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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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Summary

This thesis examines the legal responsibility for human rights violations that may occur in the context of border control or return operations coordinated by Frontex.

Frontex is a European Union (EU) agency that supports Schengen states in the management of their external borders *inter alia* by organising joint operations. In the framework of a joint operation, a state (referred to as the '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 involved actors.

This means, for example, 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 involved parties, where unlawful activities are performed during a joint operation. Imagine the following scenario: During a border control operation at sea, a vessel forces a boat carrying migrants back to its place of origin. This may be in violation of the human rights of persons on that boat, for example the prohibition to send individuals back to a place where they would face persecution or serious maltreatment. The operation is hosted by State A, coordinated and financed by Frontex, but the vessel in question and its crew are from State B. The crew on State B's vessel did not decide alone to send the migrant boat back. Representatives of States A, B, C, D, and Frontex sat together and discussed possible courses of conduct, concluding this was the way to proceed. Whilst each may have contributed to the unlawful activity, their contributions vary in nature and degree. But which contribution leads to legal responsibility? In other words, who has to bear the consequences for and remedy the unlawful conduct?

The aim of this thesis is to clarify the allocation of responsibility among the actors involved in Frontex operations by determining to what extent each of their contributions may trigger legal responsibility if human rights violations occur during joint operations. Establishing such clarity fulfils a two-fold purpose. First, it strengthens the position of individual victims

of human rights violations. Knowing the roles, powers, and authority of each actor involved, and the rules on allocation of responsibility applicable in that context, individuals are better placed for taking legal action if their rights have been violated. Second, the more clarity there is, the smaller the scope for 'blame-shifting' from one actor to another, which may function as an incentive for compliance with human rights obligations. Importantly, difficulties in allocating responsibility are not unique to Frontex, but exist more generally when multiple actors contribute to an unlawful outcome (*'multi-actor situations'*). In this vein, the contribution of this study goes beyond the specific case of Frontex operations and provides a legal framework for addressing allocation of legal responsibility in multi-actor situations.

The study is divided into three main parts. The first, **Chapter 2**, discusses the powers of Frontex and the states involved. The extent and nature of each actor's contribution and the authority they exercise over the resources deployed, are relevant in determining the existence and degree of their legal responsibility. Thus, in Chapter 2, this study examines the detailed roles and powers of Frontex and the states involved enjoy during joint operations. It elaborates on the pooling of operational resources prior to launching operations, the process of deployment, the coordination bodies and instruments established for joint operation, and the procedures in place for dealing with fundamental rights related incidents. Its main focus, however, is on the respective authority exercised by the actors involved over the deployed operational resources, in particular on the decision-making processes and chains of command.

Importantly, Chapter 2 shows that during the implementation of joint operations, participating states partially transfer authority over resources they contribute to the host state and Frontex. The host state, in particular, has a key role in deciding the course of conduct of deployed resources and enjoys far-reaching authority to issue instructions to its own, but also to participating states' officers. Notably, however, participating states that contribute large (often military) assets, such as vessels or aeroplanes, retain crucial parts of authority through two mechanisms. First, they are represented within the body set up to run the operation (Joint Coordination Board) in the form of a so-called National Official. This National Official has to be consulted whenever a decision affects a large asset of a participating state. Second, with each asset the contributing state deploys a Commanding Officer responsible for commanding the asset's staff.

The second and third parts of this study, **Chapters 3 and 4**, discuss the rules that govern the allocation of responsibility in multi-actor situations and apply them to Frontex operations. Two regimes of legal responsibility were chosen as frameworks for the analysis: responsibility for breaches of the European Convention on Human Rights (ECHR) on the one hand, and liability under EU law for breaches of the Charter of Fundamental Rights of the European Union (CFR) on the other. The main reason for this choice is

that both forms of legal responsibility can be established before courts following an action by an individual and are in principle capable of addressing questions of allocation of responsibility.

In both ECHR and EU law, responsibility is 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 the assistance in, or a 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.

