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

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Citation

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

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

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Date: 2017-12-13

This study examined the legal responsibility for human rights violations that may occur in the context of operations coordinated by Frontex. Frontex is an EU agency that supports Schengen states in the management of their external border *inter alia* by organising joint operations. In the framework of a joint operation, a state (referred to as a 'host state') receives assistance in order to carry out border control activities at its external borders or to return third country nationals that have no right to stay. This assistance mainly consists of additional human and technical resources made available by other Schengen states (referred to as 'participating states') or Frontex. In addition, Frontex finances the operations and coordinates the activities of the various actors involved.

Practically speaking, this means that a migrant intending to cross the EU external border in State A may encounter a border guard of State B using equipment provided by State C in an operation funded by Frontex. This poses the fundamental question of how responsibility is distributed among the parties involved, where unlawful activities are performed during a joint operation. It is particularly important to clarify the allocation of responsibility among the actors involved in joint operations because border control and return operations inherently touch upon a broad range of human rights. In this light, this study centred on the distribution of responsibility among the actors involved in Frontex operations, determining to what extent each of their contributions may trigger responsibility.

Two regimes of legal responsibility were chosen as frameworks for the analysis: responsibility for breaches of the ECHR on the one hand, and liability under EU law for breaches of the CFR on the other. 'Liability' refers to the non-contractual liability of Frontex under Article 60(3) EBCG Regulation (which in turn is based on the non-contractual liability of the Union under Article 340 TFEU), and state liability as developed by the CJEU. The approach adopted within both legal frameworks was to first determine the general rules applicable to multi-actor situations more generally and then apply them to Frontex operations.

The following summarises the findings and practical implications of this study. It then sets out the main obstacles to determining, incurring, and implementing responsibility identified throughout this study and puts forward recommendations on how to address them.

5.1 JOINT OPERATIONS AND LEGAL RESPONSIBILITY UNDER THE ECHR AND EU PUBLIC LIABILITY LAW

5.1.1 Joint operations, deployed resources, and transfer of authority

Joint operations coordinated by Frontex may either be border control or return operations. During border control operations, the host state receives assistance in controlling its external air, land, or sea borders, that is, in detecting, preventing, and responding to irregular migration flows. In this vein, the additional human and technical resources made available by participating states and Frontex are typically deployed in order to verify whether a person fulfils the conditions governing entry, to conduct screening and debriefing interviews, and to surveil the border with a view to preventing unauthorised border crossings. In the context of return operations, member states, under the lead of a host state, together carry out the return of persons that have no right to stay. Whilst not all return operations include the deployment of additional human resources, when they do, this may include return monitors, forced-return escorts, or other specialists. Hence, the most characteristic element of joint operations, when compared to unilateral operations, is that foreign personnel, such as border guards, return specialists, or other relevant staff, using foreign equipment, carry out law enforcement activities in the host state.

A large majority of personnel, and definitely all law enforcement personnel, are deployed from 'pools' set up by Frontex in order to plan activities more efficiently and make swift reaction possible. These pools consist of officers contributed by Schengen states, and officers seconded to Frontex and then contributed to the pool by the agency. Personnel deployed from a pool have the status of 'team members' (formerly 'guest officers'). This is crucial because that status brings with it a range of executive powers conferred by virtue of EU law. In particular, they have the capacity to perform all tasks and exercise all powers in relation to border control and return, can carry service weapons, and under certain circumstances may resort to the use of force. Together with the local staff, team members therefore form the central corps of personnel relied on to carry out joint operations. In addition to personnel from a human resources pool, Frontex can also deploy its own staff to joint operations. However, these can only fulfil coordinating and similar tasks, and may in particular not exercise law enforcement activities and are not conferred executive powers. There seems to be a misconception that participating as a foreign officer in a Frontex operation makes a person a 'Frontex officer'. That is, however, not true. In fact, persons deployed to a host state in the framework of a Frontex operation may be 'Frontex officers', but most of them are not. In the narrowest sense, only Frontex staff deployed with coordinating tasks are 'Frontex officers'. Beyond this, personnel seconded to the agency and then contributed to an operation are also considered contributions by Frontex. Whilst these may be called 'Frontex

officers' in a broader sense, they are not, as revealed in this study, for the purposes of responsibility.

All joint operations are based on an Operational Plan that is drawn up specifically for each operation and sets out *inter alia* the aims of the operation, area and period of implementation, tasks of each participant, and command and control arrangements. The Operational Plan is central to determining the allocation of responsibility among the actors involved, particularly because it regulates the relationship between them and the authority they exercise over the deployed resources.

In terms of responsibility, the most important aspect of the implementation of joint operations is the transfer of authority over deployed resources that takes place. Whilst the EBCG Regulation clearly and unequivocally envisages an exclusive authority of the host state to issue instructions to team members, command and control arrangements are more complex in practice. In accordance with the Operational Plan, an International Coordination Centre is set up for each operation. It is located in the host state and serves as the focal point for leading and coordinating the implementation of all operational activities. Within the International Coordination Centre, a Joint Coordination Board is established to run the operation. It is led by a host state officer. Importantly, those participating states that contribute large (often military) assets, such as vessels or aeroplanes, send a so-called National Official, who represents them in the Joint Coordination Board throughout the whole operation. The Joint Coordination Board holds daily meetings where the past 24 hours are discussed and the course of action for the ensuing 24 hours is decided. The Joint Coordination Board's 'decision-making' is informal and largely relies on consensus among all participants. However, even though as a rule they are informed and consulted, the National Officials have no general *right* to be consulted, even less to take or block decisions. Yet, there is an important exception. Decisions that affect the course of conduct to be adopted by large assets *require* the National Official of the state who contributed the assets to be consulted. Whilst there is no formal right to block a decision, in practice any course of conduct involving a participating state's large asset is only implemented with the consent of the respective National Official. The decisions reached by the Joint Coordination Board are communicated by a host state official to the team leaders on the ground, who are also host state officers and in turn instruct the members of their teams accordingly. Only instructions to large assets are communicated directly by the National Official of the state who contributed it to the Commanding Officer of the assets, an officer of the same state, who in turn instructs the asset's crew accordingly. It is noteworthy that the representation on the Joint Coordination Board and resultant privileges of states contributing large assets have, as this study showed, far-reaching implications for the human rights responsibility of these states.

Joint operations may touch upon a number of human rights of affected migrants. Most frequently, this concerns the protection from *refoulement*, i.e. the prohibition against sending individuals back to a place where they would face especially serious maltreatment, and the prohibition of collective expulsion. However, as a law enforcement activity, border management may also include coercion or the use of physical force and is thus particularly sensitive to a person's human dignity and physical integrity. Importantly, if human rights violations occur in the context of a joint operation, or are suspected to have occurred, these must be immediately reported to Frontex and the host state in the framework of a strict incident reporting system. Under certain circumstances, this triggers an obligation for Frontex to suspend or terminate an operation, or withdraw its financial support.

5.1.2 Preconditions for legal responsibility under ECHR and EU law

States are responsible under the ECHR when conduct that is attributable to them is in breach of the Convention. These two preconditions, attribution and breach, are sufficient for responsibility to arise. This is fundamentally different under EU law, where liability only arises for breaches of individual rights that qualify as sufficiently serious and have a causal link to damage that the victim suffers. Since there is no fundamental rights-specific liability regime, these conditions apply to fundamental rights just as to any other breach of Union law. In the fundamental rights context, neither the individual rights requirement, nor damage and causal link generally pose significant obstacles to liability. The sufficiently serious breach requirement, however, may.

A breach only qualifies as sufficiently serious, and consequently triggers liability, when the authority in question manifestly and gravely disregarded the limits on its discretion. The key rule in determining the seriousness of a breach was found to be that breaches based on a *reasonable* unlawful interpretation of the provision in question are not sufficiently serious, whereas those based on an *unreasonable* unlawful interpretation are. Essentially, the clearer an obligation and its application to a specific situation, the more 'unreasonable' it is to disobey it. In this vein, where the content of an obligation has been clarified, for example by the Court, or is otherwise evident either more generally or in a specific situation, a breach thereof is sufficiently serious to trigger liability. Similarly, the narrower the extent of discretion that an authority enjoys, the more 'unreasonable' it is to overstep the limits of discretion in a specific case.

What exactly this means for breaches of fundamental rights obligations is unclear. A fundamental rights analysis already involves a balancing exercise in order to distinguish (lawful) interference from (unlawful) breaches. Moreover, fundamental rights form particularly important guarantees in democratic societies. With this in mind, there is an argument to be made that

all fundamental rights breaches are 'unreasonable', and consequently sufficiently serious for the purposes of public liability law. The CJEU, however, has so far failed to develop a consistent line of case law in this respect. This renders it highly unpredictable whether, and under what circumstances, fundamental rights violations give rise to public liability. One may speculate that much depends on the type of right involved. In the context of Frontex operations, where infringements typically concern rights such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of *refoulement*, this means that breaches may automatically be considered as sufficiently serious, simply because of the nature of the rights involved. This is even more so when considering that many of the obligations at stake have already been clarified, for example by the ECtHR.

Based on the higher threshold for responsibility under EU law than under ECHR law, it may be expected that actors involved in Frontex operations are less likely to incur liability under EU law than they are to incur responsibility under the ECHR. However, the analysis revealed that this is not the case. In essence, ECHR law imposes other obstacles on responsibility in cases of cross-border multi-actor situations, such that the final result differs less from EU law than might have been expected.

