraordinary Renditions", Diplomatic Assurances and the Principle of Non-Refoulement' in Walter Kälin and others (eds), *International law, conflict and development: The emergence of a holistic approach in international affairs* (Martinus Nijhoff Publishers 2010).

804 ECtHR, *El-Masri v Macedonia*, 13 December 2012, application no 39630/09; ECtHR, *Al Nashiri v Poland*, 24 July 2014, application no 28761/11; ECtHR, *Husayn (Abu Zubaydah) v Poland*, 24 July 2014, application no 7511/13; ECtHR, *Nasr and Ghali v Italy*, 23 February 2016, application no 44883/09.

805 ECtHR, *El-Masri* (n 804) paras 206, 211; in this vein see also ECtHR, *Al Nashiri* (n 804) paras 452, 517; ECtHR, *Husayn (Abu Zubaydah)* (n 804) paras 449, 512; ECtHR, *Nasr and Ghali* (n 804) paras 241 ,289.

806 ECtHR, *El-Masri* (n 804) paras 207-211, in particular para 211.

Throughout the judgment, the Court does not always exhaustively clarify the precise conceptual basis for Macedonia's responsibility.[807] However, it can be assumed that its responsibility for the torture Mr El-Masri suffered at Skopje airport arises on the basis of its failure to protect the applicant against interference by the CIA agents that it had knowledge of and the means to prevent.[808]

3.4.1.2.3 Conclusion

It is beyond dispute that states, under the Convention, have to protect individuals from human rights violations committed by others, which includes a duty to intervene where the protection so requires. The ECtHR's case law in this area is characterised by a case-by-case approach. However, for the present purposes, two important conclusions may be drawn from the overview above.

The first relates to the conditions under which states incur responsibility for a failure to protect individuals from interference by other public actors. On the one hand, under the prohibition of *refoulement*, they have to abstain from exposing an individual to risks of serious maltreatment that would be inflicted abroad if expelled. More importantly for the current purposes, they also have to take active steps to protect an individual, where this is necessary. It seems that the Court in this respect does not draw a conceptual distinction between interference by private parties on the one hand, and other states or international organisations on the other.[809] When it comes to the duty to take practical or operational measures to protect an individual, responsibility regularly arises under two conditions: The authorities (1) knew or ought to have known of a risk of ill-treatment contrary to the Convention, (2) but did not take reasonable steps to prevent it. Measures are 'reasonable' when they are available, have a real prospect of altering the outcome or mitigating the harm, and do not place a disproportionate burden on the state. In other words, states are under a due diligence obligation to take measures if they can realistically be expected to do so.[810]

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807 In this respect see in particular André Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (EJIL: *Talk!* 24 December 2012) <http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>.

808 The Court in this respect in particular reiterates states' positive obligations under Article 3 ECHR, see ECtHR, *El-Masri* (n 804) para 198, and when holding Macedonia responsible specifically refers to ECtHR, *Z and Others* (n 780), ECtHR, *M.C.* (n 767), and ECtHR, *Gldani v Georgia* (n 783), a line of case law discussed in more detail above 3.4.1.2.1.

809 In ECtHR, *El-Masri* (n 804) in particular para 211, for example, the Court relies on its case-law in the area of positive obligations that arise in relation to interference by private parties, when holding Macedonia responsible; see also den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 27.

810 See in particular ECtHR, *Osman* (n 771) para 116; see also ECtHR, *El-Masri* (n 804) para 206, where the Court emphasised the presence of state officials and the acquiescence or connivance of the state; see also Beijer (n 745) 63–69; Shelton and Gould (n 745) 577.

Second, in line with the Court's case law, in particular *Avotiņš* and *Tarakhel*, the principle of mutual trust does not release states from this obligation.

3.4.1.3 Responsibility for failures to protect during Frontex operations

The following analyses the circumstances under which states that are involved in Frontex operations but are not directly responsible in a specific case, may nevertheless be responsible for failing to meet their obligations under the Convention to protect individuals from human rights interference by others.

3.4.1.3.1 Responsibility of the host state

Questions of associated responsibility of the host state arise in particular in two situations. The first is human rights violations that occur during joint operations for which a participating state is responsible, but the host state is not. This is the case where infringements originate in the conduct of personnel on large assets, such as vessels or aeroplanes, contributed by participating states (such as in Example 2).[811] Hence, the crucial question is whether the host state may be responsible for these under the doctrine of positive obligations.

In light of the above, such responsibility arises under two conditions, namely that the host state knew or ought to have known of an immediate and real risk of interference with an individual's Convention rights, but did not take measures available to it to prevent them.[812] As discussed in more detail in Chapter 2, the host state assumes the overall lead during Frontex operations. More specifically, it enjoys a central role within the International Coordination Centre and the Joint Coordination Board, the focal points for leading and coordinating the implementation of all operational activities as well as for communicating with and coordinating all assets and experts deployed.[813] In addition, any serious incidents, such as human rights violations, have to be reported immediately to the Frontex Situation Centre and the host state authorities.[814] Hence, it can safely be assumed that the host state at all times has, or should have, knowledge of potential human rights violations.

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811 See above 3.3.

812 See also *El-Masri*, where the Court more specifically found that a state is responsible for the acts of foreign officials carried out within its jurisdiction and with the acquiescence or connivance of its authorities, if it fails to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring, see ECtHR, *El-Masri* (n 804) in particular paras 206, 211; see also above text to n 804-808.

813 See above 2.4.2.1.

814 See above 2.4.4.1.

The host state's leading role during Frontex operations at the same time equips it with the possibility to prevent human rights violations being committed by deployed assets. It in particular shares the authority over large assets with the respective contributing state. Whilst this is not sufficient to meet the threshold for attribution of of asset personnel's activities to the host state, it provides the host state with a range of measures to shape their conduct so as to prevent human rights violations.[815] For example, within the Joint Coordination Board, it may simply refrain from consenting to decisions that would lead to human rights violations.

Against this background, if human rights violations are committed by personnel on foreign vessels or aeroplanes, the host state incurs responsibility under the ECHR *alongside* the respective contributing state for having failed to prevent the occurrence of that breach.

The second relevant scenario where the associated responsibility of the host state may arise, concerns the situation where the implementation of a return decision issued by a participating state infringes the prohibition of *refoulement*. This begs the question whether the host state is itself also responsible for a violation of the prohibition of *refoulement* for executing the return decision in the framework of the Frontex operation (see in particular Example 4).

Whilst the principle of mutual trust allows the host state to presume that the participating state's return decision complies with human rights requirements, this presumption does not release the host state from its obligations under the Convention.[816] Thus, where the suspicion arises that the return of an individual would violate that person's rights, the host state has to assess whether there are substantial grounds to believe that the expulsion places the returnee at risk of being subjected to torture or to inhuman or degrading treatment or punishment. When that is the case, the host state is prohibited under the Convention from carrying out the return, and is responsible for a violation of the prohibition of *refoulement* if it does.

3.4.1.3.2 Responsibility of participating states

It was found above that participating states are responsible for human rights violations committed with the involvement of their own large assets, e.g. when their own vessels carry out interceptions during a border control operation at sea and violate human rights whilst doing so.[817] The question here is whether they may incur responsibility for human rights violations committed by other states, in particular the host state, for a failure to prevent them.

815 On attribution of conduct of persons deployed on large assets see above 3.3.2.3.4.
816 For more detail see above 3.1.2.2.4 and 3.4.1.2.2.
817 See above 3.3.

In principle, it is conceivable that responsibility arises from either of two aspects of the participating states' involvement.