Chapter 3 examines the allocation of responsibility among states involved in Frontex operations for breaches of the ECHR committed in the course of the operations. The analysis in this context is based on the law of international responsibility as applied by the European Court of Human Rights (ECtHR). The law of international responsibility is understood as encompassing the rules represented in the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organizations (ARIO), which were formulated by the International Law Commission in 2001 and 2011 respectively.

Chapter 3 is divided into four main sections. The first outlines the 'basics' of the law of international responsibility, focussing on its relationship with the ECHR and application to the EU member states when they act within EU law. The subsequent section examines the conditions for responsibility. Given that in this thesis responsibility is analysed on the basis that violations do indeed occur, the focus is on the question of attribution of conduct, the only other precondition for responsibility to arise. The third section of Chapter 3 studies primary responsibility under the ECHR and is dominated by a discussion of attribution rules and their application to the actors involved in joint operations. The most basic of these rules is that the conduct of a person that a state or an international organisation has designated by law as their organ, is attributable to that state or international organisation (Articles 4 ASR and 6 ARIO). In the context of Frontex operations, this means that at the outset the conduct of personnel is generally attributable to the entity that contributed them. However, since participating states partially transfer authority over resources they contribute to the host state and Frontex, the crucial question is how this affects the attribution of their personnel's conduct.

The relevant rules are found in Articles 6 ASR and 7 ARIQ, both of which are discussed in detail in Chapter 3. Article 6 ASR deals with the situation where an organ of one state is placed at the disposal of another and sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state. The parallel provision in the ARIQ, Article 7, deals with the situation where an organ of a state or an international organisation is placed at the disposal of another international organisation. Whilst the situations these two articles address are similar, they differ in the thresholds established for attribution of the 'lent' organ's conduct to the receiving entity. Article 6 ASR essentially requires full and exclusive normative control for a 'transfer' of an organ from one state to another. In contrast, Article 7 ARIQ provides that conduct of the lent organ is attributable to the receiving organisation, if and to the extent that the latter exercises effective (factual) control that need not necessarily be exclusive.

It is evident from the analysis of the application of these rules to Frontex operations, that conduct of both local staff and deployed officers (contributed by states or Frontex) is attributable to the host state. Thus, the host state is directly responsible for conduct of local and deployed officers in breach of the ECHR. Conversely, the conduct of personnel on large assets deployed by participating states, such as vessels or aeroplanes, remains attributable to their original home states, who are responsible if these assets are involved in a breach of the ECHR. Importantly, neither participating states that do not contribute large assets nor the EU typically incur direct responsibility under the ECHR for human rights breaches committed during joint operations.

Finally, in the fourth section, Chapter 3 analyses associated responsibility. More specifically, it discusses whether states that are not directly responsible for a specific breach may still be responsible for contributing to, or not preventing it. Questions of associated responsibility are examined in light of the obligations to protect as developed by the ECtHR, in particular under the doctrine of positive obligations. In essence, states may incur responsibility if they fail to prevent human rights violations committed by others. This, however, requires that they know or ought to know of the violation and have means to prevent it. In relation to the states involved in Frontex operations, the analysis shows that only the host state and participating states that contribute large assets are likely to incur responsibility on this basis, essentially due to their possibility to influence the course of action during joint operations. All other states do not exercise sufficient control in the context of joint operations so as to bring the relevant situations under their jurisdiction within the meaning of Article 1 ECHR. Hence, these states' obligations to protect under the ECHR are not triggered.

Against this background, Chapter 3 also discusses responsibility for rendering aid or assistance under public international law. The relevant rule, Article 16 ASR, provides that responsibility for 'complicity' arises whenever a state renders aid or assistance that makes it materially easier for the receiv-

ing state to commit an internationally wrongful act, provided the assisting state does so in the knowledge of the internationally wrongful act and is itself bound by the primary obligation the receiving state has breached. 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 therefore fill the 'gap' left where the ECHR's obligations to protect are not applicable, the ECtHR does not generally hold states responsible on that basis.