5.2 ALLOCATION OF RESPONSIBILITY IN MULTI-ACTOR SITUATIONS: THE GENERAL RULES

Under both ECHR and EU law, responsibility was analysed in the framework of two different conceptual bases. The first is the responsibility that arises *directly* from a human rights violation committed during an operation, referred to here as primary or direct responsibility. For example, if a person is expelled in violation of the prohibition of *refoulement*, primary responsibility is the responsibility that directly results from that breach.

The second is the responsibility that arises for *conduct associated with the primary violation*, referred to here as associated or indirect responsibility. Associated responsibility arises for assistance in, or failure to protect an individual from, breaches of human rights for which another actor is primarily responsible. For example, if a person is expelled in violation of the prohibition of *refoulement* and the host state is directly responsible for it, Frontex or participating states may incur responsibility for failing to prevent that infringement.

This section summarises the general rules identified under both ECHR and EU law in relation to primary and associated responsibility.

5.2.1 Allocation of primary responsibility under ECHR and EU law

A state is directly responsible for a breach of the ECHR only insofar as it can be considered the 'author' of the breach, in other words, if the course of conduct at the origin of the breach is *attributable* to it. 'Attributable' means that the conduct of a physical person is characterised, from the point of view of the Convention, as an act of a specific state. In this vein, where several actors were involved in a breach, the distribution of responsibility directly resulting from it depends on whether the impugned conduct is attributable to one, some, or all of them.

International law provides for a set of rules on attribution of conduct, represented by the Articles on State Responsibility (ASR) and the Articles on Responsibility of International Organizations (ARIO), that are applicable in the context of the ECHR. These envisage, generally speaking, that conduct of persons in a public function qualifies as state conduct. In most cases, this means that the conduct of a state's organs is attributable to its 'home state'. That basic rule is stipulated in Article 4 ASR. The same applies *mutatis mutandis* to international organisations, as set out in Article 6 ARIO.

However, the ASR provide a specific rule for cases where one state lends its organs to another. This is indeed what happens in the context of Frontex operations. Participating states and Frontex lend personnel to the host state so they can support it in carrying out border management activities. The relevant attribution rule is Article 6 ASR. It sets out that the conduct of a lent organ may be attributable to the receiving state, but only under very strict circumstances. This study found that, most importantly, the lent organ needs to exercise governmental authority for the purposes and under the law and exclusive instructions of the receiving state, not under the instructions of the sending state. In other words, Article 6 ASR requires that the lent organ is under the genuine and exclusive legal authority of the receiving state. Practically speaking, this means that the host state is directly responsible for human rights infringements during joint operations, provided the participating actors transfer sufficient authority to it, so that their personnel can be considered 'lent' to the host state within the meaning of Article 6 ASR.

Notably, the application of Article 6 ASR 'breaks' the original link between the lent organ and its home entity. In other words, if the authority of the receiving state over the lent organ is sufficiently exclusive to trigger the application of Article 6 ASR, so is attribution. This means that lent organs are considered organs *only* of the receiving state under whose exclusive legal authority they operate, not joint organs of the sending and the receiving state. Consequently, if the conduct of personnel deployed during Frontex operations is attributable to the host state, they do not engage the responsibility of their home states.

In the same vein, Article 7 ARIO sets out the circumstances under which the conduct of organs lent by states to an international organisation is attributable to the latter. Because during Frontex operations not only the host state, but also Frontex exercises a certain degree of authority over personnel involved, this raises the question of whether Article 7 ARIO renders their conduct attributable to the EU whilst they exercise their tasks and powers during joint operations. Even though neither the EU nor Frontex itself can be held directly responsible under the ECHR, Article 7 ARIO is relevant to this study because if the conduct of personnel deployed to joint operations is indeed attributable to the EU, it does not necessarily trigger the (primary) responsibility of the states involved under the ECHR.

Article 7 ARIO provides that conduct of organs lent to an international organisation is attributable to it if the international organisation exercises 'effective control'. This has been defined as factual control that is exercised over the specific impugned conduct. What is remarkable is that, on this issue, Article 7 ARIO sets out a different threshold from its twin provision Article 6 ASR. In particular, it requires a *de facto* relationship to the international organisation, instead of a *de jure* relationship. It is also noteworthy that, as opposed to Article 6 ASR, the application of Article 7 ARIO does not necessarily 'break' the link of the organ in question with its home entity because it only requires the control of the international organisation to be 'effective', but not 'exclusive'.

The allocation of direct responsibility under EU law is even more complex than under the ECHR. In essence, the reason is that there is simply neither a conceptual framework to address questions of allocation of liability, nor explicit substantive rules that govern such situations. It is unclear whether liability is distributed on the basis of rules on attribution of conduct, rules on attribution of damage, rules on causation, or any other concept. The conceptual foundation on the basis of which liability is allocated, however, matters. Most importantly, this is because different substantive rules may apply. Further adding to the lack of clarity, the CJEU is also not explicit about the substantive rules on the basis of which it distributes liability among several potential wrongdoers and has failed to develop a coherent line of case law in this area. The Court's *ad hoc* approach makes it difficult to deduce any general rules that would govern multi-actor situations.

This study sought to address primarily the question of what substantive rules apply to multi-actor situations, rather than their theoretical foundation. For this purpose, it identified and categorised multi-actor situations that are likely to arise under EU law and examined the results the Court reached regarding the liability of the actors involved. On that basis, this study defined a tentative set of key rules that seemed to inform the allocation of liability to one or another actor. The overarching principle that emerged is that liability follows legal decision-making power. Importantly,

this threshold was developed exclusively from the CJEU's case law concerning the distribution of liability between the Union and its member states, as it has yet to clarify how liability would be allocated among several member states whose conduct may be at the origin of an unlawful outcome.

How do the rules on allocation of primary responsibility under ECHR and EU law compare? First, among states, both legal frameworks set out the threshold of normative control as decisive. Of course, this is assuming that the CJEU would not apply different thresholds governing the distribution of liability between Union bodies and member states on the one hand, and between member states on the other. There is, however, one noteworthy difference in this respect. Whereas ECHR law requires normative control to be exclusive if it is to trigger the responsibility of a state for the conduct of a 'foreign' organ, this does not seem to be necessary under EU law.

Second, the decisive threshold governing the distribution of responsibility between the EU and its member states differs under ECHR and EU law respectively. Whereas under ECHR law *factual* control is decisive, it is *normative* control under EU law. The analysis in this study, as described below, showed that in the specific case of Frontex, this difference does not affect the final result reached, because neither of the two thresholds that would trigger the EU's/Frontex' responsibility is met. However, if Frontex' powers further expand, it will make a crucial difference for the distribution of responsibility for unlawful conduct during joint operations, whether these powers equip it with factual or legal control, or both.

5.2.2 Allocation of associated responsibility under ECHR and EU law

When a state cooperates in the unlawful activity of another, or watches it happen without using its powers to prevent it, this inevitably raises the question whether that state should share some of the responsibility for the undesired outcome. Exploring this question, this study found that this may be, but is not always, the case. The mere fact of having helped another authority to act unlawfully is not, in itself, sufficient to engage the facilitating actor's responsibility. Generally speaking, associated responsibility only arises when the supporting action or omission is prohibited by an 'associated obligation' and the facilitating actor did not live up to that obligation in the specific case.

This study overall identified three different types of associated obligation. Obligations to protect, obligations to supervise, and obligations to abstain from rendering aid or assistance. The first type arises under both ECHR law and EU fundamental rights law. The second type, in the present context, arises only under EU law. The third type, for the purposes discussed in this study, is specific to international law. It is, strictly speaking, not concerned with 'obligations', but rather with responsibility arising for a contribution to a wrong regardless of whether the facilitating actor has engaged in conduct

prohibited by a primary obligation under international law. These rules are relevant to the ECHR because they may, as this study revealed, offer protection where obligations to protect do not.

All of these are in essence due diligence obligations. On the one hand, typically there needs to be a trigger for these obligations to arise in a specific case. The trigger is commonly related to the knowledge a facilitating actor has, or should have, about the risk of unlawful activities or their continuation. On the other hand, associated obligations tend to be obligations of means, not of result, in that they require authorities to make the effort that they can reasonably be expected to make in the circumstances of the case. If the authority does so, it is typically not considered to have infringed its associated obligations, regardless of whether the unlawful outcome occurs anyway.

Despite these similarities, there are also important differences between these types of associated obligation.

Obligations to protect individuals from interference by others may be negative, where the protection requires an authority to abstain from a certain course of conduct, such as in the context of the prohibition of *refoulement*. However, in most situations, that will not be sufficient and the effective protection of an individual requires an authority to actively interfere with the course of conduct of the direct perpetrator. So, obligations to protect are often positive obligations. These in turn are heavily dependent on the actual options an authority has in a specific situation. As a rule, they arise only when the authority knew or should have known that an individual's rights were at risk of being interfered with, and only to the extent the authority has means available to protect the individual. Obligations to protect, positive or negative, in principle exist under both ECHR and EU law. However, positive obligations are considerably less developed under EU fundamental rights law and, most importantly for the present purposes, do not seem to have given rise to actions for damages. In addition, they may conflict with the principle of mutual trust, a challenge that has not yet been addressed by the CJEU in the context of Frontex' activities.