First, responsibility may arise for contributing human and technical resources to a human rights violation of the host state. When discussing the predecessor to Article 6 ASR, the ILC indeed noted that 'the very act of placing some of a State's organs at the disposal of another State' could in itself constitute a breach of an international obligation of the sending or the receiving state. As an example, it pointed out that a state may be internationally bound not to furnish aid of any kind, and therefore also not to 'lend' any of its organs, to another state.[818]

At the outset, if the ECHR requires states to prevent infringements by others, it must *a fortiori* also prohibit active contributions. It may be assumed that this would at least require that the state knows or ought to know of the violation when rendering assistance. Such knowledge can be expected to exist, if the deficiencies in the host state are either structural, or inherent in the design of the specific operation. For example, if a host state's human rights record exposes systemic failures that would inevitably materialise during a Frontex operation, participating states must be assumed to know that their contributions would be used for human rights violations. This may be the case, for instance, where the conditions under which asylum seekers are detained are so inappropriate that they qualify as inhuman and degrading treatment (see also Example 3). Similarly, if the Operational Plan itself sets out a course of conduct that would be in violation of the ECHR, it has to be obvious to a participating state that it would be assisting in a human rights violation.

Second, participating states may be responsible for a failure to intervene at the moment a human rights violation occurs. Again, this would at least require that they know or ought to know of the infringement, but also that they have the means to prevent it. Depending on the extent of involvement of a participating state, the likelihood of gaining knowledge about the risk of a violation and the possibility to prevent it vary. Broadly speaking, there are three types of involvement that have different consequences in this respect.

1) States who contribute large assets are the most likely to gain knowledge of circumstances that may lead to a human rights violation. This is in particular because they have a National Official present on the Joint Coordination Board, which holds daily meetings where the past and ensuing 24 hours are discussed. Thus, they can be assumed to know when there is a risk that human rights violations may occur. Moreover, being present on the Joint Coordination Board and consulted with respect to activities during joint operations also makes it possible for them to change, or attempt to change, the course of conduct in order to prevent or mitigate foreseeable risks.

818 ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 16.

2) States who contribute standard team members neither have National Officials present in the Joint Coordination Board, nor can they otherwise influence the decision-making process during the Joint Coordination Board's daily meetings. However, their team members may gain knowledge of risks of human rights violations in their respective areas of deployment and report these to their respective home state. Since a participating state cannot issue instructions to the team members it contributed, the only relevant option in those circumstances seems to be for that state to withdraw its assistance altogether. A specific challenge that additionally arises in this respect is that under the EBCG Regulation states are under an obligation to make personnel registered in a human resources pool available for joint operations. The EBCG foresees only one explicit exception to this obligation, namely where they are themselves faced with an exceptional situation substantially affecting the discharge of national tasks.[819] When rapid border control interventions are concerned, as a rule, no exception applies at all.[820] Unless the CJEU would find there to be an additional implicit exception where human rights law requires, states may indeed find themselves to be obliged, under the EBCG Regulation, to follow a course of conduct that contradicts their Convention obligations. This could indeed trigger the '*Bosphorus* presumption', meaning the ECtHR could decide to step back from detailed scrutiny of a participating state's conduct in a specific case, unless it finds the human rights protection granted by EU law in these circumstances to be manifestly deficient.[821]

3) States who contribute minor technical equipment, as a rule, do not seem to be in a position to either gain sufficient knowledge of imminent human rights risks during operations, or substantially alter the course of conduct.

In any case, with respect to both possibilities—responsibility for the contribution as such on the one hand and responsibility for a failure to intervene on the other—the main challenge does not lie in the lack of knowledge, possibilities to intervene, or the application of the '*Bosphorus*-presumption'. Rather, from the perspective of the participating state, human rights violations that may occur during Frontex operations are not only committed by another state, but more importantly, they also take place within another state. Whilst states more generally have to protect the rights of individuals within their territory, the Convention's applicability is more limited extraterritorially. Thus, the crucial question is whether the Convention prohibits states from contributing to, and requires states to intervene in human rights violations committed by other states within the latter's own territory.[822]

819 EBCG Regulation (n 18) arts 20(3), 29(3), 30(3), 31(3); for more detail see above 2.3.2.1.1 and 2.3.2.1.3.

820 Ibid art 20(5, 7); for more detail see above 2.3.2.1.2.

821 For more detail see above 3.1.2.2 and 3.1.2.3.

822 For a detailed analysis of state's obligations to prevent within their own territory and extraterritorially see van der Have (n 762).

Whilst this will not be discussed in detail here, some tentative observations may help to shed light on the challenges that arise in this respect.

According to Article 1 ECHR, the High Contracting Parties owe their Convention obligations to those individuals who come within their 'jurisdiction'. Whilst all individuals on a state's territory are generally within that state's jurisdiction, under some circumstances individuals that are outside a state's territory may also come within its jurisdiction.

One possibility is that a decision taken inside a state's territory adversely affects the rights of individuals abroad. For example, it is conceivable that the decision itself to participate in or to continue participating in a Frontex operation despite the foreseeability of specific human rights violations engages a state's responsibility. Some support for this argument can be found in *Soering*. As explained in more detail above, in that case the Court found that the *decision* by a state to extradite a person may engage its responsibility, where the person can be expected to face a real risk of torture if extradited.[823] Citing this passage, the Court observed in *Ilaşcu*, 'A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.'[824]

However, there is an important difference between *Soering* and situations such as Frontex operations. In *Soering*, the individual's rights were at risk outside the state's territory. But at the time of the decision to expose the individual to those risks, the individual was within the state's territory (and thus unquestionably within its jurisdiction). In contrast, in the context of Frontex operations, the decision to (continue to) contribute to an operation despite foreseeable human rights violations has consequences for individuals that are abroad, both at the time of the decision and at the time the risk materialises. Whilst the Court has not specifically addressed this question, it is doubtful that, as the law currently stands, states incur positive obligations under these circumstances.

The other possibility is that the individuals whose rights may be infringed during Frontex operations are within the participating states' jurisdiction even though they are abroad. Whilst complex in detail, it suffices to note here that state parties generally incur Convention obligations extraterritori-

823 ECtHR, *Soering v The United Kingdom* (n 34) para 91 [emphasis added].
824 ECtHR, *Ilaşcu* (n 800) para 317.

ally in the following two situations.[825] The first is where a state exercises 'effective (overall) control' over an area outside their own territory, which brings the individuals in that territory within the 'controlling' states' jurisdiction.[826] Clearly, this is not applicable in the present context. States participating in Frontex operations do not, by virtue of their participation, exercise effective control over the host state's territory. The second situation in which a contracting state incurs Convention obligations in relation to individuals abroad is where the state exercises 'authority and control' over them.[827] Authority and control over individuals may consist of either of two possibilities. On the one hand, a state may exercise physical power and control over individuals, like apprehending or detaining them, and thereby bring them under its jurisdiction.[828] On the other hand, a state may exercise all or some of the public powers abroad that are normally exercised by the government of the territory in question, with the consent, invitation, or acquiescence of that government. That brings the individuals affected by those public powers within the jurisdiction of the state who exercises them.[829]

It is indeed conceivable that in the context of a joint operation, participating states exercise authority and control over individuals, bringing them within their jurisdiction. Simply speaking, when they contribute a border guard to a joint operation, that border guard exercises border management functions in the territory and with the consent of the host state. They may thus be considered to participate in the exercise of public powers normally exercised by the host state alone. Whether this kind of *participation* in the exercise of public powers is really sufficient for the purposes of Article 1 ECHR is not entirely clear. But for the current purposes it is noteworthy that it may be.

825 The general rules were summarised in particular by the Court in ECtHR, *Al-Skeini and Others v the United Kingdom*, 7 July 2011, application no 55721/07, paras 130-142; reiterated more recently in ECtHR, *Jaloud* (n 444) para 139; for a detailed discussion of the Court's case-law on the Convention's extraterritorial application see for example Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013); Rick Lawson, 'Life after *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

826 See in particular ECtHR, *Loizidou v Turkey (Preliminary Objections)*, 23 March 1995, application no 15318/89, para 62; ECtHR, *Loizidou v Turkey (Merits)*, 18 December 1996, application no 15318/89, paras 52, 56; ECtHR, *Cyprus v Turkey*, 10 May 2001, application no 25781/94, paras 76-77.

