Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

Gkliati, M.

E.M. MEIJERS INSTITUUT
INSTITUUT VOOR RECHTSWETENSCHAPPELIJK ONDERZOEK

Systemic Accountability of the European Border and Coast Guard

The legal responsibility of Frontex for human rights violations

M. GKLIATI

Systemic Accountability of the European Border and Coast Guard

The legal responsibility of Frontex for human rights violations

Systemic Accountability of the European Border and Coast Guard

The legal responsibility of Frontex for human rights violations

PROEFSCHRIFT

Ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op donderdag 11 november 2021
klokke 10.00 uur

door

Mariana Gkliati

Promotoren:	Prof. dr. mr. P.R. Rodrigues Prof. dr. L.F.M. Besselink (Universiteit van Amsterdam)
Promotiecommissie:	Prof. dr. N.M. Blokker Dr. V. Moreno-Lax (Queen Mary, University of London, UK) Prof. dr. S. Carrera (the European University Institute, Florence, Italy) Prof. dr. R.A. Lawson Prof. dr. M.L.P. Loenen

Lay-out: AlphaZet prepress, Bodegraven
Printwerk: Ridderprint, Alblasserdam

to Christos and Eleni

Acknowledgments – The myth of the lone genius

"I felt that I had to do everything on my own, because asking for help was a sign that I was not intelligent enough. I now see how destructive this attitude was."
Martin Chalfie, 2008 Nobel Prize in Chemistry

The myth of the lone genius perpetuates the idea that our creative accomplishments are exclusively our own. Our achievements as scientists, academics, writers tend to be seen as solo pursuits, lavished by hiding the contributions of others. My experience in this doctoral journey has deconstructed for me this hyper-individualistic conception of creativity. Collaborating was key and a significant number of people have greatly accounted for this product.

I wish to acknowledge their contributions, but unfortunately, I can only mention some of them in this limited space. Such mention could not possibly fail to start from my promotor, Prof.dr.mr. P.R. Rodrigues. I am grateful for the opportunity to develop my proposal and work with him on my PhD at one of the most important universities in Europe. He has been a supervisor to count on and an extremely valued colleague.

My experience in the Netherlands has started with Dhr. prof. dr. L.F.M. Besselink at Utrecht University (then) who supported me through my Masters, mentored me, offered me countless opportunities, supervised my MA thesis, and agreed to accompany me as co-promotor in my PhD, this time from the UvA. I would enter his office in panic and leave with a solution. This journey would have not been possible without him.

I am also grateful to the Meijers Research Institute, which has chosen and financially supported my PhD project. Moreover, I would like to acknowledge Gerrie Lodder and Mark Klaassen, my colleagues at the Institute of Immigration Law, Damiaan van Eeten, Licette Claproth and all other library and administrative staff of Leiden University, who have tirelessly supported my research, teaching and other activities throughout the years. As I am starting the new chapter at Radboud University, I cannot but look back with gratitude and respect.

The Refugee Law Initiative (RLI), University of London, has been my research's second home. I have profited immensely from the opportunities, support, hospitality, mentoring, and feedback I have received from David Cantor, Sarah Singer, Violeta Moreno-Lax, and the RLI network.

Moreover, I need to acknowledge the Netherlands Network for Human Rights Research that has supported me in my starting years and expanded my horizons. Annick Pijnenburg and my fellow members at the Migration & Borders Working Group deserve special mention for the fruitful collaboration and enriching discussions.

I should also express my gratitude to the members of my Reading Committee that enhanced the quality of my work with their comments, along with all those colleagues that generously give their time, dedication, and ideas to each other. Academia may be a particularly competitive field – not always unsullied – but I feel the need to extend a warm thanks to all those keeping the academic culture of generosity alive. I should also extend a special thanks for the unseen work of mostly women academics and administrators keeping our institutions alive.

The PhD does not have to be a lonely process. Mine was not. Therefore, I would like to give a special thanks to colleagues from civil society, policy-makers, journalists, and lawyers who have kept me on my toes with their ever-burning questions. I am indebted to Statewatch's Tony Bunyan, Chris Jones and Jane Kilpatrick, for their hospitality, support and invaluable contribution to my work with material and insights.

A warm thanks also to all my students at Leiden, the RLI, and the Roma Tre Law Clinic for all the energy and inspiration they gave me. When I was tired, discouraged, when I was doubting myself, I could always draw from the waves of their energy.

I am also grateful to Dimitris, my informal promotor for his career guidance and emotional support throughout my PhD. The contribution of my childhood friends, Despoina and Vasso, even though distant, has been invaluable. When everything around you is always changing it's important to have a constant in your life.

My dearest thanks to Antonia, Eduardo, Hariwa, Nacho, Sophia, Jeremy, Caspar, Jilles, Nikoletta, Merel, Sophia, Loes, Bas, Alex, Ying, and all my friends from KSU and ReInform for the interactions, triggers, debates, criticisms, support, and inspiration I draw from their example. Eternal gratitude I owe to Chrats, Kleoniki, Aman Molli and all my musical friends in Greece and in the Netherlands for keeping me sane and on track with the rest of my life.

Finally, my deepest gratitude goes to my parents for their constant support, patience and self-sacrifice, especially sacrificing all these years without me and not once making me look back, for they know we would have all turned into stone.

Table of Contents

List of Abbreviations

ACP	States of Africa, the Caribbean and the Pacific
AFIC	Africa-Frontex Intelligence Community
ARIO	Articles on the Responsibility of International Organizations
ARS	Articles on the Responsibility of States
CAT	Convention against torture and other cruel, inhuman or degrading treatment or punishment
CFI	Court of First Instance
CFR	Charter of Fundamental Right of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPMP	Committee from Proprietary Medicinal Products
CPT	Committee for the Prevention of Torture
CRATE	Centralised Record of Available Technical Equipment
EASA	European Union Aviation Safety Agency
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
EBCGA	European Border and Coast Guard Agency
EC	European Commission
ECDC	European Centre for Disease Prevention and Control
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EGC	General Court
EMA	European Medicines Agency
EP	European Parliament
ETIAS	European Travel Information and Authorisation System
EU	European Union
EUROPOL	European Union Agency for Law Enforcement Cooperation
EUROSUR	European Border Surveillance System
FRA	European Union Agency for Fundamental Rights
FRO	Frontex Fundamental Rights Officer
FRS	Fundamental Rights Strategy
FRY	Former Republic of Yugoslavia
GUE/NGL	European United Left-Nordic Green Left
HRW	Human Rights Watch
IBM	EU's Integrated Border Management
ICC	International Criminal Court
ICJ	International Court of Justice
IICPR	International Covenant on Civil and Political Rights

ILC	International Law Commission
ILOs	Immigration Liaison Officers
IOM	International Organization for Migration
JHA	Justice and Home Affairs Council
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
NHRIs	National Human Rights Institutions
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PCU	External Borders Practitioners' Common Unit
RABIT	Rapid border intervention teams
SADC	African Development Community
SBC	Schengen Borders Code
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SIS	Schengen Information System
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UMOSOM	United Nations Operation in Somalia
UN	United Nation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VIS	Visa Information System

1 Introduction

1 Background and context

The harmonisation of internal and external border management is one of the most vital aspects of the European integration process. Since the abolition of the internal borders, we have been witnessing a growing emphasis on controlling the common external borders, which has been used as counterbalance to free movement within the Schengen area. While the establishment of safe and legal channels of entry remain limited and predominantly discretionary and ineffective,[1] with resettlement[2] and humanitarian visas[3] as the primary examples, the development of 'policies of non-entrée',[4] or 'ugly-duckling policies' more broadly, has been rapid.[5]

Today, six years into the political crisis that developed around the summer of 2015, framed as a 'refugee crisis', the turn in European politics towards intolerance, protectionism, and securitisation has profoundly influenced the EU's agenda on migration, so that border control has become today's equivalent of migration management.[6]

Such policies can have dire effects on refugee and human rights protection, putting the right to non-refoulement at risk, impeding access to protection, and turning the Mediterranean into 'the world's deadliest border', according to the International Organisation for Migration.[7]

---

1 European Union Fundamental Rights Agency, Legal entry channels to the EU for persons in need of international protection: a toolbox, 06 March 2015, https://fra.europa.eu/en/publication/2015/legal-entry-channels-eu-persons-need-international-protection-toolbox.

2 UNCHR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 31 December 2016, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiki8fdwMnuAhVhEWMBHekNDPIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.refworld.org%2Fpdfid%2F588b4af44.pdf&usg=AOvVaw2ujy3vs77kSgzhlSztfIQm.

3 CJEU 7 March 2017, C-638/16, ECLI:EU:C:2017:173 (*PPU X. and X. v. État Belge*).

4 J. Hathaway, 'The Emerging Politics of Non-Entrée', 91 *Refugees* 40, 1992.

5 T. Gammeltoft-Hansen, 'The Ugly Duckling: Denmark's Anti-Refugee Policies and Europe's Race to the Bottom', *Huffpost*, 2016, https://www.huffpost.com/entry/denmark-refugee-europe_b_9574538?guccounter=1.

6 Perre N., De Vries M., Richards H., and Gkliati M., Refugee Crisis: three perspectives on the makings of a crisis. RLI Blog on Refugee Law and Forced Migration: Refugee Law Initiative, 16 April 2018, https://rli.blogs.sas.ac.uk/2018/04/16/refugee-crisis-three-perspectives-on-the-makings-of-a-crisis/.

7 International Organisation for Migration, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe. A Review of the Evidence*, Geneva: 2017, https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

Central in the EU's border control response has been the work of Frontex. The agency has been cardinal to the EU's objectives of integrated border management and ever-growing cross-border cooperation among the member states, which has been defined as 'a more or less institutionalised collaboration between contiguous subnational authorities across national borders'.[8] Frontex has become the symbolism of this cross-border collaboration, essentially embodying in popular imaginary and public debate both the cross-border cooperation and the securitisation characterising EU migration policies.[9] In particular, it reflects the realisation of the main goals of the EU Agenda on Migration presented in 2005, which focuses on maximising EU support on border control.

Its activities, aiming at preventing irregular entry to Europe, are inherently sensitive to human rights violations, especially regarding freedom from refoulement and the right to seek asylum. Other sensitivities also include, but are not limited to, freedom from torture, the right to life, the right to liberty and security, the rights of the child, as well as privacy and data protection.

With a growing number of surveillance and return operations and a budget that has been continually expanding in parallel to its mandate, Frontex and its evolution, the European Border and Coast Guard Agency (EBCGA) has become the most important actor in border enforcement in Europe. With consecutive evolutions of its mandate, the agency moves ever closer to its original conception as a European Border Police Corps.[10]

Joint operations in a nutshell

The core of the agency's activities is the organisation and coordination of joint surveillance operations at the land, air, or sea external borders of the EU. Since 2016 it also conducts joint return operations. It plans, finances and coordinates such operations. It drafts the operational plan, which is binding, it deploys staff and equipment, monitors and supervises the operations, including their compatibility with fundamental rights, and conducts trainings. Decisions concerning the operations are made based on the agency's research and risk analysis, a particularly impactful aspect of its work.

An operation is hosted by a member state, which takes the lead in implementing the operational plan. Other member states contribute with

8 M. Perkmann, 'Cross-border Regions in Europe: Significance and Drivers of Regional Cross-Border Co-Operation', *European Urban and Regional Studies* 2013, vol. 10(2), pp.: 153-171.

9 E.g. Frontexit campaign, http://www.frontexit.org/en/.

10 House of Lords, *European Union – Ninth Report, CHAPTER 3: integrated border management and a European border guard*, European Union Committee Publications, par. 30, http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13305.htm;
J. Monar, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. Caparini and O. Marenin (eds), *Borders and Security Governance, Managing Borders in a Globalised World*, LIT Verlag Münster, 2006, Chapter 10, p. 2.

seconded border guards and technical equipment, while they may also co-finance the operation.

Since 2016, Frontex has the mandate to launch joint operations in the territory of a neighbouring third country, hosted and carried out by that third state. The first such operation was launched in Albania in 2019.

2 Research aim and research questions

Managing migration is considered by the legal community amongst the state's legitimate interests and an integral part of state sovereignty.[11] These legitimate state interests should nonetheless be consistent with international obligations, and failure to abide by them can engage the responsibility of the actors involved.[12]

Frontex operates in a field with high stakes on human rights. When these sensitivities materialise into real violations, the need arises to examine the legal responsibility and the accountability of Frontex. It is precisely the hypothesis that the agency can bear responsibility for human rights violations and should therefore be held accountable for it, that is explored in this work; a hypothesis based on the growing mandate and operational powers and the human rights sensitivity of the agency's work.[13]

Hence, the main research questions that this book aims to answer are:

How can Frontex be understood to be able to bear legal responsibility for human rights violations that take place during its operations?

How can it be held legally accountable for such violations?

What is the appropriate conceptual framework under which the responsibility and accountability of Frontex should be examined in the context of EBCG operations? How can this translate into the applicable legal framework?

The main research questions can be divided into several sub-questions, addressed in this book's core chapters. Chapters II and III are descriptive of the agency and the human rights sensitivity of its work. In contrast, the rest of the chapters deal with the standards of responsibility and accountability. Specifically:

The first two chapters are empirical in nature. Chapter II (*Frontex: Separating the Insiders from the Outsiders*) deals with the character, identity, legal basis, and modus operandi of Frontex. It aims at reaching a deeper understanding of Frontex and its work, especially on how that has developed throughout the years. Chapter III (*Human Rights Sensitivities and the Need for Protection*) examines the relevant societal problem, asking what the human rights tensions are that appear in the work of Frontex. This sets the basis for the examination of the possible responsibility of the agency.

---

11 E.g.: ECtHR 11 January 2007, App. No. 1948/04, (*Salah Sheekh/the Netherland*).

12 H. Lambert, 'Protection against refoulement from Europe: human rights law comes to the rescue', *International and Comparative Law Quarterly*, 1999, pp.: 515-44.

13 D. Fernández-Rojo, EU Migration Agencies The Operation and Cooperation of FRONTEX, EASO and EUROPOL, Edward Elgar Publishing: 2021.

Having acquired a better empirical understanding of the character of the EBCGA, Chapters IV (*Theoretical Framework (I): Responsibility*) and V (*Theoretical Framework (II): Accountability*) move on to examine more conceptual matters, namely questions of responsibility and accountability. What is responsibility, and what is accountability? What is the appropriate conceptual framework under which the responsibility of Frontex should be examined in the context of EBCG operations? Should Frontex be held accountable, and what is the appropriate conceptual framework for dealing with its accountability in EBCG operations? These are the questions that are at the centre of this research.

Chapters VI (*A Normative Framework on Responsibility*) and VII (*Application of the Legal Framework to the EBCG*) deal with the applicable legal framework on responsibility. Chapter VI entails the translation of the developed theoretical framework into the legal framework to provide answers to the following key questions: What is the appropriate legal framework? What are the elements of establishing responsibility for an internationally wrongful act? Is Frontex a subject of international law? How can wrongful conduct be attributed to it? Chapter VII builds upon that and applies the normative framework to the particular circumstances of responsibility within the EBCG. The sub-questions answered here are whether Frontex can independently or together with the member states bear responsibility for breaches of its international obligations, and how such responsibility can be solidified within the legal framework, developing the appropriate legal structure under which such responsibility should be addressed.

Finally, given that legal responsibility can ultimately only be guaranteed if its practical manifestation follows it in courts, the last two chapters deal with the implementation of legal accountability. Chapters VIII (*Legal Accountability in Practice: CJEU*) and IX (*Legal Accountability in Practice: ECtHR and Domestic Courts*) study the application of the developed framework on accountability in judicial practice. Therefore, these final chapters look at the EU and ECHR legal frameworks and sketch potential litigation avenues before the CJEU, the ECtHR, and the domestic courts, assess their limitations and lay out procedural hurdles and possible solutions to them.

Chapter X (*Conclusions*) provides an overview of the findings and answers the research questions directly, while it closes with recommendations for the agency, lawmakers and the judiciary.

This book is structured to move from the empirical (mandate and human rights) to the conceptual (theoretical framework), from the conceptual to the normative (legal framework) and from the normative to the applied (judicial routes for accountability).

It is thus divided into four parts:

Part 1 – Empirical: The Development and Human Rights Sensitivities
Part 2 – Conceptual: From Many Hands to Systemic Accountability
Part 3 – Normative: Pluralism in Human Rights Protection
Part 4 – Applied: Legal Remedies and Litigation Avenues

Terminological notes

An important terminological observation concerns the use of the terms of responsibility and accountability. In this work, 'responsibility' is used in the meaning it has in international law, as it has been authoritatively formulated in the *Chorzow Factory* judgment: '*It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.*'[14]

Inspired by the analytical framework developed by Bovens, Curtin and Hart,[15] I use the term 'accountability' in the sense of '*answering for decisions on how governance is being exercised*'. Several forms of accountability can be identified (e.g. democratic, administrative), but this work mainly deals with '*legal accountability*', i.e. *the actor's subjection to substantive legal control and formal judicial mechanisms of accountability*.[16] In other words, while 'responsibility' refers to the obligation for reparations in case of breach of an engagement, 'legal accountability' would be the possibility to be held responsible, to answer for breaches of international obligations before courts. As identified by H.L.A. Hart and Bovens, the different meanings of responsibility are analysed in Chapter 3.

The term 'irregular migrant' is understood in the meaning it has in international and EU law. The Protocol against the Smuggling identifies as irregaular migrant a person, that is not a national or a permanent resident of the state into which the person is entering illegally. In the Schengen Borders Code and the EU Facilitation Directive,[17] the irregular migrant is seen as a third-country national present on the territory of a Schengen State, who does not fulfil the conditions of entry, stay or residence. This may include refugees and other persons that are entitled to international protection, as long as their entry or stay in the territory is without permit.[18] Similarly, illegal or irregular entry is understood as crossing borders without complying with the necessary legal entry requirements into the receiving state.[19] This is without prejudice to the rights of people entitled to international protection including the right to asylum under the EU Charter or the rights of non-penalisation, free movement, socio-economic rights, and non-deprivation of liberty under the Refugee Convention. Thus, essentially,

14 PCIJ, Factory at Chorzow, 1927 (ser. A) No. 9 (*Germany/Poland)*, p. 21.

15 M. Bovens, D. Curtin, P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?*, Oxford: Oxford University Press, 2010.

16 Bovens 2010, p. 5.

17 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code); Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

18 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000, Art. 3.

19 Protocol against the Smuggling, Art. 3.

this study deals with irregular migrants, as people on the move without permit, crossing EU borders in the operational area of Frontex operations, including those with additional entitlements to protection.

In 2016 Frontex acquired the more descriptive name, EBCGA. However, the original name remains in use. The following chapters may also refer to Frontex as the 'EBCGA' or simply 'the agency'.

The reference to 'EBCG Regulation' refers to the Regulation's latest 2019 amendment, while the original Regulation is noted as 'EBCG Regulation 2016'. The founding Regulation of the agency of 2004 is referred to as 'Frontex Regulation'.

This book refers to 'fundamental rights' and 'human rights'. Although the term fundamental rights is favoured in EU law, this study uses the term human rights to encompass all legal bases and express the unity of the legal framework. Fundamental rights is still used when referring to the EU framework in particular.

The term 'asylum' covers both asylum status and subsidiary protection. It functions as shorthand for the umbrella term 'international protection' covering the activities addressed in Article 78 of the Treaty on the Functioning of the European Union (TFEU).

The term 'member states' refers to EU member states.

Finally, gender pronouns are used interchangeably throughout the book.

3 Scope and delineation

This study is situated in the problematisation that international organisations are recognised as subjects of international law, but may nevertheless lack accountability. At the same time, their responsibility has to overcome many legal hurdles.[20] More specifically, the evolution of their role has not been accompanied by an evolution of the mechanisms required to hold them internationally responsible.[21] This problem is particularly pertinent when we are talking about human rights violations. It is precisely this problem that this study aims to address looking at the responsibility and the accountability of Frontex.

I focus on organisational accountability,[22] i.e. holding the organisation of the agency as such accountable, rather than the individual border guards. The conduct of the border guards, participating members of teams or belonging to the agency's staturoty staff, is discussed in the context of

20 J. Klabbers, 'The Transformation of International Organizations Law', *European Journal of International Law*, 26(1), 2015, p. 82.

21 A. D. Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge: Cambridge University Press, 2016, p. 54.

22 Bovens, Curtin and 't Hart 2010, p. 45.

the accountability of the agency, as it can bind the agency.[23] I further take a supranationalist viewpoint on accountability with the EU and its institutions as its focal point, as opposed to an intergovernmentalist or regulatory regime approach that would prioritise the accountability of the member states.[24] Thus, I mainly deal with the responsibility of Frontex.

The responsibility of member states that make available to the agency equipment and personnel by virtue of its involvement in the conduct of the Agency, or that of all EU member states by virtue of their membership in the Frontex Executive Board and the EU Council that determines the mandate of the agency falls outside the scope of the present research. The latter is in accordance with the theory of *volonté distincte*, concerning the constitutional relationship between the EU and its member states, particularly the control of member states over EU decision making.[25] If the EU were to be understood as no more than 'the concerted will of its Member States',[26] this would have consequences for its international responsibility and that of its members. If not, member states would be able to hide behind the international legal personality of the EU to avoid their own share of responsibility.[27]

This study does not deal directly with the derivative or secondary responsibility of member states for the acts of an international organisation. Even though the focus is on Frontex, the responsibility of states hosting or taking part in Frontex operations cannot be ignored, as they together form the European Border and Coast Guard, participate in joint operatios and share responsibility for integrated border management. Thus, the examination of their responsibility still plays a role in determining the nature of the responsibility of Frontex and the environment within which this responsibility arises. In particular, when addressing complex structures, such as the EBCG, Dennis Thompson's '*problem of many hands*' is encountered, where responsibilities become obscured due to the multiplicity of the actors involved.[28] The responsibility and accountability of the agency are seen through this framework of analysis.

---

23 While the changes of the 2019 Regulations, including those regarding Frontex's standing corps of border guards, have not been fully implements, this study addresses and considers their expected effects and foreseeable implications with respect to the legal responsibility of the agency.

24 Bovens, Curtin and 't Hart 2010, pp.: 21-29.

25 J. Klabbers, 'The Changing Image of International Organizations' in J. M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations*, Tokyo: United Nations University Press 2001, p. 226.

26 R. Schütze, 'On "Federal" Ground: The European Unions as an (inter)National Phenomenon', *Common Market Law Review*, 2009, p. 1069.

27 Casteleiro 2016; J. Rijpma, 'Frontex: Successful Blame Shifting of the Member States?', *ARI Real Instituto Elcano*, ARI 69/2010, 13 April 2010, pp.:1-4, https://www.files.ethz.ch/isn/117232/ARI69-2010_Rijpma_Frontex_Memeber_State_European_Union.pdf.

28 D. Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands', *The American Political Science Review* 1980, Vol. 74, No. 4, pp.: 905-16.

This study focuses on the responsibility and the accountability of the agency. What falls outside the scope is the examination of the EU's responsibility concerning the normative control the Commission and the Council[29] or even the CJEU[30] exercise over a member state in the context of an EBCG operation, either in terms of mandate or through the power to intervene.

I deal with the legal solutions if these occur in the context of EBCG operations, not with issues of evidence or the apportionment of contributions for damages amongst several actors. The focus is here on responsibility for possible violations. Therefore, the possible positive impact of the work of Frontex on human rights is not discussed at length but is taken into account here in the context of the human rights monitoring obligations of the agency.

Different types of accountability are examined here, providing an overview of the non-legal mechanisms that address the accountability of Frontex, namely, administrative, democratic, professional, and social accountability arrangements. However, the predominant focus of the study lies with legal accountability before courts.

Moreover, there is no particular focus on the coordination of joint surveillance operations in the territory of third countries, and the responsibility of the hosting third country. Consequently, the extraterritorial jurisdiction of the CJEU and the litigation avenues outside the EU fall outside the scope of this research.[31]

4 Academic relevance

This book addresses scholars interested in EU agencies in the area of Freedom Security and Justice, anyone interested in how Frontex operates as part of the European system of border management, but also those involved in the study of the broader issues of accountability, responsibility, and the protection of fundamental rights in the area of migration and asylum.

It sheds light on theoretical and normative issues or legal responsibility and accountability in a developing area of EU agencies that have operational powers but are not fully autonomous, and their cooperation with member states, which gives rise to the *problem of many hands* when their responsibility is discussed.

It aims to add to the body of academic knowledge, participate in the still-evolving debate on the agency's responsibility, and cover existing gaps in accountability by standing on a solid theoretical foundation (Bovens, Hart, Thomson, Rawls), which it develops further.

29 Casteleiro 2016, p. 83.

30 E. Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with EC's and the EC Member States' Membership of the WTO', *The European Journal of International Law*, 17, 4, 2006, p. 851.

31 M. Den Heijer, Europe and Extraterritorial Asylum, Hart Publishing: 2012.

In this regard, this study firstly provides a detailed examination of the evolution of the agency's powers and competences, along with the different human rights sensitivities that may occur not only during joint surveillance operations but in all aspects of the agency's work.

Secondly, it tries to navigate the legal framework by developing a new theory that fits the particular circumstances of EBCG operations. It contests the dominant ways of looking at responsibility and accountability, takes a step back to gain perspective on the '*problem of many hands*', and reimagines their optimal function by forming conceptual understandings that can best address the problem and its implications.

Thirdly, it translates the reimagined framework into legal accountability, a broad range of legal remedies, existing and future legal avenues, and develops judicial strategies that best incorporate the objectives of the conceptual framework. While others have dealt with the application of international law[32] and specific aspects of EU liability law on Frontex,[33] the added value of this book also lies in the emphasis on and the breadth of analysis of procedural issues that can arise in actual cases regarding the agency's accountability.

Fourthly, it examines the issue from the premise of constitutional or legal pluralism in human rights protection, focusing mainly on pluralism of legal sources. When using this term 'pluralism', I mean that I specifically look at how international law fits within the EU legal context. While other authors have discussed the ILC Articles in the context of the discussion of the responsibility of Frontex,[34] this study extensively argues for the interaction of the two legal systems and concretely proposes their (conditional) application in the EU legal framework. It sees the two systems as complementary, forming parts of a consistent legal order, and formulates explicit propositions on how the systems can learn from one another.

Hence, in the plethora of black-letter positivist studies on the responsibility of Frontex,[35] this book adds a conceptual and analytical dimension that can offer a framework for the broader examination of the research questions and addresses the issues from a normative perspective, which can complement and enrich the analytical work on particular aspects of the legal framework that has been done so far. It further implements this new understanding in the legal framework and develops judicial strategies for

---

32 R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press 2016; E. Papastavridis, 'The EU and the Obligation of Non-Refoulement at Sea' in F. Ippolito & S. Trevisanut (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation,* Cambridge: Cambridge University Press 2015.

33 M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Leiden: Leiden University, EM Meijers Instituut, 2017.

34 Mungianu 2016, I. Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?', *Silesian Journal of Legal Studies*, 7, 1, 2015.

35 Fink 2017, Mungianu 2016, Papastavridis 2015.

the agency's legal accountability. In this sense, the research is partly fundamental and partly applied.[36]

4.1 Contextualisation in the body of literature

There is a vast amount of literature concerning the accountability of EU agencies more generally, especially coming from the fields of governance and political science.[37] While such literature sheds much-needed light upon aspects such as the balance between independence and accountability,[38] the EU principle of subsidiarity,[39] and goes deeply into analytical arguments surrounding the democratic, administrative and social accountability, interestingly, judicial accountability remains understudied.

Earlier important works have already evaluated the added value of Frontex, in particular, as an instrument of EU governance,[40] and its effectiveness vis-à-vis political, legal, and operational difficulties,[41] and have dealt with a topic from the point of view of governance and the politics of institutionalisation.[42] The current study examines the issue from a legal perspective. Nevertheless, these works have provided essential guidance and the necessary framework for the embeddedness of the research.

There is also a growing body of literature focusing on Frontex in particular, and the accountability of the agency has been the matter of study for several researchers from different points of view. Aas and Gundhus have

36 H.S. Taekema, B.M.J. van Klink, On the Border, Limits and Possibilities of Interdisciplinary Research, in B.M.J. van Klink & H.S. Taekema (eds.), *Law and Method. Interdisciplinary Research into Law*, Tübingen: Mohr Siebeck 2011, p. 20.

37 See among others: L. den Hertog, *The rule of law in the external dimension of EU migration and asylum policy. Organizational dynamics between legitimation and constraint*, Oisterwijk: Wolf Legal Publishers 2014; M. Busuioc, *European Agencies Law and Practices of Accountability*, Oxford University Press, 2013; S. Peers & M. Costa, 'Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission', *European Constitutional Law Review*, 8, 1, 2012.

38 E.g. M. Busuioc, 'Accountability, Control and Independence: The Case of European Agencies', *European Law Journal*, 2009, pp.: 599-615.

39 P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2012.

40 S. Wolff & A. Schout, 'Frontex as Agency: More of the Same?', *Perspectives on European Politics and Society*, 2013, pp.: 305-324.

41 S. Wolff, 'EU border policies beyond Lisbon', in R. Zapata-Barrero (Ed.) *Shaping the Normative Contours of the European Union: A Migration-Border Framework*, Barcelona: CIDOB, 2010, pp.: 23-36.

42 S. Carrera, 'The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands', *CEPS Working Document No. 261/March 2007* (CEPS Working document), Brussels: Centre for European Policy Studies March 2007, http://aei.pitt.edu/7385/1/1482.pdf; J. Pollak & P. Slominski, 'Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders', *West European Politics* 2009, vol. 32(5), pp.: 904-924; S. Leonard, 'The creation of Frontex and the politics of institutionalization in the EU external borders policy', *Journal of Contemporary European Research*, 2009, pp.: 371-388.

analysed the perspective of Frontex border guards.[43] Wolff and Shout had developed a legitimacy-based model of accountability, while den Hertog, Rosenfeldt have studied the accountability of Frontex from a public administration perspective (governance approach).[44] Fernández-Rojo has focused on the development of the operational tasks of the agency, and inter-agency cooperation between Frontex, EASO and Europol.[45] Giannetto's research revolves around the agency's social accountability and the role of the Frontex Consultative Forum.[46] The present study belongs to this family of literature. It engages with accountability on a theoretical-normative level and develops a model of accountability based on understandings of justice and the rule of law.

It is also embedded in a second family of literature, as it also engages with the legal debate on the responsibility of the agency. Several authors have provided arguments to challenge the rejection of legal responsibility or, in other words, the complete irresponsibility of the agency,[47] or have provided more in depth but focused analyses upon more specific aspects of the responsibility of the agency,[48] the impact of the agency's work upon fundamental rights,[49] and the responsibility of member states participating in Frontex operations, and the allocation of responsibility between the member states and the agency.[50] A more overarching study, on which the present research has heavily built on comes from the rapporteurs to the LIBE Committee and refers to the implementation of the EU Charter of Fundamental Rights by EU Home Affairs Agencies.[51] Some of these studies

43 K. Franko Aas & H. O.I. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', *British Journal of Criminology* 2015, vol. 55(1).

44 H. Rosenfeldt, *The European Border and Coast Guard Rising: Recent Developments in the Light of EU Accountability Standards and Mechanisms*, SSRN, 2017.

45 Fernández-Rojo 2021.

46 L. Giannetto, *CSOs and EU Border Management: Cooperation or Resistance? The Case of Frontex Consultative Forum*, American Behavioral Scientist 64(4) 2019.

47 G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', *International Journal of Refugee Law*, 23, 2011; M. Fernandez 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts', in V. Moreno-Lax and E. Papastavridis (eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach,* Nijmegen: Brill 2016.

48 Mungianu 2016; Papastavridis 2015; A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', 229-257 in B. Ryan & V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, p.: 229-257.

49 Majcher 2015; N. Perkowski, *A normative assessment of the aims and practices of the European border management agency Frontex* (Working Paper Series No. 81), Oxford: Refugee Studies Centre, 2012, pp.: 21-24.

50 Fink 2017; Rijpma 2010.

51 European Parliament Civil Liberties, Justice and Home Affairs Department, G. Elspeth, S. Carrera, L. Den Hertog, J. Parkin (Rapporteurs), *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office (EASO)*, 2011, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf.

look at the responsibility of Frontex from a general public international law perspective,[52] while others from the perspective of EU law.[53] This study looks at their interaction within existing and developing normative frameworks, engaging with international law on responsibility, EU law, and the EU's accession to the ECHR.

This study builds upon this research and takes it one step further empirically and legally to the extent that it deals with the constant evolution of the agency's mandate and related developments. It further adds to the body of insight by providing an extensive and comprehensive examination of issues of both responsibility and accountability, developing new frameworks and ways of understanding these concepts as they are to apply in situations, such as these of Frontex operations, where the *problem of many hands* appears. It builds bridges between responsibility and accountability, between international, ECHR and EU law, between theoretical frameworks and their procedural applications.

Regarding the latter, the legal accountability of the agency is not only studied within EU liability law,[54] but takes on board also other legal remedies available in EU law, while also taking into account the role of the ECtHR and domestic courts in a case involving the accountability of Frontex.

Finally, this study adds to the existing body of literature as it updates our existing knowledge and insights taking into account the latest amendment of the EBCG Regulation in 2019. While the new Frontex standing corps and other innovations of the 2019 Regulation have not been yet fully operationalized, this work assesses their expected effects upon the legal responsibility and the accountability of the agency.

5 Societal relevance

This work was conducted with the aspiration to contribute to the solution to the human rights challenges faced by EU migration law as a result of 'policies of non-entrée', which lead to the regression of the rule of law and an overall legitimacy crisis of the EU. In the words of Canivez: 'As the fundamental values the EU claims to be based on are of importance to European identity and to European legitimacy, not implementing them in EU policies potentially has strong negative effects and threatens the legitimacy of the European project'.[55]

Therefore, the study also intends to take the theoretical questions one step further and connect them with legal practice. In particular, it also aims

52 Papastavridis 2010, Mungianu 2016.
53 Fink 2017; LIBE 2011.
54 Fink 2017.
55 P. Canivez, 'Review Essay: Under Consideration', in F. Cerutti and S. Lucarelli (eds.), 'The Search for a European Identity: Values, Policies and Legitimacy of the European Union', *Philosophy & Social Criticism*, 36 (7), p. 864.

to become the groundwork that opens up the possibility of development into a useful resource for legal practitioners. It further offers insights on the international legal framework on responsibility and the EU liability framework that the CJEU may utilise towards the progressive development of its own case law. Finally, this resource is relevant for officials working for EU agencies and EU Institutions, as well as national policymakers involved in migration issues. It can help identify and mitigate gaps and correct deficiencies in accountability and human rights protection.

The examination of the specific procedural and substantive issues that may play a role in a court case regarding Frontex, the development of judicial strategies, and the reference throughout this book to real-life examples of alleged violations and accountability initiatives, taken from the study of civil society, policy and news reports, adds distinctly to the existing body of literature. It further makes the research relevant also to a non-academic specialist audience. I use such examples to highlight the need for the agency's accountability, support arguments on the responsibility of Frontex, or engage in discussions regarding the procedural aspects of its accountability.

6 Methodology

In times of multi- and interdisciplinary research, this study is monodisciplinary. The perspective and methods are legal, even though arguments are borrowed from and developed in the context of legal philosophy. Still, to the greatest extent, the research at the basis of the present dissertation is conducted using traditional legal research methods. The loans from philosophy and the examples of empirical methodology it uses, such as content analysis and archival research are embedded in the legal methodology and constitute the necessary reminder that law cannot be studied disconnected from society, but always with an eye out for its application in the real world. Besides that, the research sits comfortably in the legal discipline, and the research questions can be clearly answered with the tools and methods of traditional legal research.

This is mainly a black-letter study, which aims to find the potential and the limits of the current judicial framework in holding the agency into account. For this reason, doctrinal legal analysis of legislation and case law is the essence of this study, in the meaning of constructing logically sound conclusions based on the elementary principles of argumentation, conceptual clarification and discussion, as well as methods of interpretation.[56]

56 M. van Hoecke, *Law as Communication*, Oxford/Portland: Hart publishing 2002, pp.: 125-145; C. McCrudden, 'Legal Research and the Social Sciences', *Law Quarterly Review*, 2006, pp.: 632-650.

6.1 Human rights embeddedness

In no small extent, the study concerns the rights of refugees. However, the methodological choice is made not to engage directly with the 1951 Refugee Convention Relating to the Status of Refugees. In doctrine and legal practise, human rights law and the Refugee Convention have been converging to the extent that one can argue that human rights have become the primary source of refugee protection.[57] Moreover, human rights, which are the actual scope of this study, provide a broader personal and material scope; they complement the Refugee Convention's provisions even when the two coincide. Furthermore, the human rights system, particularly at the European regional system, which is discussed here, provides for more appropriate and effective supervisory and enforcement mechanisms. All in all, human rights offer a more holistic approach, covering all issues regarding the protection of refugees, other migrants, and any person as subject of human rights. Therefore, this book discusses refugee rights as human rights, and further covers the rights of all humans regardless of status or qualification for international protection.

6.2 Do you believe in Human Rights?

There are many books, reports and court cases that have proven of essential importance as sources of information and legal analysis in the course of this research. They have set the foundations of arguments, and they have provided evidence and illustrations without which I would not have been able to communicate the message of this book.

'Who believes in Human Rights?' by Marie-Bénédicte Dembour is not one of them as such. Nonetheless, it has been valuable in embedding this research into the greater context of human rights. It has helped me understand my own concerns about the concept (not the law; not the practice) of human rights, and at the same time, it has empowered me to go on writing this book without having to communicate these concerns in the pages to follow.

Answering Dembour's question, I am certainly not a believer in human rights. I see human rights as one, but certainly not the only, or the morally superior, form of talking about politics of dignity, emancipation, social justice or simply the human condition within a society. Encouraged by her proclamation that using human rights strategically 'is not hypocritical, but a way to attain moral aims in the absence of a more persuasive language in

57 V. Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R. Rubio-Marín (ed), *Human rights and immigration*, Oxford: Oxford University Press 2014.

which to articulate claims for emancipation',[58] I write this book upon this principle.

For this reason, to its largest part (Chapters II, IV, and V), this is a 'black-letter' study. It deals with the law, not as it could have or should have been, but with the law as it is, its purpose being to investigate what the lawyer can do with it in the current judicial system. The rest (Chapter III) is dedicated to the law as it should have been, to its shortcomings compared against the principle of justice, the rule of law, and accountability in broader terms.

In this regard, engaging with critical literature such as this of Dembour or Douzinas,[59] in the process of unlearning and emancipating oneself from the intellectual orthodoxy of human rights, has inspired in this book, a divergent approach from the liberal positivist approach to legal research that is motivated and directed by goals and standards already set by decision-makers (national parliamentary, EU, or judicial). It has also inspired an approach divergent from the individualist approach to human rights and adjudication along the lines of compensation for a given individual alone.

In particular, while not rejecting the classic liberal-individualist conception of rights, a Kantian perspective of the law, where the individual is in the centre of the concept of rights,[60] this book is embedded in structuralist analyses on human rights. Structuralism moves away from individuals and states as the sole actors of interest and the starting points of analysis (rights and obligations). It focuses on the holistic understanding of society, the networks that form among the separate actors in society, and the socio-economic, political or legal structures that fundamentally influence social action.[61] Such legal analysis looks at systems and regimes that can fundamentally impact societal organisation. It can focus on access to justice for individuals, the impact of systemic deficiencies upon the protection and realisation of human rights, and structural changes that can bring societal impact broader than the remedying of the violation of a particular individual.

---

58 M. B. Dembour, *Who Believes in Human Rights*? Reflections on the European Convention, Cambridge University Press, New York 2006, p. 2, ''Though it does not appear to be intellectually tenable to 'believe' in human rights, I am ready to act as if I believed in them in a world where they have become part of the received wisdom - the more so since I almost believe in them, having been socialised in them and being persuaded by some of the values they seek to express. As far as I am concerned, using them strategically is not hypocritical, but a way to attain moral aims in the absence of a more persuasive language in which to articulate claims for emancipation.''

59 C. Douzinas, *The End of Human Rights*, Oxford: Hart Publishing, 2000.

60 G. Beck, 'Kant's Theory of Rights', *Ratio Juris*, 2006, Vol. 19 № 4, p. 371-401.

61 T. Landman, *Studying Human Rights*, London: Routledge 2006, p. 45.

Part I

Empirical: The Development and Human Rights Sensitivities

2 Frontex: separating the insiders from the outsiders

1 Introduction

This first substantive chapter introduces the reader to the character, the identity, and the modus operandi of the Frontex. A more in-depth description of the agency follows through the multiple alterations in its legislative framework and its ever-growing de jure and de facto powers and competences.

Reaching a deeper understanding of Frontex and its work, especially on how that has developed throughout the years, since its establishment in Warsaw in 2004, and on the possible impact of its activities upon fundamental rights, in the next chapter, is an essential first step towards the examination of the agency's responsibility and accountability.

2 Frontex and the European Border and Coast Guard

With a continually growing number of joint surveillance operations at the EU external borders since 2005, and with a budget, which in 2019 is for the first time counted in billions,[1] Frontex and its evolution, the European Border Guards Agency (EBCGA) has become one of the most important actors in border enforcement in Europe.

Frontex is an essential element of cross-border cooperation, defined as 'a more or less institutionalised collaboration between contiguous subnational authorities across national borders'.[2] This has materialised at the EU level in the conceptual framework of European Integrated Border Management, which has been defining EU policies since the beginning of the 2000s.[3] It aims to control access to the EU territory based on a four-tier system, which comprises of cooperation with third countries (for example visa policies), cooperation with neighbouring third countries, control of the external

1 The budget allocated to Frontex in the 2019 amendment of its Regulation notes a sharp increase. An additional €2.3 billion is proposed for 2019-2020, which is followed by €11.3 billion proposed for the 2021-2027 period. The new budget has at the time of writing not yet been released.

2 M. Perkmann, 'Cross-border Regions in Europe: Significance and Drivers of Regional Cross-Border Co-Operation', *European Urban and Regional Studies* 2013, vol. 10(2), pp.: 153-171.

3 Carrera 2007.

borders, and control measures within the Schengen area.[4] Since early on, the establishment of a European border control agency has been deemed crucial for the effective implementation of integrated border management.

2.1 The establishment

In order to accommodate the common Schengen borders with a territorial scope of over 43,000 km of coastline and land borders and 1.3 billion crossings a year,[5] as well as the security concerns of member states after 9/11,[6] Frontex was created in 2004.

The initiative belonged to Italy, Belgium, France, Germany, and Spain.[7] The agency reflected the member states' security concerns, especially in the face of the Union's enlargement towards Eastern Europe, and their commitment to closer integration.[8] The main reasons for supporting the project were that the agency would be a manifestation of solidarity and a useful tool for burden-sharing, it would allow for more efficient use of resources and expertise. It would, at the same time, further European integration.[9]

It pursued the strategic objective of Article 2(4) Treaty on European Union (TEU) to 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. The same objectives had been expressed earlier in the Treaty Establishing the European Community (TEC) in Articles 61-63, which also establish the competences of the European Council in the area of immigration policy, and constitute the juridical basis for the agency's founding Regulations. It was essentially the concrete implementation of the Schengen Agreement, which

4 Council of the European Union, Justice and Home Affairs, 2768th Council Meeting, Brussels: 4 December 2006, https://ec.europa.eu/commission/presscorner/detail/en/PRES_06_341.

5 European Parliament, European Parliamentary Research Service, *The economic impact of suspending Schengen*, March 2016.
The common EU borders are specified in Art. 2(2) Regulation (EU) 2016/399, in accordance with Protocol 19 of the Schengen acquis annexed to the TEU and the TFEU.