Like obligations to protect, obligations to supervise also require authorities to take positive action. As noted already, in the present context, these only arise under EU law in the sense that Frontex is required to ensure all actors during joint operations comply with fundamental rights, at least to some extent. However, as opposed to obligations to protect, the general orientation of obligations to supervise is towards ensuring compliance with the law more generally, rather than specifically protecting individuals. They may thus not always confer rights on individuals that can be invoked in the context of an action for damages. This study found that very general supervisory obligations alone do not confer rights on individuals, but more specific supervisory obligations may. In this vein, it may be assumed that Frontex'

supervisory obligations do confer rights on individuals. The Court more recently suggested that it may be sufficient that the provision with which an authority is required to ensure compliance (the 'primary obligation') confers rights on individuals. Thus, simply speaking, if Frontex is required to ensure that host and participating states comply with fundamental rights, then individuals can invoke breaches of Frontex' supervisory obligations in the context of the action for damages because fundamental rights confer rights on individuals. It is, if this argument is accepted, irrelevant whether Frontex' supervisory obligations themselves confer rights on individuals. However, for the time being, the Court has not yet fully clarified the precise circumstances under which obligations to supervise confer rights on individuals and to what extent that is always necessary.

Finally, there are the rules on aid or assistance, specific to international law. These rules provide that states who knowingly aid or assist another state in the commission of an internationally wrongful act are responsible, as long as they are themselves bound by the obligation which is breached by the state receiving the support. As opposed to obligations to protect and obligations to supervise, responsibility under the rules on aid or assistance generally only arises for active conduct in support of another authority, but not for omissions. However, this study found that where a state is already generally involved in a situation, a failure to intervene, once it becomes clear that unlawful conduct occurs or is about to occur, also triggers the facilitating actor's responsibility. In this vein, in the context of Frontex operations, states that learn of a breach may be responsible if they do not react to it. However, the most important aspect in relation to the rules on aid or assistance in the present context is the following: Whilst it is required that the breach by the state receiving the support would 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 not to assist in that violation. This study showed that for this reason, the rules on aid or assistance may prove a useful tool for the protection of individuals to fill the 'gap' left by obligations to protect discussed in the following paragraphs. However, associated responsibility under the ECHR currently only arises if and to the extent a state infringes its obligations to protect.

Both ECHR and EU law each pose significant obstacles to associated responsibility. In ECHR law, these arise when the facilitating acts or omissions happen across state borders. The ECHR, according to its Article 1, requires all contracting parties to secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention. Whilst an individual that is within a state's territory is also within that state's jurisdiction it is more complex when the individual is not. In essence, individuals that are outside a state's

own territory or a territory that the state controls, are only considered to be within that state's jurisdiction, if they are otherwise under the authority and control of that state's organs. Authority and control over an individual may consist of physical power, e.g. detention, or the (legal) exercise of public powers that are normally exercised by the government of the territory in question. This is important because from the perspective of participating states, individuals whose rights may be infringed during a joint operation are outside their territory. In this vein, a participating state may be held responsible under the ECHR for having failed to protect an individual from human rights interference by the host state within its own jurisdiction only if and to the extent that it exercises authority and control over the individual in question. This study revealed, as will be recalled in the following section, that this threshold is indeed not met with respect to most participating states.

EU fundamental rights law does not have a limitation similar to Article 1 ECHR. However, there is a different obstacle to associated liability. It should be noted at the outset that the CJEU has hardly ever, and indeed never in much detail, dealt with the question of associated liability. Whilst much is therefore left open for speculation, it appears that the generally high threshold for liability may pose a significant obstacle to associated liability. On the one hand, liability only arises if a facilitating actor's failure to protect or supervise qualifies as 'sufficiently serious'. In that context, the extent of the obligations to protect or supervise, the required standard of diligence, the extent of involvement of the facilitating actor, and the seriousness of the primary breach may play a role. A further challenge seems to be that for a causal link to be established between the breach of the associated obligation and the damage, it is necessary that the lawful execution of the associated obligation would have changed the course of the events with some certainty. These high thresholds for liability, as the study showed, will not regularly be met with respect to most participating states.

5.3 ALLOCATION OF RESPONSIBILITY IN MULTI-ACTOR SITUATIONS: THE CASE OF FRONTEX

At the outset, it is important to recall that public actors generally incur direct responsibility when they exercise control over the course of conduct that was at the origin of an infringement. Indirect responsibility typically arises when a public actor is aware of a potential interference with human rights, but nonetheless assists or fails to use means available to it to protect the individual at risk. In other words, responsibility is heavily dependent on the authority exercised by each actor involved, the opportunities they have to foresee and react to violations. This means that from the point of view of distributing responsibility, it is crucial to understand the degree of authority the host and participating states, as well as Frontex, exercise over deployed personnel and the reaction capacity they have.

It is in this light that it turned out to be essential to make two important distinctions. The first is between different types of personnel, because the authority over them varies. There are, on the one hand, personnel in respect of which no substantial transfer of authority occurs. This includes in particular Frontex coordinating staff and local staff of the host state. There are, on the other hand, personnel in respect of which a substantial shift of authority occurs. These are team members. Practically speaking, participating states transfer key elements of authority over the personnel they contribute to the host state, but partly also to Frontex. Importantly, because different types of personnel are subject to the authority of different entities, where a human rights violation occurs it is essential to know what type of personnel was involved.

The second fundamental distinction is between different types of participating state. States contribute to joint operations to varying degrees. They may only be marginally involved, for example with some minor technical equipment. Typically, however, they send at least some officers to assist the host state as part of teams of border patrol, screening, or debriefing officers (these officers are referred to in this study as ‘standard team members’). Some states may even contribute large (military) assets, such as vessels, aeroplanes, or helicopters. The key point here is that depending on the extent of their involvement, participating states retain authority and gain influence to varying degrees. Most importantly, states contributing large assets retain a significant degree of authority over their assets and are represented on and consulted in the Joint Coordination Board. The analysis revealed that this, as set out in more detail below, has major implications for their responsibility.

With this in mind, the following summarises the key findings regarding the responsibility of the host state, participating states, and Frontex, first more generally and then with respect to the more specific examples set out in Chapter 1.¹⁵⁰²

5.3.1 Primary responsibility of host states, participating states, and Frontex

It should be noted that, as a general rule, local staff and team members are the most likely of the personnel deployed during joint operations to be involved in human rights violations. The simple reason is that they exercise the core border management tasks and thus engage in more human rights-sensitive activities. The focus is thus on responsibility for human rights violations that may be committed by local staff or team members.

Unsurprisingly, human rights violations that originate in the conduct of local staff engage the host state’s direct responsibility under both ECHR and EU law. The reason is simply that they are host state organs acting under the authority of the host state.

¹⁵⁰² See above 1.3.1.

More interestingly, however, this study found that the host state is also directly responsible for human rights violations that originate in the conduct of standard team members. Under both ECHR and EU law, the relevant threshold triggering direct responsibility for the unlawful conduct of a foreign organ was found to be normative control exercised over that conduct. In the context of the ECHR, the relevance of that threshold stems from the attribution rule expressed in Article 6 ASR. In the context of EU law, the rules governing allocation of primary liability are less clear. However, on the basis of the CJEU's case law in this area, this study found that the legal decision-making power of an authority is decisive.

In this vein, the reason for the host state's direct responsibility for human rights violations that originate in the conduct of standard team members is the comprehensive normative control it exercises over them during their deployment. Most importantly, this control stems from the authority of the host state to issue instructions, and thus legally determine what course of conduct these team members are to follow. Even though instructions are in practice decided in the Joint Coordination Board, rather than by the host state unilaterally, the host state's lead within that body and the lack of rights of other board members to interfere, strongly suggest that, as a rule, the host state has to be considered the 'author' of these instructions.

Due to the host state's near exclusive authority over the conduct of standard team members, the host state is exclusively responsible. This means, in particular, that states contributing these officers are not directly responsible for their unlawful conduct.

The situation is more complex in relation to human rights violations that originate in the conduct of personnel on large assets. It was found in this study that the host state's authority over large assets is not exclusive. Importantly, whilst participating states do transfer a substantial degree of authority over deployed large assets to the host state, they retain enough to effectively *share* legal authority with the host state. In essence, when the Joint Coordination Board takes decisions that affect large assets, the National Official of the state who contributed them has a *right* to be consulted. In practice, decisions are not taken without the consent of the National Official.

This shared authority over large assets has different consequences in ECHR and EU law respectively. Under the ECHR, if the conduct of a lent organ is to be attributable to the receiving state, this requires the legal authority of the receiving state to issue instructions to be *exclusive*. Sharing legal authority with the sending state is simply not sufficient. Because Article 6 ASR is not applicable, the conduct of personnel on large assets is not attributable to the host state. At the same time, this means that the default rule, i.e. the rule that the conduct of a state's organs is attributable to it (Article 4 ASR), continues to apply and the conduct of persons on large assets is attributable to the respective contributing state. Thus, under the ECHR, *only* participat-

ing states are directly responsible for human rights violations that originate in the conduct of personnel on large assets they contributed to a joint operation.