827 See for example ECtHR, *Issa and Others v Turkey*, 16 November 2004, application no 31821/96, para 71; see also ECtHR, *Isaak v Turkey*, 24 June 2008, application no 44587/98.

828 See for example ECtHR, *Öcalan v Turkey*, 12 May 2005, application no 46221/99, para 91; ECtHR, *Medvedyev v France*, 29 March 2010, application no 3394/03, para 67.

829 See for example ECtHR, *Al-Skeini* (n 825) para 135.

Importantly, however, as a general rule, only participating states that contribute large assets, such as vessels or aeroplanes, may be considered to participate in the exercise of public powers in the host state. In contrast, states who deploy standard team members do not exercise such powers. The reason is that the conduct of their team members is exclusively attributable to the host state.[830] In the eyes of international law, during joint operations team members act solely in the name of the host state. As a consequence, whilst they exercise public powers, they do so in the name of the host state, not their home state. Thus, it appears that they do not bring the affected individuals within the jurisdiction of their home state. Notably, thus, the lack of control over them by their 'home' states that impedes attribution of conduct, also precludes extraterritorial application of the Convention.

In practice this means that individuals affected by border management activities conducted during joint operations may be within the jurisdiction *not only* of the directly responsible state, but also of participating states that contribute large assets. For example, if a host state vessel forces a boat carrying migrants back to its place of origin the individuals on that boat are arguably within the host state's jurisdiction.[831] This section shows, however, that in addition, the persons on that boat may be within the jurisdiction of those participating states that contribute large assets and thereby participate in the exercise of the host state's public powers. As a consequence, these participating states incur positive obligations under the ECHR and, under the circumstances described above, may consequently be responsible if they contribute to or fail to prevent a human rights violation committed by the host state in sending the boat back to its place of departure.

This conclusion, it should be noted, is tentative. The Court consistently requires the exercise of jurisdiction if the Convention is to apply extraterritorially. However, the details of what exactly amounts to jurisdiction and what does not remain disputed and cannot be exhaustively dealt with here.[832] Having set out a particularly strict understanding of the jurisdiction requirement in its decision in *Banković* in 2001, the Court has since then certainly shown willingness to loosen the criteria where the consequences would have seemed arbitrary or otherwise unjustified.[833] Yet, as a rule, the power or possibility to positively affect the situation of an individual who is abroad does not amount to an exercise of jurisdiction, if not accompanied by

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830 See above 3.3.2.3.4.

831 See above 2.4.1.3, in particular n 334.

832 For more detail see in particular Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 825); Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

833 ECtHR, *Banković and Others v Belgium and Others*, 12 December 2001, application no 52207/99; for a critique of *Banković* see Lawson, 'Life after Bankovic' (n 825); for the developments after *Banković* see in particular above n 827-829; for more detail see in particular den Heijer, *Europe and Extraterritorial Asylum* (n 584) 45–48; den Heijer and Lawson (n 825) 187–190.

some form of control over the territory in question or the affected individual.[834] In this vein, the mere possibility to prevent a human rights violation committed by another state abroad does not mean states incur an *obligation* under the Convention to do so. The case of states participating in Frontex operations illustrates in particular two things in this context: First, the line between sufficient and insufficient control for positive obligations to arise extraterritorially is unclear. It was tentatively drawn here between participating states that contribute large assets and those that do not. Ultimately, however, more specific case law and research on this question is needed to reach a more definite conclusion. Second, if participations in human rights violations that do not entail the control currently required for the exercise of jurisdiction are to be governed by ECHR law, a change in the present state of the law seems necessary. In this respect, there are in particular two possibilities. The first is to adopt a more lenient approach to the extraterritorial applicability of the ECHR.[835] The second is to hold states responsible under the rules on aid or assitance provided for under general international law. It is the latter possibility that is explored in more detail in the following section.

3.4.2 Responsibility for rendering aid or assistance[836]

As the analysis in the previous section revealed, positive obligations to protect are not fully applicable to all relevant situations during Frontex operations. Against this background, this section offers an analysis of a second

834 It should be noted, however, that in *Manoilescu and Dobrescu v Romania and Russia*, a case eventually declared inadmissible, the Court held that 'even in the absence of effective control of a territory outside its border' the state may still incur positive obligations under the Convention, see ECtHR, *Manoilescu and Dobrescu v Romania and Russia*, 3 March 2005, application no 60861/00, para 101; this was repeated in ECtHR, *Treska v Albania and Italy*, 29 June 2006, application no 26937/04. Importantly, however, this statement was explicitly based on *Ilaşcu*, where the Court found Moldova did incur positive obligations with respect to Transdniestria, an area *within its own territory* over which it had lost full effective control, see ECtHR, *Ilaşcu* (n 800), discussed in more detail above 3.4.1.2.2. Moreover, the idea that states incur positive obligations outside their own territory without exercising jurisdiction does not seem to have gained support in later case law. See also Kjetil M Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press 2012) 220–224.

835 See also below 5.4.2.2; arguing for a wider understanding of 'jurisdiction' see also Fabiane Baxewanos, *Defending Refugee Rights: International Law and Europe's Offshored Immigration Control* (Neuer Wissenschaftlicher Verlag 2015) in particular 99-105; Fabiane Baxewanos, 'Relinking Power and Responsibility in Extraterritorial Immigration Control: The case of immigration liaison officers' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017).

836 This section is partially based on an earlier publication, Melanie Fink, 'A "blind spot" in the framework of international responsibility?: Third-party responsibility for human rights violations: the case of Frontex' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017).

form of associated responsibility, namely the rules on aid or assistance under general international law.

It should be noted that the ECtHR does not currently rely on the rules on aid or assistance beyond situations that would already be covered by obligations to protect arising under ECHR law. As will be discussed in more detail in this section, obligations to protect under ECHR law generally require more from a state than the rules on aid or assistance do. Hence, the only relevant scenario where the latter may usefully complement the former seems to be where obligations to protect do not apply, i.e. in situations outside an assisting state's jurisdiction. This section thus focusses on the question of whether the rules on aid or assistance may fill the 'gap' in the context of the ECHR where obligations to protect are not applicable to a specific situation.

3.4.2.1 Derivative responsibility under international law

International law provides for a set of rules dealing with responsibility of states for their involvement in an internationally wrongful act of other states or international organisations.[837] This type of responsibility is conditional upon a breach of international law by another state or international organisation, it is thus 'derivative'.[838] The underlying idea is that a contribution to a wrong ought to trigger legal consequences, even though the actor has not necessarily engaged in conduct prohibited by a primary obligation under international law.

Questions of derivative responsibility can only arise as a result of the participation of a state or international organisation in the acts of another international legal person. Where a state's involvement in the acts of individuals or groups of individuals is at stake, this may raise questions of attribution of those acts to the state, but no issue of derived responsibility arises.[839]

In his first, more detailed, discussion of derivative responsibility, Special Rapporteur Ago distinguished two conceptual categories of the '[i]mplication of a State in the internationally wrongful act of another state'.[840] The overall proposition was to treat situations where a state *participates* in the act of another differently from those where a state *constrains* another state in its freedom to decide whether or not to commit an international wrong.[841] In this vein, the ASR and the ARIO cover three different scenarios of derivative

837 ILC, 'ASR' (n 58) chapter IV; for the more specific obligations of states triggered by serious breaches of peremptory norms see Annie Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 European Journal of International Law 883.