6 S. Wolff, 'Border management in the Mediterranean: internal, external and ethical challenges', *Cambrigde Review of International Affairs* 2008, vol. 21(2), p. 255; Pollak & Slominski 2009, p. 904; J. D. Fry, 'European Asylum Law: Race-to-the-Bottom Harmonization?', *Journal of Transnational Law & Policy* 2005, vol. 15(1), p. 101.

7 Council of the European Union, *Feasibility study for the setting up of the "European Border Police"*, Rome, March 2002, p. 5.

8 Council of the European Union 2002, p. 5.

9 House of Lords, Select Committee on European Union, *Ninth Report, CHAPTER 3: integrated border management and a European border guard*, European Union Committee Publications, par. 22, https://publications.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13305.htm; For a critical analysis on the establishment of Frontex, see Perkowski 2012.

was annexed as a Protocol to the Treaty of Amsterdam,[10] and the Tampere Conclusions, which at point 24 call for closer cooperation and mutual technical assistance between the member states in the field of border control, including exchange programmes and technology transfer, especially on maritime borders.[11]

Initially, the project concerned a 'European Border Police' or a 'European Border Guard' that would be in the centre of an integrated approach combining infrastructures, information exchange, cooperation and coordination, border management, and police cooperation.[12] It would support but not replace national border police forces.[13] It was still unclear whether the future intention was for it to become an 'operational force'.[14] The idea of the body being vested with full operational powers effectively replacing the national border authorities, as it was the intention of the Commission and the European Parliament (EP),[15] was discussed and dismissed for the time being due to the sovereignty concerns of the Member states.[16]

The name has proven controversial with member states, including the UK, Finland and Sweden, that expressed reservations about a fully integrated system of border management represented in a European Border Police Corps.[17] The name was dropped by the European Council already in 2001,[18] but the European Commission (EC) insisted on it as a longer-term plan that would result from progressive integration.[19] The long-term

10 The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22/09/2000 P. 0013 – 0018.

11 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Tampere: European Council 15 and 16 October 1999.

12 'It should be highlighted that border management is not focusing solely on the immigration aspect but also on other purposes customs purposes, traffic security, prevention of the entry of dangerous or illegal goods, identification of persons wanted for arrest or extradition (...)". Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001, Laeken: European Council 14 and 15 December 2001, point 4.4.

13 European Council, Plan for the management of the external borders of the Member states of the European Union, Council document 10019/02, 14 June 2002, paras 118-120.

14 House of Lords 2004.

15 H. Jorry, *Construction of a European Institutional model for managing operational cooperation at the EU's external borders: Is the FRONTEX agency a decisive step forward?* (CEPS Research Paper No. 6), Brussels: Centre for European Policy Studies March 2007, p. 2.

16 J. Monar, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. Caparini and O. Marenin (eds), *Borders and Security Governance, Managing Borders in a Globalised World*, LIT Verlag Münster, 2006, Chapter 10, pp.: 4, 5; Wolff 2008, pp.: 253–271.

17 House of Lords 2004, par. 30; Monar 2006, p. 2.

18 Laeken Conclusions.

19 European Commission Communication to the Council and the European Parliament entitled "Towards integrated management of the external borders of the Member states of the European Union", 2002; Monar 2006, p. 2.

development of Frontex and the exploration of the feasibility of a European system of border guards were included in the Stockholm Programme.[20]

An evanescent attempt to get the wheels turning took place in 2003 with the creation of the External Borders Practitioners' Common Unit (PCU) within the intergovernmental Council working group called Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). CPU would become a 'leader' in border management coordinating and controlling operational projects'.[21] Under PCU the heads of national border guards would deal with and coordinate their activities exclusively on operational matters. After only one year of operation, its limitations soon came to light[22] and it gave space to the establishment of the EU External Borders Agency, 'Frontex', a name derived from the French term for external borders, *frontières extérieures*.[23]

The EC following the mandate given to it by the Thessaloniki European Council to examine alternative governance structures,[24] presented a proposal on the creation of an agency that was soon approved by the Council.[25] The agency was established under the consultation procedure with the active involvement of the EP, the majority of the members of which supported the initiative. Support, however, was not universal. Heated discussions took place at the time, in principle led by members of the GUE/NGL group, which voiced strong concerns regarding the idea of 'Fortress Europe' and the adding 'to the suffering of refugees and migrants'.[26]

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders, was created with Council Regulation (EC) 2007/2004[27] (Frontex Regulation) in fulfilment of the aim of operational cooperation, i.e. collaboration between the competent services. Its historical legal basis is found in Articles 62(2a) and 66 of the Amsterdam Treaty.[28] Today, the EU competence and the procedures in migration policy

20 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, p. 56.

21 European Commission 2002, p. 2.

22 S. Wolff and A. Schout 2013, pp.: 312-315. According to the authors, however 'Frontex as an agency has not been a major addition', p. 319.

23 For a more detailed view on the establishment of Frontex, see H. Ekelund, 'The Establishment of FRONTEX: A New Institutionalist Approach', *Journal of European Integration* 2013, vol. 36(2) and A. W. Neal, 'Securitization and risk at the EU border: the origins of FRONTEX', *Journal of Common Market Studies* 2008, vol. 47(2).

24 European Council, Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions.

25 European Council, Presidency conclusions. European Council meeting in Brussels, 16 and 17 October 2003, Brussels, 15 November 2003, 15188/03.

26 Ekelund 2013, pp.: 107, 108.

27 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

28 Jorry 2007, p. 9.

are laid out in Articles 77 and 79 TFEU, which reflect the dynamics of the Schengen system with free movement complemented with efficient control of irregular migration especially at the external borders and a growing emphasis on integrated border management. The aim of the agency is to ensure effective border management by coordinating and assisting the member states in the surveillance and control of the external borders, which is seen as a necessary corollary to the absence of controls when crossing the internal borders.[29]

However, the agency's stated purpose is qualitatively broader[30]: 'improving the integrated management of the external borders, ensuring a uniform and high level of control and surveillance'.[31] Its tasks, a more detailed view of which is given below, have been formed around the definition of integrated border management. This definition includes border checks and surveillance as defined in the Schengen Borders Code, cross-border crime investigation, inter-agency cooperation and cooperation with member states and third countries, as well as coordinating and ensuring coherence of actions at the EU level.[32]

The Management Board of the agency is composed of one representative of the border authorities of the Schengen acquis states and two Commission representatives, which serve for a renewable four years term.[33] It makes the strategic decisions and exercises oversight over the agency. Among its tasks is to establish and supervise the execution of the budget, ensure transparent decision-making procedures, appoint the Executive Director of the Agency, and adopt the agency's work programme and annual report. These are subsequently sent to the EP, the Council, the Commission, the European Economic and Social Committee, and the Court of Auditors.[34]

---

29 Frontex Regulation 2004, Preambular Paragraph (1).

30 Baldaccini 2010, pp.: 232, 233.

31 Frontex Regulation 2004, Article 1.

32 Conclusions of the Justice and Home Affairs Council meeting of 4-5 December 2006, preceded by the draft Council Conclusions in Integrated Border Management, document 1422/06, 19 October 2006, p. 2. A more narrow interpretation of integrated border management, which restricts the notion to border control and other aspects of the management of the external borders, excludes criminal law from the mandate of Frontex. S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2011, p. 157; Mungianu 2016, pp: 22, 32.

33 Iceland, Lichtenstein, Norway and Switzerland, as non-EU Member states but signatories to the Schengen Acquis have limited voting rights. Article 101 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. The United Kingdom and Ireland are invited to participate in the Management Board meetings. Article 104(5) EBCG Regulation.

34 Article 100 EBCG Regulation; Frontex website http://frontex.europa.eu/about-frontex/organisation/management-board/.

The Executive Director, a post which since January 2015 belongs to Fabrice Leggeri,[35] is appointed by the Management Board on a proposal of the Commission.[36] He is entirely independent and does not take instructions from the member states or any other body. He answers to the Management Board. He proposes, prepares, and manages the implementation of strategic decisions, programs and activities of the agency, including operational plans and budgets. He proposes the initiation of operations upon project proposals prepared by the Risk Analysis Unit and approves such requests filled by member states.[37]

2.2 The mandate

Since it became operational, in May 2005, the Warsaw-based agency has witnessed considerable growth in its operational capacity. Its staff had increased from 43 members in 2005[38] to 330 in 2016[39], while 2020 finds the agency with its own standing corps. Furthermore, from an initial budget of €6 million[40], which was enough only to cover the staffing and administration costs,[41] the agency handled today a budget that is counted in billions.

Its mandate has developed in parallel to the growth of its financial and human resources with two amendments of its founding Regulation in 2007 (hereafter RABIT Regulation)[42] and in 2011[43] that expanded the agency's operational powers, while its mandate is also developing on an ad hoc

35 Ilkka Laitinen served as the agency's first Executive Director since 2005.

36 Article 107 EBCG Regulation.

37 Article 106 EBCG Regulation.

38 Council of the European Union, "Strengthening the European external borders agency Frontex – Political Agreement between Council and Parliament", 11916/11, Presse 192, Brussels, 23 June 2011.

39 House of Lords, Frontex Executive Director, Fabrice Leggeri, hearing before UK Parliament, 16 September 2016, http://parliamentlive.tv/Event/Index/1e48fc9c-722d-4cc1-9c85-1e5f772630d9.

40 Council of the European Union 2011.

41 Pollak and Slominski 2009, p. 909.

42 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union, [2004] OJ L 349/1 (Frontex Regulation), as amended by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, [2007] OJ L 199/30 (RABIT Regulation).

43 Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union; Steve Peers has produced a codified version, Statewatch analysis, The Frontex Regulation Consolidated text after 2011 amendments, available here: http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf.

basis.[44] The European Border and Coast Guard (EBCG) Regulation,[45] which replaced the Frontex Regulation in 2016 make a marked change in the status and operational role of Frontex.[46] The first amendment of the 2016 EBCG Regulation came soon after in 2019.

This gradual approach in the development of mandate and capabilities, where the agency is being vested with new powers almost every two years, was a necessary reconciliation between the Commission's vision of fully-integrated border management led by a fully-fledged corps of border guards, and the sovereignty concerns of member states. The following section takes a historical approach in presenting the agency's mandate, where the relevant legislative framework is set in chronological order to showcase this gradual but truly prodigious development of the powers and competences of the agency since its establishment.

2.2.1 Original mandate

As described in its founding Regulation, the role of Frontex focuses on reinforcing and streamlining the cooperation amongst the member states, which nevertheless remain primarily responsible for their section of the common borders (Article 2(1)(a)).[47] The tasks of the agency were threefold. The first group of tasks concerned the deployment of technical equipment (e.g. aeroplanes, ships), and personnel to those member states that face significant pressure at their borders. Here belonged tasks, such as organisation and coordination of joint operations at the sea, land and air external borders (border surveillance operations), and coordination of joint return operations (operations aiming at the collective return of irregular migrants from several member states) (Articles 2(1)(f), 9).

---

44 Frontex had already been participating in operations in the context of bilateral agreements with third countries, e.g. Hera Operation, 2006, before that was foreseen in its founding Regulation in 2011. Operations Triton and Poseidon are awarded a significant 'search and rescue' character after several incidents of mass drowning in the Mediterranean. European Commission, *Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean*, Brussels: European Commission 7 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566; Council of the European Union, *Special meeting of the European Council, 23 April 2015 – statement*, Brussels, 23 April 2015, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/.

45 Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC.

46 S. Peers, 'The Reform of Frontex: Saving Schengen at Refugees' Expense?', *Blog EU Law Analysis* 16 December 2015, http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html.

47 Frontex Regulation 2004

The aforementioned operations would take place upon request of a member state facing disproportional pressures at its borders or on the agency's initiative (Article 3(1)). In joint return operations, Frontex was responsible for the organisation, coordination, and (co-)financing of the missions without entering into the merits of return decisions (Article 9). Frontex also built relationships of cooperation with third states (Article 2(2), 14), mainly states of origin and transit countries.

On a second level, Frontex helped member states with capacity building in various areas related to border control, mainly through training of national border guards, setting common training standards, and sharing information and best practices (Articles 2(1)(b), 5, 6). Frontex runs the Network of Training Coordinators and the national training coordinators group, with its common core curriculum facilitating the exchange of best practices among member states. More generally, the meaning of 'capacity building' is not clearly defined and is so general that it could include any border-related activity.

Thirdly, all the aforementioned tasks were carried out in an information-rich environment. The agency used information-sharing links, such as the Information and Coordination Network,[48] and conducted research and risk analyses, allowing the EU and member states to make informed decisions on appropriate measures or tackle identified threats and risks.[49]

2.2.2 Frontex Regulation 2007 amendment

In 2007 already, the existing system of support with regard to border checks and surveillance at the external borders was considered insufficient, especially when member states were faced with the arrival of a large number of people trying to enter the EU in an irregular manner.[50] Therefore, member states agreed to increase the operational powers of Frontex significantly[51] with the adoption of the amending Regulation (EC) No 863/2007 (RABIT Regulation).

The European Council called upon the Commission to bring a proposal that would regulate the creation of specialised units, which could be deployed in member states that face high immigration flows.[52] The time-

48 Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member states' Migration Management Services (OJ L 83, 1.4.2005, p. 48.

49 Preambular Paragraph (6), Article 2 (c) and (d) Frontex Regulation 2004; S. Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices', *European Security* 2010.

50 Preambular Paragraph (5) RABIT Regulation.

51 J.J. Rijpma and M. Cremona, *EUI Working Papers. The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, Fiesole: European University Institute 2007, pp. 20-21.

52 European Council, Presidency Conclusions of 15 and 16 December 2005, Brussels, 30 January 2006.

liness of the proposal, presented in July 2006, is defined by the alarming situation around Lampedusa and the Canary Islands.[53]

The Regulation, finally adopted in 2007, gave the agency the ability to deploy Rapid Border Intervention Teams (RABITs)[54]. These teams, composed and fully financed by the agency (Article 4(1)(4)), consist of national border guards from participating member states and are deployed temporarily upon request of a member state (Article 3 (1)(b).

Member states may call upon the RABITs in cases, where they face an emergency situation at their borders, such as urgent and exceptional pressure from 'mass influx' of migrants that requires increased technical and operational assistance (Article 1). At that stage, Frontex can intervene providing immediate efficient, practical assistance, especially personnel.[55]

Apart from the deployment of the RABITs, the amending Regulation also defined the tasks and powers of border guards participating in joint operations and pilot projects of Frontex (guest officers). Namely, guest officers were given active border control and police tasks, such as investigating nationality, stamping passports, and preventing irregular border crossing (Articles 10, 12). Moreover, guest officers would wear a special uniform and carry EU credentials (Article 6(4)). They were also authorised to use force and carry weapons (Article 6(5)(6)).

The amending Regulation also strengthened the Community character of the agency and its authority over the member states.[56] It conferred a certain amount of coercive power with respect to organising the deployment of RABITs. Based on the principle of 'compulsory solidarity', member states were obliged to make border guards available for a mission 'unless they are faced with an exceptional situation substantially affecting the discharge of national tasks' (Article 4(3)). Frontex determined the number of seconded officers per member state. However, it remained within the discretion of the member states to select the officers and decide the duration of their secondment.[57]

The first emergency situation, where the RABIT teams were deployed arose in 2010 at the Turkish-Greek border.[58] Twenty-six member states participated in the mission making available more than 200 border guards, interpreters and other experts, and a large number of assets and other equipment in an operation that lasted from November 2010 to March 2011.[59]

---

53 Rijpma and Cremona 2007, pp.: 20-21; COM(2006) 401 final, Proposal for the Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism.

54 The name was replaced by the following 2011 amending Regulation with the name European Border Guard Teams.

55 Preambular paragraph (4) RABIT Regulation.

56 Baldaccini 2010, pp.: 234, 236.

57 Doc. 7497/10 FRONT 35 CODEC 224 COMIX 212; Mungianu 2016. pp.: 43-44.

58 Wolff 2010, p. 122; Council of the European Union 2011.

59 Frontex website http://frontex.europa.eu/operations/archive-of-accomplished-operations/181.

The RABIT forces assisted the Greek authorities on multiple levels. Apart from the deployment of border guards at the land border with Turkey, guest officers also assisted in screening apprehended migrants and the return of those found to be staying illegally in Greece. Finally, Frontex was also involved in intelligence activities concerning trans-border crime.[60] The mechanism was deployed once more by Greece in 2015.[61]

2.2.3 *Regulation on Frontex immigration liaison officers' networks*

Council Regulation (EC) No 377/2004 had created the mandate for enhancing cooperation with third states on issues of irregular migration by deploying Immigration Liaison Officers (ILOs) of member states in third countries and regions of interest. Regulation 493/2011 centralised these already existing networks into an EU Network of ILOs operated by Frontex.[62] Frontex liaison officers are posted today in third states, by virtue of the 2011 recast Frontex Regulation, in order to facilitate the collection and exchange of information to be used for operational purposes and for promoting more effective cooperation, while at the same time taking into consideration the relevant human rights aspects. This opportunity had not been implemented until 2015 when the first liaison officer was appointed in Ankara.[63] Frontex has since posted two more liaison officers in Serbia and Niger,[64] while it aims at deploying more liaison officers in key areas of interest, especially in Western Africa and the Western Balkans.[65]

2.2.4 *Frontex Regulation 2011 amendment*

Shortly after the 2007 amendment, new calls were made by the Council at several instances for the enhancement of the efficiency and the expansion of the operational role of the agency.[66] Finally, the Commission published

60 L. Bargiotti, 'FRONTEX: first ever RABIT operation deployed on 2 November', *Blog FREE Group* 14 November 2010, https://free-group.eu/2010/11/14/frontex-first-ever-rabit-operation-deployed-on-2-november-2/.

61 Frontex, *General Report 2015*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2015, https://op.europa.eu/en/publication-detail/-/publication/474bb018-b537-11e6-9e3c-01aa75ed71a1, p. 28.

62 Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

63 House of Lords 2016.

64 *A Year in Review: First 12 Months of the European Border and Coast Guard Agency*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2017, p. 3, https://frontex.europa.eu/assets/Publications/General/A_Year_in_Review.pdf.

65 House of Lords 2016.

66 E.g. European Pact on Immigration and Asylum, 13440/08, October 2008 and in the Stockholm Programme.

its proposal for strengthening the mandate of FRONTEX in February 2010[67] and the amending Regulation (EU) No 1168/2011 was adopted on 25 October 2011.

The 2011 recast had a distinguishable impact on the powers of the agency in the whole range of its activities. In particular, all teams deployed during Frontex operations – be it joint operations, pilot projects or rapid border interventions – were called European Border Guard Teams, giving thus the stamp of the agency (Articles 1(4)(a), 3(1)(a,e), which was until then reserved only for Rapid Border Intervention Teams.

The amendments also included inter alia the secondment to the agency of a pool of border guards, composed of national border guards made available by the member states, to be deployed at joint operations and pilot projects (Article 3(1)(b)). Border guards should operate under the instructions of the authorities of the requesting state (Article 3(1)(c). Nonetheless, the views of the agency on the instructions provided by the member state must be taken into consideration (Article 3(1)(c).

Besides that, the recast Regulation rendered compulsory the contributions of member states to the technical equipment pool, gradually opening the way for the acquisition by Frontex of its own equipment (Article 7).

Concerning joint operations and pilot projects, Frontex, apart from its coordinating tasks, acquired then a co-leading role together with the host member state (Article 3(1)(a)), while the role of the agency was also strengthened with respect to cooperation with third countries. Among others, Frontex may deploy its liaison officers in third countries (Article 14).

Furthermore, the intelligence-led work of the agency was upgraded as it was allowed to develop and operate information and border surveillance systems with a particular focus on information sharing (Articles 2(1)(h,i), 11). Furthermore, it was given the mandate to collect and process personal data related to irregular migration and trans-border criminal activities during all operations. The agency could retain this information for up to three months[68] and exchange it with EUROPOL and other European agencies (Article 11(b,c)).

As a development parallel to the review of the operational mandate of Frontex, several amendments adopted in 2011 referred to the human rights and international law framework in which the agency operates, including the Geneva Convention.[69] This reference occupied a prominent position

---

67 COM(2010)61 final of the European Commission, Proposal for the Regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

68 In practice, the data are destroyed in principle ten days after the operation, but when Frontex charters aircraft itself for a joint return operation, the passenger list is kept for five years. Greens in European Parliament in collaboration with Migreurop , S. Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, Brussels, March 2011, p. 19.

69 Convention Relating to the Status of Refugees, Geneva, 28 July 1951.

already in Article 1 of the consolidated version of the Frontex Regulation and was repeated in a number of other provisions (Articles 10(2), 14). Prohibition of refoulement and an obligation for special attention to the needs of vulnerable groups was also added in express terms as part of the main tasks of the agency (Article 2(1)(b)).

Furthermore, guarantees for fundamental rights and the rule of law should, according to the 2011 recast, be laid down in an obligatory Code of Conduct (Article 2(a)),[70] which should be drawn up in cooperation with the Consultative Forum (Article 26(a)). The Forum comprised of the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA), the United Nations High Commissioner for Refugees (UNHCR) and civil society organisations, is mandated to assist in fundamental rights matters (Article 26(b)). Since then, the agency also has a Fundamental Rights Officer (FRO), tasked with monitoring the agency's activities with respect to fundamental rights (Article 26(a)).

The agency had also undertaken the task to provide training to border guards participating in its operations and to instructors of border guards in the member states with regard to human rights and access to international protection (Article 5). Also, its financial support to the member states for return operations became conditional upon the respect of the EU Charter of Fundamental Rights (Article 9).

Moreover, special safeguards were put in place including the deployment of a Data Protection Officer and cooperation with the European Data Protection Supervisor (EDPS) and the FRA (Articles 11(a), 13). Finally, the agency was mandated to draw up a Fundamental Rights Strategy[71] and set up a monitoring mechanism that ensured the respect of fundamental rights in all its activities (Article 26(1)).

2.2.5 EUROSUR Regulation (2013)

EUROSUR is a pan-European surveillance system of the EU's southern and eastern borders, established with Regulation 1052/2013[72] and coordinated by Frontex, which integrates all maritime surveillance facilities of the member states. The aim is to improve coordination in existing infrastructures, and extend their reach, in order to provide a more complete picture

70 The Code of Conduct for all Persons Participating in Frontex Activities is currently available at http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf

71 The Fundamental Rights Strategy of Frontex in currently available here: http://www.frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf.

72 Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

of the situation in real-time, and thus increase situational awareness[73] and reaction capability[74].

It does so as part of the Common Information Sharing Environment by a) creating a broad information-sharing network through the inter-linking of national infrastructures and information collected by the member states and Frontex, b) conducting research and development in order to improve the efficiency of surveillance tools and infrastructures, and c) gathering, analysing and communicating data from national, EU, and international surveillance and intelligence tools and reports to develop a common pre-frontier picture.[75]

It has been called the 'system of systems', as it employs all currently available infrastructure and resources, including the latest advancements of military technology, such as earth observation satellites, ultraviolet A-rays (UVA's), and drones. Satellites allow for the monitoring at once of a large part of the Mediterranean beyond the EU territory, into the international waters and third-country territories. Complementarily, UVA radiation, applied to the target area on demand, can produce high-resolution imagery. The combination of these tools can provide a detailed picture of the surveillance area.[76]

The Regulation was the result of several years of negotiations. The Commission expressed its intention in 2006 to create a European Surveillance System for Borders,[77] and was endorsed by the European Council of 14 and 15 December 2006. It has been one of the critical objectives for both the Commission[78] and the member states[79], while the agency was involved in the development of the European border surveillance system from the beginning, participating actively in the work of the European Security

73 'Situational awareness measures how the authorities are capable of detecting cross-border movements and finding reasoned grounds for control measures.' Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM (2008) 68 final, p. 4.

74 'The reaction capability measures the lapse of time required to reach any cross-border movement to be controlled and also the time and the means to react adequately to unusual circumstances'. European Commission 2008, p. 4.

75 Such as Vessel Monitoring System, Automatic Identification System, Long Range Identification and Tracking System, SafeSeaNet.

76 European Commission 2008, pp.: 8, 10.

77 Commission Communication, COM (2006) 733 final of 30 November 2006, Communication from the Commission to the Council, Reinforcing the management of the European Union's Southern Maritime Borders.

78 Communication COM (2010) 673 final of 22 November 2010, The EU Internal Security Strategy in Action: Five steps towards a safer Europe.

79 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, OJ C 115/1.

Research and Innovation Forum.[80] The EUROSUR Regulation was finally adopted in 2013. EUROSUR's operations officially started on 2 December 2013, but in practice, the system had already been operational on the ground, while its legal basis was still under negotiation.[81]

Supported by EU funding and coordinated by Frontex, member states retain pivotal roles in the system's implementation, as the system is decentralised and information is physically managed by the national coordination centres rather than fed to a central server. The role of Frontex is 'meant to grow steadily', with the agency adopting tasks, such as administering the centralised components of the EUROSUR network, ensuring the common application of surveillance tools and products, and providing the common pre-frontier intelligence picture.[82] The active involvement of third states in providing but also receiving surveillance information is considered a significant factor for the success of EUROSUR.[83]

What is worth mentioning is that the stated goal for EUROSUR in 2008 was to enhance border surveillance 'with the main purpose of preventing unauthorised border crossings, to counter cross-border criminality and to support measures to be taken against persons who have crossed the border illegally'.[84]

The EP hesitantly introduced an additional goal to 'step up search and rescue capabilities so as to save more lives',[85] but the Commission's initial legislative proposal of 2012, had only one mention of 'protecting and saving lives' and this only in the preamble.'[86] Later, between 2011 and 2013, when the death toll of migrants at the EU's borders entered the public debate vividly, a shift was observed in the direction of 'humanitarisation' of language and policies, as discussed further below.[87] The 'considerable life-saving potential in situations of distress at sea' became then central in the

80 European Parliament Report (EU doc. no. A6-0437/2008) on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), pp.: 13, 14; European Commission, *Commission Staff Working Paper determining the technical and operational framework of the European Border Surveillance System (EUROSUR) and the actions to be taken for its establishment Council of the European Union*, 2011, SEC 45 final, p. 4.

81 Frontex, *General Report 2012,* Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2013, p. 20; European Commission 2011a, p. 2.

82 European Commission 2011a, p. 5.

83 European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM (2008) 68 final, p. 6; European Commission 2011a, pp.: 5, 7.

84 European Commission 2008, p. 2.

85 European Parliament 2008, p. 14.

86 Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), 2011/0427 COD.

87 Aas & Gundhus 2015, pp.: 11, 12.

institutional discussion about EUROSUR,[88] and the system was presented and promoted as 'protecting migrants' lives'.[89] Saving the lives of migrants was also introduced as an objective in Article 2 of the Regulation.

However, serious doubts have been expressed as to the life-saving capacity of EUROSUR, as the system was not sufficient to avert the Lampedusa tragedy were almost 400 people lost their lives in a single incident in 2013.[90] Moreover, the current state of remote sensing technologies does not allow for the detection of small vessels.[91] Perhaps more importantly, no legal obligation can be found in the EUROSUR Regulation for either member states or Frontex to respond to the detection of a vessel in distress, or an obligation to address the right to asylum. To some extent, this gap was dealt with for Frontex operations in the Frontex Sea Operations Regulation adopted one year later.

Apart from the concerns that the life-saving potential of the system will not be exploited to the full,[92] it is also feared that cooperation with third states, as envisioned in EUROSUR,[93] will lead to an increase of push backs.[94] EUROSUR Regulation explicitly prohibits sharing information with third countries, which could use it to stop potential asylum seekers from leaving the territory to seek asylum in Europe or punish them for attempting to flee. However, there are no adequate checks and balances in place that would

88 European Commission, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) SEC (2011) 1538 final, p. 9; Parliamentary Question, E-006760/2011; answer given by Ms Malmström on behalf of the Commission (28 July 2011).

89 European Commission, press release, Brussels, 29 November 2013, available at http://europa.eu/rapid/press-release_MEMO-13-1070_en.htm.

90 C. Heller and C. Jones, 'Eurosur: saving lives or reinforcing deadly borders?', *Statewatch Journal* 2014, vol. 23.

91 According to the result of a Frontex pilot study, 'maritime surveillance with high resolution images would require a large number of images to cover wide maritime areas, which is very expensive and for the time being technically not feasible'. Charles Heller and Chris Jones, 'Eurosur: saving lives or reinforcing deadly borders?', Heller and Jones 2014.

92 ECRE interview with Adriano Silvestri, Head of Asylum, Migration and Borders Sector at the EU Fundamental Rights Agency, 'Joint operations outside EU waters must not lead to the circumvention of European fundamental rights safeguards', 29 March 2013, http://www.cir-onlus.org/Interview%20with%20Adriano%20Silvestri%20(1).pdf; Hayes Ben and Vermeulen Mathias , Heinrich Böll Foundation, *'Borderline, The EU's New Border Surveillance Initiatives, Assessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposals'*, June 2012, p. 46; Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 2013, par 44.

93 Article 18 EUROSUR Regulation Proposal.

94 Hayes and Vermeulen 2012, pp.: 4, 5; European Union Fundamental Rights Agency, *Fundamental rights at Europe's southern sea borders*, Luxembourg: European Union Agency for Fundamental Rights 27 March 2013, p. 61, https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf.

assure that.[95] Finally, there is no provision in the Regulation concerning identifying persons in need of international protection. In particular, Article 2(3) states that the Regulation does not apply to legal or administrative measures taken after the interception, while the impact assessment explicitly states that asylum, readmission, and return are out of the scope of EUROSUR.[96]

EUROSUR Regulation has been repelled by and incorporated in the 2019 amendment of the EBCG Regulation without substantial changes.

2.2.6 Sea Operations Regulation (2014)

In response to the criticism that arose especially after the *Hirsi Jamaa* case, concerning the forced return of persons to an unsafe country during a Frontex operation,[97] the Council and the EP adopted rules concerning the surveillance of the external sea borders in the context of Frontex operations, thus recognising the human rights implications of these operations and setting down safeguards for refugees and migrants' rights.[98]

An earlier attempt to establish rules for maritime surveillance, Council Decision 252/2010 implementing the Schengen Borders Code, was annulled by the CJEU on the ground that the rules on maritime operations include measures of a coercive nature that can affect human rights. As such, they should be adopted using the regular legislative procedure, which requires the approval of the EP.[99] After this ruling, the Council returned with a legislative measure.

The Sea Operations Regulation establishes, on the one hand, binding rules on interception, search and rescue in territorial waters and the high seas (Articles 3, 5-10).[100] These rules include the definition of when a vessel is in a state of 'alert', 'uncertainty' or 'distress' (Article 9), and specific rules on the place of disembarkation (Article 10). Lack of agreement among member states on these points had caused the death of 63 people in 2011

95 FRA 2013, p. 62.

96 European Commission 2011b, p. 24; Hayes and Vermeulen 2012, p. 46.

97 ECtHR 23 February 2012, Judgment, App. No. 27765/09 *(Hirsi Jamaa and Others v Italy).*

98 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union.

99 ECJ, 5 September 2012, C-355/10, ECLI:EU:C:2012:516 (*European Parliament v. Council*).

100 Several member states attempted during the negotiations to 'water-down' the binding rules on search and rescue and disembarkation but were ultimately unsuccessful. S. Peers, 'New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?', *Statewatch Analysis* February 2014, https://www.statewatch.org/media/documents/analyses/no-237-maritime-surveillance.pdf;

at the infamous 'left-to-die-boat' case. [101] This necessary reinstatement and clarification of the law of the sea aimed at reducing the 'human cost of border control'.[102]

On the other hand, the Regulation focused on protecting refugees and those at risk of ill-treatment upon return to their country of origin or any other country (Article 4). It was promoted as putting an end to the practice of push backs at sea and bringing Frontex operations in line with international law.[103]

In particular, the Regulation clarifies and details the obligations of non-refoulement, respect for human dignity and human rights. Article 4 introduces the principle of non-refoulement, stating that no one shall be disembarked in, (…) or otherwise handed over to the authorities of a state that is considered unsafe. The article also covers the possibility of chain refoulement, i.e. the case where the person would be forced to enter a country that is in itself safe but from which there is a serious risk of expulsion, removal or extradition to another country where they would face risk to their life or freedom.

Moreover, following the *Hirsi Jamaa* ruling, the Regulation provides that, when deciding whether a state can be considered safe, the general situation in the country should be taken into account already when drafting the operational plan (Article 4(2)). This decision shall be informed from a 'broad range' of sources, such as member state, EU bodies', offices' and agency's reports, and reports of international organisations, as well as the existence of agreements and projects engaging Union funds. Concerns have been expressed as to the latter sources' relevance in assessing the human rights situation in a country.[104] As infamous examples of these sources, we can mention the EU-Turkey deal[105] and the direct linking of EU development aid with containing migration in third states.[106]

---

101 PACE, Council of Europe, Tineke Strik (Rapporteur), Lives lost in the Mediterranean Sea: who is responsible?, https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf.

102 See 'Deaths at the Borders Database' that is the collection of official evidence on people who have died while attempting to reach southern EU countries, available at http://www.borderdeaths.org/.

103 *Rescuing Refugees at Sea. Frontex Treatment of Refugees at Sea to be Retasked Following EP Vote*, The Greens/EFA Group European Parliament 9 December 2014, https://www.greens-efa.eu/en/article/press/rescuing-refugees-at-sea-4602/.

104 S. Keller, 'New rules on Frontex operations at sea', *The Libe Flash* April 2014, https://www.statewatch.org/media/documents/news/2014/apr/ep-green-keler-mep-frontex-operations-at-sea.pdf.

105 S. Peers and E. Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?', *Blog EU Law Analysis* 5 February 2016, https://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html.

106 N. Jensen, 'EU to use aid and trade to stop Africa migration, *EUObserver* 28 June 2016, https://euobserver.com/migration/134067.

The Regulation further provides for attending to the unique needs of vulnerable groups, such as children or victims of torture, protection of personal data, human dignity, and for the appropriate training of everyone participating in an operation (Article 4 (4-8)).

As far as the procedural rights of those intercepted are concerned, Article 4(3) provides that the participating units shall use all means to identify the persons on board, assess their personal circumstances and inform them of the destination to which they are sent in a way that they understand. They shall be given the opportunity to express any reasons for believing that disembarkation in the proposed state would be in violation of non-refoulement.

The provision presents these obligations in a general manner, generating questions about the criteria based on which the specific procedures and guarantees or those in need of protection will be identified. These are left to be specified in the operational plan. The crucial role of the operational plan in laying down the procedural safeguards that will ensure compliance is evident, as, without it, the provisions of the Regulation would be merely a repetition of the rights and principles found already in international law and the EU Charter. Furthermore, the operational plan must 'where necessary' provide for shore-based medical staff, such as medical personnel, interpreters, legal advisers and other relevant experts.[107] Thus, it depends on the operational plan, whether the procedural guarantees are adequate to ensure access to asylum and protection from refoulement. Moreover, Frontex must provide in its Annual Reports further details on cases of disembarkation in third states, regarding the compliance with the guarantees of the Regulation.

Although the Sea Operations Regulation was an improvement to the existing framework regarding search and rescue and disembarkation, it has fallen short from fulfilling the expectations for protection of the rights of those intercepted, and an enhanced accountability framework.[108] Without concrete procedural guarantees and legal remedies, the provisions concerning access to protection and non-refoulement are at risk of remaining mere declarations. At the same time, the Regulation has been criticised as not providing adequate protection from refoulement.[109]

---

107 The European Parliament resisted this phrasing, but the Council finally succeeded in including 'when necessary'. The flexibility that this phrasing allows is a cause for concern, as it is the basic understanding of asylum law professionals that interpreters and legal advisers are always necessary to guarantee a fair process. Peers and Roman 2016, p. 3.

108 UNHCR's Observations on the European Commission's Proposal for a Regulation of the European Parliament and the Council Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex), COM (2010)61 Final.

109 Keller 2014; Peers 2014b, p. 2; Meijers Committee, *Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex (COM(2013) 197 final)*, Utrecht, 23 May 2013.

Finally, it can be pointed out that the EU legislature missed then the opportunity to introduce a legislative amendment that would satisfy the European Ombudsman's recommendation to set up a complaints mechanism, only to come back to it two years later, at the European Coast and Border Guard Regulation.

2.2.7 European Border and Coast Guard Regulation (2016)

After continuous amendments of its mandate and powers, the member states felt that time was ripe to accept a name that symbolically limits the absolute sovereign control over their borders and brings them closer to a fully integrated scheme of border management.

In September 2016 Regulation 2016/1624 creating a 'European Border and Coast Guard.' EBCG was adopted, which repels the Frontex Regulation and its amendments.[110]

With the EBCG, Schengen passed to a more advanced phase of the integrated border management, but still, the plan fell short of the Commission's original idea of a permanent European Border Police Corps, as the agency still has to rely on the cooperation of member states to provide information, staff and equipment, but also for the conduct of a joint operation as a whole.[111] Member states remain primarily responsible,[112] and the main legal framework of the joint operations does not change substantially.[113] The Regulation, nevertheless, made a marked change in the status and operational role of Frontex.[114]

In fact, the EBCG consists of the EBCGA, Frontex, and the national authorities of member states responsible for border management, including coast guards to the extent that they carry out border control tasks (Article 3).

The new EBCGA, which assumed operations immediately after the adoption of the Regulation, is the evolution of Frontex with more powers and competences, as well as resources. The permanent staff of the agency is more than doubled, its budget has increased accordingly, while better access to resources has been ensured with the creation of staff and equipment pools.[115]

---

110 EBCG Regulation 2016.

111 It has been argued that further supranationalisation to the extent that a European system of border guards would fully replace national coast guards, would be in violation of the division of competence between the EU and its Member states (Article 72 TFEU). Mungianu 2016, p. 43.

112 J. Rijpma, *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?*, Brussels: Study for the LIBE Committee, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2016, p. 32.

113 Fink 2017, p. 29.

114 Peers 2015.

115 Section 2.3.

Integrated management of the common borders becomes under the Regulation a 'shared responsibility' of member states and the agency (Article 7(1). Member states retain the primary responsibility to control their part of the external borders, 'in close cooperation with the agency', while the stated role of the agency is to support them by reinforcing, assessing, and coordinating their actions (Article 7(1-3)).

2.2.7.1 Returns

As far as the powers of the agency are concerned, one of the most important developments was the enhanced role of the agency with respect to returns, combined with its increased budget in this area.[116] Frontex was then mandated to organise and coordinate joint return operations and return intervention, focusing on the voluntary repatriation or deportation of irregular migrants. The agency further, finances (and co-finances) the operations, deploys the European Return Intervention teams and offers technical and operational reinforcements to national return systems, including translation services, acquisition of the necessary travel documents, and country of origin information (Article 27).

A return operation could then be conducted upon request of a member state or on the agency's own initiative. Frontex would draw a 'rolling operational plan' based on the monthly updates it received from the member states regarding their return needs, including the number of prospective returnees, and their countries of return (Article 28(1)(2)). A return operation can take the form of a 'collecting return operation', where the means of transport and the forced-return escorts are provided by the country of return (a third country) (Article 28(3)).

Frontex since 2016 has a dedicated Return Office responsible for organising and coordinating removal operations, and it can now carry out deportations on its own initiative (Article 18). It manages pools of forced return specialists who will form part of European Return Intervention teams (Article 32). These teams consist of forced-return monitors who supervise the operation (Article 29), forced-return escorts who will carry out the operation (Article 30), and forced-return specialists with specific skills and expertise to carry out activities such as identifying particular groups of third-country nationals, the acquisition of travel documents from third countries and facilitation of consular cooperation (Article 31).

The agency should not enter into the merits of return decisions issued by member states or provide information for the purposes of return decisions (Article 28(1)). However, if the agency has concerns regarding the compliance with fundamental rights, including refugee protection, it needs to communicate those to the Commission and the participating member states (Article 28(7)). To ensure the observance of fundamental rights

116 The budget for returns was increased from EUR 13 million to EUR 66 million in a year. Frontex, Budget 2016, 24 December 2016, http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2016.pdf.

standards, at least one member state representative and one forced-return monitor deployed either from the pool of forced return monitors or from the national monitoring body of a participating member state needed to be present until arrival at the third country (Article 28(3)).

Apart from return operations, the agency is also mandated for the first time in the EBCG Regulation with launching return interventions. A return intervention may include the organisation of one or several return operations, as well as the deployment of European return intervention teams. It can take place in support of a member state, which faces a burden with respect to returns (Article 33(1)). When such a burden becomes disproportionate and challenges the member state's capacity, the intervention can take the form of a rapid return intervention, which can take place on the agency's own initiative (Article 33(2)).

In preparation of such return intervention, a pool of forced-return monitors, along with a pool of forced-return escorts, and a pool of return specialists is compiled by the agency, after consulting with the FRO, with personnel from the national bodies that carry out forced-returns. These need to have received appropriate training (Articles 29(1), 30(1), 31(1)). Upon the Executive Director's proposal, the management board decides on the number and the profiles of experts composing each of these pools (Articles 29(2), 30(2), 31(2)). Member states contribute to the pools based on bilateral negotiations and binding agreements with the agency (Articles 29(3,4), 30(3,4), 31(3,4)). A tailor-made European return intervention team is set up for each return intervention, compiled with members from the above pools (Article 32).

2.2.7.2 Monitoring and supervisory powers

Turning from return operations to the agency's general monitoring and supervisory responsibilities, we notice that these were operationalised in the EBCG Regulation. The agency was mandated with carrying out a vulnerability assessment at least once a year to assess the capacity and readiness of member states to face present and future challenges at the external borders and identify possible consequences at the external borders and for the Schengen Area (Article 13). Based on a set of common objective criteria, the assessment covers the availability of technical and operational equipment, system and infrastructure, capabilities, financial and other resources, and staff necessary for border control.

Based on this assessment, Frontex has the 'right to intervene' to cope with a crisis at a state's external borders. Upon consultation with the member state concerned, the Executive Director recommends the measures to be taken by the member state within a specified deadline to eliminate the identified vulnerabilities. Such measures may include initiating and carrying out joint operations or rapid border interventions (Article 15(4)). If the deadline passes unfulfilled, the Executive Director refers the matter to the Management Board that will adopt a binding decision upon his proposal. If the member state fails to implement the measures within the given deadline,

further action may be taken by the Council and the Commission in accordance with Article 19.

Article 19 covered situations at the external borders requiring urgent action. In case a member state does not implement the measures ordered by the Frontex management board, or when a member state is not managing to effectively address disproportionate pressure at its borders while not requesting sufficient support from the agency, the agency can intervene and impose measures upon the member state, which is required to cooperate for their implementation. These measures may be politically sensitive and touch on national executive and enforcement powers.[117] In other words, the agency acquires the right to intervene even when a member state is unable or unwilling to take the necessary measures.

Due to the sensitivity of the issue, the initial proposal was watered-down. While in the initial proposal, the agency could intervene on its own even without the permission of the member state, in the final compromise the measures proposed by the agency can be implemented by the Council upon the proposal of the Commission.[118] The Regulation allowed for internal border checks to be reintroduced, in accordance with Article 29 of the Schengen Borders Code in the member state does not cooperate.

2.2.7.3 Intelligence Activities

The agency's 2016 mandate permitted it to collect, process and share personal data not only for purposes of migration management but also for purposes of law enforcement, including combating terrorism, human trafficking and human smuggling, as well as document fraud.