Under EU law, in contrast, the consequences of shared legal control are less clear. However, there are no indications in the Court's case law that the legal decision-making power of an authority would have to be exclusive in order to trigger liability. Hence, shared legal control may be assumed to lead to shared liability. In this vein, participating states are liable together with the host state for human rights violations of large assets they contributed.

As opposed to the host and participating states, neither the EU nor Frontex incur direct responsibility for the conduct of local staff or team members. Whilst this is obviously the case under ECHR law because the EU is not a signatory to the Convention, this finding would generally remain unchanged even in the event of accession of the EU to the ECHR. In light of the attribution rule set out in Article 7 ARIIO, the EU's international responsibility for conduct of local staff or team members would require Frontex to exercise effective control over it. This study found, however, that due to the lack of possibilities for directly issuing operational instructions to deployed personnel, Frontex cannot be considered to exercise such control. Thus, even in the event of accession, the EU does not incur primary responsibility, unless Frontex coordinating staff are involved or a breach stems directly from the Operational Plan.

Under EU law, Frontex is capable of being directly liable for human rights violations, including those that occur during joint operations. Nonetheless, the agency is liable only in rather exceptional scenarios. On the one hand, it is directly liable in the unlikely event that its coordinating staff are directly involved in a breach of fundamental rights. In contrast, breaches committed by member state officers, i.e. local staff or team members, only engage its direct liability if Frontex has the power to legally determine their conduct during joint operations. The simplest way to do so would be by issuing instructions to them, a power that Frontex, however, does not possess. The only realistic possibility for Frontex to legally determine deployed officers' conduct appears to be the Operational Plan, which is adopted by Frontex and the host state together and is legally binding on all participating parties. In this vein, in the exceptional case that a fundamental rights violation is inherent in the Operational Plan, Frontex incurs primary liability for the ensuing breaches jointly with the host state.

In conclusion, the host state incurs direct responsibility for almost any human rights violation that may occur during joint operations. The most important exception is those committed by persons on large assets deployed by other states, which do not engage its primary responsibility under the ECHR. Participating states' direct responsibility is considerably more limited and, under both ECHR and EU law, comprises only human rights vio-

lations that originate in the conduct of persons on their own large assets. Frontex, in turn, is not typically directly responsible at all, unless a breach is committed by its own (coordinating) staff or is inherent in the Operational Plan.

5.3.2 Associated responsibility of host states, participating states, and Frontex

Associated responsibility, this study found, does not arise from the mere fact of having supported another authority in what turned out to be a human rights violation. This means, in particular, that the additional resources and other assistance that participating states and Frontex provide to the host state, do not automatically make them indirectly responsible for human rights violations occurring during operations. Generally speaking, associated responsibility only arises when the facilitating actor breached an obligation to protect, an obligation to supervise, or an obligation to abstain from rendering aid or assistance. These are typically triggered when the facilitating actor has (or should have) knowledge of an interference and has the possibility to intervene.

In light of the host state's comprehensive direct responsibility, questions of associated responsibility of the host state do not arise as frequently as with respect to the other actors involved. However, where they do, it is important to note that the dominant role of the host state in the implementation of joint operations ensures that it regularly has knowledge of as well as possibilities to prevent human rights violations that may be committed by Frontex or a participating state. Under these circumstances, the host state incurs obligations under the ECHR and EU fundamental rights law to protect the individual victim with all reasonable means available to it. Failing to do so, means that it incurs responsibility alongside the primary responsible actor. There are two situations where the host state's associated responsibility may arise in practice. The first is only relevant to ECHR law and concerns human rights violations involving large assets, for which the respective contributing state is directly responsible. The second concerns return operations where the return of an individual would violate the prohibition of *refoulement*. This study found that in both cases the host state incurs responsibility, frequently alongside another state.

Almost as far-reaching are the possibilities Frontex enjoys. Its involvement in joint operations is particularly far-reaching. It not only takes the lead in the organisation of operations, but more importantly also comprehensively supports and monitors them throughout their implementation. Under EU law, Frontex is indeed under an obligation to supervise the conduct of member state authorities during joint operations, including with respect to fundamental rights compliance. It also incurs obligations to protect under EU fundamental rights law. All of these obligations are capable of giving rise

to Frontex' liability under EU law, should it fail to meet them, provided the breach can be considered sufficiently serious. In that context, the seriousness of the infringement to be prevented, and the measures Frontex actually took, determine whether or not a specific breach can be considered sufficiently serious. Frontex may, for example, use its position within the Joint Coordination Board, communicate its views on instructions to the host state, withdraw its support from the joint operation, or terminate it altogether. As a rule, the more obvious and persistent a fundamental rights violation, the more actively Frontex has to take measures to prevent or stop it, the failure to do which may lead to its liability.

The most complex is the associated responsibility of participating states. As explained above, they incur primary responsibility under both ECHR and EU law only if a human rights violation originates in the conduct of persons on a large asset they contributed. Thus, for instance, if one of their vessels hands over a migrant boat to third state authorities in violation of the prohibition of *refoulement*. They do, however, play an important role in supporting the host state during joint operations, even when they do not contribute such large assets. In light of their contribution, the question arises whether there are circumstances in which they are indirectly responsible for human rights violations committed in particular by the host state. For instance, if the host state has a notoriously bad human rights record in its border management, can the participation in and contribution to a joint operation make a participating state responsible for having rendered support in a human rights violation? Similarly, if a participating state learns of human rights violations that are taking place in the context of a joint operation it is participating in, does it incur responsibility for failing to intervene?

Even more so than all other actors, the role and contribution of a participating state will have to be assessed in each individual situation, in order to determine its associated responsibility. The main reason is the vast diversity among participating states. On one end of the spectrum is the state that contributes some minor technical equipment, and does not care to follow-up at all. On the other end, there is the state that contributes military vessels and helicopters, and is thoroughly involved in the running of the operation. In this light, the involvement of a participating state, as well as its possibilities to gain knowledge of and prevent a human rights violation that may take place, have to be analysed in each specific case in order to determine whether an associated obligation arises, whether it is breached, and whether that breach is capable of leading to responsibility.

Having said this, it is important to note that depending how extensively participating states contribute to a joint operation, their insight into the daily occurrences and their possibilities to influence the course of conduct vary quite significantly. Thus, a specific type of contribution typically comes with a specific range of possibilities. On this basis, some general remarks can be made.

In light of this study, it is undisputable that a contribution of minor technical equipment can hardly secure a participating state the knowledge and possibilities required to engage its responsibility. In the same vein, it is relatively safe to conclude that states contributing large assets will regularly incur indirect responsibility for human rights violations that others, in particular the host state, commit during joint operations. This is predominantly due to their involvement in the Joint Coordination Board, which allows them to stay informed of all events that occur and provides them with opportunities to steer the course of action in certain directions. The extensive involvement and influence of these participating states triggers obligations under both the ECHR and EU fundamental rights law to use their position in order to protect affected individuals from human rights violations. A failure to do so may give rise to associated responsibility under both legal frameworks. It should be noted, in relation to the ECHR, that the fact that the relevant breaches occur outside the territory of participating states does not seem to be an obstacle to responsibility in the case of states contributing large assets. This is so because they may be considered to exercise public powers during joint operations capable of bringing the affected individuals within their jurisdiction for the purposes of Article 1 ECHR. In relation to EU law, it is worth pointing out that depending on the circumstances of the case, it appears that the failure of a state who contributes large assets may qualify as sufficiently serious, depending, of course, on the seriousness of the primary violation, and the measures they actually took.

The situation is most complex in relation to participating states whose contribution lies somewhere between small equipment and large (military) assets. This concerns in particular states that contribute personnel, i.e. standard team members. Their possibilities indeed go significantly beyond those of states with minor contributions. Consider, for example, the situation that a state requires the team members it contributed to report back 'home' on a regular basis. Whilst their associated responsibility seems conceivable at first, this study revealed that it is beset with a broad range of difficulties. One concerns their actual possibilities to react, even if they learn of a human rights violation. The most realistically available option appears to be a withdrawal of their assistance. Under EU law, however, it is unclear how an 'obligation to withdraw' under fundamental rights law would affect their obligation under the EBCG Regulation to make their personnel available in the first place. Another difficulty, also under EU law, is that a failure to react to a foreseeable breach would seem to qualify as sufficiently serious only under highly exceptional circumstances. This is so in particular when considering the rather limited possibilities for these states to react, and the lack of clarity as to whether, or under what circumstances, such an obligation arises in the first place. It seems that only a substantial contribution to a blatant and clearly foreseeable violation would be capable of engaging the indirect liability of a state that is involved in an operation with its human resources.

The final difficulty to be mentioned here relates to ECHR law. It is indeed equally unlikely under ECHR law as under EU law that a state contributing standard team members incurs associated responsibility. The reason is the limited applicability of the Convention extraterritorially. In particular, states contributing standard team members do not exercise the control required to bring the individuals in question within that state's jurisdiction within the meaning of Article 1 ECHR. Hence, these states' obligations to protect under the ECHR are not triggered. It should be noted that the same difficulty does not arise in relation to the rules on aid or assistance under general international law. Most importantly, there is no need for the assisting state to be under an obligation, for example under the ECHR, to abstain from rendering assistance. 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. Whilst the rules on aid or assistance could thus fill the 'gap' left where the ECHR's obligations to protect are inapplicable, the ECtHR does not generally hold states responsible on that basis. Outside the ECHR context, however, the rules on aid or assistance are largely unenforceable by individual victims.