838 See also ILC, 'ASR' (n 58) chapter IV, comm (8).

839 See for example Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 Revue Belge de Droit International 370, 370.

840 Special Rapporteur Ago, 'Seventh Report on State Responsibility' (A/CN.4/307, Thirtieth Session, 1978), para 52.

841 Ibid paras 52-53.

responsibility. First, Article 16 ASR, Article 14 ARIO, and Article 58 ARIO provide that aid or assistance rendered in the commission of a wrongful act triggers responsibility of the assisting state or international organisation. Second, Article 17 ASR, Article 15 ARIO, and Article 59 ARIO concern direction and control exercised over the commission of an internationally wrongful act. Third, Article 18 ASR, Article 16 ARIO, and Article 60 ARIO deal with coercion of another state or international organisation to commit an internationally wrongful act. The provisions on aid or assistance cause the participating actor to incur responsibility 'for its own act in deliberately assisting another State [or international organisation] to breach an international obligation'.[842] In contrast, direction and control or coercion exercised over the commission of an internationally wrongful act trigger responsibility for the principal wrongful act itself.[843]

The most common forms of involvement of one state or international organisation in the wrong of another international entity fall under the provisions dealing with 'aid or assistance'. This is also the case for Frontex operations. The question that arises is whether, even in the absence of a specific obligation to protect (or inapplicability thereof), states involved in Frontex operations are responsible for assisting one another in what turns out to be a wrongful act.

The following section more closely examines the conditions under which responsibility for rendering aid or assistance arises. It traces the meaning of Article 16 ASR, taking into account not only its wording and the ordinary meaning of the terms, but also the commentaries to and the development of the provision.[844] Since a thorough analysis of state practice and *opinio iuris* in relation to Article 16 ASR would go well beyond the scope of this section, the discussion proceeds on the assumption that Article 16 ASR reflects customary international law. It should be noted, however, that as opposed to the attribution rules laid down in the ILC Articles, which are to a large

842 ILC, 'ASR' (n 58) art 16, comm (10); see also Graefrath (n 839) 371.

843 ILC, 'ASR' (n 58) art 17, comm (1), art 18, comm (1); Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Schulthess 2007) 89–95.

844 It should be noted here that even though the choice to draft the Articles in treaty form may induce the application of rules of interpretation inspired by the Vienna Convention on the Law of Treaties, these are unsuitable to give meaning to the ASR and the ARIO. The focus of the Vienna Convention on the ordinary meaning of the terms used rests on the basis that the language of a treaty reflects a final compromise reached by the contracting parties. This lends particular authority to the wording. In contrast, the ILC Articles represent the dominant view within the ILC, an expert body, meaning that minority views may not be reflected in the text. Since the wording of the Articles therefore does not have the same authority as the language of a treaty, the commentaries to and the development of the Articles bear more weight than they do in relation to treaties, where preparatory works only serve as supplementary means of interpretation. For more detail see David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 The American Journal of International Law 857, 868–870.

extent considered to reflect customary international law, the status of the prohibition of rendering aid or assistance remains disputed. Whereas the Special Rapporteurs initially leaned towards considering Article 16 ASR progressive development, the final commentaries to the Articles suggest a basis in customary international law.[845] Scholarly writings are divided on the issue, even though a majority of authors argue for a customary law basis for the provision.[846] In one of the rare cases where the prohibition of rendering aid or assistance in the commission of an internationally wrongful act has been addressed in international case law, the International Court of Justice confirmed the customary nature of the principle underlying Article 16 ASR in the *Genocide Convention* case.[847]

3.4.2.2 Responsibility for rendering aid or assistance

Article 16 ASR sets out the conditions under which responsibility for rendering aid or assistance, also referred to as 'complicity', arises.[848] It provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

Article 16 rests upon three conditions. First, Article 16(b) confirms that the assisting state only incurs responsibility where it is itself bound by the primary obligation breached. This is understood as a safeguard in order to prevent the rules on derivative responsibility from undermining the principle that obligations between two states create neither rights nor obligations for third parties.[849]

The second requirement is concerned with distinguishing conduct that is suitable for triggering derivative responsibility from conduct that falls outside its scope. Assistance is required to reach a certain threshold and show effects on the wrongful conduct it facilitates.[850] This requirement is not explicitly addressed in the text of Article 16 but Special Rapporteur Craw-

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845 Aust (n 65) 97–98.

846 With extensive references to scholarly writings see ibid 98–99, who – on the basis of a thorough analysis of state practice and *opinio iuris* – confirms that Article 16 ASR represents customary international law, see page 191.

847 ICJ, *Genocide Convention* (n 516) para 420.

848 For a discussion of the various meanings of 'complicity' in international law see John Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSA Journal of International and Comparative Law 525.

849 For a critique of this requirement see Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' 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) 156–161.

850 See also Crawford, *State Responsibility* (n 426) 405.

ford considered the use of the terms 'aid or assistance', accompanied by the commentaries, sufficient to make clear that a nexus between the wrongful act and the assistance rendered is to be established.[851] The commentaries to Article 16 explain in very general terms that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, *and must actually do so*.'[852] Upon adoption of then Article 27 on first reading, the ILC suggested that the assistance rendered 'must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'.[853] Yet, there is no requirement 'that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.[854] The decisive element in distinguishing conduct suitable for triggering derivative responsibility from other activities thus seems to be the impact rather than the type of assistance rendered.[855]

The third and most controversial requirement is found in Article 16(a), namely that the assisting state ought to have 'knowledge of the circumstances of the internationally wrongful act'. This suggests that responsibility arises if the assisting state is aware that its assistance is used for the commission of a wrongful act. In its commentaries, however, the ILC seems to adopt a somewhat narrower approach. It points out that assistance must be given 'with a view to facilitating the commission of an internationally wrongful act'.[856] More explicitly, the ILC clarifies that a 'State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[857]

The nature of this requirement has given rise to divergent views. In particular, one position is to either regard intention as an additional limitation on derivative responsibility not contained in the wording of Article 16, or to narrow the meaning of 'knowledge' in Article 16(a) to 'intention' on the basis of the commentary or state practice.[858] Others, however, have questioned the usefulness of intent as a decisive criterion for complicity or

851 James Crawford, Second Report on State Responsibility, Addendum, A/CN.4/498/Add.1, para 180.
852 ILC, 'ASR' (n 58) art 16, comm (3) [emphasis added].
853 International Law Commission, Report on its Thirtieth Session, YILC 1978, vol II(2), 104.
854 ILC, 'ASR' (n 58) art 16, comm (5); see also Crawford, *State Responsibility* (n 426) 403 who argues that 'the required standard would […] appear to be one of substantial involvement on the part of the complicit state.'
855 For more detail on the scope of the 'material element' of 'complicity', see Lanovoy (n 849) 141–150.
856 ILC, 'ASR' (n 58) art 16, comm (3, 5); see also den Heijer, *Europe and Extraterritorial Asylum* (n 584) 96.
857 ASR (n 58) art 16, comm (5).
858 For the former see Crawford, *State Responsibility* (n 426) 406; for the latter see Aust (n 65) 235–241.

pointed to the inherent difficulty in determining the state of mind of a state or an international organisation.[859] Apart from the fact that a state will usually not officially declare the purposes of its aid, it often acts through several officials who might not share the same state of mind.[860] In addition, the difficulties in proving that aid is given specifically for the illegal purpose have been advanced in opposition to an intention requirement.[861]

The knowledge requirement contained in the text of Article 16 indeed seems to have developed in response to the wish to incorporate some form of intention as a 'subjective element'. Upon introducing the knowledge requirement into Article 16 which until then required that assistance 'is rendered for the commission of an internationally wrongful act', Special Rapporteur Crawford noted that, 'The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances.'[862] This is in line with how Special Rapporteur Ago seems to have understood the requirement of intention: 'The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.'[863] Thus, it seems that the knowledge requirement may be considered a manifestation of intention, without additionally requiring a volitional element.

In this vein, intention may be established by demonstrating the participating actor had knowledge of the specific circumstances. This means the assisting state needs to be aware, first, of the commission of a wrongful act (as opposed to a general habit of another state of breaching international law) and, second, of the fact that the assistance given is used for that purpose.[864] Assisting another actor whilst being aware that the assistance is used for an international wrong implies that the participating actor accepted the anticipated consequences.[865]

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859 For example Graefrath (n 839); John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 British Yearbook of International Law 77; Kate Nahapetian, 'Confronting State Complicity in International Law' (2002) 7 UCLA Journal of International Law and Foreign Affairs 99.