As part of the Common Information-Sharing Environment, the agency has further a duty to exchange intelligence collected in all its field activities with member states and other EU agencies, such as EUROPOL for the purpose of criminal investigations (Article 9, 10, 44). In 2018 all members of the EBCG operational teams acquired access to a reinforced Schengen Information System (SIS) for the purpose of carrying out their tasks in the hotspots.[119]

2.2.7.4 Cooperation with Third Countries and at Hotspots

Further, the agency acquired mandate to operate in third countries not only by sending liaison officers but also by launching joint operations in their territory. Such operations may be hosted by the third state. The 2016 Regulation limited the possibility to host an operation to neighbouring third countries (Article 54(3)).

---

117 Preambular paragraph 28 ECBG Regulation 2016.

118 S. Peers, 'The EU Border Guard takes shape', *Statewatch Analysis* 13 March 2016, https://www.statewatch.org/media/documents/analyses/no-285-eu-border-guard.pdf.

119 European Commission, Press Release, *Security Union: Commission welcomes agreement on a reinforced Schengen Information System*, Brussels, 12 June 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4133.

The role of the agency in the hotspots is identified in the Regulation. A hotspot is a location where Frontex works together with the Commission, the EASO and other EU agencies and national authorities, to manage a 'disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders' (Article 2(10)). The agency deploys since Border and Coast Guard teams and the required technical equipment to assist in screening, debriefing, identification, and fingerprinting, provide initial information to persons in need for international protection, and provide technical and operational assistance in the field of return (Articles 8(i), 18(4).[120]

2.2.7.5 Individual Complaints Mechanism

A final marked change concerned the introduction of an individual complaints mechanism where individuals can report an alleged human rights abuse. This has been the request of the European Ombudsman when she closed her own initiative inquiry in 2013 on the responsibility of Frontex for fundamental rights violations. In the beginning, Frontex had been resisting any such responsibility, so the introduction of the individual complaints mechanism three years later is an important step forward.[121]

However, this falls remarkably short of the standards of effective legal protection, since as it stands in the Regulation, it is just an internal administrative procedure. When a complaint is sent through, it will be handled by the Frontex FRO in accordance with the right to good administration. She will assess the admissibility of the complaint and register admissible complaints. This first assessment stage is essentially a judgment on the division of responsibility by the FRO herself. She will decide whether a complaint concerns a member state and will forward it to that member state. Alternatively, if she concludes that the agency was responsible for the incident, she will forward it to the Executive Director. Subsequently, she will register the follow-up measures taken by either the member state or the agency.

The Executive Director will be responsible for dealing with the claim. There are several inadequacies in this mechanism. First of all, it concerns only the liability of the staff members, the border guards themselves, and not that of the agency. Second, the Executive Director is left with considerable discretion to decide on the responsibility of his own staff, since the Regulation does not identify any specific criteria or procedures. Finally, there is no mention of criminal procedures or any involvement of Courts.

120 For further information on the role of Frontex in the hotspots and its cooperation with Europol and EASO there in the context of integrated border management, see Fernández-Rojo 2021 and S. Horii, *Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis*, Refugee Survey Quarterly, 2018, pp.: 219-222.

121 A complaint form can be found on Frontex website in six languages (English, French, Arabic, Pashtu, Urdu, Tigrinya), but complaints may be submitted in any EU official languages, http://frontex.europa.eu/complaints/.

The Regulation simply says that the Executive Director will be responsible for the appropriate follow-up and that the mechanism should be effective, ensuring that the complaints are properly followed-up, without specifying what this follow-up should be.[122] While the Regulation clearly states that the member states should conduct criminal investigations, the only specific obligation set for the agency is to report on the complaints in the annual report, including 'where possible' the follow-up measures taken.[123]

2.2.8 European Border and Coast Guard Regulation 2019 amendment

The next step towards the direction of fully integrated scheme of border management was taken soon after with the 2019 amendment of the EBCG Regulation. The amendment built upon the 2016 Regulation. The overall framework and the structure of the operations have not changed radically, but the agency's powers are now significantly enhanced.

Aiming at greater autonomy and operational effectiveness, and moving towards full operational capacity the agency will have its own equipment and personnel, combined with an impressive budget, and is vested with an even broader mandate in border surveillance, returns, and cooperation with third countries.

This study takes into account this latest legislative amendment. However, it needs to be noted that the preparation for the implementation of the new legislative framework is still ongoing and will not be completed before 2021.[124] Moreover, the budget that will allow for the implementation of the expansion of competences and the acquisition of large assets has yet to be approved. A complete legal analysis would not have been possible without a better picture of how the new Regulation will operate in practice. Nevertheless, while not fully incorporated, the most important points have been included.

2.2.8.1 Standing corps of 10,000 border guards

The most monumental change brought by the 2019 amendment was the establishment of a 'standing corps of 10,000 operational EU staff with executive power and their own equipment'.[125]

So far, Frontex joint operations have relied solely on the contributions of member states. Now, the agency acquires its own operational arm: an EBCG standing corps with broad executive powers. Starting with 5.000

122 Preambular paragraph 50 ECBG Regulation 2016.

123 Preambular paragraph 50 ECBG Regulation 2016.

124 Frontex, DG Home, *Roadmap for the implementation of the European Border and Coast Guard 2.0*, 2019, p. 2; Statewatch, EU: Statewatch, *EU: German Presidency: how can Frontex help deport unaccompanied children?*, 2020, https://www.statewatch.org/news/2020/september/eu-german-presidency-how-can-frontex-help-deport-unaccompanied-children/.

125 European Commission, State of the Union, A strengthened and fully equipped European Border and Coast Guard, 12 September 2018.

operational staff in 2021, the standing corps will be fully operational by 2027 counting 10.000 staff members under the exclusive and direct control of Frontex.[126] The standing corps is meant to form a 'reliable intervention force' of agency staff and seconded or deployed officers, i.e. border guards and return experts.[127]

Moreover, the agency can still make use of temporary deployments and long-term secondments from member states, while a rapid reaction pool of 3.000 members will be at its immediate disposal for rapid border interventions.

The standing corps will have executive powers similar to the border guards and return specialists of the member states, including competence to perform identity checks, authorise or refuse entry, and intercept persons crossing irregularly. Also, they will perform identity checks using the False and Authentic Documents Online system,[128] which the agency will take over from the Council General Secretariat. Finally, the power to carry weapons will extend from the deployed national border guards to all members of the standing corps, including agency staff (Article 82(8)).

2.2.8.2 Returns

Another one of the most highlighted changes concerns the enhancement of the agency's mandate on returns of irregularly staying third country nationals to their countries of origin, which the 2019 amendment makes a top priority. Frontex is now vested with a broad mandate in return-related activities, including, most importantly, providing its own return escorts and return monitors from the standing corps.

Moreover, Frontex return operations (except for collecting operations) may no longer be organised at the request of a member state, but only on the agency's initiative upon agreement of the member state (Article 50(1) (3)). The agency, further, acquires an enhanced role in assisting member states is pre-return and return-related activities, which stops short of drafting the return decision itself. The agency essentially prepares the return decision as it identifies irregularly staying third-country nationals, assists in obtaining travel documents, collects information relevant for the return, analyses such information and provides recommendations regarding the country of return (Article 48(1)). The agency is, nevertheless, not allowed to enter the merits of the return decision (Articles 48(1), 50(1)).

126 Annex 1 EBCG Regulation.

127 European Commission 2018c.

128 European Commission, False and Authentic Documents Online (FADO), https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/false-and-authentic-documents-online_en.

2.2.8.3 *In the centre of extensive data processing*

The information-sharing aspect of the agency's work is also significantly strengthened along with the creation of new specialised structures and mechanisms. At the same time, EUROSUR is encompassed in the EBCG Regulation aiming at improving its functioning and enlarging its scope (Article 18).

In the context of its new powers, Frontex can exchange information with EU agencies, including Europol as well as third countries for a variety of different and not clearly delineated purposes ranging from border surveillance to combating terrorism (Article 12(2)). This, combined with the interoperability-related competencies of Frontex,[129] creates a quite broad mandate for the processing and especially the sharing of data both within the EU and outside, involving EU institutions, agencies, and law enforcement authorities.

Most of its extensive data management powers are related to returns in order for the agency to facilitate more efficient returns. In particular, Frontex was mandated to collect from various sources information necessary for issuing return decisions, identifying individuals subject to removal, and other pre-return, return-related and post-arrival and post-return activities. (Article 49(1)(a)(i)).

Moreover, it was tasked with developing and operating a centralised return management platform for processing all relevant information (Articles 15(4), 49(1)(d), 50(1)). This platform integrates the existing national and EU-wide return management systems[130] and allows for an automated transfer of data. Member states shall submit to this platform the operational data necessary for the agency to assess the return needs, along with their needs for assistance or coordination by the agency, so that the agency can decide upon the necessary return operation and draft a rolling operational plan (Article 51(2)).

2.2.8.4 *Cooperation with Third Countries*

The cooperation of the agency with third countries has been strengthened since 2016.

Now the agency may launch and finance technical assistance projects in third countries, and provide other operational and technical assistance relevant to returns (Article 74 (6-7), 75).

More importantly, the 2019 amendment allows a border control operation to be launched in any third country, not limited to neighbouring countries, as the case was in the 2016 Regulation.

---

129 Statewatch, *EU: Interoperability: Member States want "substantial changes" to Entry/Exit System; questions over "red links" and the role of Frontex*, 09 May 2018, https://www.statewatch.org/news/2018/may/eu-interoperability-member-states-want-substantial-changes-to-entry-exit-system-questions-over-red-links-and-the-role-of-frontex/.

130 See further on the existing IT systems operated by Frontex, C. Jones, J. Kilpatrick, M. Gkliati, *Deportation Union Frontex and Return Operations*, 2020, pp.: 43-45.

2.3 Operational capacity

The operational role and workload of Frontex have been advancing in parallel with the size of the agency. The budget of Frontex at the time of its creation in 2004, amounting almost to 6 million EUR, as indicated in Table 1 (Budget and Personnel) was enough only to cover the staffing and administration costs.[131] Already in 2006, the budget of the agency reached 19 million EUR, while it increased by almost 120% in 2007 with the revision of the agency's operational responsibilities.

In view of the 2011 amendment that 'places new and increased obligations on the Agency, entails new tasks for the Agency, and specifies that certain tasks have to be carried out by certain categories of the agency staff', the agency's funding rose to 94 million in 2013. Now a total of 11.3 billion EUR total Frontex budget has been proposed for the 2021- 2027 period.

These figures are substantially exceeding the initial budgetary estimations for the agency, which is 'turning out into a costlier than expected venture for the EU budget'.[132] Regularly, more than 50% of the budget is allocated to the financing of joint operations,[133] a percentage that reached 73% in 2016 (see Table 1).[134]

Concerning human resources, the agency is still mostly dependent upon border guards and other relevant staff made available by member states to the European Border and Coast Guard teams. Member states pledge a number of border guards to the agency based on annual bilateral agreements. This staff is registered in the EBCG teams pool and should be deployed upon request of the agency, unless that would seriously affect the border management capabilities of the sending state.

The EBCG Regulation set the absolute minimum of seconded border guards that should be available at any time in order to ensure the effectiveness of the agency on short notice. A minimum of 1,500 border guards and other experts, such as finger scanning experts, document officers, and nationality screening experts, need to be made available to the agency for a Rapid Reaction Pool of the EBCG teams. This serves as a standing corps in the immediate disposal of the agency amounting to a minimum of 1,500

131 Pollak and Slominksi 2009, p. 909.

132 J. Jeandesboz, *An analysis of the Commission Communications on future development of Frontex and the creation of a European Surveillance System*, Brussels: Briefing Paper Future development of Frontex and the creation of Eurosur, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2008, p. 12. The rapporteur foresees the rise of the costs of the agency, as it may have to pay pecuniary damages to individuals that may have died during operations.

133 *Consolidated Annual Activity Report*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2018, 12 July 2019, p. 70; COWI Consultants, *External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Kongens Lyngby, January 2009.

134 Frontex 2019, p. 14.

(Articles 10(1)(j), 42).[135] Thus, Frontex is now able to draw on at least 1,500 border guards that can be deployed in under three days addressing a vital operational issue. In fact, Frontex had in 2018 more than 1,700 officers deployed at the EU borders assisting with functions such as surveillance, registration, document checks, fingerprinting and security checks.[136] The number of deployed border guards is expected to rise by 10,000 additional border guards in 2020.[137]

Next to that, Frontex has established since 2016 three more staff pools to facilitate return operations, a pool of forced-return monitors, a pool of forced-return escorts, and a pool of return specialist (Article 51).[138] These pools provide the members of the European Return Intervention teams,[139] and currently involve 550 return experts the profiles of which have been developed by Frontex in accordance with the identified needs. These can assist in document checks and the identification of irregular migrants, while they may cooperate with consular authorities for their return to their countries of origin. Return monitors are tasked with the monitoring the compliance with human rights during return operations, while return escorts assist the national escorts in carrying out the operation.[140]

The agency's own staff has also been steadily growing, especially since the 2019 amendment of the EBCG Regulation as shown in Table 1. The agency started with 70 employees in 2006, while more than 500 people worked in Warsaw in 2017. In the first months of 2018, the agency requited another 112 new staff, which means that one in six working in Warsaw were hired in 2018 alone. This includes officials, temporary and contract staff and seconded national experts.[141] The promise is that by 2021 the agency's permanent staff will reach 1,000 experts (Article 55(1), Annex 1).

135 The Rapid Reaction Pool became operational on 7 December 2016. European Commission, 'Report on the operationalisation of the European Border and Coast Guard', COM (2017) 42 final, 25 January 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/20170125_report_on_the_operationalization_of_the_european_border_and_coast_guard_en.pdf.

136 Frontex 2017, p. 3.

137 D. M. Herszenhorn and F. Eder, 'Brussels readies new border enforcement plan', *Politico* 7 June 2018, https://www.politico.eu/article/jean-claude-juncker-sebastian-kurz-brussels-readies-new-border-enforcement-plan-migration/.

138 European Commission 2017a, pp.: 7, 8. The return pools are operational since 7 January 2017. European Commission 2017a, pp.: 7, 8.

139 For more detailed information on the pools, see Fink 2017, pp.: 58-61.

140 Frontex 2017, p. 3.

141 European Court of Auditors, *Report on the Annual Accounts of the European Border and Coast Guard Agency for the Financial Year 2016 Together with the Agency's Reply*, Luxembourg, 6 December 2017, p. 2, https://www.eca.europa.eu/Lists/ECADocuments/FRONTEX_2016/FRONTEX_2016_EN.pdf.

Table 1 Budget and Personnel

Frontex (2005-2017)	*Budget (million €)*	*Budget increase*	*Total staff*	*Staff increase*
2005	6		45	
2006	19	217%	70	56%
2007	42	121%	128	83%
2008	70	67%	181	41%
2009	88	26%	226	25%
2010	93	6%	294	30%
2011	118	27%	304	3%
2012	90	–24%	303	–0,3%
2013	94	4%	302	–0,3%
2014	93	–1%	311	3%
2015	143	54%	309	–0.6%
2016	254	78%	370	20%
2017	302	19%	531	44%
2018	320	6%	643	21%
2019 – 2020	1,300 (1.3 billion)	306%	1,000	56%
2021 – 2027	11,300 (11.3 billion)	770%	3,000	200%

Mariana Gkliati, 2019[142]

Finally, the agency's operational effectiveness depends on the availability of technical equipment, such as helicopters, vessels, or dog teams, and smaller items, such as thermal cameras. At first, such equipment was made available by the member states on an ad hoc basis, but in 2007, Frontex created the Centralised Record of Available Technical Equipment (CRATE), to which states contributed on a voluntary basis, but in a more structured manner, in accordance with the needs specified by the agency.[143] CRATE listed in 2010 476 items of technical equipment, such as mobile radars, thermal cameras, CO2 detectors, heartbeat detectors and a passive millimetric wave imager (PMMW).[144]

142 The author wants to acknowledge student assistant, Nilson Milheiro Anselmo, for his help in the production of this table. The numbers have been rounded up where necessary. The data for the period 2005-2015 have been collected from the agency's annual activities reports. The data for the period 2016-2018 have been extracted from the 'Frontex, *2018 In Brief*, Warsaw 2018, p. 32, https://frontex.europa.eu/assets/Publications/briefreport2018/2/. The prognosis for 2020 and 2027 is in accordance with the 2019 amendment of the EBCG Regulation, Article 55(1) and Annex 1 (personnel), and the European Commission's press release, European Commission 2018b. A final agreement for the text of the Regulation has been reached, while the budget has at the time of writing not yet been formally approved.

143 Frontex 2007a.

144 Frontex, 2010 Working programme and related aspects. Presentation by Ilkka Laitinen, FRONTEX Executive Director, to the European Parliament, LIBE Committee, 11 January 2010, http://www.poptel.org.uk/statewatch/news/2010/jan/eu-frontex-work-prog-2010.pdf; Migreurop and Greens 2011, p. 7.

CRATE was replaced in 2016 with the Technical Equipment Pool, which serves a record of all technical equipment available to the agency, whether owned by a member state or the agency or co-owned by both (Article 64). Similarly to the Rapid Reaction Pool of the EBCG teams, the Executive Director determines the minimum number of items of technical equipment required for a rapid border intervention, including smaller and larger vessels, aircraft, helicopters, patrol cars and other vehicles. These form the Rapid Reaction Equipment Pool and can be deployed by the agency within two weeks.[145] The equipment is made available based on annual bilateral agreements, while requests of additional pledges are still possible (Article 64).

According to the latest Frontex' reporting on the operational resources, in 2019, host member states contributed with the deployment of 128 large assets. In 2019 Frontex acquired and leased its own technical equipment and was able to contribute with 41 large assets, such as fixes wing aircrafts and ferries for readmission operations.[146] Table 2 represents the current state of play of the Technical Equipment Pool.[147]

Member states need to provide the equipment specified in the bilateral agreements unless they are faced with a critical situation at a national level, which prevents them from doing so.

It needs to be noted that while the contributions on paper seem almost entirely to cover the agency's needs, the actual availability of the pledged assets by the member states can be more problematic, especially during the summer.[148]

Therefore there is a growing emphasis on developing the agency's own capabilities. As of 2017, Frontex had EUR 10 million per year in its disposal (EUR 40 million in total for 2017-2020) to acquire its own equipment, while co-ownership with a member state, renting, leasing, and long-term deployments are additional options in the 2016 Regulation (Articles 63, 64).[149]

145 Frontex 2017, p. 3.

146 Frontex, *Annual information on the commitments and deployments of the Member States to the European border and coast guard teams and the technical equipment pool. Report on the operational resources in 2018*, Warsaw, 5 July 2019, p. 35, https://op.europa.eu/nl/publication-detail/-/publication/c5a27b03-a131-11e9-9d01-01aa75ed71a1/language-en/format-RDF.

147 Frontex 2019a, p. 28.

148 Fink 2017, p. 62.

149 European Commission, Fourth Report from the Commission to the European Parliament, The European Council and the Council on the operationalisation of the European Border and Coast Guard, COM(2017) 325 final, 13 July 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjTqKK13fHdAhXSyqQKHbWnAEQQFjAAegQICRAC&url=https%3A%2F%2Fec.europa.eu%2Fhome-affairs%2Fsites%2Fhomeaffairs%2Ffiles%2Fwhat-we-do%2Fpolicies%2Feuropean-agenda-security%2F20170613_report_on_the_operationalisation_of_the_european_border_and_coast_guard_en.pdf&usg=AOvVaw0y4mNOvBQ_oJ6QVp_xo0Gd.

Table 2 Composition of the Technical Equipment Pool – 2019

TE Type	*Number*	*Percent of the total*
Major Equipment	*444*	*100%*
Offshore Patrol Vassel (OPV)	27	6%
Coastal Patrol Vessel (CPV)	58	13%
Coastal Patrol Boat (CPB)	276	62%
Fixed Wing Aircraft (FWA)	35	8%
Helicopter	48	11%
Light Equipment	*195*	*100%*
Patrol Car	148	76%
Thermo-Vision Vehicle (TVV)	32	16%6%
Transportation Vehicle/Canine Team Vehicle	2	1%
Mobile Laboratory	13	7%
Portable Equipment	*590*	*100%*
Basic Forgery Detection Kits	140	24%
CO_2 Detector	71	12%
Heartbeat Detector	12	2%
Document checking device with microscope connected to a computer	77	13%
Other Equipment for border checks	9	2%
Mobile Radar Unit	1	0%
Infrared Camera	2	0%
Thermal Camera	67	11%
Night Vision Goggles	82	14%
Other equipment for border surveillance	129	22%
Total	*1 229*	

Frontex, 2019

The Commission made its priorities clear with the 2019 legislative amendment, which substantially increased the capacity of the agency to acquire and operate its own air, maritime and land assets, including aircrafts and vessels, another step closer to improving its stability, flexibility and autonomy of the agency. The Commission intends that the agency's own equipment "should ultimately become the backbone of [its] operational deployments with additional contributions of Member States to be called upon in exceptional circumstances."[150] A total of €2.2 billion of the EU budget for 2021-2027 has now been earmarked to allow Frontex to acquire, but also to maintain and operate the necessary air, maritime and land assets.

150 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/631 final.

2.4 Joint operations in a nutshell

The above sections form our understanding of the progressive development of the powers of the agency, both in terms of mandate and of resources. They also help us create a picture of the structure of joint operations. Both these elements will be utilised in later chapters when discussing the responsibility of Frontex.

To sum up, the agency conducts joint operations, pilot projects, and rapid border interventions (swift assistance for 'specific and disproportionate challenges') in the form of joint return operations or joint surveillance operations of the land, air, or sea external borders. Such operations may also take place in the territory of a third country. Furthermore, Frontex works closely with third countries, based on working arrangements it concludes with them.

A member state hosts an operation (or a third state), the national border guard of which takes the lead in implementing the operational plan. Other member states contribute with seconded border guards and other experts, such as translators, which staff the EBCG teams and the European Return Intervention teams, and with equipment which they have made available at the Technical Equipment Pool. The agency's own staff is not part of the EBCG and Return Intervention teams, also referred to as 'guest officers'. These are the physical actors of the operation on the ground, and their powers and tasks are defined in Article 40 EBCG Regulation. The effectiveness of the agency depends on the actual availability of the staff and assets registered in the pools.

Frontex plans, organises and coordinates the operation, deploys experts and equipment from these pools, in accordance with the needs identified in the operational plan, which is drawn up by the agency's Executive Director and agreed upon by the host member state. The operational plan is binding and covers all aspect necessary for carrying out a joint operation, including the division of tasks and responsibilities, the composition of the EBCG teams, and command and control provisions (Article 38 EBCG Regulation).

A joint operation may be initiated by a member state's request, and approved by Frontex, or upon the recommendation of the Executive Director, with the consent of the host member state.[151] In exceptional circumstances, when the member state is unwilling or unable to cooperate, and there is an urgent need for action at the external borders, the operation or rapid intervention may be launched with a Council decision upon the initiative of Commission (Article 42).

Decisions concerning the launch of an operation, as well as others concerning the content of the operational plan, are made based on research and risk analysis conducted by the agency. This takes into account the situational picture provided by EUROSUR, and the information of the vulner-

151 For a summary of the main joint border control operations implemented by Frontex, see Fink 2017, p. 49.

ability assessment, which evaluates the capacity and readiness of a member state to manage their section of the external borders (Articles 37, 39). In this regard, the agency also has a vital role in the collection and processing of data, which it may exchange with member states and other agencies in the context of a common information-sharing environment (Article 11, 12).

Apart from the organisation of the operation, and the deployment of staff and equipment, Frontex also finances (and co-finances) the operations, and coordinates the different actors participating in them. It monitors and supervises the operations as well as the general capacity and conduct of host member states, including compatibility with fundamental rights.

The members of the EBCG teams either belong to the agency's own staff or are seconded by the member states and under the direct command of the authorities of the host state, which follow the operational plan. A Frontex Coordinating Officer(s), who belongs to the agency's own staff, monitors the instructions given and the overall compliance with the operational plan, including the protection of fundamental rights. She may communicate the views of the agency to the national authorities, which should be followed to the extent possible, and will report back to the Executive Director (Articles 43, 44). The seconded officers remain subject to the disciplinary powers of their home state (Article 43).

2.5 The European Border and Coast Guard: What it is and what it's not

In 2016 Frontex passed from an agency for the coordination of the operational cooperation of the member states for the management of the EU external borders, to the European Border and Coast Guard. In 2019, it acquired even more autonomy and operational effectiveness so that it has become the fastest-growing EU agency.

These changes bring the agency closer to a fully integrated scheme of border management, with centralisation (e.g. EUROSUR, centralized returns management system) and autonomy (e.g. own border guards and operational assets) being marked as clear priorities. Neither the symbolic re-naming, though, nor the explosive expansion of powers and competencies were adequate to fully transmogrify the agency. The Commission's original idea of a permanent European Border Police Corps still has a long way to cover. The most recent Regulations do not create a genuine European Corps of Border Guards with full and exclusive competences in border management,[152] while the main operational and governance framework remains the same. The agency is still to the largest extent dependent upon the approval of the host member state to launch an operation and upon national deployments, while EBCG teams are still under the orders and directions of the host member state. Finally, the agency is led by its Manage-

152 D. Fernandes Rojo, 'The Umpteenth Reinforcement of FRONTEX's Operational Tasks: Third Time Lucky?', *EU Law Analysis*, 04.06.2019, http://eulawanalysis.blogspot.com/2019/06/the-umpteenth-reinforcement-of-frontexs.html.

ment Board, which is composed of national delegates of all member states and two representatives of the Commission.

While the agency has undoubtedly gained a more independent and crucial role and has come much closer to the Commission's original vision, the dominant paradigm of its operation in this very sensitive area of border controls is still an intergovernmental one. In normative terms, Frontex in its current form is not yet a true European Border and Coast Guard that can singlehandedly ensure the constant and uniform application of EU law across the EU borders.[153] Moreover, in terms of practical implementation the Court of Auditors in its most recent investigation of the agency concluded that Frontex has not yet managed to adapt its organisation to the requirements of its 2016 mandate and it is not ready to implement its 2019 mandate effectively.[154]

The European Border and Coast Guard is composed of the agency and national authorities of the member states that carry out border and coast guard functions, and the agency depends on their active participation and approval in order to achieve the goal of operational cooperation. As shown by CEPS, the national authorities that carry out such functions vary considerably from country to country. In fact, several countries at the external borders, border and coast guard authorities also include military or (para-) military actors.[155] Thus, in 2016, the network of cooperation of Frontex expanded even further, which further complicated the environment of actual division of competences and responsibility in joint operations. This exacerbates the problem of many hands, which is examined later in Chapter IV.

3 Conclusions

The European Border and Coast Guard Agency, Frontex, is one of the most outstanding products of the process of EU agencification. It plays an increasingly important role in EU administration, while its powers, staff and budget continue to grow, as its work constitutes a central part of the EU's response to the 'migration crisis'.

In this chapter, I have introduced the agency and its modus operandi. I have also described its purpose and legislative basis, along with its powers and activities. The chronological sequence was chosen as the method for data analysis to showcase the agency's dynamic growth as that is reflected both in its operational capacity and in its growing mandate. While the foundations for our examination of the agency are now set, I will proceed to examine the human rights sensitivities of the agency's work in the following chapter.

153 S. Carrera, L. den Hertog, 'A European Border and Coast Guard: What's in a name?' CEPS Paper in Liberty and Security in Europe, no. 88, March 2016, p. 1, 12.

154 European Court of Auditors, Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, 07.06.2021.

155 Carrera, den Hertog, 2016, p. 3.

3 Human Rights Sensitivities and the Need for Protection for the Individual

1 INTRODUCTION

As Chapter II has shown, the powers of Frontex range from initiating, organising and coordinating joint border surveillance operations and pilot projects, as well as return operations upon request of a member state or on its own initiative, to monitoring the capacity and readiness of the member states to face migratory pressures and possible crisis at their borders effectively, and imposing measures when deemed necessary with or without the consent of the host member state. The agency also has an essential role in research and risk analysis, as well as the management of EUROSUR and the centralised returns platform.

These activities are inherently sensitive to human rights violations. When these sensitivities materialise into real violations, the need arises to protect the rights of the individual. Tensions between Frontex operations and human rights and relevant criticisms have been repeatedly expressed by civil society[1] and academia since early on.[2] This chapter aims to showcase the societal problem that this study aims to address, in particular, to illuminate the sensitivity of the agency's work and examine the specific nature of these sensitivities by identifying the rights that may be at stake during Frontex operations. It is not the purpose of this study, nor is it deemed feasible at the level of academic research, to prove the occurrence of breaches of human rights law. However, Frontex documents, such as Annual Reports and reports of governmental and non-governmental organisations are studied, to provide illustrations and indications of such potential breaches.

First, the border operations are examined that are conducted at the sea, land, and air borders as well as the parallel issue of cooperation with the national authorities of the member states with respect to the apprehended migrants. Next, I describe the hazards for fundamental rights that arise during joint return operations. Taking a step back, I further examine the situation as it manifests itself before the realisation of the operations on the ground, concerning the information activities of the agency, its cooperation with third states, and its risk analyses.

---

1 Amnesty International 2007; Amnesty International 2008, p. 276; Refugee Council and ECRE 2007.

2 Carrera 2008; Baldaccini 2010.

2 Joint border surveillance operations

It is the area of on-the-ground-operational activities that presents the most obvious relationship with fundamental rights. In joint border surveillance operations, the rights that are at particularly high stake, as they have been reported by NGOs and international organisations such as UNHCR, the EU Fundamental Rights Agency (FRA), or the Parliamentary Assembly of the Council of Europe (PACE), are protection against refoulement and collective expulsions, the right to claim asylum, protection against inhuman and degrading treatment, the right to leave a country, protection of personal data; and protection from discrimination.[3]

The primary objective of Frontex is to safeguard the security of the common borders, and it is precisely its success in meeting its goals that raises human rights concerns. Its approach towards Iraqis already since 2007 is indicative. In particular, 18.4% of all asylum applications in Europe in the period January – September 2007 were lodged by Iraqis,[4] which, to the largest extent, were afforded international protection. While Frontex acknowledges this, its primary concern appears to be that 80-90% of the Iraqis applying for asylum in Sweden[5] could have been intercepted before reaching the territory.[6]

2.1 Sea borders

This is especially the case with respect to interceptions at sea, where border guards participating in Frontex operations may not only stop vessels trying to enter EU territory irregularly, but also conduct the ship or persons on board to a third country, or otherwise hand over the ship or persons on board to the authorities of a third country.[7]

The agency counts in its successes that its operations have led to a considerable decrease in the number of irregular entries in Europe. For instance, Frontex reported a decrease in irregular migration flows of 80% in 2011,[8] a year of massive migration flows triggered by the Arab Spring. That year, 59,592 migrants were refused entry at the land borders, 49,393 at the

3 See Chapter II for elaboration on the legal framework; Statewatch and Migreurop 2012, p. 1.
4 UNHCR 2007b.
5 Iraqis were awarded international protection at 90% in Sweden. Sperl 2007; UNHCR 2007a.
6 Frontex 2007c, p. 1.
7 Council Decision 252/2010 was annulled with *European Parliament v. Council*, but it remains in force until a new text is adopted. The European Commission presented in 2013 a new Proposal for a Regulation establishing rules for the surveillance of the external sea borders, 2013/0106 (COD) of 12.4.2013; FRA 2013a, p. 11.
8 Frontex 2011d, p. 49.

air borders, and 9,000 at the sea external borders of Europe.[9] A further 50% decrease is reported for 2012.[10]

Although several other head-count figures are provided in Frontex reports with respect to the people apprehended or detained, or to the falsified travel documents detected, there is no information available on the specific characteristics of the third-country nationals involved, the destination of those that are diverted, or a follow up of their situation.

Refugees and economic migrants tend to travel in mixed flows, and those eligible for international protection cannot be easily identified.[11] The European Commission has acknowledged that border guards are frequently confronted with situations involving persons in need of international protection.[12]

However, neither the Commission in its evaluation report nor the agency in its annual reports refers to the procedures to which these migrants are subjected, such as lodging an asylum application or an appeal against the refusal of entry or the fate of those diverted.[13] According to Amnesty International and the European Council on Refugees and Exiles (ECRE), Frontex does not know whether any asylum claims were made during interception operations.[14]

Since information on whether those diverted back had protection concerns is lacking, a legitimate argument exists suggesting that, among those diverted back, there are refugees, victims of trafficking, unaccompanied minors or other vulnerable groups.[15] Without reaching the territory of an EU state, these persons were deprived of the opportunity to seek international protection. The possibility of assessing asylum claims onboard

9 Frontex 2012a.

10 Frontex 2013a.

11 Vandvik 2008, p. 31; Betts 2006, pp.: 656-659; Kneebone, McDowell and Morrell 2006, pp.: 492-493.

12 European Commission, Report on the evaluation and future development of the FRONTEX agency, COM (2008) 67 final, Brussels, 13 February 2008, p.5.

13 Meijers Committee, 'Views Standing Committee on the evaluation and future development of the FRONTEX agency (COM(2008) 67 final)', addressed to the European Parliament, 4 April 2008. S. Sirtori and P. Coelho, *Defending Refugees' Access to Protection in Europe* (ECRE paper), Brussels: European Council on Refugees and Exiles December 2007, p. 12, https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf.

14 Amnesty International and ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (FRONTEX), September 2010, https://www.refworld.org/docid/4ca337ca2.html.

15 One case of an EU national being on board a migrant vessel has been reported. N. Pisa, 'German mum grabs nine-year-old daughter and flees husband with immigrants to Italy', *Daily Mail Online* 8 March 2011, https://www.dailymail.co.uk/news/article-1364173/German-mum-grabs-year-old-daughter-flees-husband-immigrants-Italy.html.

has been evaluated as inadequate.[16] Even when potential refugees are not returned to the country from where they are fleeing, they may be sent back to the place of departure that is usually countries, such as Libya and Senegal that do not have a system providing protection to those who seek asylum.[17]

Not only operations designed to prevent irregular access, but also search and rescue operations, where the priority is to bring the shipwrecked to a place of safety, must be measured against the prohibition of refoulement.[18] This means that when migrant ships are forced to sail to a port of safety in a third country, without having identified those in need of international protection, there are legitimate reasons to believe that the rescue operation could result in grave human rights violations.[19]

The protection of the procedural rights of those eligible for international protection can only be guaranteed through procedural rights that are only practicable when the applicant is within the state's territory.[20] It is only there that a substantive examination of the individual application; the right to information and legal representation; the right to contact the UNHCR; and an effective legal remedy with suspensive effect can be materialised. This also seems to be the rationale behind the Asylum Procedures Directive,[21] which generally provides for the right of applicants to stay until their applications are examined.[22]

The UN High Commissioner for Refugees has repeatedly stated that those persons in need of international protection should be enabled access to the EU, while he has compared Europe to the Wild West, where human life no longer has value.[23] This view that access to the territory is essential

16 ECtHR 23 February 2012, App. No. 27765/09, (*Hirsi Jamaa and Others v. Italy*); FRA 2013a, pp. 12, 68, 69.

17 L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', *Journal for Contemporary European Research 2011*, vol. 7(4), p. 482; The situation in third countries concerning violations other than those relating to international protection are examined below under the section 5; FRA 2013a, p. 49.

18 Article 4 Frontex Sea Operations Regulation.

19 R. Weinzierl and U. Lisson, 'Border Management and Human Rights: A study of EU Law and the Law of the Sea', *German Institute for Human Rights*, 2007, p. 16, http://www.statewatch.org/news/2008/feb/eu-study-border-management.pdf; The rules on disembarkation of apprehended migrants are not clear. House of Lords, 'Frontex: the EU External Borders Agency. Report with Evidence', HL Paper 60, London, 5 March 2008, p. 37, http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/60/60.pdf.

20 For instance, the right to be given reasons for the refusal of entry, the right to appeal a negative decision, and the right to remain in the territory pending the appeal.

21 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status.

22 Weinzierl and Lisson 2007, p. 14.

23 UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, Geneva: United Nations High Commissioner for Refugees September 2007, pp.: 8,9, https://www.refworld.org/pdfid/46e159f82.pdf.

for access to protection, among others, by PACE,[24] the ECtHR,[25] and the LIBE Committee.[26] Indeed, the graveness and irreversible nature of the harms that may result from these diversions is such that there is no room for derogations from the procedural guarantees at the border under any circumstances.[27]

The UNHCR has warned of the risk of refoulement for those returned to Turkey, already in 2009,[28] while several other reports have appeared corroborating this concern since the entry into force of the EU-Turkey deal.[29] Thus, such push backs could potentially constitute refoulement and violate the prohibition of collective expulsion, the right to seek asylum, and the right to an effective remedy protected in the EU Charter, the ECHR, the Geneva Convention on the Status of Refugees and Exiles (Refugee Convention),[30] and other instruments of international law covering the principle of non-refoulement, as well as customary law.[31]

Further reinforcement of these concerns is derived from the statistics on Mediterranean arrivals. In particular, 58% of all arrivals by boat to Malta in 2009 were recognised as being in need of international protection.[32] Furthermore, around 70% of all asylum applications in Italy for 2008 were presented by persons arriving by boat, while eligibility for international protection was recognised in almost 50% of these cases.[33]

24 PACE 2012, p. 10.
25 Hirsi Jamaa and Others v. Italy., prohibition of collective eplulsion, pp. 7-75.
26 EP Civil Liberties (2011), supra n. 15, p. 53.
27 Weinzierl and Lisson 2007, pp. 54, 55; Hirsi Jamaa and Others v. Italy.
28 UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09)*, Geneva: United Nations High Commissioner for Refugees January 2009, https://www.refworld.org/pdfid/4afd25c32.pdf.
29 M. Gkliati, 'The Application of the EU-Turkey Deal: A Critical Analysis of the Decisions of the Greek Appeals Committees', European Journal of Legal Studies 2017, vol. 10(1).
30 LIBE 2011, p. 58; Meijers Commissie 2013, par. I; Rijpma 2010, p. 4.
31 Mungianu 2016.
32 Malta Annual Reports of Government Departments *2009*, Valletta: Office of the Prime Minister Malta July 2010. https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Annual%20Government%20Reports/Documents/Annual%20Report%20of%20Government%20Departments%20-%202009.pdf.
33 UNHCR, *Refugee protection and international migration: a review of UNHCR's operational role in southern* Italy – Prepublication edition, September 2009, p. 4, www.unhcr.org/4ac35c600.html. See also information from the Italian Ministry of the Interior: www.interno.it/mininterno/export/sites/default/it/temi/asilo/sottotema009.html.

Such concerns are shared by the ECJ[34] and PACE,[35] while push backs have been extensively documented by NGOs, since the early years of operation fo the agency.[36] The Executive Director of Frontex categorically stated then that such operations 'cannot take place',[37] but the annual reports of the agency suggest the opposite, for instance, for Hera I[38] and Hera III operation[39]. In the context of Hera III operation of 2011, the European Commissioner, Cecilia Malmström, had to make clear that the push-back of migrants encountered at sea is not permitted.[40] The prohibition of the surrender of irregular migrants to the authorities of a country, where they would face a serious risk of death penalty, torture or other inhuman or degrading treatment or further refoulement is included in the EC Proposal for a Regulation establishing rules for Frontex joint operations at sea.[41]

Allegations of violations occurring during joint operations have been repeatedly made over the years.

The most prominent documentation of such push backs was undoubtedly the *Hirsi* case, where the ECtHR held that the principle of non-refoulement was violated by systematic practice of push backs from Italy to Libya

34 "[P]rovisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required". European Parliament v. Council.

35 PACE, Council of Europe, Resolution 1637 (2008) 'Europe's boat people: mixed migration flows by sea into southern Europe' and PACE 2012, pp. 1, 2.

36 Migreurop, *Frontex Agency: Which Guarantees for Human Rights?*, March 2011, pp. 11-13, http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf; Pro Asyl, Borderline-europe, and Menschenrechte ohne Grenzen, J. Gleitze, *Die Folgen der Abschottung auf See – das Mittelmeer,* in T. Pflüger (in cooperation with Informationsstelle Militarisierung), *Was ist Frontex?*, Januar 2008, pp. 34-35, http://www.imi-online.de/download/FRONTEX-Broschuere.pdf; Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, *The Truth Might Be Bitter, but It Must Be Told': The Situation of Refugees in the Aegean and the Practices of the Greek Cost Guard*, Frankfurt am Main and Athens, October 2007, https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Report_Refugees_in_Greece_The_truth_may_be_bitter_but_it_must_be_told_Oct_2007.pdf.

37 Frontex's Executive Director, Ilka Laitinen, speaking before the LIBE Committee on the measures taken by the agency in preparation for search and rescue operations, 11 October 2012, video of the session available at http://www.europarl.europa.eu/eplive/en/committees/video?event=20121011-0900-COMMITTEE-LIBE.

38 Frontex, *HERA 2008 and NAUTILUS 2008 Statistics*, Warsaw, 13 February 2009, https://frontex.europa.eu/media-centre/news-release/hera-2008-and-nautilus-2008-statistics-oP7kLN.

39 Frontex, 'Hera III operation', Press Release 13 April 2007, https://frontex.europa.eu/media-centre/news/news-release/hera-iii-operation-It9SH3.

40 N. Frenzen, Frontex Operation Hermes to Begin on Sunday, 20 Feb.–Push-Back Practice Prohibited, Migrants at Sea, 19 February 2011, https://migrantsatsea.org/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-%E2%80%93push-back-practice-prohibited/.

41 Frontex Sea Operations Regulation Proposal. This proposal is presented in replacement of Council Decision 2010/252/EU, which was annulled by the ECJ.

on the basis of their bilateral agreement. These push-back practices also continued in the context of a Frontex operation, for instance in the case of 200 Eritrean and Somali nationals who were summarily returned to Libya in the case that reached the Court. In *Hirsi*, the ECtHR found a violation of Article 3 (direct and indirect refoulement) due to the risk of ill-treatment in Libya and the possibility of their repatriation to Somalia and Eritrea, Article 4 of Protocol 4 (collective expulsion), and Article 13 in conjunction with Article 3 and Article 4 of Protocol 4 (effective legal protection).[42]

Prior to the ECtHR judgment, Frontex had already been accused of facilitating the Italian practice of push backs to Libya during Nautilus operation of 2009.[43] The agency had then admitted that it was helping the Italian coastguard in this policy, but refused to take up responsibility 'for decisions taken by Italy'.[44]

Similar allegations were expressed for operation HERA operations. Hera I operation (2006), the first large-scale operations of the newly established then agency was a joint sea operation combined with a return operation, the main purpose of which was to gather information about the migrants' routes. Upon request of Spain, Frontex officers supported the Spanish authorities in identifying irregular migrants, and the agency coordinated returns. The operation was evaluated as successful.[45] During the operation, 6,076 migrants were sent back.[46]

The follow-up operation HERA II (2008), hosted by Spain, focused on interceptions of irregular migrants in Senegal and Mauritania's territorial waters and their readmission to these countries in the context of bilateral agreements with Spain.[47] During this operation, 5,969 persons were diverted back to the closest shore (Senegal or Mauritania).[48] The fate of those apprehended was never revealed, particularly concerning the protection of their

42 Hirsi Jamaa and Others v Italy.

43 Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York: Human Rights Watch September 2009, p. 37, https://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf; The Italian practice of forcibly returning immigrant vessels to the country of departure was condemned by the ECtHR in Hirsi Jamaa and Others v. Italy.

44 Interview of Gil Arias-Fernández, deputy director of Frontex, at European Voice, A.C. Martin, *Gil Arias-Fernández: 'the immigration problem in Calais is not so bad'*, 24 November 2014, https://www.euractiv.com/section/justice-home-affairs/interview/gil-arias-fernandez-the-immigration-problem-in-calais-is-not-so-bad/.