In conclusion, both the host state and Frontex have far-reaching possibilities to influence the course of action during joint operations. A failure to do so may trigger their responsibility under ECHR (with respect to the host state) and EU law (with respect to both). Participating states' associated responsibility is highly dependent on the knowledge and possibilities of each of them. However, as a general rule, this study found that only states who contribute large assets have the involvement and influence necessary to engage their associated responsibility.

5.3.3 Summary of findings

Table 14 summarises the findings of this study in relation to primary and associated responsibility in the context of Frontex operations.

Table 14: Summary of findings (final)

	ECHR			CFR	
	Primary responsibility	Associated responsibility (obligations to protect)	Associated responsibility ('complicity')	Primary liability	Associated liability
Frontex/EU	No responsibility	No responsibility	No responsibility	Liability for breaches by Frontex staff; liability for breaches that result directly from OPlan	Liability if not performing its supervisory obligations; liability if not meeting its positive obligations under fundamental rights law
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	Responsibility for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states	Liability for breaches by local staff and team members, including those on large assets	Liability for implementing a return decision in violation of the prohibition of <i>refoulement</i>
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)	No liability	No liability
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of	No liability	As a rule no liability (not sufficiently serious)
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	Liability for breaches by team members on large assets they contributed	Liability for not preventing breaches by the host state or other participating states if they had the means to prevent

5.3.4 Responsibility in Examples 1-4

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).

Under both ECHR and EU law, State A is responsible for the human rights breaches committed by State C's officer, whereas C is not. The reason is the transfer of the authority relevant for responsibility from State C to State A. The key element is the power to issue instructions that C's officer is bound to comply with. Essentially, because that power lies with State A, responsibility does so too.

Moreover, State C is not responsible for failing to prevent the human rights violations in question under either ECHR or EU law, even though the reasons are different. Under ECHR law, it is the lack of obligations to protect that State C incurs in that context. The human rights violation occurs extra-territorially from State C's perspective. Because State C does not exercise the authority and control in State A required to bring individuals that are abroad within the 'jurisdiction' of a state, the ECHR does not require State C to intervene in protection of the individual concerned in Example 1. Under EU law, it is the lack of possibility for C to effectively learn of and prevent the excessive use of force by its officer on the one hand, but more specifically the high threshold of liability that would require its failure to prevent to be 'sufficiently serious' for liability to arise on the other.

Finally, Frontex is neither responsible for the breach committed by C's officer, nor for having failed to prevent it. Even though the EU is in principle responsible under international law for the conduct of its agency, it is not a contracting party to the ECHR and may thus not be held responsible for breaches thereof. Under EU law, Frontex is capable of incurring liability. However, it lacks the legal control over the conduct of C's officer to be directly responsible for the infringements committed by that officer. More importantly, under the circumstances described in Example 1, it is also not liable for having failed to prevent the breaches. Whilst Frontex' failure to ensure that activities during joint operations comply with fundamental rights is in principle capable of giving rise to associated liability under EU law, it is unlikely that it does in Example 1. Frontex' staff on the ground are not commonly scheduled to be on patrol with other officers, but work from

offices set up in the area. Thus, the agency will have learned of the excessive use of force too late to be able to prevent it. Since a diligent authority could therefore not have been expected to act any differently, Frontex is not liable for not having prevented the breach. Of course, if this is a recurring problem with respect to that specific officer, this may affect the analysis.

In conclusion, only State A is responsible in Example 1.

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).

Under ECHR law only State B is responsible for the breach committed by its vessel. In contrast, under EU law, both States A and B are liable. The reason for the diverging results is the different impact of the shared authority States A and B exercise over the conduct of B's vessel. The shared authority is a consequence of the specific decision-making and command regime in place with respect to large assets deployed by participating states. On the one hand, whilst State A enjoys a central position within the Joint Coordination Board, the body running the joint operation, State B always has a national representative present, who has to be consulted whenever decisions affect B's vessel. On the other hand, the vessel's Commanding Officer receives the instructions that result from the Joint Coordination Board's decisions only from the national representative.

In the context of the ECHR, the shared authority by States A and B over B's vessel prevents that vessel's conduct from being attributable to State A. The reason is that the rule governing attribution of conduct of organs lent by one state to another (Article 6 ASR) requires the receiving state's authority over the lent organ to be exclusive. If that is not the case, for example because the authority is shared between the sending and the receiving state, the conduct of the lent organ remains attributable to the sending state. Hence, the conduct of State B's vessel is exclusively attributable to State B. Therefore, only B is responsible for its vessel's conduct in violation of the ECHR. In the context of EU law, the consequences of shared authority for the purposes of liability are less clear. However, in the case law of the CJEU the exercise of legal control emerged as the determining factor for liability, with no specific

requirement of exclusive legal control. It may thus be assumed that shared legal control leads to shared liability. Therefore, both States A and B are liable for the conduct of B's vessel in violation of the CFR.

Having said this, whilst only State B is directly responsible under the ECHR for its vessel's conduct, 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. Thus, ultimately, under the ECHR, too, both States A and B are responsible.

Finally, Frontex is also responsible in Example 2, but only under EU law. Under its founding Regulation and under EU fundamental rights law, Frontex is required to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. It is crucial in this regard to emphasise that Frontex is represented on the Joint Coordination Board at all times and therefore gains knowledge of any circumstances or decisions that may lead to a human rights violation. To prevent the foreseeable breach by State B's vessel Frontex can, for example, communicate to the relevant states (in particular to State A) that the decision with respect to the course of conduct of State B's vessel is in violation of the Operational Plan and EU fundamental rights law. If that is unsuccessful, it may withdraw its financial support, or suspend or terminate the operation altogether. If it fails to take any of the measures available, Frontex is liable alongside States A and B for not preventing the breach committed by State B's vessel.

In conclusion, in Example 2, under the ECHR, State B is directly responsible for its vessel's conduct in breach of the Convention. State A is additionally responsible for not preventing it. Under EU law, both State A and State B are directly liable for the breach of the CFR committed by State B's vessel. Frontex is liable if it did not take all reasonable measures to prevent the infringement.

The question Example 3 poses is whether State C and Frontex are 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. In this example, the results under ECHR and EU law diverge the most.

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.

Under the ECHR, Frontex is evidently not responsible, but neither is State C. In essence, the reason is the same as in Example 1, namely the lack of extraterritorial applicability of the ECHR to State C. Because the individuals in question do not come within State C's jurisdiction, C incurs no positive obligations to prevent breaches from occurring during joint operations. The outcome would be different if the ECtHR were to hold contracting parties responsible under the rules on aid or assistance ('complicity'). Under that regime, 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 that its assistance to the operation is used in the context of a human rights violation. In this vein, in particular if the reception facilities in State A are known to not live up to 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 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.

Under EU law State C may be liable for having failed to protect the victim of the fundamental rights violation, but probably only under exceptional circumstances. The obligations to protect that State C incurs under EU fundamental rights law apply to all activities of C within the context of EU law. Thus, there is no necessity for the individual to be under the 'jurisdiction'

of C in order to trigger the obligation to take all reasonable measures to prevent foreseeable breaches. The infringements at stake could have been foreseeable for State C. Consider, for example, that C's officer may continue to report back to C, raising issues such as these. In any case, if State A notoriously fails to provide reception facilities that live up to minimum fundamental rights requirements, State C must be assumed to be aware. The crucial question then is, whether State C took all reasonable measures to prevent the violation. This will depend on a number of circumstances, for example whether C could have made sure other reception facilities would be used, or whether C could have been expected to refuse to participate in the first place, or withdraw its assistance later on. As noted already in relation to Example 1, the latter option may conflict with C's obligation under the EBCG Regulation to assist the host state in the context of joint operations. Depending on how clear it was that the reception facility did not live up to fundamental rights standards, how extensive State C's contribution was, and what measures State C could and actually did take, a breach by State C of its positive obligations may qualify as sufficiently serious and thus trigger its liability. Considering the strict interpretation by the CJEU of the conditions for liability, however, it seems that this would only be the case under exceptional circumstance.

Under EU law, Frontex is also liable, more likely so than State C, for not having prevented the infringement of the CFR. As noted in relation to the earlier example, Frontex is required to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. In the context of Example 3, it is clear that Frontex knew in what state the reception facility was. If the conditions did not live up to fundamental rights standards before the operation was launched, a diligent authority could have been expected, for example, to implement the operation in a different area, make sure State A improved the conditions in the reception facility before the start of the operation, or design the operation so as to avoid having to transfer migrants there. Taking into account the fundamental rights risks (including the detention conditions in a member state) before launching a joint operation is indeed envisaged as the first step according to the standard operating procedure adopted by Frontex in order to ensure respect of fundamental rights in joint operations. If the conditions only deteriorated whilst the operation was under-way, Frontex could have made the necessary changes so migrants were not transferred to that specific facility anymore. Ultimately, if that was not possible, Frontex would have had the possibility of withdrawing its support, or suspending or terminating the operation altogether. Failing to take any of these measures, Frontex is liable for not having lived up to its obligations to supervise and protect.