860 Quigley (n 859) 111.

861 Graefrath (n 839) 375.

862 At that time it was Article 27, see Special Rapporteur Crawford, 'Second Report on State Responsibility' (UN Doc A/CN.4/498, Fifty-First Session 1999), para 188, n 362.

863 Special Rapporteur Ago, 'Seventh Report on State Responsibility' (n 840) para 72.

864 See also Georg Nolte and Helmut P Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 International and Comparative Law Quarterly 1, 14–15; setting out a number of criteria that may be relevant in determining knowledge for the purposes of Article 16 ASR, see Lanovoy (n 849) 150–156.

865 See also den Heijer, *Europe and Extraterritorial Asylum* (n 584) 75, citing the 'Grotian theory of *culpa*' in connection with state responsibility for acts of individuals. For *culpa* knowledge is sufficient because 'knowledge implies a concurrence of will'.

3.4.2.3 Aid or assistance in the context of Frontex operations

The previous section showed that responsibility for 'complicity' arises under four conditions.

1. A state commits an internationally wrongful act (the 'receiving state'). For the current purposes, this would be a breach of the ECHR.
2. Another state (the 'assisting state') renders aid or assistance that makes it materially easier for that internationally wrongful act to occur.
3. The assisting state does so in the knowledge that the assistance is used for that internationally wrongful act.
4. The act would be internationally wrongful if committed by the assisting state, i.e. the assisting state is itself bound by the primary obligation breached by the receiving state.

These four conditions are necessary, but also sufficient. Most importantly, whilst it is required that the original internationally wrongful act would still be unlawful if committed by the assisting state, there is no need, in addition, for an obligation that prohibits a state from rendering assistance. For example, if the host state breaches the prohibition of *refoulement* during a Frontex operation, participating states may incur responsibility for rendering aid or assistance regardless of whether they additionally are under an obligation to prevent, or not to assist in, that violation. This at the same time renders the question of applicability of the Convention with respect to the assisting states futile. In other words, a participating state may incur responsibility for being complicit in a human rights violation by the host state, regardless of whether the victim of the violation is within its jurisdiction according to Article 1 ECHR.

Consequently, states involved in Frontex operations are responsible for having rendered aid or assistance if the four conditions set out above are met. Neither the first nor the fourth condition pose particular challenges in this context. A breach of human rights attributable to another state is simply presumed to exist for the current purposes. In addition, all states involved are contracting parties to the ECHR. A breach of the Convention by one of them would thus also be internationally wrongful if committed by any other.

The second and the third requirements are similar, but not identical to those that trigger responsibility for breaches of positive obligations to protect under the ECHR.[866] In essence, the provisions on 'aid or assistance' set a higher threshold for responsibility to arise than positive obligations.

866 See above 3.4.1.

On the one hand, 'complicity' requires knowledge. In contrast, it is sufficient to show that a state 'ought to have had knowledge' for responsibility under the doctrine of positive obligations to arise. Whilst the former can be more difficult for applicants to prove, it appears that at least the host state, participating states that are represented in the International Coordination Centre through their National Officials, and participating states with team members on the ground who report back to them, can commonly be assumed to have actual knowledge.

On the other hand, responsibility for 'complicity' seems to require active conduct, whereas responsibility for violation of positive obligations by definition arises from failures to act. In this vein, the concepts of 'aid or assistance' and positive obligations have sometimes been distinguished along the lines of positive action and omissions. In the *Genocide Convention* case, the International Court of Justice held that

> complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission.[867]

This does not pose a significant obstacle to the derivative responsibility of the host state for violations attributable to participating states. Providing all structures to actually run the operation and being required to consent to decisions taken during joint operations, mean that its aid or assistance plainly qualifies as active contribution, making it 'complicit' in participating states' breaches.

Similarly, participating states actively aid or assist when they contribute human and technical resources to an operation. That in itself may render them complicit in breaches committed by the host state or other participating states. However, as noted above in the context of obligations to protect, at the time of rendering assistance, the participating state cannot as a general rule be considered to have knowledge of the fact that violations may be committed using their contributions, unless the deficiencies in question are structural or inherent in the design of an operation.[868]

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867 ICJ, *Genocide Convention* (n 516) para 432; also arguing against the possibility of derivative responsibility being triggered by omissions see for example Felder (n 843) 254–255; see also Crawford, *State Responsibility* (n 426) 405, who considers that 'the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility.'

868 For more detail see above 3.4.1.3.2.

The most common scenario in relation to participating states is that they gain knowledge about an imminent human rights violation in the course of the implementation of an operation.[869] Against this background, the crucial question is whether there are circumstances in which derivative responsibility may arise for a failure to prevent a human rights violation, i.e. an omission.

The major difference between the concepts of 'aid or assistance' and positive obligations lies in the role played by the third party in question. The former is an exception to the general rule that states are free to take either side in a conflict insofar as it places limits *on the possibility to support* a perpetrator in the commission of a wrongful act. Yet, there is generally no requirement to actively protect the victim and it is normally legitimate for a state not to get involved at all. In contrast, the obligation to prevent human rights violations is aimed at protecting potential victims from unlawful interference. This prohibits states from remaining inactive and requires their involvement on the side of the victim. Thus, whereas the concept of derivative responsibility does not apply to a stranger to a dispute, states incur a duty to take preventive measures under the concept of positive obligations even without prior involvement.[870]

As a general rule, it can hence be said that 'doing nothing' is fine when assessed through the lens of derivative responsibility. Accordingly, omissions usually do not trigger such responsibility. However, this does not apply when a state is already involved, i.e. when the state cannot be considered a stranger to the situation or dispute. In those cases, they are under an obligation to react to a wrongful act, failing which they incur derivative responsibility.[871] With due regard to the institutional set-up, the planning, and the implementation of joint operations, all participating states are indeed already 'involved' prior to any human rights breach. In this light, they are, under the rules on aid or assistance, under a duty to prevent, so far as possible, human rights violations when they gain knowledge thereof. Failing to do so may trigger their derivative responsibility.

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869 On the likelihood of gaining knowledge according to different types of contributions see above 3.4.1.3.2.

870 For this conceptual approach see also Lea Brilmayer and Isaias Y Tesfalidet, 'Third State Obligations and the Enforcement of International Law' (2011) 44 NYU Journal Of International Law And Politics 1, 37–42.

871 More generally arguing that omissions may also qualify as 'aid or assistance', see Lanovoy (n 849) in particular 145-147; see also the examples given by Quigley (n 859) 124–125, and by Aust (n 65) 229–230; the approach proposed here is, however, less far-reaching than Quigley (n 859) 124–125, who argues: 'If a donor State supplies, for example, electrical apparatus and stipulates that it should not be used to administer torture, it should be liable for complicity if it learns that the apparatus is being used for torture yet takes no action to prevent continued wrongful use, when such action is available to it.'

In sum, obligations to protect under ECHR law are generally more far-reaching than the rules on aid or assistance under general international law. However, in the specific context of Frontex operations, states involved incur responsibility for having been complicit in a human rights violation committed by another state under circumstances similar to those in relation to the doctrine of positive obligations. Importantly, under the rules on aid or assistance, there is no need to establish that the victim of a breach comes within the jurisdiction of the assisting state. It is sufficient that a breach of the ECHR was committed by a contracting party and another contracting party rendered aid or assistance in the commission of that breach. The concept of aid or assistance may thus fulfil an important function in complementing the doctrine of positive obligations where human rights violations take place under the jurisdiction of a contracting party to the ECHR but outside the territory of an assisting state.[872]

It is noteworthy that the rules on aid or assistance cannot fulfil the same function in relation to operations hosted by third states who are no contracting parties to the ECHR.[873] In these cases the first condition is not met, i.e. there is no breach of the ECHR by the 'receiving state'. For this reason, states participating in joint operations hosted by third states cannot be held responsible under the ECHR for their assistance rendered, even if the ECtHR was to apply the rules on aid or assistance. Of course, this does not exclude their responsibility under general public international law.