45 Frontex, *HERA II Operation to be Prolonged*, Warsaw, 13 October 2006, https://frontex.europa.eu/media-centre/news-release/hera-ii-operation-to-be-prolonged-iWMEF9.

46 Frontex Annual Report 2006 *Coordination of intelligence driven operational cooperation at EU level to strengthen security at external borders*, Warsaw, 5 December 2007, p. 12, https://www.europarl.europa.eu/document/activities/cont/200801/20080111ATT18445/20080111ATT18445EN.pdf.

47 Jeandesboz 2008, p. 14.

48 Frontex 2009.

human rights by the Spanish, Senegalese and Mauritanian authorities.[49] Concerns have been expressed regarding the risk of undermining the principle of non-refoulement.[50] Similarly, as already mentioned, in such circumstances, the right to an effective remedy is at risk.[51] The ECtHR has ruled that the obligation to provide the right to an effective remedy is not suspended in the high seas. Individuals should still be provided with the opportunity to challenge the administrative decisions regarding the denial of entry or the refusal of their asylum request.[52] Denying them the possibility to exercise their right to appeal but not providing sufficient information, access to a lawyer or access to courts in EU territory would constitute a violation of the right.

HERMES 2011 aiming to detect and prevent unauthorised border crossings to the Pelagic Islands, Sicily and the Italian mainland. The agency celebrates the success of the operation: 'Since the deployment of the RABIT operation, the numbers of irregular crossings have dropped by approximately 75%'.[53] At the same time, according to the agency, the vast majority of migrants were Tunisian,[54] while 20% of all apprehended individuals had 'indicated an intention to apply for international protection'.[55] Thus, Frontex was in knowledge of the fact that among the 75% of irregular crossings that

49 Socialist Group, Spain, Committee on Migration, Refugee and Population, T. Arcadio Díaz, Rapporteur, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, p. 15.

50 V. Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', *European Journal of Migration and Law* 2008, vol. 10(3); Neal 2008; P. Nyers, 'Forms of irregular citizenship', in Vicki Squire (ed.), *The Contested Politics of Mobility. Borderzones and Irregularity*, London: Routledge 2011; H. Oosterom-Staples, ''Effective Rights for Third-Country Nationals', in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishing 2009; M. Pace, 'Norm shifting from EMP to ENP: the EU as a norm entrepreneur in the south?', *Cambridge Review of International Affairs* 2007, vol. 20(4); E. Papastavridis, ''Fortress Europe' and FRONTEX: Within or Without International Law?', *Nordic Journal of International Law* 2010, vol. 79(1); Perkowski 2012, p.p.: 21-24.

51 M. Hernández-Carretero, *Reconciling Border Control with the Human Aspects of Unauthorized Migration* (PRIO Policy Brief Paper), Oslo: International Peace Research Institute, Oslo 2009, https://www.prio.org/utility/DownloadFile.ashx?id=198andtype=publicationfile.

52 CJEU 19 February 2004, C-327/02, ECLI:EU:C:2004:110 *(Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie)*; *Hirsi Jamaa and Others v. Italy., par. 201-207.*

53 Frontex, *Frontex and the RABIT operation at the Greek-Turkish border*, Warsaw, 2 March 2011, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_130.

54 The Democracy Spring or Arab Spring began in Tunisia in December 2010.

55 Frontex, Press Release, *Update to Joint Operation Hermes 2011*, 11 March 2011, http://frontex.europa.eu/news/update-to-joint-operation-hermes-2011-7DIILz.

were averted, were also asylum seekers. Nevertheless, the operation was also extended to cover Sardinia.[56]

Most recently, between 2018 and 2020, academic research and civil society reporting have been implicating Frontex team members in systematic push backs conducted by the Greek authorities.[57] In October 2020 a consortium of international news outlets published evidence that implicates Frontex in six push-backs by the Greek authorities between April and August 2020.[58] The Frontex Executive Director, Fabrice Leggeri, has denied the existence of evidence of Frontex officers in the push backs.[59] As a result, the issue of the complicity of Frontex in human rights violations occupied a central role in the public debate in the last months of 2020.[60]

Naturally, additional risks may result for the life and the physical integrity of the people on board from conducting unseaworthy boats to high seas.[61] With more than 33,000 migrants having lost their lives at sea trying to reach European shores between 2000 and 2017, the IOM declared the Mediterranean 'by far the world's deadliest border'.[62]

---

56 Frontex, Press Release, Hermes Operation Extended, 23 March 2011, http://frontex.europa.eu/news/hermes-operation-extended-OWmwti; FRA 2013a, pp.: 29, 30.

57 L. Karamanidou and B. Kasparek, *Consequences and Responses Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency*, in Working Papers Global Migration, 2020, p. 64; Border Violence Monitoring Network, *Special report: Covid-19 and border violence along the Balkan rout*e, 2020, http://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the- Balkan-route/; Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported*, 2020 https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border.

58 G. Christides, E. Freudenthal, S. Luedke and M. Popp 2020, *EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign,* in Spiegel, 2020, https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Finternational%2Feurope%2Feu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7.

59 ECRE, *Greece: Frontex Denies Involvement in Push-backs, Expert Council Critique of NGO Registration Rules*, 27 November 2020, https://www.ecre.org/greece-frontex-denies-involvement-in-pushbacks-expert-council-critique-of-ngo-registration-rules/.

60 M. Gkliati, *The next phase of the European Border and Coast Guard: Responsibility for returns and push-backs in Hungary and Greece*, in A. Ott, L. Tsourdi and Z. Vankova (eds), 'Migration and EU Borders: Foundations, Policy Change, and Administrative Governance', European Papers, 2021 (forthcoming).

61 Rijpma 2010, p. 4; "State parties [to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air] should prioritise the preservation of life and safety upon detection of a vessel used to smuggle migrants", United Nations, Working Group on the Smuggling of Migrants 2012, Report on the meeting of the Working group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012, CTOC/COP/WG.7/2012/6, http://www.unodc.org/documents/treaties/organized_crime/2012_CTOC_COP_WG7/CTOC_COP_WG7_2012_6/CTOC_COP_WG7_2012_6_E.pdf.

62 International Organisation for Migration, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe. A Review of the Evidence*, Geneva: 2017, p. 13, https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

The EBCG Regulation makes search and rescue that takes place in the context of border controls explicitly part of Integrated Border Management (IBM) (Article 3(1)(b)). Nevertheless, Frontex does not collect data on migrant mortality.[63] This is left to the national authorities, which show differences in registration deaths and keeping official statistics as comprehensive academic research has shown.[64]

Discussing the lack of recording Aas and Gunthus mention: 'While the right to life has been extensively debated in relation to the duty of assistance to boats in distress, and the adequacy of timing of Frontex search and rescue operations, far less attention has been paid to how the right is institutionally anchored in the agency's performance measures and its mechanisms of knowledge production.'[65] The act of counting has been noted as substantially political, as an acknowledgement of death in contrast with the invisibility of casualties.[66]

Regarding the search and rescue obligations of the agency as such, allegations have even been voiced with respect to non-assistance to persons in danger.[67] A 2013 PACE report refers to an incident, where 56 people died after a Frontex aeroplane reportedly crossed their boat while in distress without providing any assistance.[68]

Finally, complaints of ill-treatment during maritime operations are not rare. Human Rights Watch has voiced allegations that Frontex personnel had refused intercepted persons access to drinking water. The Commission, questioned by Members of the European Parliament,[69] responded that neither it nor the agency could verify the allegations due to lack of

63 Aas and Gundhus 2015, p.p.: 9, 10.

64 T. Last and T. Spijkerboer, 'Tracking Deaths in the Mediterranean', in: T. Brian and F. Laczko (eds.), *Fatal Journeys. Tracking Lives Lost during Migration*, Geneva: International Organization for Migration 2014, p. 85.

65 Aas and Gundhus 2015, p. 9.

66 See for instance: P. Andreas and K. M. Greenhill, 'Introduction: The Politics of Numbers', in: P. Andreas and K. M. Greenhill (eds), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca: Cornell University Press 2010; N. Rose, *Powers of Freedom. Reframing Political Thought*, Cambridge: Cambridge University Press 1999; S. Sandberg, 'What can "Lies" Tell Us about Life? Notes towards a Framework of Narrative Criminology', *Journal of Criminal Justice Education* 2010, vol. 21(4); L. Weber and S. Pickering, *Globalization and Borders: Death at the Global Frontier*, London: Palgrave Macmillan 2011.

67 Like any state or private vessel, Frontex vessels are under the obligation to render assistance to persons in distress at sea. Montego Bay Convention on the Law of the See of 1982, the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and the Search and Rescue Convention (SAR Convention) of 1979.

68 PACE 2012, p. 11.

69 Parliamentary questions put to the European Commission on 27 October 2009 by Birgit Sippel (S&D), Alexander Alvaro (ALDE), Ulrike Lunacek (Greens/EFA), Nirj Deva (ECR), Sabine Lösing (GUE/NGL) and Martin Ehrenhauser.

evidence.[70] An incident, during which the Greek coast guard opened fire and injured at least four Syrian passengers was reported in 2014. The Greek courts found the conduct to be in accordance with the law. The victims were subsequently given asylum in Germany and Sweden.[71] Journalistic research into several Frontex serious incident reports revealed 'a broader Greek and European tactic of using weapons to stop boats driven by suspected smugglers – and injuring or killing refugees in the process'[72]

2.2 Land borders

The situation is developing in a parallel way at the land borders. The first RABIT operation at the Greek-Turkish borders succeeded in diminishing irregular crossings by 44% within one month. In fact, the Executive Director of Frontex at the time, Ilkka Laitinen, stated that this operation 'will be remembered as a milestone in the history of Frontex'.[73] The majority of those detected trying to cross the border irregularly come from Afghanistan, Iran, Palestine, and Somalia, primarily refugee-producing countries. Nevertheless, the Rapid Intervention Team was composed of specialists on false documents, clandestine entry, first and second-line border checks and stolen vehicles, rather than asylum experts.[74]

A lower but not negligible risk to life and physical integrity also exists in land operations. Indicatively, a 16-year old boy from Syria trying to cross the Greek-Turkish border in Evros died, and two more were injured in pursuit by Greek border guards and Frontex officials in 2011.[75]

70 Parliamentary questions, Answer given by Mr Barrot on behalf of the Commission, 18 December 2009, E-5353/2009.

71 Z. Campbell, 'Shoot First. Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept* 22 August 2016, https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/.

72 Campbell 2016a.

73 Frontex, *RABIT Operation 2010 Evaluation Report*, Warsaw, August 2011, https://www.yumpu.com/en/document/read/34681466/rabit-operation-2010-evaluation-report-frontex-europa.

74 S. Carrera and E. Guild, *'Joint Operation RABIT 2010' – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System* (CEPS Paper), Brussels: Centre for European Policy Studies November 2010, https://www.researchgate.net/publication/48665031_'Joint_Operation_RABIT_2010'_-_FRONTEX_Assistance_to_Greece's_Border_with_Turkey_Revealing_the_Deficiencies_of_Europe's_Dublin_Asylum_System_CEPS_Liberty_and_Security_in_Europe_November_2010/link/5950b5ce45851543383c3a0e/download.

75 Statewatch, Statewatch News Online, 'Greece-Turkey: 16-year-old sans-papiers killed in FRONTEX-aided police pursuit', December 2011.

Several allegations of severe beatings and refoulement to Turkey were registered at Frontex' serious incidents reports', with regard to operation Poseidon Land at the Bulgarian-Turkish borders between December 2012 and January 2014.[76]

The most prominent allegations concerning violations during Frontex land surveillance operations are expressed with regard to the Hungarian-Serbian border. Already since 2016 the Frontex Consultative Forum and the Fundamental Rights Officer (FRO) had repeatedly suggested that the agency withdrew from return operations in Hungary because of the systematic nature of violations of human rights and asylum law.[77]

2.3 Air borders

Concerns that Frontex does not take seriously into account potential protection issues have also been expressed concerning operations conducted at airports.[78]

Indicatively, according to Frontex data, already in 2006, 3,166 third-country nationals were refused entry during joint operation Amazon, conducted at airports in Spain, Portugal, France, the United Kingdom, Italy, the Netherlands, and Germany.[79]

2.4 Frontex as a humanitarian agent

One of the highlighted facts concerning the efficiency and contributions of EU agencies in improving the life of EU citizens in a study commissioned by the EU Agencies Network reads: 'The European Border and Coastguard Agency has contributed to the rescue of more than 250,000 people at sea and has processed 20 million visa applications.'[80]

---

76 A. Fotiadis, 'E.U. Border Agency Still Unaccountable on Refugees' Rights', *The New Humanitarian* 18 November 2016, https://deeply.thenewhumanitarian.org/refugees/community/2016/11/18/e-u-border-agency-still-unaccountable-on-refugees-rights; Z. Campbell, 'Over the Line. Bulgaria Welcomes Refugees With Attack Dogs and Beatings', *The Intercept* 3 November 2016, https://theintercept.com/2016/11/03/bulgaria-welcomes-refugees-with-attack-dogs-and-beatings/.

77 Frontex, *Frontex Observations, Situation at the Hungarian-Serbian Border*, 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming- 14832; Frontex Consultative Forum on Fundamental Rights, *Recommendation by the Consultative forum to the Executive Director and Management board of the European Border and coast guard Agency,* 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming-14832. Further on this topic see Gkliati 2021b.

78 Sirtori and Coelho 2007, p. 12.

79 FRONTEX 2006b, p. 11.

80 Deloitte, *How do EU agencies and other bodies contribute to the Europe 2020 Strategy and to the Juncker Commission Agenda?*, London, November 2016, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/TEMP/Deloitte%20Study_EU%20agencies%20contribution.pdf?_cldee=bWFyaWFuYWdrbEB5YWhvby5ncg%3d%3d&recipientid=contact-253f7aa82caae111b7e500155d043f10-df2137815e99433886cc66cd9beadfb3&esid=5cff7273-90bb-e611-80ce-00155d040a3b&urlid=2.

In particular, operations Triton and Poseidon were awarded a significant 'search and rescue' character after several incidents of mass drowning in the Mediterranean.[81] Similarly, the life-saving character of EUROSUR has been its main promotion point.[82] Frontex itself claims humanitarian motives for its operations. For instance, the agency promotes its success in intercepting and diverting '3,887 illegal immigrants' in 2006 in the context of HERA II Operation and notes that 'This means that these people were stopped from setting off for a dangerous journey that might have cost their lives'.[83]

This fits in the general tendency of 'humanitarisation' of language concerning EU migration control policies.[84]

In an interesting study of Aas and Gunthus, discussing humanitarian thinking and the human rights discourse among the officers on the ground, but also in the self-presentation of Frontex, the authors note that the motto' *humanity, open communication, professionalism, trustworthiness, teamwork*' features on the business cards of the agency's staff.[85] Furthermore, interviews show, that participating officers see their presence as alleviating the migrants' suffering and enhancing the quality of human rights at the borders. Often, they express compassion and the intention to help those vulnerable, viewing that not just as their individual character qualities, but as their official role. [86] An earlier study had also concluded that participating officers have a strong belief in the morality of their actions. The interviewees found that 'anti-terrorism/radicalisation policies and interceptions of migrants are in line with the ethical values they are mandated to respect in the implementation of such practices'.[87]

It has been recognised that humanitarian and human rights discourse can be instrumentalised to conceal the goals of securitisation and border control. Perkowski gives the example of the RABIT operation in Greece between November 2010 and March 2011, where she notes an increasing use of human rights terminology in the press releases, although the purpose was to address 'urgent and exceptional pressure' at the borders.[88] It becomes apparent that the agency is adopting a language of humanitarian assistance.

---

81 European Commission 2014; Council of the European Union 2015.

82 Chapter II, section 2.2.5.

83 Hera Statistics, available online at http://www.frontex.eu.int/gfx/frontex/files/hera-statistics.pdf.

84 S. Klepp, 'Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?', *Blog Middle East Institute* 1 August 2010, https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy#edn35.

85 Aas and Gundhus 2015, p. 4.

86 Aas and Gundhus 2015, p.p.: 5,6.

87 I. Ioannides and M. Tondini, *Ethical Security in Europe? Empirical Findings on Value Shifts and Dilemmas across European Internal External Security Policies* (Policy Recommendation Report INEX Work Package 3), Oslo: International Peace Research Institute 30 September 2010, p. 100.

88 Perkowski 2012, p. 26.

According to Aas and Gundhus it 'seems to have appropriated the language of as a standard item of its self-presentation'.[89]

What is essential however, is to see these declarations materialising in effective protection of human rights, also by the means of accountability mechanisms that can ensure the adherence with human rights and the rule of law.[90] Furthermore, since the beginning, fundamental rights were a basic aspect of the training Frontex provides.[91] Next to that, the agency is expected to contribute to the uniform application of EU fundamental rights in all its operations, including facilitating the exchange of good practices among member states.[92] In practice, Frontex presence may have a disciplinary effect as the case was at the Bulgarian – Turkish borders, where the guest officers integrated surveillance systems that had an anti-corruption effect.

2.5 The apprehended migrants in a member state

When apprehended migrants are not turned back at the border or diverted to third states directly, they are surrendered to the national authorities of a member state, where they are usually detained pending their removal. This is another area where the responsibility of Frontex for human rights violations may occur.

Characteristically, in the period between November 2010 and March 2011, during the first RABIT operation in Greece, nearly 12,000 migrants that tried to enter the country from the land border with Turkey were arrested and detained in Greece. The grave detention conditions in Greek police stations and detention centres as well as ill-treatment incidents by the police have been extensively documented and held by the ECtHR to amount to torture in several cases.[93] Frontex has nevertheless provided Greece with staff and material support facilitating the arrest and detention of the undocumented migrants.[94] Moreover, a high-ranking Frontex

89 Aas and Gundhus 2015, p. 14.

90 On translating human rights principles into practice, see P. Neyroud and A. Beckley, *Policing, Ethics and Human Rights*, New York: Routledge 2001.

91 European Union Agency for Fundamental Rights, *Fundamental rights-based police training. A manual for police trainers*, Luxembourg, 3 December 2013, https://fra.europa.eu/sites/default/files/fra-2013-fundamental-rights-based-police-training_en_0.pdf.

92 Article 5(4) EBCG Regulation.

93 e.g., ECtHR 11 June 2009, App. No. 53541/07, (*S.D. v. Greece*); ECtHR 26 November 2009, App. No. 8256/07, (*Tabesh v. Greece*); ECtHR 7 June 2011, App. No. 2237/08, (*R.U. v. Greece*); ECtHR 21 June 2011, App. No. 33225/08, (*Efremidzi v. Greece*); ECtHR 17 July 2012, App. No. 74279/10, (*Lica v. Greece*); ECtHR 21 June 2018, Judgment, App. No. 66702/13, *(S.Z. v. Greece);* ECtHR 28 February 2019, Judgment, App. No 19951/16, (*H.A. and others v. Greece)*.

94 Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, p. 1, https://www.hrw.org/sites/default/files/reports/greece-0911webwcover_0.pdf; Migreurop 2011, p. 11.

official stated that Frontex personnel are not allowed to enter the cells and thus, 'have not witnessed what is going on there'.[95] Following a Human Rights Watch report in 2011,[96] assessing the involvement of Frontex in the ill-treatment of migrants detained in Greece, the agency issued a response according to which 'the Agency has been extremely concerned with the conditions at the detention centres' but 'at the practical level abandoning emergency support operations, such as RABIT 2011, is neither responsible, nor does it do anything to help the situation of irregular migrants on the ground'.[97]

Related to this is also allegations of Joint Operation Hera targeting vulnerable groups of migrants to detract information, resulting from the leak of 2012 debriefing guidelines.[98]

3 Return operations

The number of joint return operations coordinated by Frontex is gradually growing, as is the number of returned migrants.[99] This is expected to scale up even further in the near future given the enhanced powers of Frontex with respect to return, and the significant boost in the allocation of funding. In particular, EUR 66.5 million have been allocated to joint return operations in 2016 and 2017, increased from EUR 9.5 million in 2015.[100] The growth continued in the next years, but it is only with the new 2019 EBCG Regulation that the budgetary allowance permits the agency to reach its potential in returns. In particular, approximately EUR 250 million per year on average is added to the agency's budget for 2021-2027 to facilitate its return activities.[101]

Illustratively, over 53,000 people have been returned in flights where Frontex was involved in the period 2007-2018. This is still only a small fraction (7%) compared to the total number of persons returned by member

95 Migreurop 2011, p. 11.
96 Human Rights Watch 2011.
97 Frontex, Frontex's Reaction to HRW report, 'The EU's dirty hands', 20 September 2011, http://migrantsatsea.files.wordpress.com/2011/09/frontex-_-news-frontexs-reaction-to-hrw-report-2011-20-sept.pdf.
98 'Statewatch, *Press release: EU border agency targeted "isolated or mistreated" individuals for questioning*, London: Statewatch 16 February 2017, https://www.statewatch.org/news/2017/february/press-release-eu-border-agency-targeted-isolated-or-mistreated-individuals-for-questioning/.
99 On a more focused look into the Frontex return operations see Jones, Kilpatrick and Gkliati 2020.
100 Statewatch, *Rapid introduction of new Frontex powers: EU and Member States prefer to shut the door and return refugees than relocate them*, London: Statewatch 27 January 2017.
101 Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May 2019, p. 6.

states in these years.[102] The stated goal for 2021-2027 is to facilitate the return of 50,000 returnees per year.[103]

Concerns have been expressed regarding the risk of collective expulsions.[104] Moreover, the risk of violation of the principle of non-refoulement exists, especially given the serious discrepancies in the asylum determination systems of different EU member states.[105] For instance, in Greece, recognition rates were found to be extremely low in 2010, especially in the first instance, where they came down to 0.04%.[106] This was one of the reasons that led the ECtHR to the judgment of *MSS v Belgium and Greece*, which essentially banned Dublin returns to Greece, since asylum seekers would be in danger of being refouled.[107] The result of such unfair asylum procedures may be that refugees were sent back, to places where they were at risk of being tortured or persecuted, in the context of a Frontex coordinated joint operation.[108]

In an incident of October 2016 that caught the public eye, 10 Syrians were returned to Turkey in a Frontex coordinated flight from the Greek island, Kos, after the entry into force of the EU-Turkey deal.[109] The passengers were reportedly never given the opportunity to apply for asylum and were not informed of the destination of their trip (they believed they were flying to Athens). This incident attracted the interest of the UNHCR, and

102 Jones, Kilpatrick and Gkliati 2020, p. 37.

103 Council of the European Union 2019, p. 6.

104 Migreurop, Chachipe a.s.b.l., Rom e.V., Köln, Flüchtlingsrat Niedersachsen, Project Roma Center, Göttingen, European Network against Racism (ENAR), *New Group Deportation Flight Coordinated by FRONTEX as means of Collective Expulsion towards Serbia: Rights violation and the impunity of member states*, 20 April 2012.

105 PACE 2012, p. 11.

106 Amnesty International, 'Greece: Systematic detention of irregular immigrants and asylum seekers under minimal condition' (in Greek), 2010, available at www.amnesty.org.gr/; It needs. to be noted that after the establishment of the transitional appeal committees with Presidential Decree 114/2010, recognition rates on second instance have risen and are near the European average. M. Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece', *Inter-American and European Human Rights Journal* 2011, vol. 4(1), p. 102; In 2011 recognition rates were between 1,65 and 2,05% in the first instance and 28,2 and 40,62% in the second instance. Council of Europe, Commissioner for Human Rights, Nils Muižnieks, report following country visit to Greece from 28 January to 1 February 2013, 16 April 2013.

107 ECtHR [GC] 21 January 2011, App. No. 30696/09, (*M.S.S. v. Belgium v. Greece*), para. 301.

108 Such concerns have been expressed, for instance, also with respect to Hungary (Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited. An update of the Hungarian Helsinki Committee's 2011 report based on a field mission to Serbia (2-4 April 2012)*, Budapest, June 2012, http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf) and Germany (Migreurop e.a. 2012).

109 P. Kingsley, 'Syrian refugees: we were tricked into returning to Turkey', *The Guardian* 1 November 2016, https://www.theguardian.com/world/2016/nov/01/syrian-refugees-tricked-into-returning-to-turkey-greece-eu; Fotiadis, 2016.

Amnesty International denounced it as refoulement.[110] On another occasion, the ECtHR granting the applicant interim measures stopped a Frontex coordinated deportation of an Iranian activist from Greece to Turkey.[111]

Furthermore, an element of force and coercion is inherent in these operations, since most of the returns are non-voluntary, and it is to be expected that some individuals will actively resist.[112] Thus, the right to physical integrity may be at risk.[113] Several NGOs have reported the use of disproportionate force and degrading and inhuman treatment upon return.[114] According to Migreurop, during the return flights, 'their legs may be bound and their wrists handcuffed, their mouths are sometimes covered to prevent them from speaking or crying out, and in some instances disabling sprays are used to prevent them from shouting'.[115]

Migreurop has pointed out the lack of transparency regarding the rules and protocols applied during joint return operations that would guarantee the physical integrity of those returned.[116] Since then, the agency has developed a Code of Conduct for Joint Return Operations, which sets out common principles and main procedures to be observed by everyone participating in joint return operations.[117]

PACE, had called on Frontex in 2013 to put in place an effective and independent monitoring system at all stages of joint return operations, which operations should only be carried out for EU member states that have an effective system of forced return monitoring in place at the national level.[118] Furthermore, after he participated in a return operation in 2017, the Greek Ombudsman expressed concerns regarding the lack of appropriate

110 Amnesty International, *A Blueprint for Despair. Human Rights Impact of the EU-Turkey deal*, London: Amnesty International 14 February 2017, https://www.amnesty.nl/content/uploads/2017/02/EU-Turkey-Deal-Briefing.pdf?x87333.

111 D. Angelidis, 'Message from the ECtHR, against deportations', *EFSYN,* 2017, https://www.efsyn.gr/ellada/dikaiomata/108778_minyma-edda-kata-ton-apelaseon; The Press Project, Λέσβος: Απελαύνουν άρον άρον πρόσφυγες – Παρέμβαση ΕΔΑΔ, 30 April 2017, https://www.thepressproject.gr/article/110765/Lesbos-Apelaunoun-aron-aron-prosfuges---Parembasi-EDAD.

112 LIBE 2011, p. 61; PACE 2012, p. 11.

113 Several deaths have even been reported during expulsions organised by member states. Migreurop 2011, p. 17.

114 Statewatch and Migreurop 2012, p. 10.

115 Migreurop 2011, p. 15; Two descriptive complaints by expelled foreigners have been posted on the website Mille Babords, www.millebabords.org/spip.php?article13938.

116 Migreurop 2011, p. 17.

117 Frontex, Code of Conduct for Joint Return Operations Coordinated by Frontex, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.

118 PACE Resolution 1932, 'Frontex: human rights responsibilities', 2013, Mr Mikael Cederbratt rapporteur, (Doc. 13161).

safeguards,[119] while the CPT also noted that 'the current arrangements cannot be considered as an independent external monitoring mechanism'.[120]

4 Intelligence activities

When the information policies of the EU are seen under the light of combating terrorism and crime, then the gathering of a large amount of data is deemed essential for the purposes of border surveillance.[121] Frontex plays a critical role in this respect. Its work has a strong intelligence dimension.

In particular, Frontex is tasked with monitoring the migratory flows towards and within the EU and identifying possible routes and entry points. For this purpose, it has established a Common Integrated Risk Analysis Model, which collects and analyses statistical and operational data provided by member states and other agencies, but also media and other sources, produced by the agency's own work, or though EUROSUR. On the basis of this information, the agency prepares a general risk analysis and tailored analyses for separate operations, based on which joint surveillance and return operations are conducted (Article 29).[122]

The agency did not have the competence to process personal data until the 2011 amendment.[123] However, the agency has long before that amendment been processing personal data in the context of joint return operations,[124] allegedly without adopting any measures for the application of Regulation 45/2001 on data protection.[125]

---

119 Greek Ombudsman, *Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues*, Athens: The Greek Ombudsman. Independent Authority April 2017, p.p.: 37, 38, https://www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017_en.pdf.

120 European Committee for the Prevention of Torture, Germany: Visit 2018 (return flight), Inf (2019) 14, Section: 12/18, 03/12/2018, section 60, https://hudoc.cpt.coe.int/eng#{%22sort%22:[%22CPTDocumentDate%20Descending,CPTDocumentID%20Ascending,CPTSectionNumber%20Ascending%22],%22tabview%22:[%22document%22],%22CPTSectionID%22:[%22p-deu-20180813-en-12%22]}.

121 A. Fischer-Lescano and T. Tohidipur, *Europaisches Grenzkontrollregime. Rechtsrahmen der europaischen Grenzschutzagentur FRONTEX*, 2007, vol. 67(4), https://www.zaoerv.de/67_2007/67_2007_4_b_1219_1276.pdf, p.p.: 1260, 1261.

122 Frontex, Operational Analysis, http://www.frontex.europa.eu/intelligence/operational-analysis.

123 Article 11(b) and (c) Frontex Regulation.

124 European Data Protection Supervisor (EDPS), *Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (FRONTEX) concerning the "collection of names and certain other relevant data of returnees for joint return operations (JRO)"*, Case 2009-0281, Brussels, 26 April 2010(c).

125 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institution and bodies and on the free movement of such data; Statewatch and Migreurop 2012, p.p.: 11, 12.

Moreover, Frontex operates EUROSUR, which has unique capabilities to collect and process vast information and share this data with multiple actors. It is also responsible for developing a Common Information-Sharing Environment, including the interoperability of systems, particularly by developing, maintaining, and coordinating the EUROSUR framework (Article 10).

Such activities may infringe upon the right to privacy and data protection. The principles underpinning data protection are that personal data must be processed fairly and lawfully. They may be collected for explicitly specified legitimate purposes, while they may not be further processed in a way incompatible with those purposes.[126]

Article 86 EBCG Regulation stipulates that Regulation (EC) No 45/2001[127] should be applied when processing personal data, and it expressly prohibits the onward transfer of personal data from member states to third countries or any other third parties. The purposes for which data may be processed are laid out in Article 87 EBCG Regulation. Articles 88 to 92 cover the type of data and the circumstances under which these may be processed.

More specific limitations and guarantees had already been introduced with the 2011 amendment with respect to the processing of personal data by Frontex, such as the introduction of a Data Protection Officer for the agency[128] and the monitoring of the activities of the agency by the European Data Protection Supervisor (EDPS).[129] However, these guarantees are not deemed adequate by the EDPS in the context of the agency's growing tasks and responsibilities.[130] He also expresses concerns about the lack of clarity regarding the scope of processing personal data, which could lead to legal uncertainty and a significant risk of non-compliance with data protection rules.[131]

Thus, notwithstanding these guarantees, there is still a great risk that personal data could be ill-protected in an area that is particularly delicate with respect to the stigmatisation of the migrants[132] or when operational decisions are taken, for instance, on the basis of data that identify ethnicity.[133]

126 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, p. 31); Data Protection Regulation, p. 1; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

127 Data Protection Regulation.

128 Art 11(a) Frontex Regulation.

129 Preambular par. 25 and Article 13 of Frontex Regulation.

130 EDPS 2010, p. 3,4

131 EDPS 2010, p. 4.

132 ECtHR 4 December 2008, Nos. 30562/04 30566/04, (*Marper v. the United Kingdom*).

133 LIBE 2011, p. 62-64; The human rights risks of surveillance technology and databases are described extensively in E. Brouwer, *Digital Borders and Real Rights. Effective Remedies for Third-Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers 2008, Chapters 6 and 7.

Moreover, the European Parliament has held regarding EUROSUR that the 'necessary guarantee in terms of privacy and purposive collection, which lie at the heart of EU values regarding the operation of databases and information systems' are lacking.[134]

As far as the redress mechanisms are concerned, the secrecy over Frontex operations and risk analyses does not allow the individual to challenge the unlawful acts of the agency by making use of his rights under Article 8(2) of the Charter and Article 12 of Regulation 45/2001.[135]

The rights of individuals are even more at risk because of the advanced security technologies deployed in the field of data surveillance and employed in the frame of EUROSUR. These cover not only radar and satellite images, but also identification technologies that increasingly make use of biometric data.[136] Large amounts of these personal data are stored in databanks, such as the second-generation Schengen Information System (SIS II),[137] the Visa Information System (VIS) and the DNA database under the Prüm Treaty as well as the Smart Borders Package.

5 Cooperation with Third States

Building cooperation with neighbouring countries and with countries of origin and transit is an integral part of the EU's IBM and has contributed significantly to the success of Frontex. Its extent becomes apparent in the operational plans and the working arrangements it concludes with third states. Frontex has concluded working arrangements with 18 countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, the Former Yugoslav Republic of Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, and the United States.[138]

The agency is in regular contact since 2010 with the African countries that form part of the Africa-Frontex Intelligence Community (AFIC),[139] in the context of which it launched in 2017 a capacity-building project for

134 Jeandesbo 2008, p. 14.

135 LIBE 2011, p. 64; EDPS 2010.

136 Wolff 2010, p. 264, referring to D. Bigo, 'From foreigners to "abnormal aliens": how the faces of the enemy have changed following September the 11th', in: E. Guild and J. van Selm (eds.), *From Foreigners to Abnormal Aliens: How the Faces of the Enemy Have Changed Following September the 11th*, London: Routledge 2005, p. 73.

137 SIS II became operational on 9 April 2013.

138 Frontex website, https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries.

139 Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Democratic Republic of Congo, Ivory Coast, Egypt, Eritrea, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan and Togo.

Africa aiming to strengthen the capacity of AFIC countries to work on joint intelligence analysis of crime.[140] Other capacity-building cooperation projects include the Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey (IPA II) and the Eastern Partnership Integrated Border Management Capacity Building Project. It is also involved in cooperation based on agreements concluded between a third country and an EU member state.[141] Technically such agreements, in the form of Memoranda of Understanding or Technical Protocols are concluded between Frontex and the border control authority of the third country.[142]

The cooperation could be on the level of information exchange, training, research, development, or joint patrols. In particular, the collaboration may take the form of donations of border management technologies and assets, deployment of liaison officers to third countries, and financial means so that states develop their border security systems.[143]

The aim is that the third countries are assisted so that they are able to successfully stop the departure of immigrant vessels aiming to reach Europe, intercept migrant vessels or readmit third-country nationals and return them to their respective countries of origin.

Cooperation with third states is clearly illustrated in the example of Joint Operation Hera, where Frontex co-financed an aeroplane based in Senegal for the surveillance of the national waters of Senegal. The purpose was to detect immigrant boats leaving the country with a destination to Europe so that either Spanish or Senegalese vessels could return them to their port of departure.[144]

These pre-border preventive actions are in obvious tension with the right of a person to leave a country, which is protected in Article 2 of the Fourth Protocol to the ECHR and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR).[145]

Furthermore, responsibility may result from violations committed against the individuals by the authorities of the third state. The cooperating countries are usually not subject to human rights commitments or have worrying human rights records. Many of these countries operate under different legal standards as they are not bound by the ECHR[146] or EU law.

140 Frontex launches capacity building project for Africa during AFIC meeting', Warsaw, 29 September 2017, http://frontex.europa.eu/news/frontex-launches-capacity-building-project-for-africa-during-afic-meeting-nqXaPW.

141 For instance, operation HERA was based on bilateral agreements that Spain had concluded with Mauritania and Senegal.

142 Papastavridis 2010, p.p.: 89, 90.

143 Frontex website, http://www.frontex.europa.eu/partners/third-countries.

144 Baldaccini 2010, p. 251.

145 FRA 2013a, p. 46; Migreurop 2011, p. 13.

146 With the exception of Turkey.

Moreover, Libya is not bound by the 1951 Refugee Convention, while Turkey still retains a geographic reservation to the Convention, which means that it accepts only asylum claims coming from Europe.[147]

Serious human rights violations have been documented time and again by international organisations and NGOs, while the ECtHR and the UNHCR have warned that it is not safe to send certain persons back to these countries. Libya is one of the most characteristic examples, being reported of arbitrarily detaining people for long periods, inhumane detention conditions, beatings, rape, and other forms of ill-treatment towards irregular migrants.[148] Amnesty International has been reporting the abuse of 'tens of thousands' of migrants at the hand of Libyan authorities and non-state actors, such as tribes and armed groups. It has highlighted the complicity of EU member states in such violations.[149] The report expressly indicates that the EU has also been assisting Libya through Frontex.[150]

Besides, observers repeatedly report ill-treatment of migrants in Nigeria,[151] while similar criticism is being expressed concerning Mauritania.[152] Indicatively, the Nouadhibou detention centre in Mauritania has been renamed Guantanamito by migrants.[153] Finally, most North African states and Turkey have criminalised irregular exit imposing fines and imprisonment to those trying to leave the country without the necessary documents or outside the designated border crossing points.[154]

Frontex does not provide information as to the fortune of the apprehended migrants and does not consider itself responsible for the treatment of individuals after they are surrendered to the authorities of the third state.[155] Moreover, there is no mechanism or policy that would allow monitoring whether third states use the donated assets and equipment in accordance with human rights law.[156]

---

147 Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, *Management of mixed migration and asylum challenges beyond the European Union's eastern border*, 8 April 2013, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19549&Language=EN&; The most expected new asylum law in Turkey has not managed to remedy the inconsistency of the geographic restriction.

148 Human Rights Watch, Libya: Nightmarish Detention for Migrants, Asylum Seekers, 21 January 2019, https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers.

149 Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees and Migrants*, London: Amnesty International 7 December 2017, https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF.

150

151 The World Organisation Against Torture, The International Federation for Human Rights and FrontLine, *Nigeria: Defending Human Rights: Not Everywhere Not Every Right. International Fact-Finding Mission Report*, Geneva, Paris and Dublin, April 2010, https://www.omct.org/files/2010/05/20688/nigeria_mission_report.pdf.

152 Migreurop 2011, p. 14.

153 Migreurop 2011, p. 14.

154 FRA 2013a, p.p.: 42, 43.

155 Migreurop 2011, p. 11; Human Rights Watch 2009, p. 98.

156 FRA 2013a, p. 11.

Various sources have expressed repetitive criticism on the cooperation of Frontex with third countries and called for safeguards on the choice of countries.[157] According to the Frontex Regulation, liaison officers 'shall only be deployed to third countries in which border management practices respect minimum human rights standards'. However, such guarantees do not wholly reassure the experts.[158] As it has been pointed out, no information is provided on the criteria or the mechanisms of evaluation, thus constituting the guarantees unenforceable and in fact meaningless. Furthermore, there is no supervisory authority that would monitor the upholding of human rights standards in the cooperation agreements.[159]

The broadest opening of Frontex towards third countries was made with the EBCG Regulation 2016. Third states of return may provide the means of transport and the return escorts in collecting return operations, while border surveillance activities may be carried out in the territory of a third state, under its command. Specific actions, such as the deployment of European Border Control teams with executive powers, require establishing a status agreement between the EU and the third state, which will cover the details of the operation.[160]

This first third-state border surveillance operations have been launched in Albania and Montenegro.[161] Studying issues of responsibility and accountability in the context of joint operations conducted in third countries raises new questions regarding, for instance, the extraterritorial jurisdiction of the CJEU or special agreements excluding Frontex personnel from criminal and civil liability in third countries participating in EU operations. These issues deserve separate attention, and are, thus, excluded from the scope of this study.

---

157 V. Moreno-Lax, *Frontex as a Global Actor: External Relations with Third Countries and International Organizations*, in M. Dony (ed.), The External Dimension of the Area of Freedom, Security and Justice, Universite Libre de Bruxelles Press, 2012; Meijers Committee 2013, par. II; House of Lords 2008, p. 47; FRA 2013a, p.p.: 10, 11, 16; PACE 2013a, p.p.: 4, 5, 14; FRA holds that the EU should reinforce its efforts to strengthen the protection space in the transit countries, which should involve effective asylum systems, prevention of abuse, access to justice etc.

158 ECRE 2013, Rijpma and Cremona 2007, p. 23.

159 Statewatch and Migreurop 2012, p.p.: 12, 13.

160 Article 73(3)(4) EBCG Regulation. Such a model agreement has been drawn by the Commission, establishing a framework for the cooperation of the agency with third states. European Commission Communication, Model status agreement as referred to in Article 76 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (COM(2016) 747 final).

161 Frontex news release, *Frontex launches first operation in Western Balkans*, 11 May 2019, https://frontex.europa.eu/media-centre/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM; Frontex news release, *Frontex launches second operation outside EU*, 15 July 2020, https://frontex.europa.eu/media-centre/news-release/frontex-launches-second-operation-outside-eu-1UZt3Q.

6 Risk analysis

The risk analysis as such may constitute discrimination if it is targeting individuals of specific nationalities. Decisions on joint operations but also the preparation of the member states' activities at their borders depend on the risk analysis conducted by the agency to identify the different irregular immigration flows and the trends developing in the trafficking and human smuggling networks.[162]

According to the Code of Conduct of Frontex, 'all discriminatory behaviours as defined in Article 2 towards the public or other participants in Frontex activities are forbidden.[163]

However, several risk analyses have identified specific groups of irregular migrants as proportionately large in number, which led to the organisation of ethnicity focused operations. Such examples are operation Silence targeting Somali migrants, Operation Hydra targeting individuals of Chinese origin,[164] and Operation Niris, which targeted Chinese and Indian individuals.[165] As an illustration, out of the 579 travellers only 15 individuals of the aforementioned nationalities were refused entry. Such concerns about racial discrimination have been expressed not only by NGOs,[166] but also by the LIBE Committee[167] and PACE.[168]

Moreover, certain unverified statements resulting from the risk analysis could result in serious harm for the persons involved as they could act as incentives for member states to impose discriminatory measures upon certain groups.[169] For instance, Frontex stated in the 2012 Western Balkans Annual Risk Analysis Report that 'claiming asylum in the EU is part of Roma overall seasonal strategy for their livelihood.'[170] The agency does not recognise profiling as discriminatory.[171] However, such concerns have been voiced by the European Parliament which holds that in general terms descriptive and predictive profiling are 'legitimate investigative tools when they are based on specific, reliable and timely information (…) and when the actions taken on the basis of such profiles meet the legal tests of neces-

162 Frontex, Reply to the LIBE Committee regarding Frontex fundamental rights strategy, 30 May 2012, p. 4, http://www.statewatch.org/observatories_files/frontex_observatory/Frontex%20June%202012-EP%20LIBE%20Committee%20Questions.pdf. Further on the risk analysis as a form of power see, S. Horii, *The effect of Frontex's risk analysis on the European border controls*, European Politics and Society, 17(2), 2016, 242-258.

163 Article 12 of the Code of Conduct for all persons participating in Frontex activities.

164 *Frontex, General Report 2007,* Warsaw, 2008, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2007/frontex_general_report_2007_final.pdf, p. 32.

165 Frontex 2007b, p.p.: 29-30.

166 Migreurop 2011, p. 21.

167 LIBE 2011, p. 62-64.

168 PACE 2013a, p. 11.

169 Statewatch and Migreurop 2012, p.p.: 7, 8.

170 Frontex, Western Balkans Annual Risk Analysis Report, 2012 p. 29.

171 Frontex 2012d, p. 4.

sity and proportionality'. However, the European Parliament stresses that 'in the absence of adequate legal restrictions and safeguards as regards the use of data on ethnicity, race, religion, nationality and political affiliation, there is a considerable risk that profiling may lead to discriminatory practices.'[172]

Frontex may also be involved in assisting member states to enforce discriminatory policies. For instance, Frontex is being accused of legitimising the German policy of 'systemic expulsion against the Roma community.'[173] According to Migreurop, Germany carried out one or two return flights every month in 2012 to Serbia and Kosovo, coordinated and financed by Frontex. In 2011, 21 such operations were organised by Frontex, while among the deportees was a significant number of asylum seekers whose claims had been refused in accelerated procedures.[174]

7 Conclusions

In this chapter, I have explored the societal problem that generates the interest of this study, namely the human rights sensitivities that are inherent in the agency's work. I have showcased several instances where human rights violations may occur, while at the same time providing reported indications of such violations. This information provides the framework for examining the possible responsibility of the agency for such violations, in case the discussed sensitivities materialise.