In conclusion, State C is not responsible under the ECHR, but may be liable under EU law. In addition, Frontex is liable under EU law.

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.

In Example 4, a reasonable suspicion arises that executing the return decision issued by State C would violate the prohibition of *refoulement*. Regardless of the legality of and liability for the return decision itself, this raises the question of whether the host state and Frontex are liable for the execution thereof.

Under both ECHR and EU law, the prohibition of *refoulement* generally requires states to verify whether an individual faces a real risk of torture if returned, provided that a reasonable suspicion arises in the context of returning that person. Whilst the principle of mutual trust under EU law does not affect this obligation under the ECHR, this is less clear under EU law. The principle of mutual trust allows, and sometimes requires, the authorities of one member state to trust in the fundamental rights compliance of decisions issued by the authorities of another. This study found, however, that the principle of mutual trust does not require State A to execute the return decision issued by State C when this would violate that prohibition of *refoulement*. Being bound to ensure the respect for the prohibition of *refoulement* during return operations it hosts, State A has to assess whether a returnee sent by another member state would face a real risk of treatment contrary to Article 4 CFR, if a reasonable suspicion arises. In Example 4, if State A carries out the return, it is responsible under both the ECHR and EU law.

Under EU law, Frontex is also required to ensure that return operations are carried out in conformity with the principle of *non-refoulement*. In Example 4, it was apparent to the Frontex officer on the ground that the implementation of the operation would be in violation thereof. A failure to halt the return of the individual at risk engages Frontex' liability under EU law.

5.4 A WAY FORWARD: OBSTACLES AND RECOMMENDATIONS

5.4.1 Determining responsibility

This study set out to clarify the allocation of responsibility in the context of Frontex operations, with the goal to thereby positively affect the performance of human rights obligations on the one hand, and strengthen the position of the individual victims of infringements on the other. Analysing the roles and powers of the actors involved, identifying general rules governing the allocation of responsibility in multi-actor situations, and discussing them in the context of Frontex operations, the study largely achieved the generation of a clearer picture with respect to the distribution of responsibility.

However, some aspects turned out to be especially difficult to determine, or remained open altogether. These are bound to continue to pose substantial obstacles to achieving clarity in the allocation of responsibility, either in relation to Frontex operations specifically, or indeed in the context of multi-actor situations more generally. The following sections set out the two most significant areas where uncertainties remain and propose solutions to address the shortcomings identified.

5.4.1.1 *The authority regime*

This study showed that the existence and extent of responsibility of all actors involved in Frontex operations heavily depends on the precise powers each of them exercises over deployed resources. It is thus essential to know, for example, whose instructions border guards, other specialists, or deployed vessels have to follow, and who decides on these instructions. For a number of reasons, these questions proved especially difficult to determine.

One reason is that essential documents are not accessible. This concerns in particular key parts of the Operational Plans that contain the most detailed description of the specific authority and decision-making powers of the actors involved. Operational Plans are not publicly available. Even upon request, they are only partially made available, only for completed operations, and only for EU citizens. It should be pointed out that persons actually affected by the operations therefore have no general right to request (even partial) access. Whilst courts may be able to grant an individual applicant access within the framework of proceedings brought against activities during a joint operation, that is insufficient. As this study showed, the authority regime under which deployed resources operate largely determines the allocation of responsibility among the actors involved. Access to the documents setting out this authority regime is therefore necessary in order to determine against whom and where to bring legal action in the first place.

A further difficulty in clarifying the authority regime is that the relevant rules are too dispersed. The applicable framework has to be deduced from

a broad range of documents—the EBCG Regulation and other relevant legislative instruments, the Handbooks to the Operation Plans, as well as the Main Parts and Annexes of the Operational Plans. On their own, none of these describe the roles and authority of the actors involved in joint operations in sufficient detail to get a complete picture of their authority over deployed resources.

Moreover, there is no uniform terminology used with respect to the authority regime as described in the EBCG Regulation on the one hand, and the Operational Plans on the other. Whereas the EBCG Regulation speaks of ‘instructions’ without further specification, the Operational Plans refer to ‘instructions’, but also to variations of operational and tactical command and control. This makes it difficult to understand how they relate to each other and what their respective meaning is. It is particularly striking that this seems to be the result of a mismatch between what the drafters of the legislative documents (in particular the EBCG Regulation and its predecessors) consider a lawful and politically feasible authority regime on the one hand, and what operational personnel find workable and effective in practice. One of the reasons for this mismatch may be the specific nature of Frontex operations. They are law enforcement, not military operations, so officials in administration and law departments appear to be keen to avoid terminology perceived as ‘military’. At the same time, however, they rely on military assets, e.g. certain vessels or aeroplanes, and thus share some of the limitations and needs that are typically found in relation to military operations, especially when it comes to command and control arrangements.

Finally, the difficulty in clarifying the authority regime is further exacerbated by the practical implementation thereof. In particular, many arrangements are made *ad hoc*, largely shaped by practical needs, and ‘decision-making’ relies heavily on consensus among all actors involved. This is *per se* neither uncommon nor problematic. However, from a legal perspective it is nonetheless significant who, if anyone, has the authority, if need be, to ‘overrule’ the opinions of other actors involved and take a binding decision. Whilst this legal authority plainly lies with the host state according to the EBCG Regulation, it is neither sufficiently clear from the Operational Plans, nor their practical implementation how this power operates within the more detailed and elaborate authority regime that applies in practice.

It is thus safe to say that the limited accessibility of Operational Plans, the fragmentation of the authority regime, the inconsistent use of terms, and the distribution of legal authority in practice make it immensely difficult to conclusively determine the specific authority regime under which all operational resources work during joint operations. Even having studied the available documents, interviewed a number of relevant actors at different levels, and examined the practical implementation, some uncertainty remains.

In light of the significance of the authority regime for the existence and extent of responsibility of all actors involved, it is recommended here that the following measures are adopted in order to further clarify and thus strengthen both the performance of human rights obligations and the position of individual victims.

- It is necessary to draft a comprehensive and unambiguous authority regime in a single document. This is indeed not uncommon for multi-national operational resources that operate under multilayered authority structures. In the context of the EU more specifically, also in relation to EU CSDP operations, a document exists that generally describes the powers and authority of the actors involved over deployed resources.¹⁵⁰³
- This document needs to be fully and unconditionally publicly available. Neither public security nor privacy considerations, on the basis of which access to Operational Plans is typically denied, militate against public availability. The document required for the purposes of determining the distribution of legal responsibility needs to contain neither sensitive information, such as the operational area or specific methods applied, nor names or other details of persons involved in a specific operation.

Taking these measures will be even more important in the near future. In April 2017, Frontex for the first time deployed a vessel with a multinational crew on board to a joint operation. Contributed by Finland, the crew of the vessel includes officers provided by seven other member states. It is not yet clear how the authority regime described in Chapter 2 applies in these circumstances.

5.4.1.2 *EU public liability law*

The second main area where this study exposed uncertainties is EU public liability law. There are indeed a range of issues that seem underdeveloped in EU public liability law, including for example the precise circumstances under which liability arises for fundamental rights violations. Yet, questions of allocation of liability in multi-actor situations have received particularly little attention from the CJEU, as well as in academic research.

On the one hand, the Court has not developed a conceptual framework within which to decide questions of allocation of liability in multi-actor situations. It could not be conclusively determined in this study, for example, whether the allocation of liability depends on imputation, attribution, causation, a combination thereof, or a different concept altogether. Whilst it is hardly surprising, in light of the lack of a conceptual framework, that the Court's use of terms relating to distributing liability is inconsistent, it adds to the lack of clarity in this area.

1503 EU Concept for Military Command and Control (n 362).

On the other hand, the Court is not explicit about the existence and content of generally applicable rules or principles that govern situations where more than one actor is at the origin of an unlawful outcome. In cases that indeed raise questions relating to the involvement or interference of another public actor, the Court does not typically identify what general rules apply. This study, on the basis of an analysis of the Court's case law, revealed the rules and principles that the Court appears to adhere to when allocating liability among several potential wrongdoers. However, developing these implicit rules was particularly challenging for a number of reasons. Most importantly, the lack of a conceptual framework made it difficult at times to understand the legal reasoning behind specific decisions and judgments. In addition, that reasoning has not always been consistent. For example, typically, legal decision-making power seems to determine the outcome, but factual control was also sometimes relevant. The Court did not explain why and under what circumstances each of these thresholds would apply. These difficulties were further exacerbated by the fact that the Court, when dismissing a case on the basis of the involvement or interference of another actor, is often ambiguous about whether it did so on the basis of a substantive rule on allocation of liability, or on the basis of a procedural rule.

These uncertainties are problematic for a number of reasons. Most obviously, they render the Court's case law in this area highly unpredictable. One is left guessing when, why, and how it is relevant (or not) that more than one actor was at the origin of an unlawful outcome. It is illustrative that the Court does not seem to perceive this as an 'area' at all. It does not, for instance, typically refer to its own case law dealing with questions of allocation of liability, unless they concern the same policy area. The failure to recognise a pattern in cases across different policy areas that raise similar questions is particularly regrettable. It indeed may be the main reason why the Court has not so far identified a need to develop a conceptual framework and general rules governing those questions in the first place. This shortcoming also seems to have made it virtually impossible for the Court to appreciate and elaborate on associated liability and the specific questions it raises. This is unfortunate since the Commission's competences in supervising member states in the application of EU law make these questions relevant and important in the context of EU liability law.