3.4.3 Interim conclusion

This section analysed the circumstances under which states that are not directly responsible in a specific case are nonetheless responsible for conduct associated with the primary breach. The central question addressed was whether contributing to, or not preventing, a violation of the ECHR, may render the facilitating actor responsible.

In light of the findings of Section 3.3, two broad situations were identified, in which questions of associated responsibility are most relevant. The first concerns breaches by anyone but the host state. These are, in particular, breaches committed during a joint operation with the involvement of large asset, a vessel for example, deployed by participating states. The question this raises is whether the host state is responsible *in addition to the respective participating state*.

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872 Arguing that the concept of aid or assistance may be better suited than the doctrine of positive obligations to determine a state's responsibility for its involvement in conduct of a primary actor contrary to the ECHR outside its territory see den Heijer, *Europe and Extraterritorial Asylum* (n 584) 57-103, see in particular 100, 103; pointing out the Court's predominant reliance on 'independent responsibility', see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 46–47.

873 See above 2.2.3.

With due regard to its dominant position in leading joint operations, it can be expected that the host state knows or ought to know of any immediate and real risks to individuals' Convention rights during operations. Under those circumstances, state parties to the Convention incur a positive obligation to take all reasonable steps to prevent such violations. In this vein, the host state may for example have to use its position within the Joint Coordination Board to block the taking of decisions that would lead to a breach of human rights, or instruct its own local personnel to take measures to prevent breaches. If the host state fails to do so, it incurs responsibility under the ECHR. Thus, if breaches are committed during joint operations that are attributable to others, e.g. breaches by large assets of contributing states, the host state is *additionally* responsible for not preventing them.

In addition, if, during a return operation, a reasonable suspicion arises that the implementation of the return decision of a participating state would violate the prohibition of *refoulement*, the host state incurs responsibility alongside the participating state if it carries out the return nonetheless.

In practice, this means that in both Examples 2 and 4, where the participating states are responsible for the primary infringement, the host state will additionally incur responsibility for conduct associated with those breaches. In Example 2, the human rights violations committed during the operation originate in the conduct of personnel on a vessel contributed by participating State C. State A, the host state, is responsible under the doctrine of positive obligations because leading the operation means that it has (or ought to have) knowledge of risks of human rights violations that may be committed, but also that it is actually capable of preventing them. In Example 4, the prohibition of *refoulement* requires it to verify, if a reasonable suspicion arises, whether an individual that received a return order from a participating state faces a real risk of torture if returned, and refrain from carrying out the return if that is the case.

The second situation analysed concerns the associated responsibility of contributing states. The question is whether contributing states are responsible *in addition to the primarily responsible actor* for breaches attributable to the host or another contributing state.

In this context, it is crucial to note that human rights violations during Frontex operations occur extraterritorially from the viewpoint of participating states. The analysis revealed that only states contributing large assets exercise public powers that may bring the affected individuals within their jurisdiction according to Article 1 ECHR. They can also commonly be assumed to have knowledge of imminent risks to human rights during operations. This is specifically due to the presence of a state representative as a National Official on the Joint Coordination Board. As a consequence, they incur positive obligations under the ECHR to use any reasonable possibility, in particular within the Joint Coordination Board, to prevent human rights breaches

committed by others. Thus, if breaches are committed that are attributable to others, e.g. breaches by team members or large assets of another state, or breaches by local staff, states contributing large assets *additionally* incur responsibility under the ECHR if they fail to prevent those breaches.

With respect to the conduct of all other participating states during Frontex operations, the Convention does not apply, as a general rule, and they accordingly do not incur any positive obligations to protect. Even if they have team members on the ground, these exercise public powers exclusively in the name of the host state and thus cannot bring the affected individuals within the jurisdiction of their home state according to Article 1 ECHR.

Practically speaking, this means that when a team member, for example, uses excessive force, as in Example 1, participating State C does not incur responsibility in addition to State A, to whom the impugned conduct is attributed. Similarly, State C is also not responsible in Example 3, where individuals are transferred to a reception facility that does not meet minimum human rights standards. The reason in both cases is that the violations occur in State A and the individuals affected are not under State C's jurisdiction at the moment of the decision to participate in the operation, nor at the moment it later learns of a risk of human rights infringements. Thus, as the law currently stands, State C seems to neither incur responsibility for the decision to participate in and contribute to the operation in the first place, nor for its failure to intervene in protection of the affected individuals at a later stage.

In contrast, State B may incur responsibility for failing to prevent a human rights violation in the variation to Example 2, i.e. if a vessel of State A, the host state, hands over a migrant boat to third state authorities in violation of the prohibition of *refoulement*. As opposed to participating State C in the previous examples, State B, through the vessel it contributed, exercises public powers within State A. This brings the individuals affected by the operation within its jurisdiction. Since State B's position within the Joint Coordination Board also allows it to gain knowledge of and prevent human rights violations, it is responsible under the doctrine of positive obligations if it fails to take reasonable measures in order to protect the individuals at risk.

However, the rules on aid or assistance may complement the obligations to protect under the ECHR, since they do not require the establishment of jurisdiction within the meaning of Article 1 ECHR with respect to assisting states. Responsibility under the rules on aid or assistance arises when a state knowingly aids another in committing a breach of international law. Whilst responsibility ultimately depends on the specific possibilities available to a state, and the circumstances of the case, three general remarks can be made. First, participating states incur derivative responsibility under the rules on aid or assistance if they decide to participate in and contribute to a joint operation despite knowing that the assistance will be used in the

commission of a human rights violation. Such knowledge must be assumed to exist in particular when the human rights deficiencies in the host states are structural or when violations are inherent in the design of an operation (e.g. in the Operational Plan). Second, states that contribute team members may gain knowledge of human rights violations in the area of deployment, in particular when the team member reports back to its home state. If, in those cases, they have possibilities to alter the course of conduct in order to prevent a violation but do not make use of them, they incur responsibility under the rules on aid or assistance. Third, in contrast, states that contribute only minor equipment have, as a rule, more limited oppotunities to gain knowledge of human rights and prevent them. In this light, they will generally not incur associated responsibility.

In practice, this would mean that in Examples 1 and 3 it is irrelevant that the operation does not take place under State C's jurisdiction. The responsibility of State C in both cases then depends on the knowledge they have that their assistance to the operation is used in the context of a human rights violation. Whilst the excessive use of force in Example 1 may not be foreseeable, it is more likely that it is in Example 3. In particular, if the reception facilities in State A are known to not meet basic human rights requirements, State C may incur responsibility for nonetheless having participated in and substantially contributed to the operation.

These findings are summarised in Table 6.

Table 6: Summary of findings (2)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	No responsibility	No responsibility	*Chapter 4.3*	*Chapter 4.4*
Host state	Responsibility for breaches by local staff and standard team members	Responsibility for not preventing breaches of others, e.g. breaches by team members on large assets contributed by participating states	Responsible for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states		
Participating state (minor technical equipment)	No responsibility	No responsibility (no jurisdiction)	As a rule no responsibility (impact of assistance low, lack of knowledge and possibilities)		
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of		
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed	Responsibility for not preventing breaches by the host state or other participating states if they had the means to prevent	Responsibility for assisting in breaches of the host state or other participating states		

3.5 Conclusion

This chapter has examined the circumstances under which the actors participating in Frontex operations are responsible if breaches of the ECHR are committed in the course of the operations. It is concerned with the responsibility of host and participating states only, since neither Frontex itself nor the EU can be held responsible under the ECHR. The analysis was based on the law of international responsibility as reproduced in the ASR and the ARIO and applied by the ECtHR.

The ECtHR developed a line of case law under which states may be subject to limited scrutiny for conduct in strict implementation of their obligations under EU law. The so-called *Bosphorus* doctrine, however, does not apply to the conduct of states in the context of Frontex operations, in particular because states, as a rule, enjoy sufficient discretion to implement their obligations under EU law in conformity with the ECHR. Consequently, host and participating states are subject to full scrutiny before the ECtHR for their conduct during joint operations.