The dynamic growth analysis, shown in the previous chapter, combined with the presentation of the human rights sensitivities here serve to suggest that such growth also needs to be reflected in accountability frameworks.

This chapter aimed to show where the need for protection arises in Frontex coordinated operations. This knowledge, combined with our understanding of the concept and the legal framework on responsibility, examined in the following chapters, will lead us to examine the institutional responses to possible human rights violations.

172 European Parliament, *Profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control*, P6_TA(2009)0314, 24 April 2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:184E:0119:0126:EN:PDF.

173 Migreurop 2011.

174 Migreurop 2011.

Part II

Conceptual: From Many Hands to Systemic Accountability

4 Theoretical Framework (I): Responsibility

1 Introduction

Having acquired, in the previous chapters, a better empirical understanding of the character of the agency, its powers and activities, but also the possible tensions with respect to fundamental rights, we now pass to more conceptual matters, namely to questions of responsibility and accountability. In particular, the following two chapters aim to present the theoretical framework, on which this book is based. This concerns both the already existing theoretical framework, on which I am building, and the one I originally develop for the purpose of the examination of the responsibility and the accountability of Frontex.

The purpose is to establish a basic conceptual understanding of the main issues of concern for this study, namely the concepts of responsibility and accountability, and subsequently determine the appropriate framework to deal with these issues in the context of the European Border and Coast Guard Regulation EBCG.

The relevant questions for Chapter IV are: What is responsibility? What is the appropriate conceptual framework under which the responsibility of Frontex should be examined in the framework of EBCG operations?

To this end, following the presentation of the theoretical framework and the delineation of the concepts, I examine the nature of the responsibility of Frontex and the environment within which this responsibility arises. This necessarily requires a preliminary examination of the question of whether Frontex is first of all capable of carrying such responsibility. I propose an alternative understanding of the responsibilities that arise during EBCG operations, focused on solving the *problem of many hands*, which is later explained in detail.

2 The conceptual understanding of responsibility

'Responsibility', 'liability' and 'accountability', terms similar in nature, are often loosely used as synonyms especially in everyday language, political rhetoric and administrative texts, a confusion that has also penetrated academic literature. This interchangeable use of these terms may hinder the comprehension of the argument. For this reason, clarification of basic terminology and of the conceptual and analytical framework, in which each term is embedded, is deemed essential. This section tries to engage with the concept of responsibility by asking three types of questions: conceptual

(What is responsibility and how does it differ from the similar concept of liability?), analytical (Which types of responsibility can we discern?), and evaluative (What is the value of the different types of responsibility for the legal question, on which this chapter is focused, namely the legal responsibility in EBCG operations?).

2.1 The different readings of responsibility

Our modern understanding of responsibility is essentially the result of the legal philosophy of H.L.A. Hart, who managed to conceptualize and systematize the fragments of knowledge that were the concept of 'responsibility'. As elegantly put by Mark Bovens: "Anyone who reflects on the concept of 'responsibility' will quickly discover that, just like 'freedom', 'equality', or 'solidarity', it is one of those big political words that is easily said but whose premise meaning is only too often obscure."[1]

The work of H.L.A. Hart on what Bovens calls 'many responsibilities'[2] has built the foundations for the modern theoretical study of responsibility. Hart tries to classify the different contexts, in which we discuss responsibility and the different concepts the word carries.[3] Mark Bovens, heavily building upon Hart's thoughts reintroduces Hart's heads of classification slightly renamed and places them in the world of complex organizations.[4] Bovens' interpretation of Hart's categories is deemed particularly useful for this study, as they can apply directly to the complex organizational structure of Frontex.

Table 3: Classification of the 'many responsibilities'

Hart	*Bovens*
Role-Responsibility	Responsibility as task
	Responsibility as virtue
Causal-Responsibility	Responsibility as cause
Capacity-Responsibility	Responsibility as capacity
Liability-Responsibility	Responsibility as accountability

Hart classifies responsibility under four different categories: role-responsibility, causal-responsibility, capacity-responsibility, and liability-responsibility. Table 1 will help us understand the different meanings of responsibility as it results from the discussion between Hart and Bovens, and distinguish the ones that are relevant for the study of the responsibility of Frontex.

1 M. Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organizations* Cambridge: Cambridge University Press, 1998, p. 22.
2 Bovens 1998, p. 24.
3 H H.L.A. Hart, *Postscript: Responsibility and Retribution, in 'Punishment and Responsibility, Essays in the Philosophy of Law'*, Oxford: Oxford University Press 1968, p.p.: 211-230.
4 Bovens 1998, p.p.: 23-25.

(a) *Role-Responsibility (responsibility as task and responsibility as virtue).* A certain position, office, capacity or role in any social construction comes along with duties and tasks that belong in one's sphere of *responsibility*. In this commonly used interpretation of the word, the Minister of Education, for instance, is *responsible* for the quality of education in the country's primary schools. In this sense, Hart connects responsibility to the assignment of specific tasks to an agent,[5] given her role. Different ranges of tasks are accorded to people or organizations due to social arrangements and expectations (for example, the village priest) or by means of the law (for example, the Minister of Education). This is what Bovens calls *responsibility as task* and part of the concept of Hart's *Role-Responsibility*.

However, *Role-Responsibility* also includes an understanding of what Bovens presents as a separate head of classification named *responsibility as virtue*.[6] This can be explained as a 'sense of *responsibility'*, the positive value statement describing the personal quality of an individual that expresses a certain level of maturity; an awareness over one's obligations. (for example, one's role as a responsible citizen is to participate in the commons). Although theoretically sound, this head of classification is not useful for the purpose of this study, which is to discuss responsibility for harm done, while the quality that *responsibility as virtue* expresses if more of a moral nature. An expression of *responsibility as virtue* can still be read in the role of Frontex as a humanitarian agent.[7]

The first aspect of *Role-responsibility*, however, *responsibility as task*, is directly relevant. For instance, in the meaning of *Role-responsibility*, as an EU agency, Frontex is *responsible* for adhering to the EU Charter (CFR). Moreover, the Executive Director of Frontex is *responsible* for suspending an ongoing operation in the light of serious and persistent human rights violations with due regard to the Frontex Regulation. These can also be seen as the formal or de jure responsibilities of the agency.

(b) *Causal-Responsibility (responsibility as cause)*. For both authors, this head of classification expresses a simple causal statement. A social actor is responsible for the consequence, result or outcome that his act or omission has produced. *Causal-responsibility* merely gives information about the cause of the event and does not have any negative or positive connotation. It is also free from any mental, psychological or even personal condition that the actor could be possibly required to fulfil. Therefore the interpretation of the term 'actor' should be stretched to its broadest limits to include even an unfortunate event or a natural phenomenon.

5 'Agent' is used in the sense of the 'social agent', an independent actor with the ability to pursue a goal, such as a person or an organization.

6 Bovens 1998, p. 26.

7 Chapter III, section 2.4.

For instance: The dangerous weather conditions on the coast of Lampedusa caused the migrant vessel to capsize. The sea storm was responsible for the death of the 50 people on board. As this reading of responsibility excludes any moral statement, it should be distinguished from the 'causal connection', which is an element of Liability-Responsibility, as shown in Table 2. That element would be relevant when determining the causal relationship between the acts of the agency and the breach of the obligation. *Causal-Responsibility* as such is not of interest for the current study.

(c) *Capacity-Responsibility (responsibility as capacity).* This form of responsibility expresses an assertion that a person has certain normal capacities. Thus, a person is *responsible for her actions* when she can understand which behaviour is required by the given normative framework, has a certain awareness of the consequences of her actions, and is capable of acting in conformity with that framework. *Capacity-Responsibility* is not relevant for the discussion at hand, as an organization cannot be treated fully as a person, and its mental capacity is not questioned. The question of whether Frontex had (or should have had) knowledge of a violation, should be distinguished from whether the agency had the capacity to understand the law or the consequences of its actions, and will be dealt with below as a separate element of *Liability-Responsibility*.

(d) *Liability-Responsibility (responsibility as accountability).* As we have already seen, a person that causes harm is *responsible* for it in the sense of causing it (*Causal-Responsibility*). However, responsibility can also be assigned to him in terms of blame on the one hand and praise or approval on the other. (*Liability-Responsibility*). This type of responsibility entails a moral judgment, a statement of someone being deserving of either blame or praise (for example The person *responsible* for today's successful event is Ms. X). *Liability-Responsibility* is the concept of responsibility most commonly used in this study. In particular, I examine the *legal responsibility* of Frontex, which should be distinguished from other forms of responsibility, such as moral or political responsibility.[8] Also, *Liability-Responsibility* is studied in terms of blame for causing harm, i.e. responsibility for human rights violations.

Table 4: Criteria of Liability-Responsibility

Hart	Bovens
Mental or psychological criteria	Blameworthiness
Causal or other forms of connection with harm	Causal connection
Relationship with the agent	Relationship with the agent
Act punishable by law	Transgression of the norm

8 Hart 1968, p.p.: 211-230.

Going further into the meaning of *Liability-Responsibility*, moral theories base personal responsibility on causal and volitional criteria. In other words, one is responsible for a particular outcome as long as he causes it and as long as he does not 'act in ignorance or under compulsion'.[9] Based on these theories, Hart, followed by Bovens, have set a concrete framework for the study of responsibility. The four distinctive elements they have distinguished are depicted in Table 2.

(i) *Mental or psychological criteria.* The most crucial element of *Liability-Responsibility,* according to Hart, is a certain mental or psychological capacity that would make someone worthy of blame. This is the capacity of understanding, reasoning and control of conduct possessed by an adult, and would include characteristics, such as sanity as opposed to mental abnormality or disorder, or knowledge and intension as opposed to coercion.

The law recognizes the lack of these capacities as invalidating conditions in the context of legal transactions, such as contracts, marriage, or public procurement, and as excusing conditions in tort and criminal law.[10] In Hart's own words, 'the individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he was unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or persons affected by them, or, in some cases, if he was subjected to threats or other gross forms of coercion or was the victim of certain types of mental disease'.[11]

Transferred from criminal law, which Hart discusses, to public law and the responsibility of organizations, including agencies, we can single out as a relevant excusing condition the element of knowledge of the circumstances that would allow the agent to reasonably foresee the outcome of their actions or negligence.[12] This will be addressed later as the determinate mental criterion for attributing *Liability-Responsibility* to organizations for human rights violations.[13]

(ii) *Causal or other forms of connection with harm.* Necessary for *Liability-Responsibility* is also a causal relationship between the act and the harmful outcome. This means that the outcome should not be too remote of a consequence for the act to count as the cause. However, the connection or relationship does not need to be so close as to say that the agent directly caused the harm. So, the level of connection is sufficient

9 Thompson 1980, p.p.: 905-916.
10 Hart 1968, p. 34.
11 Hart 1968, p. 28.
12 Hart 1968, p.p.: 218-220.
13 Chapter VI, section 3.

when the situation concerns 'some dangerous thing escaping from the defendant's land'.[14] This *causal connection* will be discussed in detail in the context of bringing an action for damages before the CJEU.

(iii) *Relationship with the agent*. The first image of both the law and daily life when discussing an agent's responsibility is that the agent herself is the doer of the unlawful act. However, the law specifies several situations, where one person can be held responsible for another's actions. Thus, Hart mentions as a criterion of responsibility the presence of some relationship between the agent and the doer. He gives the example of the master-servant or the employer-employee relationship,[15] which in the situations discussed in this study corresponds to the relationship between the agency and its employees, or the EU and its organs.

(iv) *Transgression of a norm*. While the commission of an act punishable by law, appears only indirectly is Hart's description of *Liability-Responsibility elements,* Bovens treats *transgression of the norm* as a separate necessary condition of this form of responsibility.[16] This means that the agent *held responsible* needs to have contravened some norm (for example social behaviour, administrative rules or binding legislation). In the given discussion about agencies' responsibility, the norm is explicitly formulated in terms of their fundamental rights obligations prescribed by EU and international legislation.

In sum, all different readings of 'responsibility' can be viewed together in the following everyday example:

'Who's responsible for the broken glass?', asked the mother. 'It was me. But it was not my fault. Bettina pushed me.', Alastair responded. 'Your baby sister cannot be held responsible. It was your responsibility to watch her. This was very irresponsible of you.'

In this example, the mother's question implies *Liability-Responsibility*. Alastair responds that he indeed had the *Causal-Responsibility,* as he let the glass drop and break, but denies *Liability-Responsibility,* arguing that it was not his fault and blaming his sister. However, the mother recognizes that Bettina does not have *Capacity-Responsibility*. She is but a toddler and reminds Alastair of his *Role-Responsibility/responsibility as task* as an older brother and care-giver. In the final sentence, she judges his behaviour drawing attention to his *Role-Responsibility/responsibility as virtue.*

For the purpose of the present study, as shown above, only two readings of responsibility are utilized, *Role-Responsibility* and *Liability-Responsibility.* The other types of responsibility are useful to achieve a deeper under-

14 Hart 1968, p. 220.
15 Hart 1968, p.p.: 220-221.
16 Bovens has renamed it as 'responsibility as accountability', Bovens 1998, p. 28.

standing of the concept of responsibility, but will not be studied further as they are not relevant for the present study. In particular, *Causal-Responsibility,* merely gives information as to the literal cause of the event without any positive or negative evaluation. The actor causing an event does not need to fulfil any mental, physical or psychological criteria, and can even be a sea storm or an unforeseeable mechanical error. Therefore, this cannot be taken into account when assessing legal responsibility and should be distinguished from the causal connection that is an element of *Liability-Responsibility. Capacity-Responsibility* reflects the mental capacity that allows a person to reasonably foresee the consequences of her actions, understand what is expected of her, and abide by this normative framework. In this sense, it should be distinguished from the mental criterion or blameworthiness that is part of *Liability-Responsibility.* As these are elements that can be lacking in a person, and Frontex, as an organization, cannot be fully treated as a person, *Capacity-Responsibility* is excluded from further study.

On the other hand, *Role-Responsibility*, particularly its element 'responsibility as task', is relevant when discussing the agency's legal obligations arising from the CRF or international law, by which it is the agency's 'task' to abide. It represents the formal duties and tasks set in the normative framework, by which an actor should abide. These can also be seen as the formal or de jure responsibilities of the agency. The second manifestation of *Role Responsibility*, as 'responsibility as virtue' is not relevant, however, as it refers to a moral 'sense of responsibility' that is of no importance for the study of legal responsibility.

Responsibility is here most commonly discussed as *Liability-Responsibility,* in terms of attributing blame for causing harm. This is the meaning I give to the discussion of the legal responsibility of the agency, a meaning which is also reflected in the relevant law (e.g. International Law Commission Articles on the Responsibility of International Organisations), and has been authoritatively formulated in the classic Chorzow Factory judgment of the Permanent Court of International Justice (now International Court of Justice) : 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'[17]

The criteria of *Liability-Responsibility*, as they have been adopted in the legal system to ascribe criminal as well as pecuniary and non-pecuniary liability, are also used here to determine the responsibility of Frontex. In particular, *Liability-Responsibility*, along with its identifying elements, blameworthiness, causal connection, relationship with the agent, and transgression from the norm, is applied in later chapers to the case of Frontex, in order to determine where the agency has responsibility for human rights violations. This will answer the question of the responsibility of Frontex at a conceptual level, while the question is also examined on the normative level in Chapter VI.

17 PCIJ, Factory at Chorzow, 1927 (ser. A) No. 9 (*Germany/Poland),* p. 21.

Finally, we can see a connection between 'responsibility as task' and *Liability Responsibility*, in the meaning of breach of legal obligations can lead to *Liability Responsibility*. Seen from a different angle, we will see in Chapter VIII that the lack of de jure tasks can exclude the liability of the agency before the CJEU, while international law adopts an approach focused on de facto powers.

2.2 Liability

At this stage, the concept of 'liability' in itself needs to be clarified. In legal doctrine and practice, one is liable to pay on account of an act for which she is legally responsible. The preceding sentence is not mere tautology. The terms '*liability*' and '*responsibility*', although closely related in this third category of Hart (*Liability-Responsibility)* and often used as synonyms in other texts, do, in fact, express different concepts. In Hart's words, 'to say that someone is *legally responsible* for something often means that under legal rules, he is *liable* to be made either to suffer or to pay compensation in certain eventualities' (emphasis added).[18]

In this sense, responsibility is one of the conditions of liability, as is the existence of concrete legal rules of punishment or compensation, which brings it closer to the concept of legal accountability. Liability is also an element of responsibility, in particular a consequence of being responsible for the breach of a legal obligation. Thus, liability does not always follow responsibility; only when rules exist that make the act punishable by law. In this study, where a case on the *responsibility* of Frontex is made, it is bound to bring about the *liability* of the agency, as a human rights violation is always to be followed by a sanction. The exact relation between responsibility and liability is sketched in the following phrase: ' (…) because a person is criminally responsible for some act he is liable to be punished for it'.[19] In practice, the term liability is used more commonly within EU law and will be used in this study predominantly to refer to the non-contractual liability of the EU. According to Article 340 (2) TFEU, which covers the non-contractual liability of the EU and its institutions and agencies, the EU, in accordance with the general principles common to the laws of the member states, shall make good any damage caused by its institutions or by its servants in the performance of their duties.[20] Thus, practically, the issue of liability is resolved in EU law via an action for damages. We return to the discussion on the liability of Frontex in Chapter VIII.

18 Hart 1968, p. 216.

19 Hart 1968, p. 222.

20 For the interpretation of each of the terms of this provision, see Case C-370/89, Société Générale d Entreprises Eletro-Mécaniques (SGEEM) v. Roland Etroy v. European Investment Bank [1992] ECR I-2583, para. 15 (institution); Case C-18/60, *Louis Worms v. High Authority of the European Coal and Steel Community* [1962] ECR I-195, par. 204 (servant); Case C-9/69, *Claude Sayag and Another v. Jean-Pierre Leduc* [1969] ECR I-329, par. 11 (performance of their duties).

3 The problem of many hands

When addressing complex structures, such as the EBCG, the attribution of responsibility is not always crystal clear. Dennis Thompson, the political philosopher who coined the term, discusses the *problem of many hands* as a difficulty to pinpoint the moral responsibility for political outcomes.[21] Bovens places this problem in the context of complex organizations,[22] while it is used in this study to discuss the legal responsibility of actors involved in EBCG operations for violations of fundamental rights. In all cases, the analysis is equally applicable, since the core of the problem is common, it is namely the difficulty to identify who is responsible, in the sense of Hart's *Liability-Responsibility,* for a harmful result, when multiple actors are involved.

It should be noted that the *problem of many hands* is not synonymous to complex organizations and does not always appear when multiple actors are involved. It rather describes a problematic situation that can arise when the tasks and responsibilities are not a priori distinctly defined. It is the vagueness of the framework, along with the complexity of the structure and gaps in transparency that can result in this problem.

In situations such as these, it can become impossible to find one actor that is entirely and independently responsible for the outcome, since that is a collective one. It also becomes practically difficult to distinguish and prove who has contributed, and to what extent, to which particular part of the outcome, and should thus be held responsible for it.

Bovens describes the problem as a practical,[23] but also as a normative one, in highly problematic cases, where the collectivity, with the sum of the actions of its individual members, meets the criteria, but the same cannot be said for all of its individual parts.[24] These are situations, where there is no clear division of tasks and formal responsibilities (*Role-Responsibility/ responsibility as task*), or transparency into the stages of preparation and execution so that the facts but also the de facto responsibilities (*Liability Responsibility*) become more or less obvious. This collective outcome can be the case in EBCG operations, especially since the clear a priori division of responsibilities and the lack of transparency are long-standing issues in the cases at hand.

The *problem of many hands* functions as a wall behind which actors may hide their own contribution and shift the blame to other actors involved. This frustrates the attempts of accountability and consequently, the preven-

21 Thompson 1980, p.p.: 905-16.

22 Bovens 1998, p. 45. Bovens does not provide a solution to the problem of many hands, but develops its conceptualization by applying it in the context of complex organisations. In the following chapters, I propose a solution in conceptual and normative terms.

23 'Complex organizations are surrounded by paper walls.'; 'Policies pass through many hands before they are actually put into effect'; 'Individual continuity is often lacking'. Bovens 1998, p. 47.

24 Bovens 1998, p.p.: 47, 48.

tion of misconduct in the future. In this sense, it is described by Bovens also as a problem of control.[25]

In fact, the *problem of many hands* is intrinsically connected to blame-shifting, where the actors involved can take advantage of the confusion in tasks and responsibilities in order to deny their responsibility and blame others. The multiplicity of actors can potentially create confusion as to the bearer of responsibility and may result in gaps in the legal accountability and the effective legal protection of those affected by immigration control.[26]

We return to these issues concerning the *problem of many hands* and develop the Nexus theory as a possible solution to the *problem* in section 5.

4 The responsibility of Frontex

4.1 Fundamental rights obligations

This section delineates the applicable substantive legal framework, covering the human rights obligations of Frontex, or part of its *Role Responsibility*. Frontex is bound by international human rights standards, as well protection obligations towards asylum seekers, which are defined in EU primary and secondary legislation. The requirement to protect human rights and abide by Union and international law is acknowledged in the founding Regulation following the 2011 amendment.[27] Furthermore, the members of the Rapid Borders Intervention Teams (hereafter RABITs) shall comply with EU law and the law of the member state hosting the operation,[28] while, the Regulation on Frontex Sea Operations reaffirms the commitment to non-refoulement, respect of human dignity, and human rights.[29] Respect for international legal norms is also mandated by the Schengen Borders Code (SBC), which states that it is without prejudice to the rights of refugees and others entitled to international protection,[30] that it respects fundamental rights, and that it should be applied in accordance with the international standards regarding international protection and non-refoulement.[31]

Above all, Frontex, as an agency of the European Union, is bound by the CRF, as enshrined in Article 51 of the Charter,[32] as well as the ECHR and fundamental rights, as they are protected in the constitutional traditions of the member states, according to Article 6(3) of the Treaty on the European Union (TEU). As such, they have historically shaped and continuously

25 Bovens 1998, p. 49.
26 LIBE 2011, p. 103; Baldaccini 2010, p. 230.
27 Articles 1(2), 2(1a) and 26a Frontex Regulation; Articles 1, and 85 EBCG Regulation.
28 Article 9 RABIT Regulation.
29 Article 4 Frontex Sea Operations Regulation.
30 Article 3(b) Schengen Borders Code.
31 Preambular paragraph 20 Schengen Borders Code.
32 Charter of Fundamental Rights of the European Union, OJ C 83/02, 30.03.2010.

inspire the fundamental rights jurisprudence of the CJEU.[33] The general principles of EU law have been articulated by the ECJ over the years[34] and draw, apart from the ECHR and the constitutional traditions of the member states, also from other international treaties signed by these states.[35] Moreover, Article 6(3) TEU should be interpreted in parallel to Article 78(1) TFEU, which states that EU law should be interpreted in accordance with the 1951 Refugee Convention, the 1967 New York Protocol and other international treaties relevant to refugee protection.[36]

Since the adoption of the Charter in 2000, and especially after it became binding and acquired status equal to that of the Treaties in 2009 with the adoption of the Lisbon Treaty, we note a growing trend in the case law of the CJEU to rely exclusively on the Charter. The CJEU has even gone as far as holding that, as the ECHR does not constitute a legal instrument formally incorporated into EU law,[37] as long as the EU has not acceded it. Therefore evaluation of the validity of EU law must be undertaken solely in the light of the Charter.[38] The Court has often interpreted the Charter in isolation from other human rights instruments,[39] in a way that has been objected against by legal scholars and national courts.[40]

Nevertheless, the CJEU recognizes the significance of ensuring a consistent interpretation of fundamental rights in Europe by continuing to make references to the case-law of the ECtHR. Moreover, the latter together with

---

33 CJEU 17 December 1970, C-11/70, ECLI:EU:C:1970:114 *(Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel)*; CJEU 26 October 1975, C-36/75, ECR 1219, ECLI:EU:C:1975:137 (*Rutili v. Ministre de l'Intérieur*); CJEU 29 May 1997, C-299/95, ECR I-2629, ECLI:EU:C:1997:254 (*Kremzow v. Austria*).

34 CJEU 12 November 1969, C-29/69 ECR 419, ECLI:EU:C:1969:57 (*Stauber v. City of Ulm*); *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

35 E.g.: International Covenant on Civil and Political Rights (CJEU 18 October 1989, C-374/87, ECR 3283, ECLI:EU:C:1989:387 (*Orkem v. Commission*)); UN Convention on the Rights of the Child (ECJ, CJEU 27 June 2006, C-540/03, ECR I-5769, ECLI:EU:C:2006:429 (*Parliament v. Council*), (family reunification)).

36 B. De Witte, 'The EU and the International Legal Order: The Case of Human Rights' in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World,* Oxford: Hart Publishing 2011, p. 130.

37 CJEU, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, Judgment of the Court of 14 May 1974.

38 CJEU 15 February 2016, C-601/15 PPU, ECLI:EU:C:2016:84 (*J.N. v. Staatssecretaris van Veiligheid en Justitie*), paras. 45, 46; CJEU 26 February 2013, C-617/10, ECLI:EU:C:2013:105 (*Åklagaren v. Hans Åkerberg Fransson*), paras. 44, 45; CJEU 3 September 2015, C-398/13, ECLI:EU:C:2015:535 (*Inuit Tapiriit Kanatami and Others v. the Commission*), paras. 45, 46.

39 G G. De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law* 2013, p. 171.

40 J. Polakiewicz, *Europe's multi-layered human rights protection system: challenges, opportunities and risks* (Lecture, Waseda University Tokyo), 2016, http://eulawanalysis.blogspot.com/2016/03/europes-multi-layered-human-rights.html; K. S. Ziegler, 'The Relationship between EU law and International Law' in D. Patterson and A. Sodersten (eds.), *A Companion to European Union Law and International Law*, Wiley Blackwell, 2016, p. 52.

the Convention itself continue to play a primary role in the interpretation of the Charter. By virtue of Article 52(3), the substantive provisions of the Charter have the same meaning and same scope as the corresponding articles of the ECHR and should be interpreted in compliance with the case law of the ECtHR. This principle has been reaffirmed in the case law of the CJEU.[41] Furthermore, Article 52(4) of the Charter states that rights that result from the constitutional traditions common to the member states shall be interpreted in harmony with those traditions. Thus, although the CJEU has become more hesitant with respect to international law, the latter still has a place in the Court's jurisprudence in the sense not so much of direct application, but of harmonious interpretation.

Particularly relevant in the context of Frontex operations are the prohibition of non-refoulement (Art. 2, 3 (mainly) ECHR, Article 19 Charter) and of collective expulsion (Art. 4 Protocol 4 ECHR, Article 19 Charter), freedom from torture and inhuman or degrading treatment (Art. 3 ECHR, Article 4 Charter), the rights to life (Art. 2 ECHR, Article 2 Charter), to liberty (Art. 5 ECHR, Article 6 Charter), to private life and data protection (Art. 8 ECHR, Article 8 Charter), and to an effective remedy (Art. 13 ECHR, Article 47 Charter). Moreover, the newly introduced by the CFR rights to human dignity (Art. 1 Charter), right to asylum (Art. 18 Charter), rights of the child (Art. 24 Charter), and the right to a good administration (Art. 41 Charter) are of importance. A violation of any of the above rights would satisfy the criterion of *transgression of the norm*, identified by Bovens (and implied by Hart) as one of the four elements of *Liability-Responsibility*.

Next to the negative obligation to respect human rights, to the extent that the EU and its agencies are bound by the Charter and the ECHR, they are also bound by the positive duties that are inherent therein. In particular Frontex needs to take active measures to protect human rights. In this regard, the limitations, set forth by the agency's mandate, competences, and practicalities such as availability of resources and personnel need to be taken into account. It is noteworthy that the agency does not have legislative or policy setting powers, or unlimited resources and that it depends on the member states for the secondment of border guards. The application of positive obligations always needs to be in conformity with the principle of attributed powers and the limited competences.[42]

Although there are restrictions regarding the agency's competences and its positive obligations, nevertheless, there is still scope for duties to prevent violations and enforce human rights obligations. Most distinctly, positive obligations have already been explicitly provided for in its mandate. For instance, as will be discussed later, Frontex was required by the 2011 amendment of its founding Regulation to develop a Fundamental Rights

41 *J.N. v. Staatssecretaris van Veiligheid en Justitie*, par. 47.

42 M. Beijer, *Limits of Fundamental Rights Protection by the EU, The Scope for the Development of Positive Obligations*, Intersentia, 2017, p.p.: 204-209.

Strategy (FRS) and Code of Conduct binding upon everyone participating in its operations. More importantly, the EBCG Regulation specified that Frontex had to put in place a monitoring mechanism that will function on the basis of individual complaints. Furthermore, the agency has extensive monitoring and supervisory obligations, central upon which is to monitor fundamental rights compliance with regard to return operations (Art. 28), carry out vulnerability assessments, including an assessment of the level of fundamental rights compliance (Art. 13).

Even when not explicitly provided by EU secondary legislation, duties may arise from general human rights law and the case law of the two European High Courts. This includes both negative and positive obligations, and the violation of these norms would satisfy one of the four elements of *Liability-Responsibility*, that is *transgression of the norm*.

4.2 The irresponsibility of the agency or the *problematique* of blame-shifting

The *problem of many hands* is particularly pertinent in the case of the EBCG joint operation. Frontex is not the only actor involved in an operation that has human rights obligations. Several other actors are involved, including the national authorities of member states that carry out border and coast guard functions of both host and participating states, as well as third countries, including military and (para-)military actors.[43] The simultaneous involvement of so many actors with their separate duties and responsibilities creates for EBCG operations the real *problem of many hands*.

Even before the creation of Frontex, under its predecessor, PCU, and before the first joint operations took place, the question of responsibility was addressed if a member state would cause an incident on another member state's territory.[44] Today, in the context of Frontex coordinated operations, it is not states that act in the territory of the member state hosting the operation but the agency itself with seconded and soon its own border guards.

A Frontex operation, with the multiplicity of actors involved, gives ample opportunities for blame-shifting. On the one hand, member states may attempt to shift the blame for misdeeds to the agency,[45] while on the other, Frontex can argue that it is merely the coordinator of the operational cooperation of the member states.[46]

43 Chapter II, section 2.5.

44 S. Peers, *Development of a European Border Guard Statewatch submission*, 2003, http://www.statewatch.org/docbin/evidence/eurbordergdmay03.html.

45 Rijpma 2010, p.p.: 1-4.

46 V. Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance', in E. Guild, H. Toner and A. Baldaccini (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart, Oxford and Portland, 2007; Fernandez 2016.

Indeed, since early on, the position of Frontex has been that the agency cannot be responsible for any possible violations that might arise in the context of its operations, as it is the member states that have the operational power and the general control of the operation on the ground and thus, it is the national authorities that bear the full responsibility for human rights violations. It is often presented as common wisdom that Frontex activities are of a technical nature and, as such, do not affect the human rights of individuals, while the exclusive responsibility of border control remains with the member states.[47]

Following this line of argumentation, it is the member states that manage the operation that should be held responsible for any wrongdoings. Frontex is officially a management agency and according to the Regulation, coordination is its central task, while it has no executive powers.[48] Like with other EU activities, it is member states that implement EU law. One member state is hosting the operation, other member states send equipment and officers, which act under the host member state's orders, while the agency itself still barely has people on the ground.

The 'capability-expectations gap'[49] is also put forward as an argument against the responsibility of the agency. This is based upon the general assertion that any international organization depends on the member states to actualize its mandate, 'due to the limited capabilities and resources put at its disposal'.[50] Concerning Frontex it is argued that the operability and efficiency of the work of the agency are tied to the voluntary contributions of the member states in border guards. These are often below the standards required by the agency to fulfil its purpose. Therefore, the expectations far exceed the actual capabilities of the agency. The grounds for this argument may change in the future as the agency gradually acquires its own border guards and assets.

---

47 The message that border control activities lie exclusively within the sovereignty of the member states is broadcasted by Frontex on several occasions to stress that the agency does not have independent executive powers. See for instance, FRONTEX note to the European Parliament regarding fundamental rights, 8 October 2010, 'As regards fundamental rights, FRONTEX is not responsible for decisions in that area. They are the responsibility of the Member states.', Migreurop 2011, p. 22; 'As regards fundamental rights, Frontex is not responsible for decisions in that area. They are the responsibility of the Member States.' Ilkka Laitinen, Frontex Executive Director, at LIBE Committee hearing on *Democratic Accountability in the Area of Freedom, Security and Justice, Evaluating Frontex*, 4 October 2010; Such views have also found support in earlier academic opinion: Rijpma 2010.

48 Frontex, Response on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11758/html.bookmark.

49 Christopher Hill coined the term 'capability-expectation gap' in 1993 with regard to EU Foreign Policy. C. Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role', *Journal of Common Market Studies* 1993, Volume 31, Issue 3.

50 Casteleiro 2016, p. 14; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press 2009, p. 50.

4.3 Fundamental rights find their place in Frontex work but a dangerous mindset remains

Under the mounting pressure of criticism,[51] the original official position of total irresponsibility has been gradually changing as has the atmosphere within the agency. Mentions of fundamental rights and humanitarian language are found in Frontex work programmes and annual reports at a gradually growing rate since 2008.[52] The agency concluded cooperation arrangements with the United Nations High Commissioner for Refugees (UNHCR) in 2008,[53] the Fundamental Rights Agency (FRA) in 2010,[54] and the European Asylum Support Office (EASO) in 2012.[55]

However, a marked shift was noted in 2011, with the amendment to its founding Regulation, when the agency was called upon to develop and implement a FRS and put in place an effective mechanism to monitor the respect for fundamental rights in all its activities.[56] The FRS provides that 'Member States remain *primarily* responsible for the implementation of (…) legislation and law enforcement actions undertaken in the context of Frontex coordinated operations (…)' (emphasis added) and that 'this does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate'.[57]

Other indications of the agency assuming the potential for responsibility, is the introduction of a Fundamental Rights Officer (FRO) and a Consultative Forum, which have a consultative function in fundamental rights matters. The agency has also drafted Codes of Conduct (CoC) for all its operational activities that lay down procedures to guarantee respect of the rule of law and fundamental rights.[58]

These developments are significant steps forwards in the protection of fundamental rights. Nevertheless, uncertainty still remains regarding the division of responsibilities between the agency and the member states, which still engages us in the *problem of many hands*. The lack of clarity in the legal framework, since the founding Regulation and the internal documents

51 Chapter III.

52 Perkowski 2012, p. 26.

53 Frontex Working Arrangement with UNHCR, http://www.statewatch.org/observatories_files/frontex_observatory/WA_UNHCR-5542_16%2006%202008.pdf.

54 Frontex Working Arrangement with the FRA, http://www.statewatch.org/observatories_files/frontex_observatory/WA_FRA_26%2005%202010.pdf.

55 Frontex Working Arrangement with EASO, http://www.statewatch.org/observatories_files/frontex_observatory/WA%20EASO-FRONTEX_26092012%20%282%29.pdf.

56 Article 26a Frontex Regulation.

57 Point 13 of the Frontex Fundamental Rights Strategy, available at: http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf.

58 Article 26a of Frontex Regulation. Two Codes of Conduct have been developed, the Code of Conduct for joint return operations, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf, and the Code of Conduct for all persons participating in Frontex activities, http://www.statewatch.org/news/2011/nov/eu-frontex-code-of-conduct-press-version.pdf.

of Frontex are purposely vague with respect to assigning responsibility,[59] as well as the lack of transparency regarding the exact range of the agency's role and activities,[60] still create opportunities for *blame-shifting*.

As precisely put by the Parliamentary Assembly of the Council of Europe:

> *'There is still a dangerous mindset which views Frontex's activities as being no more than those of member states, with responsibilities lying with individual member states and not with the agency. While progress has been made in accepting that this is not always the case, the recourse to this argument is still too frequently made when looking at issues involving human rights responsibilities.'*[61]

4.4 The Preliminary Question of the Responsibility of Frontex

The purpose of this section is not to divide responsibility ex ante or on a case-by-case basis between member states and Frontex, but only to show that, apart from the member states, also Frontex is bound by international obligations and can potentially bear responsibility for the non-fulfilment thereof. In other words, this section establishes the plausibility of the responsibility for Frontex. The actual responsibility of the agency will always depend upon the facts of each individual case.

The view of the agency's irresponsibility could not go uncontested already after the European Ombudsman opened in March 2012 an own-initiative inquiry to investigate how Frontex was implementing the 2011 Regulation provisions, with respect to promoting and monitoring compliance with fundamental rights obligations.[62] The Ombudsman insisted then on the need to enhance the accountability of the agency, urging Frontex among others to set up a monitoring and an individual complaints mechanism. Frontex did not accept the Ombudsman's recommendation, while repeating its established view that the agency has a coordinating role and can thus not be held accountable for any infringements. The same holds for its staff members participating in operations, since, according to this view, they do not have executive powers.[63] The Ombudsman found the agency's

59 See Point 13 of the Frontex Fundamental Rights Strategy, while Frontex Regulation tasks does not provide clarity on powers and responsibilities of each of the relevant actors, and also the allocation of liability and the applicable remedies in cases of violations attributed to the agency.

60 See, for instance, LIBE 2011, p.p.: 24, 25.

61 PACE 2013a, point 6.

62 Letter from the European Ombudsman opening own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations, http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark.

63 European Ombudsman, *Frontex answer on draft recommendations of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, 2013, https://www.ombudsman.europa.eu/en/correspondence/en/51139.

argument that it carries no responsibility whatsoever 'not satisfactory'.[64] In its response, Frontex moved from its original position acknowledging that the rationale behind the 2011 amendments was to increase the agency's responsibility. It declared that it is aware of the potential gaps in the division of responsibilities and will endeavour to bring some clarity. It further assumed responsibility at a theoretical level, stating that the agency is only responsible for the activities 'directly defined within its mandate', but cannot answer for the member states' sovereign actions.[65]

The Ombudsman acknowledged this statement as a starting point. Nevertheless, she noted that this theoretical division of responsibility does not call into doubt the fact that the mission of Frontex involves the coordination of joint operations that involve both its own staff and those of one or more member states. It is true that so far few of Frontex staff members participate in operational activities in the field, but there are numerous guest officers who wear armbands inscribed 'Frontex'.[66] Therefore, it is reasonable for the affected migrants to assume that such persons act under the responsibility of Frontex and thus submit their complaint to Frontex. Further, she noted that complaints could also arise with respect to the organization, execution, or consequences of a joint operation.[67] Following the Recommendation of the European Ombudsman and the follow-up report of the European Parliament,[68] an individual complaints mechanism, however significantly toned down, was included in the European Border and Coast Guard Agency Regulation (Article 111).

Along the lines of the Ombudsman's views, and in an argument that touches the borders of moral responsibility, but can nonetheless be convincing, Elspeth Guild has proposed the 'representation doctrine',[69] according to which the vessels employed in an operation fly EU flags, while participating border guards wear Frontex armbands, giving the impres-

64 Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark; In the Press Release announcing the Special Report, the Ombudsman, Emily O'Reilly stated: 'Against the backdrop of the Lampedusa tragedy and other recent humanitarian catastrophes at EU borders, it is vital that Frontex deals directly with complaints from immigrants and other affected persons. I do not accept Frontex's view that human rights infringements are exclusively the responsibility of the Member States concerned', Press release no. 17/2013, 14 November 2013, http://www.ombudsman.europa.eu/en/press/release.faces/en/52487/html.bookmark.

65 European Ombudsman 2013a.

66 For pictures refer to the Frontex website at: http://frontex.europa.eu/photo/rabit-operation-greek-turkish-border-vUmhJs.

67 European Ombudsman 2013c.

68 European Parliament, Report on the Special Report of the European Ombudsman in own - initiative inquiry OI/5/2012/BEH - MHZ concerning Frontex, (2014/2215(INI)), 26.11.2015, https://www.mendeley.com/viewer/?fileId=5cf58ba3-af84-eda5-1cb9-557b39a38daeanddocumentId=e4d49c53-7584-37c3-960c-b4aeac54cef6.

69 E. Guild, presentation at seminar 'Migration by sea in the Mediterranean', Nijmegen, 16 May 2014.

sion that they represent the agency. Frontex also claims credit in its annual reports for the goals reached, whether these concern intercepted vessels, or prevented irregular entries. Taking credit for something is only the one side of a coin, of which the other side is assuming responsibility in case of wrongdoings. In support of this argument, we can note that this is in accordance with the understanding of responsibility as *Liability-Responsibility.* Responsibility can also be assigned to a person in terms of blame or praise.[70] Blame and praise are two sides of the same coin, and acceptance of the one is interconnected with acceptance of the other.

Along these lines, we can note that the textual emphasis on management and coordination is not enough to leave aside contextual arguments regarding its activities' operational aspects and the significant consequences these have upon individuals.[71]

Moreover, Frontex has executive powers that are independent and operational. Since 2007, Frontex has the power to initiate RABITs and deploy officers which the member states are obliged to provide within the concept of 'compulsory solidarity'.[72] Furthermore, since 2011, apart from its coordinating tasks, the agency acquired a co-leading role together with the host member state in joint operations and pilot projects co-drafting the operational plan together with the host member state,[73] and since 2016 the agency drafts the operational plan, which is only approved by the member state. Frontex constructs the operational plan and gives instructions as to its execution, and thus has a crucial role in deciding how the operations are carried out. It is, further, important to remind that although the host member state issues the instructions during the operations, the views of the Frontex coordinating officer must be taken into consideration,[74] a requirement that arguably engages responsibility. If the coordinating officer fails to use this power in the face of a violation to be committed by a member state, this can lead to a violation by omission taken into consideration together with the overall conduct of the agency with regard to that or similar violations. Furthermore, the agency's executive powers in the area of data collection and processing cannot be denied. These developments carry, especially cumulatively, a sufficient degree of control over the conduct of these operations to render the agency liable for any violations that may occur.[75]

Regarding the area of returns, in particular, the agency has already had the responsibility of organizing, coordinating, and financing return operations, and in 2016 it acquired an enhanced mandate and increased budget with the power to initiate return operations, including readmission

70 Section 2.1.
71 'V. Mitsilegas, *Extraterritorial Immigration Control in the 21st Century: the Individual and the State Transformed*, Leiden, Netherlands: Brill, 2010, p.p.: 39-66.
72 Article 4(3) RABIT Regulation.
73 Article 3a Frontex Regulation.
74 Article 3c Frontex Regulation.
75 House of Lords 2008, p. 40; Weinzierl and Lisson 2007, p. 72.

operations on the basis of the EU-Turkey deal.[76] These operations need to comply with the prohibition of non-refoulement and collective expulsion, as well as the right to an effective remedy, and the prohibition of inhuman and degrading treatment. Given that several EU member states may lack an effective forced-return monitoring mechanism, as provided for in Article 8 of the EU Returns Directive (2008/115/EC),[77] or effective asylum determination procedures (for example low recognition rates, lack of access to asylum procedures),[78] Frontex return operations need to set in place the appropriate safeguards to ensure that the returns are in line with the Returns Directive and the CFR. The agency may not be responsible for the ineffectiveness of the national procedures, but it still has a positive duty to ensure that the return operation will not result in refoulement and that no excessive force and restraining measures are used. The duty also extends to post-return monitoring,[79] and covers the prohibition of degrading treatment during and after the return.