Most fundamentally, the uncertainties are problematic because the analysis of the Court's case law in this study suggests that the allocation of liability to one or another actor is often *ad hoc*, or even 'accidental'. It would, however, be preferable for liability to be allocated among several potential wrongdoers on the basis of generally applicable and transparent rules and principles. This ensures that the consequences of the relevant rules are fully appreciated and that normative choices can be made accordingly.

Ultimately, the lack of clarity, unpredictability, and inconsistency of the Court's case law in this area may negatively affect compliance with EU law, but also considerably weakens the position of individuals seeking redress for infringements they have suffered. It seems, at this point, extremely difficult to assess when and to what extent one of several potential wrongdoers is liable, and when the involvement or interference of other actors is relevant. As a consequence, it is almost impossible for individual applicants to know with sufficient certainty where to lodge an application—before the CJEU or a member state court.

To be sure, these shortcomings are regrettable. But they are even more surprising. In EU law, multi-actor situations arise by design. Indeed, different forms of interaction and cooperation between the EU and its member states, but also among member states, are the rule, rather than the exception in EU law. For example, member states typically implement or otherwise apply provisions of EU law to specific situations, member states rely on decisions made by other states and assist each other in law enforcement, and the Commission has a broad range of powers in different policy areas to supervise member states. Moreover, and as opposed to many other international organisations, the EU has a particularly strong internal dispute settlement mechanism. In this light, in EU law, multi-actor situations are not only bound to arise, but EU law also seems particularly suitable to explore and experiment with different solutions to the various emanations of the 'problem of many hands'.

One reason why this has not happened so far may be the specific nature of EU public liability law. Whilst the EU is clearly not a state, the system of non-contractual liability bears a striking resemblance to national liability regimes. This is unsurprising, taking into account that in the absence of a detailed legislative framework at Union level, the national legal systems of the member states provide the main source of inspiration for the development of the EU's public liability law. The latter is hence inevitably 'domestic' in nature. However, at the same time, as an organisation deriving its powers from the 28 separate and sovereign entities it comprises, the Union's public liability system has to respond to challenges that do not commonly arise to the same extent in national liability law. This includes difficulties in allocating liability triggered by the division of competences in a multilevel system. In this area, it seems that international law may provide a more suitable source of inspiration for EU public liability law.

In light of the above, the following is recommended:

- The Court should develop a conceptual framework to address questions of allocation of liability in multi-actor situations and define, on that basis, general rules applicable to these scenarios. Both the conceptual framework and the general rules should be spelled out explicitly. The law of international responsibility may provide a source of inspiration in this respect.

- Further research on questions relating to allocation of liability in EU law is necessary. Existing research is mainly concerned with the possibilities of joint or concurrent liability. Academic engagement with other aspects of the topic is extremely rare.

5.4.2 Incurring responsibility

The main goal of this study was to establish clarity in the allocation of responsibility in the context of Frontex operations. It, however, also proceeded from the assumption that in situations where multiple actors cooperate in what leads to a human rights violation, all of them should bear responsibility, at least to a degree proportional to their respective contributions. In this respect, this study revealed a number of shortcomings in both ECHR and EU public liability law. They result from more general aspects of the responsibility mechanisms discussed in this study on the one hand, and the way these mechanisms deal with multi-actor situations on the other.

5.4.2.1 *General aspects*

The first and most obvious shortcoming is that under the ECHR neither Frontex itself nor the EU are responsible for Frontex' involvement in and supervision over joint operations because the EU is not a signatory to the Convention. Leaving the possibility of holding all EU member states collectively responsible for the conduct of the EU aside, the only way to address this lacuna is accession of the EU to the ECHR. As already pointed out in this study, this is unlikely to happen anytime in the near future, despite the obligation under EU law for the EU to accede.¹⁵⁰⁴ Nonetheless, two points should be noted here. First, even if the EU acceded to the ECHR, the EU would not incur primary responsibility for breaches that originate neither in conduct of Frontex staff nor in the Operational Plans themselves. The reason is the lack of effective control by Frontex over conduct of human resources deployed during joint operations, which would be required to make that conduct attributable to the EU. Second, this does not mean that the EU would incur no responsibility at all. In the event of accession to the ECHR, the EU incurs positive obligations to protect individuals from interference by third parties, just like any other contracting party to the ECHR. Thus, the EU would be responsible if Frontex failed to prevent Convention violations committed by member state officers during joint operations, despite having been able to do so. Importantly, it may be assumed that persons would be under the EU's jurisdiction whenever they are under the jurisdiction of a member state.¹⁵⁰⁵ Because individuals affected by Frontex operations are

1504 TEU (n 732) art 6(2).

1505 This was the solution envisaged in the Draft Agreement on the Accession of the EU to the ECHR (n 451) art 1(6).

within the jurisdiction of (at least) the host state, they would also be within the EU's jurisdiction.

The second shortcoming relates to the difficulty of invoking liability for fundamental rights violations within EU public liability law. As elaborated in detail in this study, public liability under EU law is subject to the satisfaction of a number of conditions, including the requirement that the breach in question is 'sufficiently serious'. Because the CJEU has not developed an approach specific to fundamental rights, this condition in principle also applies when fundamental rights violations are at stake. General public liability law was found to be flexible enough to consider fundamental rights violations sufficiently serious by their very nature. However, even though the Court's case law is neither entirely clear nor consistent in this respect, some cases suggest that fundamental rights violations, like any other breaches of EU law, are only sufficiently serious if they are obvious and reprehensible. In essence, this means that it cannot be excluded that there are fundamental rights violations that do not lead to liability because they are not serious enough within the meaning of public liability law.

This is problematic because in some circumstances, and Frontex operations are a good example in this respect, the action for damages is indeed the only remedy realistically available to individuals who claim to have suffered a fundamental rights infringement by an EU body. In other words, the action for damages may be essential in guaranteeing the right to an effective remedy. At least in these situations, it is necessary to address the obstacles identified in this study in relation to legal responsibility for fundamental rights violations. This can be achieved either by lowering the threshold for liability where fundamental rights violations are concerned, or by creating an alternative remedy for fundamental rights violations, e.g. a fundamental rights complaints procedure. In this light, the following is recommended:

- In light of the right to an effective remedy, there is a need to either lower the threshold for liability where fundamental rights violations are concerned, or set up a fundamental rights complaints procedure under EU law.
- In addition, and in particular in light of the difficulties individuals face in invoking the liability of Frontex before the CJEU, it is recommended that the EU accede to the ECHR.

5.4.2.2 *Addressing multi-actor situations*

This study revealed that some actors that participate in Frontex operations incur no responsibility at all for their involvement in or contribution to human rights violations that may occur in that context. This concerns in particular states that do not contribute large assets and are therefore not represented within the International Coordination Centre and on the Joint Coordination Board.

The reason why these participating states do not incur legal responsibility is two-fold. On the one hand, they do not exercise the control required to be directly responsible for unlawful conduct during joint operations, even when it stems from personnel they contributed. On the other hand, whilst both ECHR and EU law set out a range of associated obligations, requiring states in particular to protect individuals from human rights interference by others, each of them also poses significant obstacles for responsibility to arise in a context such as Frontex operations.

Under the ECHR, the main obstacle was found to be the limited applicability of the Convention extraterritorially, which prevents obligations to protect being triggered in relation to some participating states. There are a number of possible solutions to address this lacuna. One is a more lenient approach to the extraterritorial applicability of the ECHR. This could in particular consist of an interpretation that focusses more generally on the capability of a state to protect an individual in a specific case, irrespective of whether that individual is within its jurisdiction in the first place. Another possibility, one discussed in more detail in this study, is for the ECtHR to hold states responsible under the rules on aid or assistance provided for under general international law. Whilst the ECtHR may have used the rules on aid or assistance in some of its case law (e.g. *El-Masri v Macedonia*), it has not done so where positive obligations would otherwise not arise.¹⁵⁰⁶ This seems to be less far-reaching, and thus probably more feasible, than a more generally lenient approach to the extraterritorial applicability of the Convention. In particular, it requires the ECHR to be applicable with respect to the primary actor, and would thus largely be confined to instances where state parties to the Convention contribute to each other's human rights violations. It should be noted, that this requirement makes the rules on complicity unsuitable to bring the assistance of states participating in joint operations hosted by third states within the ambit of the ECHR. In this context, the gap in participating states' responsibility may only be addressed through a more lenient approach to the extraterritorial applicability of the Convention.

In this light, the following is recommended:

- The ECtHR should hold states responsible in accordance with the rules on aid or assistance provided under general international law, where human rights violations take place under the jurisdiction of a contracting party to the ECHR but outside the territory of an assisting state. Alternatively, it may adopt a more lenient approach to the extraterritorial applicability of the Convention where positive obligations are concerned.

Under EU law, the main obstacle was found to be the high threshold for public liability to arise. As explained in detail in this study, public liability under EU law is subject to the satisfaction of a number of conditions,

¹⁵⁰⁶ ECtHR, *El-Masri* (n 804); see above 3.4.1.2.2.

namely the sufficiently serious breach of a rule conferring rights on individuals, damage on the part of the applicant, and the existence of a causal link between the unlawful conduct and the damage complained of. A number of these, or indeed their combination, pose significant obstacles when the impugned conduct is dependent on, or related to the conduct of another actor.