Responsibility under the ECHR arises for every violation of a Convention right that is attributable to a state party. That means, simply speaking, for a state to incur responsibility, the breach must have been committed by one of their organs. Whether or not a person may be considered an organ of a specific state or international organisation is defined by rules on attribution of conduct. In this light, if a Convention violation occurs during a Frontex operation, each state is responsible insofar as that violation can be attributed to it. Thus, the allocation of **primary responsibility** during Frontex operations depends on the attribution of the conduct that was in breach of the Convention. For the current purposes, the conduct of local staff and persons deployed by participating states or Frontex as team members is the most relevant The reason is that these persons are the most likely to be involved in human rights violations because they fulfil the core border management tasks and have executive powers.

The analysis was based on the premise that the general attribution rules are applicable to conduct during Frontex operations. The most basic of these rules is that the conduct of a person that a state or an international organisation has designated by law as their organ, is attributable to that state or international organisation (Article 4 ASR and Article 6 ARIO). In the context of Frontex operations, this means that at the outset, the conduct of personnel is generally attributable to the entity that contributed them. In particular, local staff are attributable to the host state under Article 4 ASR, and team members are attributable to a participating state (Article 4 ASR) or Frontex (Article 6 ARIO).

However, for the duration of their deployment, personnel are subject to a specific command regime during Frontex operations under which authority over them is partly exercised by the host state and Frontex. The crucial question this raises is how the transfer of authority affects attribution of their conduct.

The relevant rules are found in Articles 6 ASR and 7 ARIO. Article 6 ASR deals with the situation that an organ of one state is placed at the disposal of another and sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state. A transfer of attribution from a sending to a receiving state within the meaning of Article 6 ASR requires that an organ of another state exercises governmental functions of

the receiving state at whose disposal it is placed. 'Placed at the disposal' in this context entails that the transferred organ acts for the purposes, with the consent, and under the exclusive authority, i.e. subject to the laws and instructions, of the receiving state.

The parallel provision in the ARIO is Article 7. Article 7 ARIO deals with the situation where an organ of a state or an international organisation is placed at the disposal of another international organisation. It provides that conduct of the lent organ is attributable to the receiving organisation, if and to the extent that the latter exercises effective control. Effective control in this context is understood as *de facto* control over the specific course of conduct in question. Simply speaking, conduct is attributable to the entity that gives operational orders. In the absence of orders, the power to prevent may indicate which entity effectively controls the impugned conduct.

Thus, whilst Article 6 ASR essentially requires full and exclusive normative control for a 'transfer' of an organ from one state to another, under Article 7 ARIO factual control (that need not necessarily be exclusive) is decisive. This also makes Article 7 ARIO more susceptible to multiple attribution, i.e. attribution of one course of conduct to more than one entity at the same time. Once Article 6 ASR is applicable, this 'breaks' the attribution link between the lent organ and its original 'home' entity. In other words, the lent organ's conduct is exclusively attributable to the receiving state. In contrast, under Article 7 ARIO, there may be situations in which conduct is attributable to the sending and the receiving entity at the same time.

It is evident from the analysis of the application of these articles to Frontex operations that conduct of local staff and standard team members contributed by states or Frontex is attributable to the host state. Conversely, team members deployed on large assets (vessels, aeroplanes) remain attributable to their original home state. This conclusion was reached on the basis of a number of considerations.

First, standard team members are attributable to the host state under Article 6 ASR. They act for the purposes and with the consent of the host state, and are subject to its laws and exclusive instructions. In particular, operational decisions concerning these team members are taken under the lead of the Joint Coordination Board's chair, a host state officer, without any other entity having the authority to 'block' or 'overrule' them, and are passed on to the team members through other host state officers. Hence, in line with Article 6 ASR, standard team members are considered exclusively organs of the host state.

Second, team members on large assets are not attributable to the host state under Article 6 ASR. Whilst they are partly under the authority of the host state, it is not sufficiently exclusive. Their home states retain powers within the chain of command. In particular, decisions taken in the Joint Coordina-

tion Board concerning large assets are in practice not taken without the consent of the representative of the respective participating state within the Joint Coordination Board (the National Official). In addition, the Joint Coordination Board's instructions are passed on to the asset concerned by the National Official via the Commanding Officer, who is of the same nationality as the asset. Due to the fact that authority over them is shared by the host state and the relevant participating state, Article 6 ASR is inapplicable and their conduct remains attributable to the original home state under Article 4 ASR.

Third, their conduct is not attributable to the EU by virtue of Article 7 ARIO because the transfer of authority to Frontex is not sufficient for that rule to apply. In particular, the mere fact that an international organisation finances certain activities or renders other forms of assistance does not makes these activities attributable to it. Article 7 ARIO requires a transfer of powers that allows the organisation to more directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU.

In sum, the primary responsibility for breaches of the ECHR committed during Frontex operations lies with the host state if they result from conduct of local staff or standard team members. It lies with the respective contributing state if they result from conduct of team members deployed on large assets. Breaches resulting from the joint conduct of two or more persons attributable to different entities engage the responsibility of both or all of them.

These findings raise the question of whether states that are not directly responsible for a specific breach may still be responsible for contributing to, or not preventing it. More specifically, is the host state responsible, for instance, *in addition to the contributing state* for breaches committed by large assets? Similarly, are contributing states responsible *in addition to the primarily responsible state* for breaches attributable to the host or another contributing state?

These questions of **associated responsibility** were analysed, first, in light of the obligations to protect as developed by the ECtHR. In particular, under the doctrine of positive obligations, state parties incur a broad range of duties. The most important for the current purposes is the obligation to intervene preventatively in order to protect individuals from interference with their Convention rights by others, including other states or international organisations. In essence, where authorities know or ought to know of a risk of ill-treatment, they have to take reasonable steps to prevent it, i.e. they have to take all measures available to them that have a real prospect of altering the outcome or mitigating the harm. Hence, states involved in Frontex operations may incur responsibility if they fail to prevent each other's human rights violations. Importantly, the principle of mutual trust does not release them from their positive obligations.

The analysis showed that with due regard to the host state's dominant position in leading joint operations, it can be expected that the host state knows or ought to know of any immediate and real risks to individuals' Convention rights during operations. In this vein, the host state has to take all reasonable steps to prevent breaches that may be committed by large assets of contributing states, e.g. by blocking decisions of the Joint Coordination Board that would lead to a breach of human rights or instructing its own local personnel to take suitable measures. If it fails to do so, it incurs responsibility under the ECHR in addition to the respective contributing state. Further, if a reasonable suspicion arises during a return operation that the implementation of a return decision of a participating state would violate the prohibition of *refoulement*, the host state incurs responsibility (probably alongside the participating state) if it nonetheless executes the decision.

The situation is more complex with respect to participating states. States that contribute large assets can commonly be assumed to have knowledge of imminent risks to human rights during operations, in particular due to their presence on the Joint Coordination Board. Even though human rights violations during Frontex operations occur extraterritorially from their viewpoint, the Convention is applicable to them because through their large assets they exercise public powers, thereby bringing the affected individuals within their jurisdiction according to Article 1 ECHR. As a consequence, they incur positive obligations under the ECHR and are responsible if they do not use all possible means, in particular within the Joint Coordination Board, to prevent human rights violations. Hence, if breaches are committed that are attributable to others, e.g. breaches by team members or large assets of another state, or breaches by local staff, they incur responsibility as well under the ECHR if they fail to take reasonable measures to prevent them.

In contrast, all other contributing states are unlikely to incur responsibility under the doctrine of positive obligations. Even if they are in a position to gain knowledge of and react to Convention violations by others, they do not incur positive obligations because the affected individuals are not within their jurisdiction, making the Convention inapplicable to them.