As a matter of fact, UNHCR recently raised concerns regarding the role of Frontex in the return from Hungary to Serbia of two asylum-seeking Afghan families. The families were escorted to the border with Serbia and were given the choice to enter Serbia or be returned to Afghanistan on a Frontex flight. Under domestic law, Hungary rejects all applicants that have previously been in a country that Hungary regards safe, including Serbia, without applying the safeguards required under EU law. The UN Refugee Agency noted that this type of rejection constitutes common practice in Hungary. At the time of their statement 40 individuals, including Iraqi and Iranian nationals, were held in the pre-removal area of the transit zone and threatened with being returned to their country of origin or coerced to re-enter Serbia. UNHCR characterized the incident 'deeply shocking and a flagrant violation of international and EU law' and urged Frontex 'to refrain from supporting Hungary in the enforcement of return decisions which are not in line with International and EU law'.[80] The warning of UNHCR strongly suggests the possibility of Frontex bearing responsibility for complicity in such violations, which is discussed in the following sections as aid and assistance in a violation.

---

76 Frontex Consultative Forum, Annual Report 2016, p. 24, http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2016.pdf.

77 European Union Agency for Fundamental Rights, *Forced return monitoring systems*, 27 June 2019, https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update.

78 *M.S.S. v. Belgium v. Greece*.

79 J. Pirjola, 'Flights of Shame or Dignified Return? Return Flights and Post-return Monitoring', *European Journal of Migration and Law* 2015, p.p.: 326-8.

80 UNHCR, Hungary's coerced removal of Afghan families deeply shocking, 8 May 2019, https://www.unhcr.org/news/press/2019/5/5cd3167a4/hungarys-coerced-removal-afghan-families-deeply-shocking.html.

Further, of particular importance is a development introduced in the 2011 amendment of the Frontex Regulation. According to Article 3(1)(a) of the Frontex Regulation the Executive Director 'shall suspend or terminate operations' if serious or persistent human rights violations are noted. According to the letter of the Regulation, this is an obligation for the Executive Director, but the enforcement of this obligation in practice can become problematic considering that the Executive Director has a significant level of discretion, since there are no clear indications or guidelines as to when the conditions for suspending the operations are met. He will balance the human rights concerns with political and operational considerations.[81] Nevertheless, it is clear that the Executive Director of Frontex has a positive obligation to protect human rights and the actual power to do so.[82] It is argued here that the omission to use such a power can lead to the establishment of the responsibility of Frontex. In view of Article 14 of the International Law Commission Draft Articles on the Responsibility of International Organizations (ARIO), the Executive Director would by omission assist the member state in the commission of an internationally wrongful act, rendering the agency responsible for doing so.[83]

It is also important to note that the monitoring obligation of the agency has also been formally introduced in the EBCG Regulation, which provides that the Agency's Coordinating Officer has a duty to report on the provision of sufficient fundamental rights guarantees by the host member state (Article 44(3)(b)). Moreover, the agency conducts a vulnerability assessment once a year, based on which measures can be taken upon the recommendation of the Executive Director in order to eliminate the identified vulnerabilities, including gaps in human rights protection and related risks. Failure to do so can make the agency complicit in a possible violation that could have been prevented with the intervention of the agency. More importantly, this monitoring obligation, ensures that the agency has 'presumed knowledge'

81 PACE 2013a; 'Clear risk indicators and objective early warning criteria for the suspension of operations should be developed in cooperation with the Council of Europe, the United Nations High Commissioner for Refugees (UNHCR), the Fundamental Rights Agency of the European Union, human rights organizations and the Frontex Consultative Forum. The potential termination of an operation should not be left simply to the discretion of the deployed staff without their being given guidance;' 'Frontex further explained that, due to the complexity of operations involving a number of political and operational issues, it would not always be appropriate to suspend or terminate an operation, and the Executive Director must decide on the basis of reports presented to him by Frontex staff.' EU Ombudsman, N. Diamandouros, 'Draft recommendation of the European Ombudsman in his own-initiative inquiry 0115/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex)', 09 April 2013, http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/49794/html.bookmark.

82 Article 3(1)a Frontex Regulation.

83 Article 14 ARIO.

of the situation on the ground, which could trigger its responsibility in case of inaction.[84]

In sum, the Executive Director is under the positive obligation to ascertain whether the rights of migrants are protected in Frontex operations, and suspend or terminate an ongoing operation in the light of predictable serious and continuous violations. Failing to do so would constitute deliberate inaction and would entail the agency's indirect international responsibility, for aiding in the violations committed by the member state hosting the operation.

The above non-exhaustive arguments, subject to further analysis, present sufficient evidence for the prelimnary responsibility of Frontex for violations that may occur during its operations.

5 Nexus and the problem of many hands

After understanding responsibility in EBCG operations as giving rise to the *problem of many hands*, and having presented preliminary arguments on the responsibility of Frontex, which was a necessary prerequisite, we now need to come to the solution of the *problem*. The goal here is to address the accountability gaps that can be a consequence of the *problem of many hands*, which is essential to prevent future violations and benefit present and future victims of such violations. In this section, it is argued that this solution is to be found within a framework that can be called the Nexus theory.

As shown earlier, the *problem of many hands*, where multiple actors are simultaneously responsible for the harm, can function as a wall behind which the different actors can hide their own contribution and shift the blame to other actors involved.

In situations that may occur in EBCG operations, the outcome, namely the violation, results from collective action. Trying to allocate responsibility to one actor that is entirely and independently responsible for the outcome, in this case, the host state, creates gaps in accountability and fails to correctly attribute responsibility to all the actors that have contributed to the violation.

To prevent these gaps in accountability, we need to adjust our way of thinking about responsibility to the particularities of the cases where many hands are responsible for the outcome and develop a structure for dealing with responsibility, which reflects this need.

---

84 Responsibility is triggered, as established by the International Court of Justice in the Corfu Channel case, by 'presumed knowledge'. This principle of 'presumed knowledge' that engages the international responsibility of the actor, is reaffirmed in the jurisprudence of the ECtHR, in *M.S.S. v. Belgium and Greece* and in *Hirsi Jamaa and Others v. Italy*. ICJ 15 December 1949, *Corfu Channel Case* (*United Kingdom/ Albania*); *M.S.S. v. Belgium and Greece*, paras. 160, 314, 348-9; *Hirsi Jamaa and Others v. Italy*.

We tend to view responsibility as a linear relationship. Such is the relationship in the main principle of attribution of responsibility in the ILC Articles, called the principle of independent responsibility.[85] On the basis of this type of relationship, we draw a straight line that connects the actor to the wrongful act and the act with the harmful result. In reverse order, to find the responsible actor, we only have to follow that straight line starting from the harmful result, connecting it to the wrongful act, and leading back to the actor to which the act is attributed. This linear relationship is, in principle, independent of acts and responsibilities of others, and leads to a concrete allocation of distinct responsibilities. It is the most common understanding of a responsibility relationship but does not exclude other types of relationships under different circumstances.

It is indeed arguable that an analysis through this linear relationship does not suffice in the context of EBCG operations. There, often no single actor's acts lead entirely and independently to human rights violations, in a straight line without interacting with or passing through an act of a different actor. This can be the case, for instance, when a violation attributed to the host state, for example, physical abuse of a migrant, occurs as an isolated incident without the presumed knowledge of the participating states and Frontex. However, more often than not, it is multiple actions and omissions from several actors that lead to the violation. Thus, in such situations, responsibility should be seen not as a linear relationship between the conduct of an actor and the harmful result, but as a nexus. The term nexus is understood here as connection, or more precisely, 'a complicated series of connections between different things',[86] or members of a group. While the nexus can refer to this system of connections, it may also refer to the connected group of interlinked things.

It is in this nexus that the separate responsibilities meet and interact through the cooperation of the different actors. Only when the responsibilities meet, the harmful result can occur. It is this point of convergence where the *problem of many hands* occurs, and where the solution on responsibility should be sought. Therefore, even though the actors retain their individual nature and may not necessarily act in union but relatively separate from one another, the responsibility is a collective one.

The nexus is a concept that best reflects the cooperation relationships and the interdependencies in the joint operations, as these have become clear in the first empirical chapter. It is an analysis based on the cooperative relations between several actors that can in common contribute to a harmful result, and puts the emphasis on the interconnections that develop and their effects.

85 Chapter VI, section 3.
86 Oxford Advanced Learner's Dictionary.

In a joint operation, there may be multiple responsibilities, but a good understanding of these responsibilities requires us to view them as a nexus, rather than as a sum of distinct links. We notice the flexibility and plasticity of these relationships. Their effect upon the harmful result can be subtle and take a form other than a direct infringement of a rule (for example, trainings and risk analysis). Taking into account the interconnections, the concept of the nexus acknowledges that changes in one part of the nexus can have effect on the others. For instance, the use by Frontex of its supervisory powers, such as the monitoring of return flights and the obligation of the Executive Director to suspend or terminate an operation, can prevent violations by member states.

Within a linear understanding of responsibility, one may still be able to follow the line of responsibility back to each actor, but will not easily be able to fully disentangle the collective responsibility, at least at a prima facie stage, without access to the full facts of the individual case. This difficulty can allow space for blame-shifting from one actor to the other. Thus, trying to establish each hand's individual responsibility may result in gaps in accountability and the legal protection of those affected by border controls.

Through the idea of the nexus, we can achieve an integrated assessment that can be used to evaluate these interactions between the different components. This would show how these interactions result to the composition of a nexus and produce the harmful result. This understanding can allow us to create a more coherent and structural strategy to address legal responsibility as liability.

In other words, optimization of allocation of responsibility in EBCG joint operations requires us to consider the nexus analysis and view the responsibility relationships as a nexus of the responsibilities of the different actors. This leads us to understand that the harmful outcome is the collective result of these interlinked responsibilities. Given that the conduct is interconnected and the outcome is collective, the responsibility for this outcome should also be viewed as collective.

The Nexus theory can play a catalytic role in achieving a holistically equitable result in regard to responsibility, rather than dealing with the more obvious and easier to reach responsibilities, i.e. that of the host member state, in a fragmentary and coincidental manner. This disconnected and partial approach cannot but be incomplete. Through the nexus analysis we can achieve all responsibilities simultaneously considering them as collective.[87] This way, the Nexus theory aims to combat gaps in accountability and ensure better compliance with human rights law through the preventative effect of accountability.

87 This is true to the extent that the responsibilities are indeed collective. This, naturally, does not exclude related responsibilities that are nevertheless disconnected from the nexus and thus, fully independent.

Thus, we need to consider the nexus element when assessing responsibility in many-hands situations. The nexus is, of course, merely a theoretical construction. For it to be useful in practice, for instance, in courts, it needs to be supported both by normative construction and by empirical evidence. Even though some indication of empirical evidence has been given both in Chapter III and as examples throughout the text, the necessary evidence needs to be researched in each individual case and presented to the court in accordance with the relevant rules of procedure and evidence.

It needs to be stressed that the Nexus theory is not a radical solution that rejects the current legal framework. Quite to the opposite, it is a theoretical construction that is meant to help us understand the principles within the existing legal framework that should be spotlighted, so that we can identify the most viable solutions in order to address the *problem of many hands*. As noted, the more common linear relationship does not exclude other types of relationships that can exist under different circumstances. Such cincumstances are those of many hands, where several responsibilities meet and interact in order to reach the collective harmful outcome. Those cooperation relationships and interdependencies are already reflected in the legal framework. Solutions that can address such relationships, understood here with the construction of the nexus rather than a sum of distinct links, which solutions can help us achieve the desired holistically equitable result, are not foreign to the existing legal framework. In the following chapters I identify such solutions that should be preferred to others that would only allow us to deal with respondibilities in a disconnected manner and can lead to gaps in accountability, such as dual attribution of conduct or shared responsibility. I suggest that we can introduce such solutions more commonly found in international law to EU law that is generally less equipped for dealing with responsibilities as a nexus.

In sum, the Nexus theory suggests that the *problem of many hands* can be solved if we look at responsibility not as a linear relationship between the conduct of a discrete actor and the harmful result, but as a nexus. This problem can be successfully tackled if, instead of looking at establishing the responsibility of each actor separately following this linear relationship, we address all the responsible actors as a collective.[88]

88 This includes with respect to the present study, the host and participating member states, as well as Frontex itself. This can potentially also extend to the member states that constitute the Frontex Executive Board and the EU Council that determines the mandate of the agency. This is in accordance with the theory of volonte distincte, concerning the constitutional relationship between the EU and its member states, in particular the control of member states over EU decision making. If the EU were to be understood as no more than 'the concerted will of its Member States', this would have consequences upon its international responsibility. If not, member states would be able to hide behind the international legal personality of the EU to avoid their own share of responsibility. Such considerations fall beyond the scope of this book, but, for further information, you may consult Casteleiro 2016, p. 15; Schütze 2009, p. 1069.

6 Conclusion

In this chapter, I have analyzed the theoretical framework on responsibility, including both the theoretical framework I am building on (Hart, Bovens, Thomson) and the one I develop for the purpose of the examination of the responsibility (Nexus theory).

I have examined the nature of the responsibility of Frontex and the environment within which this responsibility arises in the context of EBCG operations. I have focused in particular in the *problem of many hands* that may arise where the multiplicity of actors can create confusion as to the bearer of responsibility in case of violations. This can lead to blame-shifting and leave irreparable gaps in accountability.

In this Chapter I seek a solution to this problem that can also apply to EBCG operations. I have namely showed that the responsibility for human rights violations in the context of EBCG operations is not so much the representation of a linear connection between the conduct of one actor and the harmful result. It is rather a nexus of responsibilities of several actors, which have contributed through their actions and omissions to the violation. It is in this nexus that the separate responsibilities meet and interact through the cooperation of the different actors. To achieve the optimal result allocating responsibility, the responsibility, similarly to the harmful result, should, thus, be seen as collective.

5 Theoretical Framework (II): Accountability

1 Introduction

Like the previous one, this chapter is also devoted to the theoretical framework, which supports this study, focusing in particular in the concept of accountability. Here, the distinction between responsibility and accountability becomes apparent, and the exact colours and connotations under which accountability is seen are described.

The relevant questions for Chapter V are: What is accountability? Should Frontex be held accountable, and what is the appropriate conceptual framework for dealing with its accountability in EBCG operations?

Ultimately, I propose an accountability framework that best fits the needs of a joint cooperative endeavour, such as the EBCG. In particular, I open a conceptual discussion on accountability and argue for the passing from a model of *individualist accountability* to one of *systemic accountability*. In this way, I aim to replace the dominant mono-actor paradigm on accountability, which allows for blame-shifting and accountability gaps, with a more holistic approach that involves all actors responsible for the harm.

2 Accountability and its different readings

Inevitably, in complex-structures, the more actors are involved, the hazier the responsibility of each actor becomes. It is then that concrete attribution of responsibility and effective accountability structures are necessary, Bovens notes, to avoid responsibility becoming 'as slippery as a squid in a fish market bin'.[1]

As, Hannah Arendt has remarkably observed, 'There are no such things as collective guilt and collective innocence; these terms make sense only if applied to individuals'.[2] In this sense, 'responsibility' and 'accountability' remain void if they cannot be attributed concretely to one or several actors.

All actors must take responsibility for their conduct, in the sense of *Role-Responsibility or responsibility as task,* and in this context, take all action necessary to avoid a possible harmful result. The attribution of responsibility in the sense of *Liability-Responsibility or responsibility as accountability* needs

1 L. Winner, *Autonomous Technology: Technics-out-of-control as a Theme*, Political Thought, MIT Press, 1978.

2 H. Arendt, *Personal Responsibility under Dictatorship*, The Listener, 6, 1964, p. 185.

to be ultimately addressed before a judicial forum. Legal accountability is necessary in order to constitute the fundamental rights safeguards practical and effective. The following section deals with this issue and introduces the concept of *'systemic accountability'* to support that the attribution of joint responsibility to the agency and the member states should be investigated by the courts.

Thus, having established that the agency can, in fact, be held responsible for human rights violations, especially in light of the difficulties created by the *problem of many hands,* the next step is to deal with the accountability of the agency, starting from the conceptual understanding of accountability in its different forms. The goal is to help reach a good understanding of accountability and delineate the concept, distinguishing it from that of responsibility and establishing the particular angles from which it is examined in this study.

2.1 Accountability as answerability: the importance of the rule of law

Accountability is used in public discourse as an umbrella concept, which has come to stand for several concepts ranging from responsibility to honesty and transparency. Attempts to clarify the term in scholarly literature have resulted in conceptual confusion with several authors providing their own definition of accountability, which ultimately hinders the production of cumulative knowledge. However, two main developing tendencies can be identified in these different definitions: one that understands accountability as a 'virtue' of public actors and one that sees it as a 'social mechanism' for answerability.[3]

The former, *accountability as virtue*, refers to the evaluation of the conduct of public actors on the basis of a set of benchmarks, i.e. judging whether an actor has behaved in an accountable manner.[4] It is understood as a positive quality of the actor, to some extent resembling Bovens' *Responsibility as virtue*, discussed in the previous chapter. In this sense, transparency and proper administrative conduct can be considered elements of an accountable behaviour in the sense of *accountability as virtue*.

This understanding is most common in US discourse, while the term is used in Commonwealth and continental discourse most often in the second sense, *accountability as a social mechanism for answerability.* For these authors, *accountability is a social mechanism designed for bringing an actor before a forum to give account for decisions on how governance is being exercised, or to answer*

3 M. Bovens, D. Curtin, P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?*, Oxford: Oxford University Press, 2010, p.p.: 32-34; E. Fisher, *The EU in the Age of Accountability*, 24 Oxford Journal of Legal Studies, 2004.

4 M. Dubnick, *Seeking Salvation for Accountability*, Paper presented at the Annual Meeting of the American Political Science Association, 2002; J. Koppell, *Pathologies of Accountability: ICANN and the Challenge of ''Multiple Accountabilities Disorder''*, Public Administrative Review, 65/1: 94-107, 2005.

to charges, and finally, suffer consequences in case of misconduct.[5] More simply, *accountability* means *being held to account before a forum*. It is in this sense that accountability is most commonly used in this study. However, the *accountability as virtue* understanding infiltrates the analysis when discussing transparency into the work of the agency.[6]

Moreover, seen from another perspective, while for scholars of governance, public administration, and political science a discussion on accountability revolves around the 'Three Es', Economy, Efficiency, Effectiveness,[7] lawyers prefer the language of the rule of law. For Majone, accountability is equal to a strong system of judicial review,[8] while Oliver defines it as follows (a rule-of-law-like definition):

> *'a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they turn out to not have been well-conceived; and to make amends if mistakes and errors of judgment have been made'*.[9]

According to this perspective, accountability is related to the rule of law. In a system of separation of powers, where the branches of liberal democratic government need to balance out against each other (institutional balance doctrine), the rule of law is an essential ingredient of democracy.[10] In fact, it has been described as the 'hallmark of democratic governance'.[11]

Based on these understandings, the accountability of agencies and Frontex, in particular, has been examined in a range of relevant analytical frameworks. In one of the most well-known studies, Wolff and Shout use a legitimacy-based model and examine the hierarchical, administrative and legal control that the agency is under, as well as the functional cooperation with peer groups. They further evaluate the effectiveness, flexibility and

---

5 Bovens, Curtin, and 't Hart 2010, p.: 34; A. Schedler, 'Conceptualizing Accountability', in A. Schedler, *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder: Lynne Rienner Publishers 1997, p. 17; G. Haydon, 'On Being Responsible', *The Philosophical Quarterly* 1978, 28 p.p.: 46-57; D. Beetham and C. Lord, Legitimacy and the European Union, London: Longman, 1998. R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies*, London: Palgrave Macmillan 2003, p. 8.

6 Section 3.3.

7 To the extent that effectiveness is discussed in this study, it is meant in the context of accountability rather than public administration.

8 G. Majone, *Causes and Consequences of Changes in the Mode of Governance,* 17 Journal of Public Policy, 1997, p.p.: 139, 160; G. Majone, *The rise of the Regulatory State in Europe*, 17 W. European Politics 77, 1994.

9 D. Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes, Open University Press, 1991, p.p.: 10, 28.

10 D. Dyzenhaus, *Reuniting the Brain: The Democratic Basis of Judicial Review,* 9 Public Law Review, 1998, p. 98; Harlow 2002, p.p.: 144, 145.

11 Bovens, Curtin, and 't Hart 2010, p. 5. Bovens refers to Mulgan 2003.

subsidiarity of its output.[12] More studies have examined the issue from a similar public administration and governance approach,[13] while others have focused on more specific administrative mechanisms of the agency, such as the Frontex Fundamental Rights Consultative Forum,[14] or its individual complaints procedure.[15] The present study, starting from the same premises, sees accountability as connected to justice and the rule of law, and implements it primarily through legal channels, while also examining other forms of accountability.

2.2 A supranationalist starting point on accountability

The goals of accountability within the European Union (EU), seen as *accountability as a social mechanism for answerability*, vary in accordance with the different perspectives on EU integration or governance, i.e. supranationalism, intergovernmentalism, and the regulatory regime analysis. We may take a brief look at each of these approaches in order to determine the goal of accountability in this study.

This study follows the supranationalist school of thought. While EU governance is still closely connected to the notion of the nation state, there is yet a certain autonomous core with strong discretionary powers. While accountability at the national level remains important, in a supranationalist reality, accountability is needed at the appropriate decision-making level. i.e. at the level of EU organs and institutions of the EU as a whole. From a *supranationalist* perspective, the EU and its organs are seen as autonomous actors that should be held accountable directly in their own right. EU agencies, in particular, should be accountable to the Commission, the EU Council, the European Parliament (EP) and the Court of Justice of the European Union (CJEU). [16] Since 2009, the list of accountability fora also includes the European Court of Human Rights (ECtHR), at least as far as the EU's accession to the ECHR is still a realisable goal.[17]

Contrariwise, for intergovernmentalists, the bond with the nation state is of utmost importance. It is the EU member states that principally and ultimately control the drafting and the execution of EU policies. Thus, accountability should be built on the basis of the national delegations being held to

12 Wolff and Schout 2013.

13 Pollak and Slominski 2009; D. F. Rojo, Evolution of the Operational Tasks of Frontex, EASO and Europol towards an Integrated Border Management. Migration And Asylum Administration in the European Union?, PhD thesis, 2018; V.A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, Political Studies, 61, 2013, 2–22.

14 *L. Giannetto, Advocacy Groups targeting the heart of EU Agencies. Frontex in the Focus*, in D. Dialer, M. Richter (eds.), Lobbying in the European Union. Strategies, Dynamics and Trends, Springer, 2019.

15 Fernández-Rojo 2021.

16 Bovens, Curtin, and Hart 2010, p.p.: 23, 24, 28, 29.

17 Article 6 TEU.

account back home, i.e. national parliaments, elections, referenda, national constitutional courts. While the focus should be on the domestic level, EU-focused systems of oversight are only supplementary, if not counterproductive. From this point of view, it would be sufficient for EU agencies to answer to their management boards, which are composed by member states representatives,[18] while more meticulous answerability mechanisms should be sought with respect to the member states themselves. These can extend from national administrative and political bodies to domestic and European or international courts.

Diametrically opposed to the former two perspectives, proponents of the *regulatory regime* view advocate that the EU is merely a results-oriented regulatory regime. From that point of view, the accountability deficit is not denied, but is considered an issue that does not fit the EU's construction by design. In other words, the accountability discussion is rather irrelevant because the EU is not a state or would-be state, but a bureaucracy, a regulatory regime that is not supposed to give account to the majorities, as it is not elected. Legitimacy is acquired by providing optimal solutions to existing problems, which solutions promote the common welfare. In fact, limited accountability options may prove beneficial for the more efficient achievement of the goals, as opposed to the sacrifice of tough choices on the political altar of democratic authorisation. This approach envisages to replace political organs with technical experts and depoliticise decision-making mechanisms. It places emphasis on administrative accountability (management boards composed of experts, Court of Auditors, etc.) and transparency rather than judicial accountability.[19] Under this approach, we should not attempt to address accountability issues at the EU level, as the role of the EU, its agencies and institutions was never intended to be such. This seems to be the angle from which Frontex has often argued with respect to its own responsibility, namely that it is only a bureaucratic regulator with no actual operational powers.

Thus, in the context of the same discussion on accountability within a joint operation, the three different perspectives on EU governance, set different goals of accountability. While the intergovernmental and the regulatory regime approaches focus on the accountability of member states, a supranationalist approach puts the accountability of the EU and its institutions at the centre of attention. A more extreme version of supranationalism would set the accountability of states entirely aside, as it would

18 Bovens, Curtin, and Hart 2010, p.p.: 21, 22, 28; The management board of Frontex is composed of representatives of the heads of the border authorities of the 26 EU Member States that are signatories of the Schengen acquis, and two members of the European Commission. Non-EU member states that participate in the Schengen acquis participate with limited voting rights. Frontex website: http://frontex.europa.eu/about-frontex/organisation/management-board/.

19 Bovens, Curtin, and Hart 2010, p.p.: 24-26, 28, 29.

not consider state sovereignty and would only be concerned with the EU's accountability. This study takes a more moderate approach towards supranationalism, which leads us to seek the pathways for the accountability of Frontex, without disregarding that of the member states.

2.3 Types of accountability as a social mechanism for answerability

As established in the previous sections, this study adopts the more commonly European approach that sees accountability as a mechanism for answerability and one that originates from supranationalist foundations, accepting that the level of autonomy that EU agencies enjoy justifies the need for accountability at the EU level. In adopting a primarily legal approach, it sees accountability as connected to the rule of law, but also complemented by other types of non-legal accountability.

These principles are honoured in the definition offered by Bovens, according to which accountability is *'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'*.[20] Bovens' definition as well as the subsequent analytical framework developed by Bovens, Curtin and Hart have become a common foundation for contemporary research on accountability[21] and are also followed in this study, as they successfully represent the qualities of the European part of the schism in the accountability debate, i.e. *accountability as a social mechanism for answerability*. Its well-rounded nature allows it to encompass the focus of previous frameworks, such as hierarchical control and democratic legitimacy, and move beyond them to cover a variety of different fora and accountability arrangements.

According to this analytical framework, accountability may be exercised in a range of different fora.[22] Depending on the answer to the question 'Accounting to Whom?', the authors distinguish between five different types of accountability: a) political or democratic accountability, b) administrative accountability, c) social accountability, d) legal accountability, and finally, e) professional accountability.

Firstly, in parliamentary systems, political or democratic accountability is among the highest levels of control. Elected and appointed public authorities are answerable to their political superior either minister and prime minister or president, and most importantly to the parliament, acting as representatives of the people. In their role as 'holding power to account', the media can also be considered fora of political accountability.

---

20 M. Bovens, *New Forms of Accountability and EU-Governance*, Comparative European Politics, 5(1), 2007, p. 107.

21 e.g. Horii 2018), p. 211.

22 Bovens, Curtin, and Hart 2010, p.p.: 41-44.

Secondly, social accountability can be seen, not merely as a separate category, as presented by Bovens, but even as a second branch of democratic accountability. It envisages accountability directly to the public through non-governmental organisations and other interest groups, unions, and other stakeholders that together form civil-society. This type of accountability is not as coherent and cannot impose immediate sanctions in the strict sense of the word. Nevertheless, the long-term consequences of this loose accountability mechanism, are powerful enough to motivate behaviours such as corporate social responsibility, transparency, open government, and public reporting.

Thirdly, the technocratic nature of public administration requires independent supervision by quasi-legal fora on administrative and financial issues. Such fora of administrative accountability can be independent authorities at the national, regional or international level, courts of auditors, ombudspersons, and other external authorities reviewing issues of fraud, efficiency, and effectiveness.

Fourthly, legal accountability may be seen as a synonym to judicial review, i.e., the courts' power to review the legality of administrative acts, and in case of unlawfulness, annul the act and award reparations. In the language of Bovens, it represents answering before a judicial forum. In the same line of thought, Dawn Oliver sees legal accountability as a duty for the public authority to 'explain and justify its actions in legal terms if sued in the courts'; a duty that is 'enforceable by action in the courts at the instigation of those affected' and that it is followed by an obligation 'to make amends'.[23] For courts, accountability reflects their task to uphold the rule of law in the sense of reviewing the legality of administrative action and putting public power under judicial scrutiny. For individuals, it means being able to challenge administrative action before courts, if it conflicts with a higher law, in the case of Frontex, mainly the EU Charter and the ECHR.

The fifth and final level of accountability identified by Bovens is professional accountability. This entails the enforcement of formally accepted professional codes of conduct by professional associations and networks, management boards and disciplinary tribunals on a peer-review basis.

In sum, in political accountability account is to be rendered to elected representatives, political parties, voters, and media. In administrative accountability the forum becomes the auditors, inspectors, and controllers, while in professional accountability, this forum is the professional peers. Social accountability is owed to interest groups, charities, and other stakeholders. Finally, the forum for legal or judicial accountability is courts. This theoretical framework is applied and the different types of accountability are analysed with respect to Frontex in section 3.

23 Oliver 1991, p. 26.

2.4 The relationship between accountability, responsibility and liability

In short, understanding *accountability as a social mechanism for answerability* and inspired by the analytical framework developed by Bovens, Curtin and Hart, I use the term 'accountability' in the sense of 'answering for decisions on how governance is being exercised'. Several forms of accountability can be identified, such as administrative, democratic, and social accountability. However, when the acts of governance directly affect individuals' rights, accountability may not remain at the political or administrative level. Then, the need arises for 'legal accountability', i.e. the actor's subjection to substantive legal control and formal judicial mechanisms of accountability. Therefore, legal accountability is the focal point of this book.

Responsibility is understood here, mainly in the sense of *Liability-Responsibility,* in terms of attributing blame for causing harm. It should be highlighted that similarly with accountability, the focus is on 'legal responsibility', rather than political or moral, referring to the principle that the breach of an engagement involves an obligation to make reparation.[24]

In other words, for the purpose of the present study, while 'responsibility' refers to the obligation for reparations in case of breach of an engagement, 'accountability' would be the possibility to be held responsible, to answer for breaches of international obligations before courts.

'Verantwortlichkeit' and 'Verantwortung' in German or 'υπευθυνότητα/ευθύνη'and 'λογοδοσία' in Greek, translated as 'responsibility' and 'accountability' respectively, are concepts interconnected that together and never in the absence of one another help construct a functional society. Accountability is the essence of responsibility. As elegantly put by Bovens: 'In the absence of a forum, our thinking about responsibility runs into trouble.'[25]

Related to legal responsibility is also the concept of liability, which suggests that someone is liable to pay on account of an act for which she is legally responsible.[26] The concept of liability may seem similar to accountability. One may even be tempted to use the two interchangeably, as liability is often the consequence of holding an actor to account, especially if we are talking about legal accountability. However, this is only one of the possible ways of holding someone to account before courts, although admittedly the most common one in general judicial practice. However, the concept of legal accountability is indeed broader as it can also include other remedies such as the legality review by the CJEU.

24 Chorzow, *Germany v Poland*, p. 21.
25 Bovens 1998, p.p.: 26, 27.
26 Chapter IV.

3 The answerability of Frontex before legal and non-legal fora

In applying the theoretical framework presented in the previous sections, the following paragraphs aim to assess the ability of the existing normative framework to ensure the agency's overall accountability. Regarding the different accountability fora, even though the present study predominantly focuses on legal accountability, it would be deficient if it did not include an overview of the other types of accountability, namely, administrative, democratic, professional, and social accountability.

3.1 Non-legal accountability

The partial assessment of non-judicial forms of accountability is deemed essential for the following reasons. Firstly, in principle, in a holistic view of accountability, the more ground is covered by other forms of accountability, the less urgent access to the (judicial) system of last resort becomes, without the latter ever losing its primary importance. A rigorous system of non-judicial remedies can potentially act pre-emptively, adding several layers of supervision, which could prevent a violation. This could be the case, for instance, with respect to monitoring mechanisms of administrative accountability that helps the agency implement its positive obligations and prevent a violation. Some of the same mechanisms that allow for the agency to answer for its executive decisions before a forum are also the safeguards that prevent violations, so that ex-post facto judicial remedies can assume a more limited role. Vice versa, the more narrow the protection offered by non-judicial safeguards, the more pertinent and urgent the availability and effectiveness of a system of legal remedies becomes.

Secondly, with regard to remedying human rights violations, the ECtHR has held that the standard of Article 13 ECHR can be met also with a remedy of a non-judicial nature, which is however not the case for the equivalent Article 47 of the Charter. According to the interpretation of the ECtHR, in the absence of judicial remedies, the 'powers and procedural guarantees of the alternative remedies' should also be taken into account in the assessment of an effective remedy.[27] It is also possible that if no single remedy is considered effective in the terms of Article 13 ECHR, a collection of remedies judicial or not may, nevertheless, cumulatively fulfil the requirement.[28]

---

27 D. Shelton, Article 47 – Rights to an Effective Remedy in S. Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (Steve Peers and others eds, Oxford 2014), p. 1202 referencing ECtHR 06 September 1978, Judgment, App. No. 5029/71, (*Klass v Germany*), par. 67 and ECtHR 25th March 1983, App. No. App Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, A/61, (*Silver and Others v the United Kingdom*), par. 113. Article 47 of the Charter leaves no space for non-judicial remedies, requiring a fair hearing by an independent and impartial tribunal previously established by law.

28 Shelton 2014, p. 1202.

Finally, in pragmatic terms, most of the developments with respect to the accountability of Frontex concern these non-legal types of accountability. These efforts on the part of the legislature and of the agency itself should not be ignored. Nevertheless, it should be evaluated whether these efforts are sufficient in practice in ensuring the accountability of the agency in a way that protects human rights and realises the proper allocation of responsibility.

3.2 Democratic or political accountability

The lack of adequate democratic scrutiny of the activities of Frontex has been addressed several times in the academic literature,[29] while it remains a desideratum for institutional actors,[30] and civil society.[31] This section focuses on some of the main points regarding democratic accountability, and does not aim to present a complete summary.[32]

As an EU agency, Frontex needs to justify its actions before the democratically elected institutions, i.e. the EP and the national Parliaments. Already at the early stages of the inception of a European Border Guard in 2006, it was seen as a body, although not vested with law enforcement powers, whose instructions on common standards and joint operations, would have such substantive impact on border control and law enforcement that would require effective parliamentary control. The role of democratic or political control was envisaged for the EP, as the role of national parliaments would only be indirect in the decisions made.[33]

In this respect, it needs to be noted that the involvement of the EP has been strengthened since Frontex was first established. The founding Regulation was adopted by the Council alone, with only consultation by the Parliament, but by the time of the adoption of the 2007 amendment, issues concerning the EU's external borders had become subject to the co-decision procedure.[34] This development concerns the legislative involvement of the EP, which is now actively involved in the negotiations and its agreement is required for the adoption of a measure.[35]

Therefore, in a further development since the agency's establishment, Article 7 has been added to the EBCG Regulation to state explicitly that the agency shall be accountable to the Parliament and the Council. However, the phrase 'in accordance with this Regulation' raises concerns as it could

29 E.g. Fischer-Lescano and Tohidipur 2007, p.p.: 1261, 1262; Baldaccini 2010, p. 236.
30 PACE 2013a, p.p.: 4,5; LIBE 2011, p. 14; House of Lords 2008, p. 30, 31.
31 Meijers Committee 2008, par. III; Amnesty International and ECRE 2010, p.p.: 12-13.
32 For a more comprehensive view on the democratic accountability of Frontex, see Rosenfeld 2017.
33 Monar 2006, Chapter 10, p. 7.
34 Pollak and Slominski 2009, p. 917.
35 The European Parliament's influence is limited, as most operational decisions are not taken on the legislative level. Pollak and Slominski 2009, p. 917.

be interpreted as limiting the accountability only to what is explicitly set in the Regulation. In this case, the Regulation would prevail, as lex specialis, over any additional obligations derived from EU secondary or tertiary legislation.[36]

One could also see a role for the EP in its powers to approve the agency's budget. Its influence is, however incomplete since it has only a weak reach into Frontex activities.[37] The control rights of the EP are limited and it does not have access to the most valuable information tools produced by the agency, i.e. its general or tailored risk analyses that are, however, accessible to the Commission and the Council.[38]

Another issue that has been pointed out is that no parliamentary hearing is required before the appointment of the Executive Director.[39] Moreover, Frontex does not seek the approval of the EP before it concludes a working arrangement with a third country, a claim that has been expressed by both the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)[40] and PACE,[41] and is also supported by the Frontex Consultative Forum,[42] an independent body of civil society organisations, the role of which will be covered in more detail under social accountability. The EP theoretically has the right to be informed about the content of such agreements, but in practice, these are not being submitted by the agency.[43]

At first sight, an essential power of the EP is its entitlement to invite the Executive Director to report before the LIBE Committee. The inquiry is limited to questions concerning the way the Director is carrying out his tasks (Article 106(2)). In a rare demonstration of its powers, the EP withheld ten million EUR of Frontex's budget for 2013 until the agency took practical steps for the improvement of its search and rescue operations.[44] It also invited the Frontex Executive Director to report on the measures taken by the agency. The Executive Director spoke before the EP in October 2012.[45] In other instances, however, senior Frontex officials have declined such invitations, concerning the specific question of the management of the

36 Gkliati and Rosenfeldt 2018, p. 5.
37 LIBE 2011, p. 24.
38 Pollak and Slominski 2009, p.p.: 917, 918.
39 LIBE 2011, p. 24; Pollak and Slominski 2009, p.p.: 917, 918.
40 LIBE 2011, p. 25.
41 PACE 2013a, p. 3; PACE has also requested that the Fundamental Rights Officer and the Consultative Forum report directly to the EP on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns. PACE 2013a, p. 3.
42 S. Kessler, Co-Chair of FRONTEX Consultative Forum, at the meeting of the Subcommittee on Human Rights of the European Parliament, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, 16 May 2013.
43 PACE 2013a, p. 14.
44 PACE 2013a.
45 Frontex 2010a.

southern maritime border.[46] This is indicative of the limited reach of this control mechanism, as it is at the discretion of Frontex official whether to answer the call of the Parliament. This power of the EP was strengthened in the EBCG Regulation, which now provides that the Executive Director shall report regularly to the European Parliament (Article 106(2)). Although the language has become more assertive, there are still no consequences envisaged in case the Executive Director does not attend a meeting before the EP. However, the language itself can create political pressure, which could cover some of the previous gaps. For instance, in December 2021 members of the EP asked for the resignation of the Executive Director, Fabrice Leggeri, in light of evidence of the engagement of Frontex in systematic pushbacks by the Greek authorities.[47]

Finally, national parliaments may also have a role in the accountability of Frontex. It can be argued that national parliaments exercise political control since national representatives that participate in the agency's Management Board are always answerable to their national parliament. However, in practice, due to the lack of awareness over Frontex's activities and EU affairs in general, politicians are rarely faced with serious inquiries in their national parliaments.[48] More importantly, although it can do so at its discretion,[49] the agency is under no obligation to report to or in any way inform national parliaments.[50]

3.3 Social accountability

Protection of fundamental rights is an issue that requires a high level of scrutiny by civil society. However, 'civil society' or 'the public' is not a unified official forum vested with formal accountability related powers. Therefore, transparency is an essential precondition to achieve such monitoring. The need for transparency was recognised in the Frontex founding Regulation, which provided that the public shall rapidly be given objective, reliable and easily accessible information with regard to the agency's work.[51] The formulation has become more sober in the EBCG Regulation, which merely makes reference to the agency's annual reporting obligations and its obligations under EU rules on access to documents.[52]

46 LIBE 2011, p. 25; Baldaccini 2010, p. 236; House of Lords 2009, par. 85.
47 Statewatch, *European Parliament: Frontex director should resign, say Socialists & Democrats*, 03 December 2020, https://www.statewatch.org/news/2020/december/european-parliament-frontex-director-should-resign-say-socialists-democrats/.
48 Pollak and Slominski 2009, p. 918.
49 E.g. House of Lords 2016.
50 LIBE 2011, p. 25; Pollak and Slominski 2009, p. 918.
51 Article 28(2) Frontex Regulation.
52 Article 74 EBCG Regulation.

The lack of transparency is often criticised as a structural problem of Frontex,[53] while the EP has spoken of a 'culture of secrecy'.[54] In principle, Frontex, as an EU agency is under the obligation to conduct its work as openly as possible,[55] and provide access to documents to EU nationals and residents.[56]

Frontex publishes annually the general and the work programme reports, which provide a broad overview of activities, along with the general risk analysis, progress reports on the Fundamental Rights Strategy (see below under administrative accountability), and any external evaluation reports. However, as Ghezelbash, Moreno-Lax et al. observe, the structure of the general report was revised in 2008, significantly reducing the level of detail included.[57]

Moreover, although the agency has improved the level of transparency through the information provided in its website, crucial information to evaluate the fundamental rights performance of the agency remains unattainable. Namely, there is no access to information on the agency's specific activities, primarily through the operational plans and serious incident reports or working arrangements with third countries, are highly confidential.[58]

Fundamental in this regard is the right to public access to documents, which is enshrined in Article 15 (3) TFEU, Article 42 CFR and Article 2 of Regulation (EC) 1049/2001. This right is granted across all EU institutions, bodies, and agencies to EU citizens or anyone else residing in the EU. Migrants involved in Frontex operations, however, cannot rely on these rights, as they have in all likelihood not established residence in the EU, and they need to depend on the work of NGOs and investigative journalists.

More importantly, access is often denied, and more often than not the released documents are extensively redacted on the ground of exceptions permitted on the basis of public security concerns.[59] A telling example of this practice that significantly limits the reach of social accountability is the request of the German NGO ECCHR for disclosure of the Operational Plan and Evaluation Report of Operation Hera, which was only partially

53 House of Lords 2008, p. 30; Pollak and Slominski 2009, p. 919; Carrera and Guild 2010, p. 3; Amnesty International and ECRE 2010, p. 12-13; PACE 2013a, p.p.: 1,2; Wolff and Schout 2013, p. 319.

54 LIBE 2011, p. 8.

55 Article 15(1) TFEU; 11(2) TEU and Article 298(1) TFEU.

56 Article 28 Frontex Regulation; Article 42 Charter; Access to Documents Regulation.

57 Ghezelbash, D., Moreno-Lax, V., Klein, N., & Opeskin, B. (2018). Securitisation of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia. International and Comparative Law Quarterly, 67(2).

58 Baldaccini 2010, p.p.: 236, 238.

59 Campbell 2016a; Gkliati and Rosenfeldt 2018, p. 7.

disclosed.[60] According to the information from the agency's annual reports, fewer applications receive full access every year, with the full acceptance rate reaching 13,9 % in 2017. Out of a total of 108 requests, almost 20% received a full refusal, while 60,2% was only awarded partial access.[61]

In combination with the right to access to documents, EU nationals or residents are also entitled to receive an answer when addressing an EU Institution.[62] Any natural or legal person can address Frontex in particular (Article 114). However, it needs to be kept in mind that the obligation to respond is only a formal one, while the content of the response is left to the discretion of the agency, which is also under no obligation of result.[63]

3.3.1 The Frontex Consultative Forum

A milestone reached in 2011 was the creation of the Frontex Consultative Forum on Fundamental Rights (Consultative Forum), an independent body of relevant international and civil society organisations. The Consultative Forum works closely with the FRO and provides guidance and independent advice on fundamental rights matters (Article 108). Nevertheless, the Parliament's initiative for creating an independent Advisory Board on Fundamental Rights that would monitor the activities of the agency was watered down in the final text of the Regulation (Article 109). This Advisory Board, in its initial conception, would be an external body that would have the right to unconditional access to information on joint and RABIT operations including the evaluation reports – information that the EP does not have access to – with the purpose of assisting the agency to respect to fundamental rights. The Parliament's proposal further granted the Advisory Board the power to suspend an operation in case it was considered to be in breach of fundamental rights and international protection obligations. The proposal was turned down unanimously by the Council.[64] The Advisory Board was replaced by a Consultative Forum with limited information rights, while, the power to suspend operations on fundamental rights grounds was given to the Executive Director of the agency. The Consultative Forum, composed of 15 international organisations, EU agencies, and

60 V. Wriedt, D. Reinhardt, ECCHR, *Opaque and Unaccountable: Frontex Operation Hera*, Statewatch, February 2017, http://www.statewatch.org/analyses/no-307-frontex-operation-hera.pdf.