Chapter 4 examines the allocation of liability under EU law among Frontex and EU member states involved in Frontex operations, and among EU member states themselves, for breaches of the CFR committed during operations. 'Liability' refers, on the one hand, to the non-contractual liability of Frontex under Article 60(3) of its founding Regulation (Regulation 2016/1624). This provision, in turn, is based on the non-contractual liability of the Union under Article 340 Treaty on the Functioning of the European Union. It refers, on the other hand, to state liability as developed by the Court of Justice of the European Union (CJEU).

Chapter 4 follows the same structure as Chapter 3. It opens by outlining the 'basics' of EU public liability law. Subsequently, it examines the conditions for liability and their application in the event of fundamental rights violations. Under EU law, liability only arises for breaches of individual rights that qualify as sufficiently serious and have a causal link to damage that the victim suffers. The analysis focusses on the sufficiently serious breach requirement. The rule identified in Chapter 4 is 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.

The third section addresses primary liability. It develops general rules on allocation of liability from the case law of the CJEU that govern situations where breaches of EU law are committed under the shared authority between the Union and its member states. The key principle derived from case law is that liability follows legal decision-making power. In other words, the authority that enjoys legal room for manoeuvre is legally capable of choosing lawful over unlawful conduct and incurs liability if opting for the latter. Whether the choice may be more limited in practice than in law is typically of no relevance. In essence, this means that with respect to each fundamental rights violation committed by officers deployed during Frontex operations, the actor that was empowered to determine the conduct at the origin of the violation in a legally binding manner incurs liability.

The analysis shows that in the context of Frontex operations, the host state enjoys legal decision-making power and consequently incurs liability if fundamental rights violations are committed during joint operations. The most relevant exception is large assets deployed by participating states, such as vessels or aeroplanes. The legal authority over these is shared between the host state and the home state, who has to consent to decisions affecting its assets. Thus, fundamental rights violations by large assets give rise to the joint liability of both the host and the home state. Frontex' means of influence, in contrast, may give it some factual control over conduct during joint operations, but not legal control. Thus, as long as fundamental rights violations do not result from conduct of its own coordinating staff or the Operational Plan itself, Frontex incurs no primary liability.

Finally, in the fourth section, Chapter 4 analyses associated liability. It discusses whether Frontex itself, or EU member states that are not directly liable for a specific breach, may still be liable for contributing to, or not preventing it. This, generally speaking, requires that an obligation to supervise another authority in the application of Union law, or an obligation to protect individuals from violations committed by others, is breached in a sufficiently serious manner. Since the host state comprehensively incurs primary liability for most violations that may occur, questions of associated liability under EU law typically arise with respect to Frontex and participating states.

The analysis in Chapter 4 shows that Frontex has far-reaching obligations to supervise the conduct of member state authorities during joint operations. It also incurs obligations under EU fundamental rights law to protect individuals from violations committed by states in the context of joint operations. All of these obligations are capable of giving rise to Frontex' liability if it fails to meet them, provided the breach can be considered sufficiently serious. Considerably more complex is the associated liability of participating states. They incur obligations to protect under EU fundamental rights law that are triggered, in essence, as soon as they know or ought to know of a violation. These obligations require participating states to act upon their knowledge by using all means reasonably available. Even if these obligations are triggered in a specific case, however, failure to react will often not qualify as sufficiently serious. Only participating states involved in an operation with large assets, it seems, have the knowledge and means available that may render their failure to protect individuals sufficiently serious.

The final **Chapter 5** summarises the main findings and their practical implications. Moreover, it identifies the obstacles that individuals, whose human rights have been breached during a Frontex operation, face when holding the actors involved to account. Most importantly, this study reveals that only the host state is comprehensively responsible for human rights violations that may occur during Frontex operations. Whilst Frontex and participating states may be partly responsible too, some of their contributions to

human rights violations during joint operations always remain below the threshold required for responsibility to arise under both the ECHR and EU public liability law. One of the reasons is that neither of these responsibility mechanisms systematically takes into account whether the impugned conduct was part of cooperative activities. In other words, the fact that several public actors can do more together than each of them alone is not always sufficiently reflected in terms of responsibility. In Chapter 5, this study puts forward a number recommendations on how to address the obstacles identified.