In this light, this chapter also analysed a second basis for associated responsibility, namely the rules on aid or assistance under public international law. The relevant rule, as reproduced in Article 16 ASR, provides that responsibility for 'complicity' arises whenever a state renders aid or assistance that makes it materially easier for the receiving state to commit an internationally wrongful act, provided the assisting state does so with knowledge of the internationally wrongful act and is itself bound by the primary obligation breached by the receiving state.

Importantly, this responsibility is 'derivative' and arises regardless of whether the assisting state is under a primary obligation that prohibits it from rendering assistance. Thus, the applicability of the Convention does not have to be

ascertained with respect to the assisting state. As a result, as opposed to obligations to protect under the ECHR, a state may incur responsibility for being complicit in a human rights violation of another state, regardless of whether the affected individual is within its jurisdiction according to Article 1 ECHR.

This means in particular that beyond the host state and states contributing large assets, other participating states may also incur responsibility for being complicit in a breach, provided all the conditions are met. For the current purposes, participating states incur responsibility for aiding or assisting in a breach under conditions that are similar to those that trigger responsibility for breaches of positive obligations under the ECHR. Thus, in particular, states that contribute team members may be responsible in addition to another state for having assisted in a human rights violation. In contrast, it is unlikely that states who have only contributed minor technical equipment incur responsibility.

In sum, the host state and states contributing large assets are responsible in addition to the primarily responsible state, if they know or ought to know of an imminent violation but do nothing to prevent it. If the ECtHR was to apply the rules on aid or assistance as provided under general international law, states contributing team members may be responsible under similar circumstances.

In conclusion, responsibility for breaches of the ECHR during Frontex operations is allocated among the states involved as follows:

- Host states
  - incur primary responsibility for breaches committed by local staff, and by persons deployed as standard team members by participating states or Frontex,
  - incur associated responsibility if they fail to protect individuals from breaches attributable to others, e.g. breaches involving large assets of participating states.
- Participating states that contribute large assets
  - incur primary responsibility for breaches committed by team members on large assets they contributed,
  - incur associated responsibility if they fail to protect individuals from breaches attributable to the host state or other contributing states, e.g. breaches by local staff, by team members, or by large assets of another state.
- Participating states that contribute standard team members
  - incur no primary responsibility,
  - incur no associated responsibility under the ECHR,
  - may incur associated responsibility under the rules on aid or assistance for breaches committed by the host state or other contributing states, provided they know about them and have means to react.

- Participating states that contribute minor technical equipment
  - incur no primary responsibility,
  - incur no associated responsibility under the ECHR,
  - incur no associated responsibility under the rules on aid or assistance.

The **practical implications** of these findings are illustrated in the following.

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).

The human rights infringements committed by State C's officer are exclusively attributable to State A because C's officer exercises governmental authority for the purposes and under the exclusive authority of A. Hence, State A is responsible under the ECHR for the violation of Article 3 ECHR committed by C's officer, whereas State C is not.

State C is also not responsible for failing to prevent the human rights breaches in question. The reason is that the conduct occurs extraterritorially from State C's perspective and C does not exercise sufficient authority over the victim to bring it within its 'jurisdiction' for the purposes of Article 1 ECHR. Essentially, even though its officer may exercise 'public powers', thereby exercising authority over the affected individuals, the officer does so in the name of State A. Hence, State C incurs no obligations to protect under the ECHR in relation to human rights interference that occurs during joint operations.

Hence, as the law currently stands, only State A is responsible in Example 1. If the ECtHR were to hold contracting states responsible under the rules on aid or assistance as provided for under general international law ('complicity'), it is irrelevant that the operation does not take place under State C's jurisdiction. The responsibility of State C then depends on the knowledge it has about the fact that its assistance to the operation is used in the context of a human rights violation. Under the specific circumstances of the example scenario, however, the excessive use of force may not be sufficiently foreseeable so as to engage State C's responsibility under the rules on complicity.

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).

The conduct of the personnel on State B's vessel is attributable to State B for the simple reason that they are State B's organs. Hence, State B is responsible for the infringement of the ECHR. Notably, the relevant conduct is not attributable to State A. State A exercises some degree of authority over the course of conduct of State B's vessel. In particular, it has a central position within the Joint Coordination Board, the body running the operation. However, it shares the authority over State B's vessel with B. B has a national representative on the Joint Coordination Board who has to be consulted whenever decisions affect B's vessel. In addition, the vessel's Commanding Officer only receives the instructions that result from the Joint Coordination Board's decisions from the national representative. The crucial point is that under Article 6 ASR, the conduct of B's vessel is attributable to State A instead of State B only if A exercises exclusive authority over their conduct. Consequently, State A's partial authority over B's vessel is insufficient and A is not responsible for B's vessel's activities.

However, State A is responsible for its own failure to prevent the breach committed by B's vessel. As a host state, it could have easily prevented the infringement, simply by not agreeing to the course of conduct that led to the violation. By not doing so, State A is responsible for a breach of its positive obligations to protect under the ECHR. Hence, both State A and State B are responsible in Example 2.

If the same infringement occurs but is committed by State A's vessel, this has a number of implications for the responsibility of both States A and B. Quite obviously, State A is responsible for the conduct of its vessel in breach of the Convention. More interesting, however, is the question whether in those circumstances State B additionally incurs responsibility for failing to prevent the infringement by State A's vessel during the operation hosted by State A. It indeed may. The activities during joint operations are extraterritorial from B's viewpoint. Simply speaking, this means that State B only incurs obligations under the ECHR if the individuals affected are under B's authority and control. In this context, it is crucial that State B's vessel exercises border

management tasks with the consent of State A. These are 'public powers' that are normally exercised by A. In light of the case law of the ECtHR, this may suffice to bring the individuals affected by the tasks under B's authority for the purpose of the ECHR. If that is the case, State B is obliged to use all reasonable measures to prevent A's foreseeable breaches.

In this context, it is important to remember that State B is represented on the Joint Coordination Board at all times and is therefore likely to gain knowledge of any circumstances or decisions that may lead to a human rights violation. B can use its position to attempt to change the course of conduct to prevent or mitigate A's human rights violation. Failing to use all reasonable means to do so renders State B responsible in addition to State A.

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 be responsible for having brought a migrant to a reception facility where the conditions do not live up to minimum human rights standards.

The question Example 3 poses is whether State C is responsible for having failed to prevent the human rights infringements suffered by the migrants that were brought to State A's reception facilities after having been picked up in the context of a Frontex operation. State C's officer has indeed helped realise the human rights violation, by handing over apprehended migrants to the facility in question. The officer thus clearly failed to protect the victim from a human rights violation (that may have been foreseeable), which normally engages a state's responsibility under the ECHR.

However, a combination of factors prevents State C from being responsible, or indeed from incurring an obligation to protect the individual migrants in the first place. As pointed out already in relation to Example 1, the conduct occurs extraterritorially from State C's perspective and the persons in the reception facility are not within C's jurisdiction. For that reason, State C is not obliged under the ECHR to protect the individuals there from human rights violations they may suffer. Therefore, as the law currently stands, State C is not responsible under the ECHR.

However, as discussed in the context of Example 1, if the ECtHR were to hold contracting parties responsible under the rules on aid or assistance ('complicity'), it is irrelevant that the operation does not take place under State C's jurisdiction. Like in Example 1, the responsibility of State C then depends on the knowledge it has that its assistance to the operation is used in the context of a human rights violation. Hence, in particular if the reception facilities in State A are known to not meet basic human rights requirements, State C may incur responsibility for nonetheless having participated in and substantially contributed to the operation. In this vein, Example 3 illustrates particularly well the difference between obligations to protect under the ECHR and the rules on aid or assistance, and the potential of the latter to complement the former.

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.

Once brought to State A, the returnees are clearly under State A's jurisdiction. The prohibition of *refoulement* requires the host state to verify whether an individual that has received a return order from a participating state faces a real risk of torture if returned, provided that a reasonable suspicion arises in the context of the implementation of a return operation. If State A carries out the return despite such a risk, it is responsible under the ECHR for doing so.