61 Frontex General Reports 2012 – 2017. A good visualisation of this information is found in L. Izuzquiza, A. Semsrott, Frontex transparency: state of play Izuzquiza and Semsrott v Frontex, November 2018, p.p.: 5,10, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj6urKtj6jjAhWKqaQKHQzxA7QQFjAAegQIAhAC&url=https%3A%2F%2Fec.europa.eu%2Finfo%2Flaw%2Fbetter-regulation%2Ffeedback%2F15674%2Fattachment%2F090166e5bf82536a_es&usg=AOvVaw3D5JWPOCCesKddqKjRFPYQ.

62 Articles 20 (2) (d), 24 (4) TFEU.

63 Gkliati and Rosenfeldt 2018, p. 7.

64 Human Rights Watch 2011.

civil society organisations[65] and its composition is decided by the agency's management board upon the proposal of the Executive Director (Article 108). It was established in October 2012 and published its first Annual Work Programme in January 2013.[66] The independent body that has broader access to the agency's documents and information about the operations, the Consultative Forum (see below under administrative accountability), publishes an annual report presenting the observations and recommendations on the agency's activities regarding fundamental rights.[67]

As the Forum has a consultative role, the agency is not bound by its recommendations. Furthermore, it cannot function as a direct link to civil society, although composed of NGOs, due to the confidentiality obligations of its members.[68] It is only allowed to share information that the Management Board has agreed to transmit and is unable to function as an information link with civil society due to its confidentiality commitments.[69] It is still unclear to which information the members of the Consultative Forum are allowed access, and thus to which extent they will be able to evaluate the impact of the fundamental rights training. Notably, the Consultative Forum has expressed concerns regarding the practices of the agency and the limitations in providing the Forum with access to information.[70]

As a result of the above, we can observe a 'knowledge gap' regarding the compliance of the agency with its fundamental rights and international law obligations. In an effort to increase transparency of its work, Frontex has concluded partnerships with organisations, which can be involved in the activities of the agency in several ways.[71] Frontex concluded in June 2008

65 Council of Europe (CoE), Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ ODIHR), United Nations High Commissioner for Refugees (UNHCR), European Union Agency for Fundamental Rights (FRA), European Asylum Support Office (EASO), International Organisation for Migration (IOM), European Council for Refugees and Exiles (ECRE), Red Cross EU Office, Amnesty International European Institutions Office (AI EIO), International Catholic Migration Commission (ICMC), Caritas Europa, International Commission of Jurists (ICJ), Jesuit Refugee Service Europe (JRS), Churches' Commission for Migrants in Europe (CCME), Platform for International Cooperation on Undocumented Migrants (PICUM).

66 Frontex Consultative Forum, *Work Programme 2013*, http://www.statewatch.org/observatories_files/frontex_observatory/CF_work_programme%202013.pdf.

67 The Annual Reports (20143– 2019) and Work Programs (2013 – 2021) of the Consultative Forum are available here: https://frontex.europa.eu/fundamental-rights/consultative-forum/documents/.

68 Frontex Consultative Forum on Fundamental Rights, *Working Methods of the Consultative Forum 2017*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_Working_Methods_2017.pdf. For an in-depth analysis into the Frontex Consultative Forum, refer to L. Giannetto, More than consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies. The case of Frontex and its Consultative Forum. PhD thesis, University of Trento, 2018.

69 The classification of a document as confidential is decided upon by the agency. Kessler 2013.

70 Consultative Forum 2017, p. 17.

71 Frontex Fundamental Rights Strategy, p. 8.

a cooperation agreement with UNHCR focusing on border guards training on international refugee law and exchange of best practices and expertise,[72] while already since 2007, a liaison officer from UNHCR had been appointed to Frontex with the objective to 'help ensure that border management complies with the international obligations of EU member states'.[73] In practice, however, the UNHCR liaison officer has met with obstacles regarding the provision of information and has stated that 'the UNHCR has little information on joint operations, making it difficult to evaluate the impact of training'.[74] Frontex also concluded an agreement with the EU Fundamental Rights Agency (FRA) in May 2010.[75] On the basis of this agreement, the FRA provides its expert advice on how fundamental rights should be incorporated into the various phases of border operations. The FRA may provide its opinion only upon request and only to the extent requested. Moreover, the participation of these external partners as observers in ongoing operations is not open and depends on a system of invitations and authorisations by Frontex and the member states (Article 78).

3.4 Professional accountability

Professional accountability, a rather soft form of accountability, is owed to professional peers, who knowing the specific characteristics of the trade can monitor, identify and possibly enforce good practices, such as identifying missing migrants during border control operations. Such accountability could be realised through participation in professional associations or disciplinary tribunals. The independence of the agency and the particular nature of its work would not, in principle, allow for many of such fora, especially those that entail enforceable standards for acceptable practice.[76] While the agency participates in fora together with national border authorities, such as the Africa-FRONTEX Intelligence Community (AFIC), these aim to enhance cooperation with third countries and improve the border management capabilities of these countries and do not have a more specific fundamental rights focus. Apart from any informal political-peer pressure that can be developed is such meetings, no formal professional accountability structure is identified.

72 Frontex and UNHCR 2008; Marin 2011, p. 483.
73 Migreurop 2011, p.p.: 29, 30.
74 Migreurop 2011, p.p.: 29, 30.
75 Frontex and FRA 2010.
76 M. Bovens, 'Analysing and Assessing Public Accountability - A Conceptual Framework' (2006) C-06-01, *European Governance Papers (EUROGOV)*, p. 17, http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp_connex_C_06_01.pdf.

3.5 Administrative accountability

The administrative accountability is, without doubt, the most developed form of accountability of Frontex. This concerns oversight systems and mechanisms, which represent the procedural obligations of the agency under the right to an effective remedy and to good administration. It can be exercised by quasi-legal forums 'exercising independent and external administrative and financial supervision and control.[77]

3.5.1 Financial oversight

At the financial level, Frontex has an internal auditor who answers to the Executive Director and the Commission's Internal Audit Service.[78] Apart from that, the European Anti-Fraud Office (OLAF) investigates illegal reception and allocation of funding (Article 117) and the European Court of Auditors exercises control over the budgetary and financial management of the agency (Article 116).[79] The objective of the Court of Auditors is to provide the EP and other relevant authorities with a statement of assurance as to the legality and regularity of the agency's transactions.[80]

3.5.2 External monitoring

Whereas external supervision is strong in financial affairs, the current administrative framework concerning human rights is primarily internal. The Executive Director is first and foremost accountable to the Management Board, to which it submits annual reports. The Management Board may also extend the Executive Directors term once or dismiss him 'in the event of misconduct, unsatisfactory performance or recurring/serious irregularities'.[81]

As far as independent monitoring and control are concerned, an independent external evaluation shall be commissioned by the Management Board every five years, which examines the effectiveness of the agency and the impact of its working practices. An external contractor carried such an evaluation in 2009, but it did not cover human rights aspects.[82] The second

77 Bovens 2006, p. 17.
78 Pollak and Slominski 2009, p. p.: 918, 919.
79 European Court of Auditors 2017.
80 European Court of Auditors 2017, p. 5.
81 Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies, Common Approach, July 2012, points 17 and 19, https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf; on management boards and accountability, see: M. Buess, *European Union agencies and their management boards: an assessment of accountability and democratic legitimacy*, Journal of European Public Policy-May (2014).
82 COWI Consultants 2009.

monitoring, which took place in 2015, dealt with the agency's implementations under its obligations under the Charter, but only to a limited extent. The report only covered the evaluation of the effectiveness of the internal accountability mechanisms studied here under administrative accountability, such as the FRO. Looking at these safeguards, the report noted that remarkable progress has been made. However, the implementation of these safeguards in practice was found to fall short, focusing in particular to the limited resources of the FRO, the negative perception of the effectiveness of the monitoring mechanisms, and the lack of practical tools for the implementation of the Codes of Conduct.[83] According to the 2019 EBCG Regulation the Commission shall carry out an evaluation every four years starting from 2023, which will include an evaluation of the compliance with the Charter (Article 121).

Amongst the most important proposals during the 2011 amendment, which was regrettably disregarded by the Council, was the Commission's proposal for an external monitoring mechanism of joint return operations.[84] The Commission had even suggested in 2007 that not yet established European Asylum Support Office (established in 2011) could act as such a body. Instead, a Code of Conduct for Joint Return Operations and a Fundamental Rights Strategy were endorsed, while the mandate of EASO is far from the one envisaged by the Commission.[85]

On other aspects of administrative control, if an access to documents request is denied by Frontex, an individual may lodge a complaint with the European Ombudsman (Article 114(5)). The European Ombudsman can receive complaints from EU citizens or residents regarding other types of maladministration against EU institutions and agencies,[86] but its most important power is that of conducting an own-initiative enquiry, which has resulted in the adoption of an individual complaints mechanism, as shown below.

3.5.3 The Fundamental Rights Officer

The 2011 amendment of the Frontex Regulation was a significant step forward with respect to the human rights accountability of the agency. The Fundamental Rights Officer (FRO), who monitors respect of fundamental rights was one of the progressive changes brought by the 2011 amendment.[87] The FRO is a staff member designated by the Management Board.

83 Ramboll Management Consulting and Eurasylum Ltd, *External Evaluation of the Agency under Article 33 of the Frontex Regulation, Final Report*, 2015, p.p.: 85-95.

84 Amnesty International and ECRE 2010, p. 2.

85 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

86 Article 228 TFEU, Article 43 Charter.

87 Article 26(a) Frontex Regulation; Ms Inmaculada Arnaez was appointed Fundamental Rights Officer in 2012.

When it was first introduced, in 2011, the FRO would report directly to the Management Board and the Consultative Forum.[88] In 2016, the obligation to report to the Consultative Forum, which to some extent safeguarded her independence, was removed (Article 109). She has access to all information concerning fundamental rights and is tasked with making observations about the operations of the agency, identifying possible preventive and corrective measures, keeping a record of possible fundamental rights incidents, as well as monitoring and analysing the implementation of the Fundamental Rights Strategy.[89]

However, this like other changes fall short of the original expectations of the European Commission (EC) and the Parliament. During the trilateral negotiations for the adoption of the 2011 amending Regulation, the EP envisaged an independent FRO who would report to the Parliament, but the parties eventually compromised for a FRO employed by the agency, who has a consultative rather than an advisory role.[90] PACE, as well as the Ombudsman, has commended negatively on a lack of independence of the FRO, given that she is a member of the staff of the agency,[91] and asked questions as to her effectiveness, such as: 'How can one person alone monitor all activities and the potential impact on fundamental rights?'[92] Today the Fundamental Rights Officer has become the Fundamental Rights Office, which, nevertheless, remains significantly underfunded and understaffed.[93] In light of her gradually increasing mandate, the FRO's workload has significantly increased without a proportionate increase in the necessary staff and resources, so it has become increasingly difficult for her to fulfil her tasks.[94] The agency recruited additional staff in November 2018 to support the FRO, but this only includes junior staff.

88 Article 26(a)(3) Frontex Regulation.

89 Frontex 2012c.

90 Human Rights Watch 2011. Statewatch, *EU: A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)*, 15 May 2012, http://www.statewatch.org/news/2012/may/02-eu-frontex-article26a.html; Statewatch and Migreurop 2012, p.p.: 3, 4.

91 PACE 2013b, p. 16; PACE 2013a, p. 3; European Ombudsman 2013b.

92 D. Dumery, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, meeting of the Subcommittee on Human Rights of the European Parliament, PACE, 16 May 2013.

93 Ramboll Management Consulting and Eurasylum Ltd 2015, p.p.: 92-93; Frontex Consultative Forum on Fundamental Rights, *Fifth Annual Report 2017*, 2018, p. 5, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiZj4i5y8jhAhVHsaQKHYacDVsQFjAAegQIBBAC&url=https%3A%2F%2Fwww.statewatch.org%2Fnews%2F2018%2Fmay%2Feu-frontex-consultative-forum-on-fundamental-rights-report-2017.pdf&usg=AOvVaw08uVyL8-TC5R5QsZr0OV7w.

94 Frontex Consultative Forum 2018.

3.5.4 The Fundamental Rights Strategy

The Fundamental Rights Strategy (FRS) and the subsequent Codes of Conduct are certainly seen as steps forward in the efforts to ensure respect for fundamental rights in Frontex activities.[95] The former focuses on the operationalisation and mainstreaming of fundamental rights into the agency's work, and the latter promotes professional values based on the principles of the rule of law and fundamental rights. In its FRS, Frontex expresses its commitment to respecting and promoting fundamental rights, considering these elements as unconditional and integral components of effective integrated border management.[96] Whether it is about joint operations or risk analyses underpinning them, they must take into account the 'particular situation of persons seeking international protection, and the particular circumstances of vulnerable individuals or groups in need of protection or special care'.[97] Furthermore, guarantees for fundamental rights and the rule of law are laid down in the Codes of Conduct,[98] which were drawn up in cooperation with the Consultative Forum.[99] The nature of these documents as to whether they are legally binding and give third parties justiciable rights is still uncertain.[100]

However, even if these documents are indeed legally binding, they simply restate the international obligations of the agency.[101] Moreover, the mere existence of rules is not sufficient to guarantee accountability. PACE has noted that '(d)espite the good intentions contained in the Fundamental Rights Strategy, most provisions have not yet been put into practice', and suggests that an independent external mechanism should be set up to control the implementation of the FRS.[102] ECRE also advocates the view that independent monitoring of Frontex operations with the involvement

95 Marin 2011, p. 483.

96 Frontex Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011, p. 1.

97 Frontex Fundamental Rights Strategy, p. 4; A Fundamental Rights Action Plan has also been developed and was adopted on 29 September 2011 as a tool for the implementation of the Fundamental Rights Strategy.

98 Article 2a Frontex Regulation; Article 81 EBCG Regulation; Frontex, Code of Conduct for all Persons Participating in Frontex Activities, http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf.

99 Article 26a Frontex Regulation.

100 Statewatch and Migreurop 2012, p. 3; The CJEU has considered in the past Codes of Conduct (on public access to documents) not merely as internal administrative documents, but as capable of giving third parties justiciable rights. It is also arguable that they only create obligations for the participants in Frontex operations, not Frontex itself. Their obligations are only before the agency, while legal accountability is not covered. Moreover, it is doubtful how far disciplinary sanctions can guarantee compliance with human rights obligations. Frontex 2012c.

101 Human Rights Watch 2011; Statewatch and Migreurop also talk of 'serious shortcomings in the Agency's fundamental rights strategy' Statewatch and Migreurop 2012, p. 17.

102 PACE 2013a, p. 15.

of NGOs is necessary for EU states to be fully equipped to ensure that the management of their external borders respects international refugee and human rights law.[103]

Consequently, the preventive and evaluative guarantees adopted in the legislative revision of 2011 are deemed inadequate by civil society.[104] PACE expressed concerns about whether these changes address all the open human rights questions and whether they are even operable and effective in their limited scope,[105] while the spokesperson of the Green Party of the EP admitted that the measures adopted are 'half-hearted and unconvincing'.[106] Amnesty International and ECRE, joined by the Council of Europe, pointed out that no specific measures are indicated that would ensure compliance despite these affirmations.[107]

3.5.5 The individual complaints mechanism

The main objective with respect to administrative accountability is still an external monitoring mechanism in parallel to the internal mechanisms of the agency. In their report regarding the implementation by Frontex of its fundamental rights obligations, the Ombudsman highlighted the need for a such a monitoring mechanism.

The agency's initial response was that one was already in place, which consisted of the requirement for participants in activities to report infringements, an incident reporting system via the Frontex Situation Centre, and the requirement for full consideration of reports that indicate infringements. Moreover, the Consultative Forum's interaction with the FRO and the mechanism for suspension and termination of operations by the Executive Director were presented by the agency as the core of its internal monitoring mechanism.[108]

The Ombudsman found the agency's response unsatisfactory. First of all, she noted that Frontex should adopt clear guidelines, a clear mechanism, and specific criteria for the suspension or termination of operations and that there is oversight to the decisions of the Executive Director. More importantly, it called for an individual complaints mechanism, arguing that without it, compliance could not be ultimately effective. According to the

103 Refugee Council and ECRE 2007, p. 15.
104 Human Rights Watch 2011.
105 PACE 2013a, p. 3; PACE has since 2011 expressed the view that the then proposed amendments to the Regulation were inadequate to achieve full respect for fundamental rights. PACE 2013a, p. 4.
106 S. Keller, Green spokesperson on migration and home affairs, Green-EFA (European Parliament), *2011 FRONTEX/EU border control, Half-hearted improvements on human rights protection fall short*, 13 September 2011, http://www.statewatch.org/news/2011/sep/ep-greens-frontexeu-border-control-prel.pdf.
107 Socialist Group Spain 2011, p. 19; Amnesty International and ECRE 2010, p. 14.
108 Frontex 2012c.

Ombudsman, to fulfil its fundamental rights responsibilities in accordance with the principles of good administration, Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex joint operations. The EP also endorsed the need for an individual complaints mechanism.[109]

As a result of the Ombudsman's report, an individual complaints mechanism was introduced in the EBCG Regulation (Article 111).[110] However, it falls remarkably short of the expectations of the Ombudsman. In a systematic study into regional, international, and supranational human rights law, Carrera and Stefan have identified the minimum standards that could qualify a complaints mechanism as an effective remedy.[111] These, as elaborated by the CoE, CPT, EU and UN bodies, include institutional independence, accessibility in practice, adequate capacity to conduct thorough and prompt investigations based on evidence, and a suspensive effect in the context of joint expulsions.[112]

For such a remedy to be considered institutionally independent, the procedure needs to be impartial,[113] while an effective remedy may not be granted 'if complaints are only allowed before the same authority responsible for conducting checks at the EU borders' if that organ's decision is not subject to appeal.[114] Accessibility in practice requires adequate access to information, procedural clarity and fairness, respect for privacy and confidentiality, the possibility for returnees to file a complaint 'either immediately upon arrival or on board the plane prior to arrival', and finally a mechanism that is open to all persons concerned including, apart from the affected individuals, also including the responsible supervisory authorities and anyone who became aware of the violation, such as journalists, NGOs, etc.[115] Such public interest complaints were for the Ombudsman a necessary precondition for an effective complaints mechanism in Frontex operations.[116]

Finally, conducting a thorough and prompt investigation requires adequate capacity both in procedural and in practical terms. Specifically, a 'genuine complaints mechanism' requires transparent procedures, that

109 European Parliament 2015.
110 On some background on the individual complaints mechanism and its evaluation by the EP, see Fotiadis 2016.
111 S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Brussels: Centre for European Policy Studies (CEPS) 2018.
112 S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Brussels: Centre for European Policy Studies (CEPS) 2018, p.5.
113 Carrera and Stefan 2018, p. 13.
114 Carrera and Stefan 2018, p. 36.
115 Carrera and Stefan 2018, p. 13.
116 European Ombudsman 2013b.

exclude large margins of appreciation,[117] as well as thoroughness in follow-up procedures.[118] The Ombudsman further suggested that the role of examining the complaints would be entrusted to the Fundamental Rights Officer, who should be resourced accordingly.[119]

Contrary to the minimum safeguards of institutional independence and evidence-based investigation, the Frontex individual complaints procedures is merely an internal administrative procedure. The complaints are received by the Fundamental Rights Officer. She will assess the admissibility of the complaint and register the admissible complaints. This first assessment stage is essentially a judgment on the division of responsibility by the FRO herself, who decides whether a complaint concerns a member state or the agency. In the former case, she forwards the complaints to that member state. Alternatively, she forwards it to the Executive Director. Subsequently, she registers the follow-up measures taken by either the member state or the agency. The Executive Director will further examine the complaint on its merits. The Executive Director is left with considerable discretion to decide on the responsibility of his own staff, since the Regulation does not identify any specific criteria or procedures that need to followed (Article 111). Therefore, it could be argued that the mechanism is independent to the extent that the complaint concerns a member state. However, it is merely an internal system of oversight as far as the allegations against the agency are concerned.[120]

With respect to the appropriate follow-up, the procedure leaves broad discretionary power to the Executive Director. No clear criteria and procedures are identified in the Regulation, which merely stipulates that the mechanism should ensure that the complaints are properly followed-up, without specifying the specific nature of this follow-up.[121] While the Regulation requires that criminal investigations are conducted by the member states as a follow-up to the complaints, the only specific obligation set for the agency is to report on the complaints in the annual report, including 'where possible' the follow-up measures taken.[122]

While other factors such as lack of confidence in the mechanism and its results may also play a role, the low number of submitted complaints raises in itself questions as to the accessibility of the remedy. Carrera and Stefan indicate that only two complaints were registered in 2016, and 13 in 2017,[123]

117 Carrera and Stefan 2018, p. 24.
118 Carrera and Stefan 2018, p. 36.
119 European Ombudsman 2013c.
120 On the independence of the mechanism see also Fernández-Rojo 2017.
121 EBCG Regulation, preambular para. 50.
122 EBCG Regulation, preambular para. 50.
123 Carrera and Stefan 2018, p. 25.

while in 2018 a total of ten complaints was received,[124] a quite low number compared to the indication of incidents shown by NGOs and the agency's own internal serious incidents reports.[125] Among the shortcomings of the mechanism, they note that only signed complaints (not anonymous) are admitted,[126] only by the alleged victim of the violation,[127] which does not allow for a complaint in the context of public interest. Moreover, the complaint needs to be submitted in writing.[128] Finally, the admissibility criteria do not seem to take due regard of the practical difficulties individuals in an irregular situation facing in collecting the necessary evidence, given the overall lack of transparency, and accessing justice; especially in the case that the individual has been subject to return.[129]

It should be further noted that the mechanism concerns the liability of the staff members, i.e. the border guards themselves, rather than examining that of the agency (Art. 72(2) EBCG Regulation). Moreover, it explicitly covers under the definition of 'staff member' only those that work in the agency's headquarters, leaving any complaints against anyone participating in an operation to be addressed by member states.[130]

These shortcomings undermine the capacity of existing administrative bodies to supplement the judicial oversight that must still be made available at the domestic and supranational level. It becomes evident that 'the way in which this mechanism is currently designed is profoundly different from the one indicated (and recommended) by the European Ombudsman'.[131] In the light of these structural shortcomings, the most celebrated perhaps development with respect to the accountability of Frontex fails to meet the existing standards required to qualify it as a non-judicial remedy that can effectively address allegations of human rights violations.

All in all, the foundations have been set in terms of administrative accountability, including the individual complaints mechanism and the FRO. However, these need to be further developed. They need to be vested with supervisory powers, independence and effectiveness guarantees and complemented with a strong external element to achieve true administrative oversight.

---

124 Frontex, Consolidated Annual Activity Report 2018, 12 June 2019, p. 51, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjHy7XJ8PDuAhXF-qQKHad7BfoQFjAAegQIARAC&url=https%3A%2F%2Fwww.europarl.europa.eu%2Fcmsdata%2F185405%2FCAAR%25202018.pdf&usg=AOvVaw2Cx_hrYTZON-N1boU2jSPF8.

125 N. Nau, A. Tillack, *Frontex – Eine EU-Agentur und der Umgang mit den Menschenrechten*, Das Erste, 06 August 2019, https://www.br.de/fernsehen/das-erste/sendungen/report-muenchen/videos-und-manuskripte/frontex-eu-menschenrechtsverletzungen-102.html.

126 Article 5(2) Frontex Rules on the Complaint Mechanism.

127 Article 3 Frontex Rules on the Complaint Mechanism.

128 Article 5(2) Frontex Rules on the Complaint Mechanism.

129 It is telling that only three out of the ten complaints registered in 2018, were declared admissible. Frontex 2019d, p. 51.

130 Articles 4(8), 10(1) Frontex Rules on the Complaint Mechanism.

131 Carrera and Stefan 2018, p. 24.

3.6 Interim Conclusion

An elemental examination of non-legal forms of accountability shows that, despite its promising potential, the existing framework for the non-legal accountability of Frontex cannot secure a sufficient standard of accountability in practice.

Firstly, it can be observed that there is not one consistent framework of accountability or coherent set of accountability standards and mechanisms. The end result is a loose compilation of several fora that cannot be deemed to be complementing each other like the match of multiple pieces of the same puzzle. We can, thus, hardly talk of a system of accountability. They present rather a fragmented picture.[132]

With regard to the separate fragments, the existing mechanism of political accountability of Frontex presents a serious democratic deficit. Although the involvement of the EP has been strengthened since the creation of the agency, this concerns mainly the legislative process. In the operational field, where many important decisions are made, several gaps still remain, which are exemplified among others in the lack of access to the most important documents produced by the agency, such as operational plans and evaluation reports, and in the lack of enforcement power, which results in a weak parliamentary control. Moreover, there are aspects, such as the conclusion of working arrangements with third countries, that fall completely outside parliamentary scrutiny. At the national level, lack of awareness over the activities of Frontex renders control from national parliaments ineffective and practically non-existent.

With respect to social accountability, despite some improvements concerning the availability of documents in the Frontex website, much is kept from the public eye. Most importantly, the right to access to documents is not adequately applied, as a vast amount of requests are partly or wholly denied on the ground of exceptions in the name of public interest. Moreover, the impact of the Consultative Forum as it stands today is fairly limited. All in all, the veil of secrecy covering the specific activities of the agency, in particular its ongoing operations, does not facilitate proper scrutiny by civil society.

Professional accountability is meant as a soft form of accountability felt as pressure from professional peers to apply good practices in ones' line of work. This is understandably not the standard to aspire to concerning human rights protection. Notwithstanding, the participation of Frontex in such fora (e.g. AFIC) and subjection to the scrutiny of its peers is relatively poor.

Finally, the developments with respect to the administrative accountability of the agency, including proactive inputs, such as the FRO, are

132 Gkliati and Rosenfeldt 2018, p. 4.

the most promising. However, these progressive changes that have been implemented have failed to satisfy the minimum standards of accountability. The definition of accountability, given by Bovens and followed in this study (*accountability is a social mechanism, which is designed for bringing an actor before a forum in order to give account for decisions on how governance is being exercised, or in order to answer to charges, and finally suffer consequences in case of misconduct*[133]) involves questioning and scrutiny of the acts and decisions of an actor by a specific forum, which makes accountability 'fundamentally retrospective'[134] and necessarily involving an element of 'justification, judgement, and consequences'.[135] These elements are absent in the Codes of Conduct, the Fundamental Rights Strategy, as well as the other accountability mechanisms introduced with the 2011 amendment of the Frontex Regulation. Evidently, the monitoring of the FRO is a weak method of scrutiny, as the FRO has limited powers and impact upon the work of the agency. The crown jewel of administrative accountability, the individual complaints mechanism, fails to meet international standards of accessibility, institutional independence, and adequate capacity for evidence-based investigation, while it does not provide a suspensive effect in the context of joint expulsions. While the legislature and the agency itself have created a fertile ground for administrative accountability, the latter cannot be achieved as long as the monitoring mechanisms remain primarily internal, ineffective, and lacking enforcement.

The above assessment shows that the available non-legal forms of accountability are insufficient to ensure the accountability of the agency. Neither their combination nor the respective parts can constitute effective non-judicial remedy in the meaning of Article 13 ECHR, while their pre-emptive functionality is not deemed adequate to prevent violations successfully. Therefore, the need for legal accountability in the form of judicial remedies becomes all the more essential.[136]

Moreover, even if the assessment would have had a more positive outcome, it should be kept in mind that mechanisms, such as complaints bodies cannot substitute for criminal and other judicial remedies, especially when fundamental rights are at stake.[137] The legality of acts of the public

133 Bovens, Curtin and Hart 2010, p.: 34; Schedler 1997, p. 17; Haydon 1978, p. 55; Beetham and Lord 1998; Mulgan 2003, p. 8.

134 Bovens, Curtin, and 't Hart, 2010, p.: 38.

135 Bovens, Curtin, and 't Hart, 2010, p.: 38.

136 The terms 'legal remedy' and 'judicial remedy' are used interchangeably as the focus of legal accountability. They are differentiated from 'non-judicial remedies', such as administrative remedies, which, as shown above, may also constitute an effective remedy in the meaning of Article 13 ECHR.

137 Bovens notes that 'it remains an empirical question to what extent these groups and panels already are full accountability mechanisms because as we saw, the possibility of judgment and sanctioning often are lacking. Also, not all of these accountability relations involving clearly demarcated, coherent and authoritative forums that the actor reports to and could debate with.' Bovens 2006, p. 18.

authorities can only be guaranteed by effective access to judicial review.[138] Based on this logic, the CJEU only recognises legal remedies as the appropriate redress for fundamental rights infringements.[139] Other types of monitoring and redress can only be supplementary to judicial remedies.[140]

Non-legal forms have intrinsically their own deficiencies. The limitations of democratic accountability, for instance, in conducting a systematic and effective investigation, led by political agendas and conducted by non-expert politicians, have been noted by several commentators.[141] Thus, even a perfect system of non-judicial remedies could not replace the need for legal accountability due to the inherently different qualities of each system.

Non-legal accountability, on the one hand, is designed to primarily act pre-emptively and streamline the exercise of monitoring and control. This aims mainly to deterring the violation through applying soft pressure. The primary focus of legal accountability, on the other hand, is to remedy a violation that has taken place and discourage future violations. It does so, by acting retroactively and applying binding measures with stricter, concrete and enforceable consequences. Therefore, as both systems are valuable, one could never replace the other. Even a rigorous system of non-judicial remedies, should be supplemented with a system of effective legal accountability, which is the focus of the following section.

3.7 Legal accountability: From individualist to systemic accountability

Legal accountability, defined as the actor's subjection to substantive legal control,[142] is the last perspective from which the accountability of Frontex can be evaluated, and the main focus of the present study. Before we enter into the evaluation of the system of judicial remedies that constitute the base of the legal accountability of Frontex in Chapter VIII it is essential to question the form that this substantive legal control takes, or in other words, our shared understanding of legal accountability.

This section argues that the proper understanding of accountability for issues concerning EBCG operations should be that of *systemic accountability*, which I define as *accountability aiming at dealing with the systemic issues, which*

138 Peers and Costa 2012, p. 90; *Inuit Tapiriit Kanatami and Others v. Commission*; *Microban v. Commission*.

139 Article 47 Charter; CJEUre 17 January 2013, C-23/12, ECLI:EU:C:2013:24 *(Zakaria)*, par. 40.

140 Carrera and Stefan 2018, p. 27, citing Principle 33, para 4, United National General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988.

141 Mulgan 2003 Mulgan 2003, p.p.: 60, 61; T. Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies', *Administration and Society* 2011, 43(4).

142 Bovens, Curtin, and 't Hart 2010, p.p.: 1-5.

underlie and cause or allow for consistent violations, via focusing on structural solutions.[143]

Systemic accountability is proposed as the preferred alternative to our traditional understanding of legal accountability as effective legal protection, which is named here *individualist accountability* and will be discussed in more detail, along with its limitations, in the following section. This choice is justified through legal theory using arguments based on justice and the rule of law inspired by liberal political philosophy. Finally, it is shown how *systemic accountability* complements the Nexus theory, as it fills the gaps left by the latter.

3.8 The traditional approach to accountability and its limitations

When assessing the legal framework on accountability regarding human rights violations, we are used to doing so on the basis of access to justice and effective legal protection, especially looking into the availability of an effective legal remedy. I refer to this approach as *individualist accountability*, i.e. *the traditional approach of answering for human rights violations on the level of the individual applicant with measures that redress the effects of the violation on him/her alone.*

This is the approach on which justiciability is based, especially with respect to civil and political rights. Looking into this approach, we can identify several features of *individualist accountability*. First of all, it puts emphasis on the specific victim(s) of the violation, the individual applicant or group of applicants that bring a case forward, while it is less interested in society as a whole. Second, it is targeted towards a particular incident that caused the harm in question. Third, it is largely designed to address the separate individual responsibilities of distinct actors. Fourth, it aims at a short-term effect that will take place upon the issuing of the judgment. Fifth, it is responsive in nature in the sense that it responds to the call of the victim that needs to take the initiative. Finally, it is a system of redress rather than a system of consequences more broadly, focusing on compensating the individual victim for the sustained damage.

143 It is important to make a terminological distinction, regarding the use of the terms 'systemic' and 'systematic'. According to Oxford dictionary, 'systematic' refers to something done or acting according to a fixed plan or system, and 'systemic' to something relating to a system, especially as opposed to a particular part. Accordingly, while there is reference in this study to 'systematic violations', the proposed accountability approach is named 'systemic'. Similarly, 'individualist accountability'should not be confused with 'individual responsibility'. 'Individual responsibility', as a well-established principle of international law, refers to the responsibility of each particular actor, whether this is a state or international organisation. It is contrasted in this study with 'collective responsibility'. 'Individualist accountability' does not refer to the accountability of an individual actor. It is rather accountability that concerns or benefits an individual rather than society as a whole. This is why 'individualist' is preferred to 'individual' to describe the traditional model of accountability. It is contrasted with 'systemic accountability'.

The type of redress for the individual applicant described above is certainly an essential part of accountability, and this approach may be successful in bringing justice to the individual applicant. Nevertheless, different additional distinctive features are necessary to address problems that are systemic in nature and affect a large number of people. This is especially so when multiple actors are responsible for the harmful result, engaging the *problem of many hands*.

If we were to apply individualist accountability in order to address violations that occurred during an EBCG operation, for instance, a push back, the route to be followed would be for the victim of the violation to come forward and bring a case against the host state before national courts. This would be the preferred course of action for the victim even though Frontex itself could bear responsibility for the violation as well. In particular, if damages were not awarded at the national level, the individual could bring the case before the ECtHR. Provided that the applicant would win the case, they would be awarded damages by the host member state.

In this case, even though the particular individual could benefit from effective legal protection (individualist accountability), the responsibility of the agency would never be examined. This is problematic for a number of reasons, that will be examined in the following section. Moreover, provided that the push back was not an isolated incident, but a repetitive violation, the individualist accountability approach has limited potential to address the systemic issues behind the violations and prevent similar violations in the future, as in an environment of integrated border management the influence of a single state is fairly limited.

The following section explains why the approach of individualist accountability can be of limited value and give reasons in favour of *systemic accountability*.

3.9 A Cue from Rawls' Theory of Justice and Court Practice

The term *systemic accountability* takes inspiration from John Rawls's theory of justice and the practice of the ECtHR. In this section, I use an argument in support of *systemic accountability* emanating from the political philosophy of John Rawls, as a representative example of the dominant liberal political theory. In particular, I use his theory of justice as fairness as a normative frame of reference.

Rawls speaks of justice in the context of his ideal constitutionalism, where responsibility for harm and restoring injustice is derived from our participation in a community under a commonly agreed-upon constitution. The obligations of responsibility, in this case, are due towards the community that exists under that constitution and take the form of legal liability implemented through a particular set of ideal just institutions.

The framework of the Rawlsian theory of justice, and in particular his theory of 'justice as fairness', are understood to be at the basis of the political, administrative and judicial structure of modern liberal democracies,

and as such has particular relevance for the present research.[144] According to Rawls, a particular approach to justice, i.e. justice as fairness, should constitute the foundation of the basic structure of society. This theory is based, according to Rawls, on the common understanding of our uncontroversial and intuitive assumptions about justice. He uses the thought experiment of 'the original position' to show that if all people were free from all awareness of the elements that make them individuals and separate them from the rest of the society (personal interests, capabilities, social position etc.), having, however, a basic understanding of a worth-living human life, they would reach an agreement on what is justice. Deciding as (theoretically) free and equal beings, based on rationality and self-interest, in this experiment, people would construct, according to Rawls, two Principles of Justice.[145]

The first principle of justice (liberty principle) reads:

'*Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar system of liberties for all'.*

The second principle of justice (difference principle) reads:

'*Social and economic inequalities are to be arranged so that they are both:*

(a) *To the greatest benefit of the least advantaged, consistent with the just savings principle, and*

(b) *Attached to the offices and positions open to all under conditions of fair equality of opportunity.*'[146]

Rawls's liberalist ideas, especially concerning the application of the two principles in relation to one another, and the higher position he attributes to civil and political rights vis-à-vis social and economic rights, are highly controversial. For the purpose of this study, it is not necessary to tackle

144 Rawls' theory of justice has attracted criticism that other philosophical and sociological theories attempt to address, such as political cosmopolitanism promoting global distributive justice and Young's social connection model of responsibility focusing on structural injustice. Acknowledging the limitations of liberal justice theories as well as the significant contributions of social justice models and the cosmopolitan perspectives on global justice, I limit here my analysis to Rawls' theory of 'justice as fairness', and consider the examination of alternative justice theories as a rich direction for further research. See for instance, I. M. Young, *Responsibility for Justice*, Oxford Scholarship Online, 2011; G. Brock, *Global Justice: A Cosmopolitan Account*, Oxford: Oxford University Press, 2009; C. Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 1999.

145 N. J. de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy', *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013, p.p.: 151-153.

146 Rawls himself has modified these principles. In Political Liberalism, they read as follows: 'Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme, the equal basic liberties, and only those liberties, are to be guaranteed their fair value. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.' J. Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993.

such questions. Limiting myself to the subject at hand, I only deal with the application of the first principle of justice, which is connected to civil rights, such as the ones that are under consideration in the case of migrants in an irregular situation: 'Each person has an equal right to a fully adequate scheme of equal basic liberties *compatible with a similar system of liberties for all*' (emphasis added).

On the basis of the liberty principle, each person's individual rights should be 'compatible with a similar system of liberties for all'. In other words, any particular liberty should fit into a 'theory of people's interests' and should be distributed in the spirit of a 'theory of equal concern for people's interests'.[147] Rawls meant this to be a critique against the utilitarian account of justice. According to Mill and other classic proponents of utilitarianism,[148] the ultimate purpose is the maximisation of net satisfaction, while in his liberty principle, Rawls imposes restrictions on how satisfaction can be achieved. In this sense, claims or interests that cannot fit within a theory of equal concern for the interests of the others are inadmissible.[149]

This approach indicates Rawls's position that the interests of the one are inextricably intertwined to the interests of the many, and a just society can only be achieved through a 'system of liberties for all'. It is this basic principle that forms the premise of a theory of *systemic accountability*.

In particular, *systemic accountability* aims to achieve a 'similar system of liberties for all'. It does not stop at guaranteeing a person's equal rights to a fully adequate scheme of equal basic liberties, as would the case be with individualist accountability. Instead, it goes further to produce structural solutions to systemic problems in society, which can bring broader societal changes. In other words, it aims to produce a similar system of liberties for all.

This perception of justice is also observed in the jurisprudence of the ECtHR. The first principle of justice translates in practice in the rulings of the ECtHR, in particular in the means the Court employs for the reparation of a violation: just satisfaction, individual and general measures.[150] Rawls speaks of a scheme of equal basic liberties for each person. These liberties can be ensured for the individual with the just satisfaction or individual measures of the ECtHR, that can take the form of measures concerning resi-

147 W. Kymlicka, *Contemporary Political Philosophy, An Introduction*, Second Edition, Oxford: Oxford University Press, 2002, p. 139.

148 Kymlicka 2002, p. 42.

149 Kymlicka 2002, p.p.: 42, 139.

150 In Scozzari and Giunta v. Italy, the Court read in Article 46 of the Convention the obligation of states to take individual and general measures to abide by the Court's judgment. ECtHR 13 July 2000, App. No. 39221/98, *(Scozzari and Giunta v Italy), par.* 249.

dence status, or reopening of judicial proceedings.[151] These measures are the manifestation of *individualist accountability*.

The second part of the first principle, however, 'compatible with a similar system of liberties for all' cannot be adequately satisfied with *individualist accountability*. It is in cases, where the Court finds consistent and systemic violations, that it orders general measures, in order to deal with the structural problems and prevent further violations. These general measures are going to be discussed further in the context of *systemic accountability* in Chapter VIII. Without the court ever referring to it, an idea of *systemic accountability* as it is conceptualised here, has found its way intuitively into its case law.

As a matter of fact, seeing the broader picture, Koskenniemi notes that '[f]ar from being merely an academic aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.'[152]

Courts around the world, adopt similar approaches, inspired by a generally acceptable perception of justice. For instance, the Colombian Constitutional Court has developed the concept of 'unconstitutional state of affairs'. This describes a situation, where systematic and widespread violations of several constitutional rights that affect a significant number of people have occurred, while the violations of these rights cannot be attributed to only one state authority, but are due to structural deficiencies. The consequence of such a finding would be the request by the Court of the adoption of measures that would ensure the protection not only of those who submitted the claim, but of all individuals in the same circumstances. The Court has applied the concept of unconstitutional state of affairs, inter alia, in the case of internally displaced persons and with respect to individuals held in inhumane detention conditions.[153]

In light of the above, we can argue that *systemic accountability* applied in courts is necessary to achieve justice based on a system of liberties for all.

In other words, *individualist accountability* is no longer adequate to achieve justice when the (societal/human rights) problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner, since a systemic response to violations would lead to

151 The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights has developed an inventory of individual measures taken by the ECHR bodies. Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), Committee of Ministers of the Council of Europe, 2006, www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/H-Exec(2006)2_IM_960_en.doc.

152 Koskenniemi, *Study on the Function and Scope of the lex specialis rule and the question of 'self-contained regimes'*, 2004, (ILC(LVI)/SG/FIL/CRD.1 and Add 1), par. 29.

153 M. Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press 2008, p.p.: 148, 149.

a more effective achievement of the first principle of justice, ensuring the same level of satisfaction of these liberties for all members of society. In such cases, a *systemic accountability* approach is needed.

Applying the approach of *systemic accountability* to the case of push back occurring during Frontex-coordinated joint operations, although the affected individuals could have had their situation remedied by getting compensation from a claim brought against the host member state alone, thus achieving *individualist accountability* and the right of the person to a 'fully adequate scheme of equal basic liberties', the promise of *systemic accountability* would remain unfulfilled if all the public authority actors involved, including Frontex, would not bear their fair share of responsibility. It is only thus that structural changes and 'a similar system of liberties for all' can be achieved.

3.10 Systemic Accountability as Limitation of Coercive Power

Legal accountability in EBCG operations apart from justice and substantive human rights challenges also raises issues with respect to the rule of law. I now study this problem through the lens of the rule of law, arguing in favour of *systemic accountability*.[154]

The origins of the rule of law in western philosophy are to be found among the Greek philosophers, Aristotle, Plato, and the Athenian democrats. However, the concept developed at large into its modern form through the philosophical tradition, which was developed during the times of the Enlightenment and liberalism. In light of the early liberal thought, the rule of law is seen as effective limitation to state authority in defence of individual liberties. Emanating from the idea of reason, as opposed to the dominance of human desires and the imposition of the law of the fittest, and the idea of equality before the law, the purpose of the principle of the rule of law is to achieve coherence and avoid arbitrariness in the legal system.[155] It is considered among the foundations of today's liberal-democratic order.