A good example is the case of a breach of Union law by a member state in which a Union body was involved by giving advice, or other guidance. If one authority is involved in an infringement of Union law by another, this may affect the seriousness—within the meaning of public liability law—of that breach. The general idea is that a member state's breach of Union law is less reprehensible, if the member state was actually following advice from an EU body in that specific case. So, in those circumstances, the member state does not incur liability because the breach in question was not sufficiently serious.

At the same time, however, the Union body may itself not incur liability for the guidance given. On the one hand, if non-binding, it is insufficient to render the Union directly liable for the breach of the member state. On the other hand, the Union's associated liability is also uncertain. It depends on whether the Union body guiding the member state was, in the circumstances of that situation, under an obligation to ensure the correct application of Union law by that member state. It further depends on whether that obligation confers rights on individuals which they may invoke in the context of an action for damages, and whether the Union body violated it in that specific case. Finally, and most importantly for the present purposes, liability of the Union also depends on whether a causal link can be shown to exist between the supervisory obligation breached by the Union body and the damage that was the direct result of the member state's infringement. Even though the Court's case law is not entirely clear in this respect, it may be necessary that the lawful execution of the obligation to supervise would have prevented the member state's unlawful conduct with some certainty. In this vein, given the guidance was non-binding, the member state's own decision-making power with respect to the impugned conduct may break the causal link between the damage and the unlawful conduct of the Union body.

Ultimately, the member state is not liable because it was guided by a Union body, but the Union is not liable because it was a member state whose conduct directly caused the damage in question. Hence, in essence, it is conceivable that none of several actors involved is liable, precisely because of the role the other played. Admittedly, the example used here may be an extreme case. It does, however, illustrate that in EU public liability law, it is a disadvantage for an applicant who suffered damage when more than one authority was involved in the impugned infringement. In this light, the following is recommended:

- Recognising the specific challenges that multi-actor situations pose, the CJEU should avoid, as a rule, considering the involvement of a public authority in the breach of another as, first, a factor mitigating the seriousness of the breach, or, second, suitable to break the causal link.

5.4.3 Implementing responsibility

Even when responsibility clearly arises, the implementation thereof may be challenging. Whilst obstacles to the implementation of responsibility are not generally discussed in this study, there is one that should be pointed out here. It concerns the difficulty, or indeed impossibility, of implementing joint liability in EU public liability law. This is especially significant here because joint liability was found to be the rule rather than the exception in the context of Frontex operations.

It is clear that actions against, for instance, Frontex, the host state, and a participating state, cannot be brought before a single court. There is no court that is competent to conclusively establish the respective contributions of each of these actors to damage suffered by an applicant. For example, whilst an action for damages can be lodged with the CJEU, that can only concern unlawful conduct on the part of Frontex itself. For the CJEU to address the host and participating states' involvement, the individual would have to additionally lodge actions for damages in the respective national courts, who in turn could refer questions for a preliminary ruling to the CJEU before finally deciding on the matter.

Bringing parallel legal proceedings in such situations, however, raises a whole range of difficulties. In particular, the CJEU may stay the proceedings against Frontex awaiting the decisions of the national courts in the host state and one or more participating states. This is not only bound to render it lengthy and complicated for applicants to obtain compensation, but it is also unclear how diverging decisions in different national courts would be resolved. Moreover, there is no guarantee that the CJEU will resume the proceedings, if the individual applicant has in the meantime received compensation from one of the states involved. Ultimately, the combination of these factors would make Frontex' liability subsidiary to the liability of host and participating states and thus render the substantive allocation of liability an (unintended) side-effect of a procedural measure.

Against this background, there is a necessity for a single forum before which individuals that suffer human rights violations during Frontex operations can claim redress. Notably, in October 2016, the agency set up a fundamental rights complaints mechanism under which anyone who considers themselves to have been the victim of a human rights violation during a Frontex operation may submit a complaint to the agency. The procedure as such is handled by the Frontex Fundamental Rights Officer, who, however, may only decide on the admissibility of a complaint. Importantly, depending on

whose personnel are accused of having been involved in the infringement, it is the Executive Director or a member state authority who decides on the substance of the complaint. Hence, the new fundamental rights mechanism does *not* provide a common forum where fundamental rights complaints are decided on.

No doubt, it is conceivable to expand that mechanism by increasing the Fundamental Rights Officer's competences to include substantive decisions on complaints, and equipping her with the necessary additional resources. Whilst this would be a significant improvement, it would not be entirely satisfactory. On the one hand, a judicial mechanism within which legally binding and enforceable decisions can be made is preferable. On the other hand, and more importantly, to ensure full independence and impartiality, it is essential that the mechanism is external to Frontex. Finally, it may be assumed that similar challenges in implementing joint liability may arise in other multi-actor situations under EU law. It would thus seem advisable to set up a mechanism that is capable of addressing this obstacle more generally, beyond the specific case of Frontex.

The 'natural' forum on which to confer this competence may be the CJEU. There is, however, also the possibility of setting up an entirely new body to rule on such matters. This was done for example in the case of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), a CSDP mission set up in order to assist institutions in Kosovo.¹⁵⁰⁷ In light of the executive functions EULEX Kosovo was equipped with and its immunity before local institutions, the EU established an independent and external Human Rights Review Panel with a mandate to decide on human rights violations by EULEX Kosovo on the basis of complaints submitted by individual victims. Even though the Panel's decisions are not legally binding, it could provide a source of inspiration for a possible forum to be established in relation to human rights violations that occur in the context of Frontex operations.

In this light, the following is recommended:

- Victims of human rights violations that occur in the context of Frontex operations should be able to lodge a complaint against all actors that are involved and potentially responsible in a single forum that decides on admissibility and substance of the complaint in a legally binding manner. To ensure full independence and impartiality it is essential that this forum is external to Frontex. Ideally, the competence to hear such complaints is conferred on the CJEU.

¹⁵⁰⁷ Council of the European Union, Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (as amended).

5.5 EPILOGUE

International cooperation comes in different shapes and forms. It may consist of *ad hoc* bilateral meetings or take place within highly integrated international organisations that span entire continents or the whole world. International cooperation is indeed indispensable to maintain peace and security, ensure sustainable development, and protect human rights in a globalised world. It has, however, also opened up a broad range of challenges. At the heart of this study are the challenges raised by the interaction and cooperation between states and other public actors across borders for the allocation of responsibility among them.

As international cooperation intensifies, so does its impact on individual lives, reaching into areas particularly sensitive to human rights, such as migration and external border control. Whilst there is a more general trend towards cooperation in this field, the mutual assistance between EU member states is remarkable in its extent and institutionalisation. Frontex, the EU agency that supports Schengen states in the management of their external borders, has come to symbolise this cooperation in both its successes and difficulties. The latter have been laid bare in the wake of the efforts in dealing with rising numbers of persons that cross international borders fleeing poverty, conflict, or persecution. Joint return and border control operations organised by Frontex are emblematic of the human rights risks associated with external border management and the difficulty in allocating human rights responsibility among multiple actors.

This study exposed just how difficult it may be for individuals to find the right place for bringing complaints against violations of their human rights suffered at the EU's external borders. As the development of Frontex over its twelve years of existence demonstrates, channelling resources to the agency and increasing its tasks has been the 'standard' emergency response. In the course of Frontex' development, the commitment of the agency to human rights protection became more explicit and visible, especially with the establishment of the position of the Frontex Fundamental Rights Officer in 2011, and the setting up of an individual fundamental rights complaints procedure in 2016. Despite these positive steps, core weaknesses remain from the human rights perspective.

The official position of the agency continues to locate human rights responsibilities predominantly (if not exclusively) with member states, at least where operational personnel deployed to joint operations are concerned. However, this study showed that the agency itself indeed bears human rights responsibility, rooted in its extensive obligations to supervise member state conduct and protect individuals at risk. In addition, there exists no independent and impartial common forum where individuals can enforce their rights.

Victims of human rights violations still have to undertake lengthy proceedings within different jurisdictions. Far from practical, the current state of affairs also fails to offer them an effective remedy. If Frontex is to remain a key player in EU external border management that operates in full respect of human rights, these shortcomings must be addressed.

While tackling these concerns is important, it will not solve all challenges relating to the allocation of responsibility. As shown in this study, certain difficulties faced by individuals in holding Frontex and the states involved in joint operations to account lie beyond the agency itself. The study revealed that there are situations where substantial contributions by one public actor to the breach of another trigger no responsibility. The reason for this outcome lies partly in the treatment of responsibility by ECHR and EU public liability law. Responsibility is typically assessed for each actor individually. The broader picture, in particular the question of whether or not the impugned conduct was part of cooperative activities, is only marginally considered, and sometimes not at all. As a result, the assessment of responsibility often fails to sufficiently reflect the fact that several public actors can do more together than in isolation.

Against this background, it is urgent to address the shortcomings identified in this study. This entails taking the human rights obligations of the agency seriously. In addition, there is a need to develop clear and comprehensive rules on allocation of responsibility that take into account the reality of cooperative action. The present study offers not only an in depth analysis of these aspects, but also a set of recommendations that can assist in achieving this objective.