Starting as a 'political ideal',[156] it evolved also through the jurisprudence of the CJEU[157] into a constitutional principle of EU law. The Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[158] Dworkin sees the rule of law as the element that binds together the 'seamless web' of the legal order.[159]

---

154 The connection between accountability and the rule of law has also been examined earlier under section 2.2.

155 Further on the conceptualisation of the rule of law in EU migration and asylum policy, Den Hertog 2014, p.p.: 40-85.

156 Den Hertog 2014, p. 40.

157 *Les Verts v Parliament*, par. 23.

158 Article 2 TEU.

159 R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1978.

Different schools of thought attach different interpretations to the concept of the rule of law. Divided into two large categories, we can identify the thin version of the rule of law, which sees the rule of law as formal legality, meaning simply that 'the government should act through laws', and the thick version, where fundamental rights (or at least individual liberties) form part and parcel of the principle of the rule of law.[160]

Respect for fundamental rights and refugee law, as norms or pieces of legislation that effectively limit state authority, is an essential element of the rule of law, which cannot be contested even by proponents of the thin version theories and also fits in the positivist philosophical tradition.

Fundamental rights, including refugee protection, as constitutional principles also enshrined in international treaties, stand high up in the Kelsenian pyramid of norms,[161] while the EU Charter is, since 2009, the key instrument, against which the compliance of the actions of all the institutions, organs and agencies of the EU is to be measured. Also in a thin interpretation, the rule of law has a strong procedural character and requires that a complete system of remedies needs to be put in place with a view of achieving effective judicial protection for the individual.

Den Hertog has shown, through a thorough analysis of the Treaties and the case law of the CJEU, that in the EU, the concept of the rule of law has developed from a thin to a thick version, though not to the extent that the most expansive thick version theories would have hoped for. With respect to the understanding of the rule of law within the context of EU law, Den Hertog adopts the following definition: the rule of law can be understood as 'effective legal remedies to ensure the protection of human rights'. In EU law, fundamental rights were not explicitly part of the rule of law, but the two are 'inextricably linked'.[162]

Key components of the rule of law are also legal certainty and the honouring of legitimate expectations of individuals from public authority. Accountability and clear attribution of responsibility are necessary to achieve the above. Lack of accountability leaves a gap on the rule of law, as shown in the work of Montesquieu[163] and Dworkin,[164] in which the role of the judiciary is central, as an important safeguard for the rights of the individual against unlawful actions of public authority.

The rule of law is not merely concerned, though, with the observance of legal principles, such as human rights for each particular individual (individualist accountability). It is a concept that exists beyond the individual victim and refers to the legal order as such. The observation of the rule of law should characterise the EU legal order, irrespective of the fact that a

160 See further Den Hertog 2014, p.p.: 44-46.
161 H. Kelsen, *Pure Theory of Law*, Reine Rechtslehre 1934.
162 Den Hertog 2014, p. 55.
163 C. Montesquieu, The Spirit of Laws (Το Πνεύμα των Νόμων), P. Kondylis and K. Papagiorgis (translation), Gnosi editions, Athens, 2006.
164 Dworkin 1978.

human rights violation committed jointly by Frontex and a member state can be remedied solely by the member state without the involvement of the EU. Therefore, the underlying focus is that of the system as a whole, while all actors responsible for a violation need to be held accountable, in view of the rule of law.

In particular, Frontex, when it takes part in a violation, should also take part in remedying the situation if the rule of law is to be preserved within the EU legal order. Leaving the agency unaccountable, even though the violation could be remedied by the member state, would create a gap with respect to the rule of law at the EU level.

Such lack of accountability and the accompanying consequences would not allow for prevention of further wrongdoing by Frontex, while it would also affect legal certainly and the legitimate expectations that individuals could have regarding the conduct of the agency.

Use of force is an inherent component of EBCG border operations. Officers participating in operations are allowed to use force, including service weapons and ammunition (Article 55). Such use of force is legitimised as the exercise of political power. However, in a democratic society that operates on the basis of the rule of law, coercion should be used only as last resort[165] and within certain limits, among which respect for human rights. The accountability of those wielding power is the safeguard, put in place to ensure the enforcement of human rights, as limits to power. In this classic rule of law approach, which fits within both the thick and the thin version of the principle, it can be concluded that if the EU is to abide by the rule of law, a systemic approach on legal accountability, covering all actors involved in a violation, is necessary in order to protect individuals against the misuse of coercive powers. Reviewing EBCG operations, in particular, failing to attribute responsibility to all actors involved in the commission of a violation, including the agency, raises challenges with respect to adherence to the rule of law.

3.11 The identifying features of systemic accountability and its practical implementations

In light of the above, it has been argued that *individualist accountability* can lead to the desired outcome of remedying a violation for a particular individual, and can perhaps be reached through less complex, already established judicial avenues. These do not require original academic literature or newly introduced legal arguments that do not guarantee a positive outcome in courts. Nevertheless, other considerations of equal weight allow us to

165 Proportionality plays an important role. Force should be used as last resort especially in the case of extended use of force judged on the basis of the numbers of the affected individuals (e.g. detainees in Greece), but also on the basis of the seriousness of the stakes (possibility of infringement of human rights – even some of the most basic ones (life, torture)).

attach certain value to an approach of *systemic accountability*, seen as a form of accountability that addresses a structural problem. Instances of repetitive violations of a systematic nature that affect large numbers of people,[166] especially when multiple actors are responsible for the harmful result, require an approach with certain distinctive features that are different from those of *individualist accountability*.

The present thesis does not attempt to argue that systemic accountability is a completely new element that needs to be introduced in the legal framework for the first time. Elements of this approach are, of course, found in the way that courts adjudicate. Examples of that are found at the general measures of the ECtHR,[167] or the regime for reparations for victims of gross human rights violations.[168] Moreover, arguing for an approach of *systemic accountability* does not in any way negate the need for *individualist accountability* in the meaning of effective legal protection for the particular individual. In fact, *systemic accountability* encompasses *individualist accountability* and expands further to also address the structural problem behind the violation. The above analysis, based on liberal political theory, shows that the prioritisation of this model of accountability is not a radical proposition outside the existing paradigm in the field. It should, however, be coherently conseptualised and understood, and its features should be distinguished for it to be properly applied.

This section aims to present the particular features of *systemic accountability* with more clarity, along with the practical applications of this model.

We can distinguish the following elements of *systemic accountability*. Such an approach should firstly, be able to act to the benefit of a large number of people, present and future members of a loosely distinct group. Secondly, it should be meant to address not merely a particular violation, but the underlying systemic issues. Thirdly, its effects should be long-term. Fourthly, it should aim to hold accountable all actors responsible for the violation in a manner that reflects the nature of their responsibility (for example, joint responsibility). Fifthly, rather than depending on the initiative of the victim 2005 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human*

166 Such repetitive violations of individual rights that is of a systematic nature that affect large numbers of people can be the result of a structural deficiency, for instance of the asylum system of a member state (e.g. ECtHR, MSS v Belgium and Greece), of established policy and common practice (e.g. ECtHR, Hirsi Jamaa v Italy) or of the legal framework that results in violations by design (CJEU, Case C-808/18, Judgment of the Court (Grand Chamber) of 17 December 2020, European Commission v Hungary). See M. Gkliati, *The next phase of the European Border and Coast Guard: Responsibility for returns and pushbacks in Hungary and Greece*, in 'Migration and EU Borders: Foundations, Policy Change, and Administrative Governance', Andrea Ott, Lilian Tsourdi and Zvezda Vankova (eds), European Papers (forthcoming).

167 Chapter IX, section 2.4.

168 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005.

Rights Law and Serious Violations of International Humanitarian Law (responsive nature), there is a need for a proactive approach to attain accountability in its own right. Sixthly, it should lead to consequences in the case of misconduct. Finally, its aims should go beyond the redress of the violation for the given applicant, which is only part of this approach, and aim to achieve justice as a system of liberties for all and safeguard the rule of law.

In practice, *systemic accountability* should aim at examining the responsibility of all actors involved in a violation and ensuring that they are all answerable before courts. In the case of EBCG operations, although individuals are able to get compensation via a lawsuit against the host state, the responsibility of the other actors, especially Frontex should not be ignored. This relates to the responsibility of the multiple actors contributing to a violation. As will be shown in the following chapters, the model of *systemic accountability* would support the dual or multiple attribution of a wrongful act to more that one actors to generate their joint responsibility for a violation that is directly attributed to them. It would also highlight the need for other forms of shared responsibility when the contribution of an actor is indirect (e.g. aiding and assisting in a violation). In essense, it would support solutions of collective responsibility rather than linear relationships of individual responsibility.

Moreover, it provides fertile ground for strategic litigation or impact litigation, understood as putting forward a case that, apart from the interests of the individual applicant, also aims at creating broader changes in society. This can also move beyond legal standing as a requirement for accessing the court, and include public interest litigation to raise such rights-based claims that do not only affect isolated individuals but are of greater public concern. Undoubtedly, such impact litigation would not be limited to a remedying or responsive function (depending on the initiative of the victim), but would also be of a proactive and preemptive nature aiming at preventing similar future violations, and protecting not only a specific applicant, but generating effects also for other present and future victims. Such litigation would also aim at generating consequences for the actors responsible for the violation and long-term effects, capable of leading to structural changes. For instance, a successful action for failure to act could lead to the suspension of operations in case of systemic violations or the appropriate application of the agency's monitoring role in order to abide by its positive obligations.

Finally, as systemic problems require structural solutions, *systemic accou*ntability would have been incomplete without solutions outside courts. Even though the present study focuses primarily on legal accountability, structural solutions can only be achieved through a holistic approach that includes the non-judicial forms of accountability. Justice based on a system of liberties for all and the safeguarding of the rule of law needs to be founded in a system of effective checks and balances. Thus, systemic accountability should focus on developing an effective system of accountability mechanisms. The above assessment in section 3 has shown that this is missing in the case of Frontex. What we observe is rather a loose compi-

lation of accountability fora and mechanisms, which due to their gaps, cannot secure a sufficient standard of accountability in practice. Therefore, strengthening administrative, political, and social accountability, through enhancing the powers of the FRO and the CF, reinforcing parliamentary control over Frontex activities, and increasing transparency and external monitoring are necessary steps in the process of *systemic accountability*. These should work together in a complementary manner, so that they constitute together with the judicial avenues for accountability a coherent accountability framework that does not only remedy a given violation, but is able to lead to systemic solutions. Thus, in order to achieve *systemic accountability*, often political decisiveness, administrative changes, legislative amendments and changes in institutional practice and culture will be needed.

4 Conclusion

This chapter discusses accountability *as a social mechanism for answerability, i.e.* a *mechanism, which is designed for bringing an actor before a forum in order to give account for decisions on how governance is being exercised, or in order to answer to charges, and finally suffer consequences in case of misconduct*.

It further looks into the different types of non-legal accountability, identified as democratic or political, social, professional, and administrative. It applies those to Frontex in an effort to assess the effectiveness of the existing normative framework to hold the agency accountable. An elemental examination of these non-legal forms of accountability leads to the conclusion that the existing framework for non-legal accountability does not secure a sufficient measure of accountability. Neither their combination nor the separate fragments can constitute an effective non-judicial remedy in the meaning of Article 13 ECHR, while their pre-emptive functionality is not deemed adequate to prevent violations successfully. Therefore, legal accountability becomes all the more important.

Examining the normative framework within which the legal accountability of Frontex is found, this chapter identifies *individualist accountability*, understood as remedying the violation for a single individual, as the traditional and dominant paradigm of accountability and finds it inadequate for dealing with complex cooperative endeavours such as the EBCG. In this regard, it proposes the replacement of the dominant mono-actor paradigm on accountability, that allows for blame-shifting and accountability gaps, with the more holistic model of *systemic accountability*, defined as *accountability aiming at dealing with the systemic issues that underlie and cause or allow for consistent violations via focusing on structural solutions.*

It has been argued that such an approach is supported by judicial precedent while it would satisfy the requirements for the construction of a just society as understood by Rawls and the principle of the rule of law. *Systemic accountability* translates in concrete cases in starting legal proceed-

ings against all actors involved in a violation, including Frontex. In other words, although individuals can in case of a violation in the context of a joint operation, get the compensation they are entitled to by bringing a case against the host member state, the responsibility of the other actors, especially Frontex should not be ignored. Furthermore, such structural solutions should be streamlined through all different forms of accountability, including external monitoring, an independent individual complaints procedure, a clear legal basis, and transparency. It should finally, focus on strategic litigation, aiming at creating broader changes in society that address the structural deficiencies of the system.

This chapter follows a supranationalist approach to accountability, with the EU and its institutions as its focal point, as opposed an intergovernmentalist or regulatory regime approach that focus on the accountability of member states. From this point of view, *systemic accountability* is the natural choice, as it aims at systemic changes. Vice versa, a *systemic accountability* perspective justifies a supranationalist approach. The EU and its organs, belonging in the system's autonomous core, should be held accountable directly and in their own right.

Finally, the model of *systemic accountability* is complementary to the Nexus theory, as it fills the gaps left by the latter. While the Nexus theory puts forward joint and several liability as the interpretation of joint responsibility and thus solves the *problem of many hands*, it nevertheless, leaves an accountability gap, if applied in EBCG operations, as it fails to hold Frontex to account. *Systemic accountability* fills this gap, as it requires all possible responsible actors to be brought before a judicial forum, focusing on the accountability of the perpetrators rather than merely the compensation of the victim. This completes the picture, as it suggests that reparation can be claimed *from any* of the actors responsible (Nexus theory), but should come *from all* possible (*systemic accountability*).

The Nexus theory and *systemic accountability* need to be substantiated in practice through the examination of the normative framework on responsibility, as well as the legal remedies and judicial review procedures. The following chapters constitute the normative application of the framework developed here. Chapters VI and VII deal with the legal framework on responsibility and the application of the Nexus theory in EBCG operations, while Chapter VIII is dedicated to examining how *systemic accountability* translates in terms of legal remedies.

Part III

Normative: Pluralism in Human Rights Protection

6 A Normative Framework on Responsibility

1 Introduction

Having achieved an understanding of responsibility that best fits occasions where the *problem of many hands* appears, namely, responsibility as nexus, we need to examine how this could be translated in the legal framework. Notably, this examination should premise from the concept of shared or joint responsibility, the legal nature of which is studied in this chapter. In the previous chapter, preliminary arguments were made regarding the responsibility of Frontex, in order to counter the claims of irresponsibility and establish whether is it in the first place capable of carrying responsibility. No matter how convincing these arguments are, however, in order for the responsibility to crystalise as a matter of law, issues of attribution and legal personality need to be discussed. Therefore, the appropriate legal framework on responsibility is analysed in this chapter to provide answers to some key questions.

What is the appropriate legal framework? What are the elements of establishing responsibility for an internationally wrongful act? Is Frontex a subject of international law? How can wrongful conduct be attributed to it?

These are the questions that need to be tackled before proceeding in the following chapter to the assessment of the responsibility of Frontex for misconduct during its operations.

2 A normative framework found in the interaction of international and EU law

To start answering the research questions, we need to acknowledge that the liability of Frontex, as an EU agency, is dealt with first and foremost as a matter of EU law, as discussed further in Chapter VIII. In this section, however, I argue that the answer to the question of the legal responsibility of Frontex should be provided in a pluralist environment through the interaction of international and EU law. The interaction of these two legal systems can provide accuracy, clarity and legal certainty to the question of the responsibility within EBCG operations.

International law offers a rich case law for dealing with the international responsibility of states and international organisations. The principles established by international courts are gradually being codified in what can constitute a framework for dealing with responsibility under international

law. In this process, the International Law Commission (ILC) adopted in 2001 the Articles on the Responsibility of States (ARS).[1] When the ARS were almost complete, the UN General Assembly recommended that the ILC[2] engages with the codification of the law on the international responsibility of international organisations.[3]

ILC completed its work in 2011, following the eight reports of General Rapporteur Giorgio Gaja, producing the Draft Articles on the Responsibility of International Organisations (ARIO).[4] These Articles govern the rules under which an international organisation incurs responsibility for breach of its international obligations. They do not contain primary rules, establishing when an organisation is bound by an international obligation, but mainly secondary rules, setting out the rules for dealing with the breach. The ARIO are accompanied by a Commentary issued by the ILC and following judicial precedent, treaties and doctrine, which Commentary is an official source of its interpretation.[5]

Even though the idea of the interplay between international and EU law, does not bring about radical changes in our understanding of the function of the law and the relationships between different legal systems, certain counter-arguments may be envisaged that reject the use of the ILC Articles for the responsibility of Frontex.

I deal below with the three most representative and critical counter-arguments to its application on a EBCG related violations: a) Frontex is not an international organisation, b) violations by Frontex are a matter of EU, not international law, c) the ILC Articles are not binding law.

1 International Law Commission Responsibility of States for Internationally Wrongful Acts 2001, Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, Yearbook of the International Law Commission, 2001, vol. II (Part Two).

2 The International Law Commission is a subsidiary organ to the UN General Assembly, established in 1947 with the mandate to progressively develop and codify international law. Statute of the International Law Commission in United Nations General Assembly Resolution 176/II, 21 November 1947.

3 United Nations General Assembly, Resolution 56/82 of 12 December 2001. This mandate includes 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet sufficiently developed in the practice of State' and 'the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. Article 15 International Law Commission Statute.

4 Draft articles on responsibility of international organisations, with commentaries. Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011 (A/66/10and Add.1).

5 Article 20 International Law Commission Statute.

2.1 Responsibility of Frontex or the Union?

A question of accuracy and precision that should be tackled is whether we should be referring to the responsibility of Frontex or the European Union (EU). I have been referring so far to the responsibility of the agency, but is it, in fact, the responsibility of the Union that would be engaged in case of violations during EBCG operations? As understood in international law, and the work of the ILC in particular, responsibility is reserved for entities with international legal personality, i.e. the capacity to bear rights and duties under international law. Such are states or international organisations. As Frontex is clearly not a state, this raises the following questions: a) is Frontex an international organisation, b) is the EU an international organisation, and c) should we refer to Frontex or the EU when talking about violations during EBCG operations?

Article 56(1) EBCG Regulation stipulates that Frontex has legal personality. However, this, does not refer to an international legal personality, but merely theagency's capacityy to bear rights and duties under EU law. Thus, for the answer, we have to turn to international law.

Defining an 'international organisation' is one of the most fundamental questions in international law

and yet it has proven impossible to agree in one single definition. Rarely, an international organisation is identified as such in its constituent document. Such an exceptional case is the Southern African Development Community (SADC).[6] More commonly, international organisations are recognised on the basis of certain common characteristics they share.[7] However, these common characteristics do not create an outcome written in stone. The founders of such organisations are not driven by the purpose of creating an international organisation as such, but by functional and teleological considerations. These entities are a means to an end and are simply bestowed with such powers and mandates that allow them to fulfil that end. The common characteristics are more the result of this effort than they are intentional. In other words, these may be shared features, but are not establishing or constitutive features, in the sense that they have to be present if an organisation is to be considered subject of international law. As observed by Klabbers, 'Usually, those organisations will have a number of characteristics in common, although, in conformity with the fact that their founding fathers are relatively free to establish whatever they wish, those characteristics are not more than characteristics. The fact that they do not always hold true does not, as such, deny their value in general'.[8]

6 H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within Diversity*, Leiden: Brill Academic Publishers 2011, p. 36.

7 Klabbers 2009, p.p.: 6, 7; Schermers and Blokker 2011, p. 36.

8 Klabbers 2009, p. 7.

As a rough attempt of a definition on the basis of these characteristics, as they are usually identified in literature,[9] international organisations are entities created by two or more states by means of a treaty governed by international law, and which have at least one organ with a distinct will of its own.

a) *created by two or more states:* Although the creation by two or more states is more common, an international organisation may be created even without the explicit decision of government representatives.[10] Moreover, other international organisations or bodies can also be founding members of international organisations. For instance, the European Communities was a founding member of the World Trade Organisation, while the Joint Vienna Institute was established exclusively by other international organisations. Vice versa, not all entities created by states, constitute international organisations. Such a creation may be the bearer of legal personality only under domestic or regional legal systems. Also, at first sight, an entity may look like an international organisation, but be, in fact, merely an organ of an international organisation. Such is the case of the European Court of Human Rights that is not an international organisation in its own right, but an organ of the Council of Europe.[11] There are authors, however, that suggest that organs with decision-making powers are in fact international organisations in sheep's clothing.[12]
b) *created by means of a treaty governed by international law:* A treaty is defined in the Vienna Convention on the Law of the Treaties as a written agreement, governed by international law.[13] In some cases, international organisations are created by informal or other types of agreement or by a legal act of the founding international organisation. Furthermore, there is significant uncertainty as to the legal nature of the constituent documents of several bodies that creates further uncertainty as to their official status as international organisations (for example Organisation for Security and Co-operation in Europe (OSCE)).[14] In any case, the existence of an international agreement is considered by the UN as the main distinguishing element between an international organisation and an NGO.[15]

9 Klabbers 2009, p.p.: 6-12; Schermers and Blokker 2011, p. 36.
10 Schermers and Blokker 2011, p. 38.
11 Klabbers 2009, p.p.: 7, 8; Schermers and Blokker 2011, p.p.: 38, 39.
12 Klabbers 2009, p. 9, fn 31 referring to D. Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine' in A. Barav et al. (eds.), *Scritti in onore di Giuseppe Federico Mancini, Volume II*, 1998, p.p.: 227-256.
13 Article 2(1)(a), Vienna Convention on the Law of the Treaties.
14 Klabbers 2009, p.p.: 7, 8; Schermers and Blokker 2011, p.p.: 37, 46, 47.
15 United Nations Economic and Social Council Resolution 1996/31 of 25 July 1996, Consultative relationship between the United Nations and non-governmental organisations.

c) *with a distinct will:* An international organisation must have at least one organ with its own will that is distinct from that of its founders. This element signifies the autonomy of the organisation that allows it to have legal personality and distinguishes it from treaty organs. Usually, an international organisation is endowed with legal personality, i.e. the capacity to bear rights and obligations under the law. Exceptionally, also due to realpolitik considerations, not all entities formally recognised as international organisations possess this characteristic, while even organs of international organisations often enjoy themselves a degree of autonomy and independence.[16]

It becomes obvious that we cannot base an answer on whether Frontex is an international organisation, solely on the above open-ended and versatile features. The ARIO offer a less demanding definition for the purposes of that document[17]:

> *"International organisation" means an organisation established by a treaty or other instrument governed by international law, and possessing its own international legal personality.*

Based on the aforementioned attempts for a definition, or at least for defining characteristics, authors contest the fact that Frontex constitutes an international organisation,[18] arguing that Frontex does not possess international personality, and thus, cannot be the bearer of responsibility for the commission of an internationally wrongful act. It is only the EU, as an international organisation that can be a subject of international law.

However, it has also been reasonably suggested that Frontex shares the characteristics of an international organisation, namely it is established under international law and on the basis of a treaty governed by international law, is set up by states or other international organisations, and enjoys certain operational and budgetary autonomy towards its creators, and it has been endowed with legal personality under EU law and enjoys the most extensive legal capacity accorded to legal persons under the laws of the member states. This includes being party to legal proceedings.[19] Furthermore, the agency incurs contractual and non-contractual liability,[20] and has extended external relations power, as it has, for instance, concluded headquarters agreements with Poland, under which Frontex is treated as

16 Klabbers 2009, p.p.: 9, 10; Schermers and Blokker 2011, p.p.: 40, 41, 44, 45.
17 Article 2(a) ARIO.
18 Mungianu 2016, p. 35; Fink 2017, p. 40.
19 Article 15(1) Frontex Regulation; Majcher 2015, pp.: 48-52.
20 Article 69 EBCG Regulation; The first actions against Frontex with respect to its contractual liability have been brought before the CJEU, e.g. CJEU 17 May 2017, T-583/16, *(PG v Frontex*); CJEU 22 April 2015, T-554/10, ECLI:EU:T:2015:224 *(Evropaïki Dynamiki v Frontex)*.

a subject of international law,[21] which has been argued to be an indication of international legal personality.[22] If the agency had not had its own legal personality at least for the matters dealt with in the agreement, the agreement itself would have been concluded by the EU in the name of the agency in accordance with Article 218 TFEU.

These arguments do not necessarily cover the international legal personality of an entity.[23] They may suggest at least a limited international legal personality (for example power to conclude treaties with respect to their headquarters), but cannot necessarily carry safely and without doubt the argument of a complete legal personality. It could even be argued that any such agreements are concluded under the EU's international legal personality.[24] Although Frontex has a certain degree of autonomy, it cannot be safely argued that it is a completely autonomous and separate entity. For instance, Frontex working arrangements are subject to the prior opinion of the Commission,[25] the agency's Management Board is composed of representatives of the member states and the Commission, and its Executive Director is appointed by the Management Board on the Commission's proposal. It can be noted, though, that there are multiple understandings of autonomy (e.g. financial, political, institutional) and different international organisations present varying levels of automomy, while others albeit enjoying conciderable autonomy are not universally considered international organisations (UNICEF).

Nevertheless, even though the agency does not fit in the traditional definition of an international organisation at first glance, and given the fluidity of that definition, it does share certain characteristics that make the distance between Frontex and a traditional international organisation rather short.

Moreover, as observed by Klabbers, the ILC clarifies that:

21 Frontex, Frontex and Poland sign the headquarters agreement, 09 March 2017, https://frontex.europa.eu/media-centre/news-release/frontex-and-poland-sign-the-headquarters-agreement-Tx15sl; Memorandum of Understanding between the Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Minister of the Interior and Administration of the Republic of Poland on the headquarters and certain other issues related to the functioning of Frontex in Poland, Warsaw, 26 March 2007; Frontex, European Border and Coast Guard Agency concluded HQ Agreement negotiations, 21 January 2017, https://frontex.europa.eu/pressroom/news/european-border-and-coast-guard-agency-concluded-hq-agreement-negotiations-L6FKqz?q.

22 G. Schusterschitz, 'European Agencies as Subjects of International Law', *International Organizations Law Review*, 1, 1, 2004, p.p.: 171-174. The conclusion of working arrangements between Frontex and third states is not an argument in favour of the agency's international legal personality, as these explicitly not considered as treaties under international law. M. Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"', *Merkourios*, 28, 2012, p. 26.

23 M. N. Shaw, *International Law*, Cambridge: Cambridge University Press 2008, p. 195.

24 Fink 2017, p. 40.

25 Article 68(2) EBCG Regulation.

'[the] fact that an international organisation does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organisation.'[26]

In the light of the above, given the parallels with an international organisation and the authoritative clarification of the ILC, it can be convincingly supported that the ARIO can, at least, be applied by analogy to Frontex in the context of international law.[27]

The status of the EU as an international organisation is more straightforward, as argued by Mungianu.[28] Article 47 TEU formally affirms the legal personality of the EU, while the EU is afforded the most extensive legal capacity accorded to legal persons in each of the member states (Article 335 TFEU), and has contractual and non-contractual liability (Article 340 TFEU). Furthermore, the CJEU has already in the *European Agreement on Road Transport* case, interpreted Article 210 EEC Treaty (now Article 47 TEU) as granting the EEC international legal personality.[29] We have no reason to doubt that the CJEU would follow the same interpretation with respect to Article 47 TEU.[30]

Thus, the EU is indeed an international organisation.[31] Frontex does not entirely fall under the traditional definition of an international organisation, but the more accurate question is in fact whether it can be considered as an international organisation for the purpose of attribution of international responsibility. This should be answered in the affirmative given the shared characteristics of Frontex with an international organisation combined with

---

26 International Law Commission, *Report on the work of its sixty-third session (26 April – 3 June and 4 July – 12 August 2011)*, UN General Assembly, A/66/10, 2011, p. 74.

27 e.g. Majcher 2015, pp.: 48-52; International Law Commission 2011, p. 74: '[the] fact that an international organisation does not possess one or more of the characteristics set forth (…) does not imply that certain principles and rules states in the following articles do not apply also to that organisation'.

28 Mungianu 2016, p.p.: 49-51.

29 CJEU 31 March 1971, C-22/70, ECLI:EU:C:1971:32 *(Commission of the European Communities v Council of the European Communities)*, paras.: 13-15.

30 M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A. Dashwood and M. Marescaeau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, p. 38.

31 On debates concerning the international legal personality of the EU and its scope see Casteleiro 2016, pp.: 11- 30; P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing 2015, p. 14; Klabbers 2009) p. 50; G. I. Hernandez, 'Beyond the Control Paradigm? International Responsibility and the European Union', *Cambridge Yearbook of European Legal Studies*, 15, 2014, p.p.: 643, 648. Nevertheless, 'there is no doubt that the EU is an international subject with its own legal personality that, by virtue of the powers conferred to it, can be bound by international law, breach it, and be held responsible for those breaches where the extent of the EU's responsibility would boil down to how its relationships with its Member States are characterised.' Casteleiro 2016, p. 15.

the fluidity of the definition itself, as well as the authoritative clarification of the ILC. In other words, the ARIO can, in principle, be applied to Frontex.

This normative debate can be brought to a close with an indisputable positivist argument. In particular, a more concrete picture can be drawn, looking at the question of the bearer of responsibility from a pragmatic point of view, namely taking into account the judicial fora that would need to determine the issue of responsibility.

Thus, from a pragmatic point of view, an individual complaint brought before the ECtHR, pending the accession of the EU to the ECHR,[32] would implicate the EU, which holds responsibility for acts of its agencies.[33] Looking at EU law, by virtue of Article 51 of the Charter, the Charter can apply to EU agencies separately from the Union. Furthermore, Article 93(1) EBCG Regulation gives Frontex legal personality, which allows it to be held liable before the CJEU independently from the Union. Finally, the CJEU has the competence (Article 263 TFEU) to look into the legality of acts of agencies, and thus into the responsibility of these bodies.[34] Hence, an action for liability would be brought before the CJEU against the agency itself.[35] Even though, in general, it is the EU rather than the agency that shall compensate for any damage caused (Article 340 (2) TFEU), in the case of Frontex its founding Regulation states that the agency is itself liable for any damage caused by its departments of staff (Article 107(3) EBCG Regulation).

In conclusion, the analysis of the legal and doctrinal framework covering international organisations, as well as the particular regime of Frontex, suggest that the EU is an organisation with legal personality under international law, but Frontex itself is not an international organisation stricto sensu. However, due to its closeness to an international organisation, given the fluidity of the definition, and the flexible interpretation given by the ILC, it can be argued that the ARIO can be applied to Frontex in questions of its international responsibility. In pragmatic terms, the question of whether we should speak of the responsibility of the Union or Frontex is resolved by the court which we are addressing. The CJEU can judge the responsibility of the agency itself, while the ECtHR will rule on the responsibility of the EU (represented by the Commission).

---

32 With the entry into force of the Lisbon Treaty, the European Union has committed to acceding to the ECHR. However, the CJEU has heavily discouraged the proponents of the accession with its Opinion 2/13 of 18 December 2014, where it ruled that the draft accession agreement is not compatible with EU law. CJEU 18 December 2014, Opinion 2/13, Opinion pursuant to Article 218(11) TFEU (*Opinion 2/13*).

33 Article 340(2) TFEU.

34 On the autonomous nature of agencies within EU law, see, for instance, M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers 2009; M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers 2010.

35 For instance, *Evropaïki Dynamiki v. Frontex*. The case concerns non-contractual liability in the context of public procurement.

2.2 Frontex as a matter of international law: a pluralist interpretation of EU law

It can be argued that the proper context to address questions regarding Frontex would be EU law, rather than international law. Without diminishing the primary importance of EU law, this section aims to argue that the framework concerning Frontex responsibility needs to include consideration of the relevant international law. It does so, on two levels. First, it discusses the place of EU law within international law, adopting a pluralist perspective. Second, it focuses on the added value of the ARIO in the present legal environment of EU liability.

This study starts from the premise of constitutional or legal pluralism. This notion reflects here how the different legal frameworks and judicial actors interact within the common environment of a coherent legal architecture of public international law that is neither solid nor fixed, but represents, as some authors have put it, a 'common space for human rights protection is Europe'.[36]

The international and the EU legal orders constitute distinct legal frameworks, which meet and merge into a consistent legal order. International law has, in fact, functioned as an instrument of European integration.[37] The regional system, within which EU law falls, in particular, the Charter and the ECHR as well as the jurisprudence of the two European High Courts, constitutes a coherent legal order in itself. However, it does not exist in isolation but is part of the broader normative system of international law. It builds upon an already existing international framework, while it also impacts upon its surrounding legal system. As the CJEU has held in the classic cases of *Van Gend en Loos* and *Costa E*NEL, the EU (then the Community) constitutes 'a new legal order of international law'.[38]

Pernice, has visualised the integration between national and supranational legal orders, emphasising the idea of complementarity amongst them, with the term 'multilevel constitutionalism'.[39] On a similar line of thought, Besselink proposes instead the notion of 'composite constitution', seeing the different elements of national law and EU law as parts of the same legal order.[40] Following their reasoning, their conclusions can be applied by

---

36 V. Kosta, N. Skoutaris and V.P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford: Hart Publishing 2014, p. 21.

37 B. de Witte, 'Using International Law for the European Union's Domestic Affairs' in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011, p. 134.

38 CJEU 5 February 1963, C-26/62, ECLI:EU:C:1963:1 *(Van Gend en Loos v Nederlandse Administratie der Belastingen)*; CJEU 15 July 1964, C-6/64, ECLI:EU:C:1964:66 *(Costa v ENEL)*.

39 I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?', *Common Market Law Review*, 1999, p.p.: 703-750.

40 L. F.M. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen: Europa Law Publishing 2007, p.52.

analogy concerning the interaction between the EU and the international legal order.

Also, Ratcovich, arguing that rules on disembarkation should be interpreted within international law, stresses that international law is one legal system, rather than simply disconnected legal instruments.[41] This view finds normative inspiration and support in the Vienna Convention on the Law of the Treaties (Vienna Convention).[42] In particular, Article 31(3)(c) of the Vienna Convention, a rather neglected provision of international law, requires the interpreter to take into account 'any relevant rules of international law applicable in the relations between the parties', introducing the 'principle of systemic integration'.[43] The ECtHR widely adopted this approach: 'The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties'.[44]

It becomes evident that treaties, as 'creatures of international law',[45] are part of a system of international law and should be 'applied and interpreted against the background of the general principles of international law'.[46] Especially on issues as important as these, legal isolation and fragmentation[47] are not in accordance with the rule of law. Therefore, to avoid such fragmentation and promote coherence in law, it is important that the different fields of law are to a certain extent, integrated and studied next to each other.

---

41 M. Ratcovich, *The Notion of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?* (Paper for the conference 'Regulating "Irregular" Migration: International Obligations and International Responsibility', National and Kapodistrian University of Athens), 2015, p.p.: 3-8.

42 To the extent that the Charter and the ECHR do not provide for their own rules of interpretation, the general rules on interpretation of Treaties apply, which are set out in the Vienna Convention on the Law of the Treaties. The CJEU has consistently observed that even though the EU is not bound by the Vienna Convention as such, as it is not a signatory party to it, the rules of customary international law reflected in it form part of the EU legal order. E.g. CJEU 25 February 2010, C-386/08, ECLI:EU:C:2010:91 *(Brita GmbH v Hauptzollamt Hamburg-Hafen)*.

43 Not to be confused with '*systemic accountability*'.

44 *Hirsi Jamaa v. Italy*. See also ECtHR 21 November 2001, Judgment, App. No. 35763/97, § 55 *(Al-Adsani v the United Kingdom)*, and ECtHR 30 June 2005, Judgment, App. No. 45036/98, § 150 *(Bosphorus Hava Yolları Turizm ve Ticaret)*.

45 C. Mclachlan, 'The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention', *The International and Comparative Law Quarterly*, 54, 2, 2005, p. 280.

46 L. McNair, *The Law of Treaties*, Oxford: Oxford University Press 1961, p. 466.

47 On the risk of fragmentation of international law, see for instance I. Brownlie, 'The Rights of Peoples in Modern International Law' in J. Crawford (ed.), *The Rights of Peoples*, Oxford: Clarendon Press 1988, p. 15; International Law Commission feasibility study, Hafner, Risks ensuing from Fragmentation of International Law, Official Records of the General Assembly, Fifty-fifth session, Supplement No 10 (A/55/10), annex 321; Mclachlan 2005, p.p.: 284-286.

This pluralistic tendency is evident also in the Treaty of Lisbon, which compared to previous EU Treaties adopts a clearly open attitude towards international law. Article 3(5) TEU urges the EU to contribute to the strict observance and development of international law. This has been interpreted as a general duty to respect international law, covering both international agreements and customary law, which has been affirmed by the case law of the CJEU.[48] The Court has further held that such law is 'binding upon the Community institutions and [. . .] part of the Community legal order'.[49]

Thus, the interaction between international and EU law is not inconceivable as they are both complementary systems forming parts of a consistent legal order. In particular, the EU is bound by international treaties it concludes, but the Court has also treated other conventions to which only its member states were parties as a sort of soft law,[50] and has attempted to interpret EU law in conformity with them.[51] It follows from the above that rules of international law, to the extent that they codify principles of international law can be used in the EU context if the situation falls within the scope of public international law. Even if the situation does not fall directly within the scope of public international law, the convincing power and juristic value of arguments taken from international law can be utilised.

Certainly, the application of the ARIO within EU law is not without limitations. These rules are without prejudice to municipal rules (lex specialis), in this context EU law.[52] Thus, when a conflicting rule exists under EU law, that rule will apply instead of the ARIO.[53] It is when the matter is not adequately regulated within EU law that general principles of international law become relevant. The lex specialis exception can be activated when there are special rules on responsibility that are enshrined in express provisions in the particular specific legal framework. Any different

48 A. Gianelli, 'The Silence of the Treaties with Regard to General International Law', in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011, p.p.: 93, 94; ECJ, CJEU 24 November 1992, C-286/90, ECLI:EU:C:1992:453 *(Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp)*, para. 9; CFI, CJEU 22 January 1997, T-115/94, *ECLI:EU:T:1997:3 (Opel Austria GmbH v Council)*, para. 90.

49 CJEU 16 June 1998, C-162/96, ECLI:EU:C:1998:293 *(A. Racke GmbH & Co. v Hauptzollamt Mainz)*, para. 46. Still, the role custom plays in EU law is more complex. Gianelli 2011, p.p.: 93, 95-108.

50 E.g. CJEU 12 December 1996, C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, ECLI:EU:C:1996:486 *(RTI and others v Ministero delle Poste e Telecomunicazioni)*.

51 CJEU 30 July 1996, C-84/95, ECLI:EU:C:1996:312 *(Bosphorus v Minister for Transport, Energy and Communications and others)*, para 14, C. Eckes, 'International Law as Law of the EU: The Role of the Court Of Justice', *CLEER Working Paper Series 2010/6*, 2010, p. 12.

52 Commentary of Article 1 Ario, par 3; Article 64 ARIO.

53 Article 64 ARIO is a general lex specialis provision, which applies to all Draft Articles. Special rules do not always prevail. See Commentary to Article 10 ARIO par 9 and Commentary TO Article 64 ARIO.

interpretation, would 'allow general law to be excluded on the bases of internal, or quasi-domestic, arrangements'.[54]

This brings us to the consideration of arguments questioning the added value of the ARIO within a system as solid and autonomous as EU law, which is also supported by the jurisprudence of the ECtHR. The EU has established its own framework concerning the liability of its member states, or its own institutions, organs, and agencies, acting therefore as 'lex specialis'. Still, there are instances, such as in the case where multiple actors are involved in a violation, that it does not provide concrete authoritative answers on issues of responsibility. Specifically, that there are no express provisions in EU law that set down special rules on responsibility of the EU or the member states, and rules on attribution in particular. This could also be due to the fact that EU law has not had adequate experience with the responsibility of agencies, which involve a combination of EU and member state action, since the jurisdiction of the CJEU over EU agencies is relatively recent, while the ECtHR has not yet dealt with international organisations. In comparison, international law, developed from state practice, has had more experience in this area and can be of help in addressing such questions of allocation of responsibility. It is in such cases that we may turn for inspiration to international law to complement EU liability law and the jurisprudence of the ECtHR.

Such gaps arise, for instance, with regard to attribution. Neither the EU Treaties nor the ECHR contains secondary rules regarding attribution. The ECtHR has resorted for that to international law and the ILC Articles in particular. Specifically, the ARIO have been extensively considered by the Court in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[55] and in *Al-Jedda v. the United Kingdom*[56]. Moreover, the ECtHR has only dealt with direct responsibility through attribution of conduct. For cases that concern aid and assistance, the ECtHR finds a practical resort to its own doctrine of positive obligations. As a final argument, neither the CJEU nor the ECtHR have developed specific criteria for the interpretation of effective control. All these are issues with which international law can be of assistance, and will be discussed further in Chapter VIII.

The 'lex specialis' rule should not be interpreted in a way that its existence automatically disqualifies the broader legal framework. Its application is rather more targeted, more specifically, to the extent that there is no contradictory specific rule, the general rule applies. In this regard, EU law

54 J. D'Aspregmont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014 p.p.: 80-81.

55 ECtHR 2 May 2007, Decision on Admissibility, App. No. 71412/01*(Behrami and Behrami v France)*, and ECtHR 2 May 2007, Decision on Admissibility, App. No. 78166/01 *(Saramati v France, Germany and Norway)*.

56 ECtHR 7 July 2011, Judgment, App. No. 27021/08 *(Al-Jedda v The United Kingdom)*.

and the ECtHR in many ways complement the ILC Articles, specifying and applying in more detail the principles enshrined in them. For instance, the element of damage[57] and the subsequent causal relationship between the damage and the wrongful act are not required for establishing responsibility under international law. This requirement is brought in by EU liability law. In international law, there is also no requirement of fault which does exist under EU law. Furthermore, the ECtHR often deals with such cases under its own doctrine of positive obligations. This does not come in opposition to the ILC Articles, but is, in fact, an element of effective control.[58] Finally, the most important element of 'lex specialis' of the regional system is the individual complaints mechanism under the ECtHR, as the ILC Articles can only be invoked by a state or international organisation.[59]

In sum, realising the interconnectedness of the legal orders, we come to the conclusion that EU law does not exist in isolation. In order to avoid fragmentation and promote coherence in law, it needs to be applied in the context of international law, drawing inspiration from it whenever necessary. We can consider customary international law and general principles of international law as part of EU law, to the extent that the situation falls within the scope of public international law. If this is not clearly the case, these principles can still be used in the context of EU law as a source of inspiration for the Court and in order to cover gaps where matters are not adequately regulated within EU law. The application of international law can be excluded when there is an opposing provision of EU law. In accordance with this pluralist interpretation, the relevant international law, as this is represented in the ARIO and the jurisprudence of international courts, even though not directly binding, should be taken into account when discussing responsibility issues arising from EBCG operations. The ARIO does not seek to replace EU law, but only to complement it when genuine gaps arise. In this sense, the primary importance of EU law as 'lex specialis' remains intact.

2.3 Applying non-binding law?

The ILC Articles are often confronted with their status within international law, as they are not a Treaty. Indeed, no more importance should be given to the ARIO than what is due. As Guy Goodwin-Gill remarks: 'A great, indeed damaging disservice is done to the protection of refugees by pretending rules exist where there are none.'[60]

57 Article 268 TFEU.
58 Section 3.4.
59 Articles 43, 49 ARIO.
60 G. S. Goodwin-Gill, 'The international protection of refugees: What future?', *International Journal for Refugee Law*, 12, 1, 2000, p. 6.

The ILC Articles constitute a framework for dealing with responsibility, but this is a framework not as solid as national law or EU Regulations. As it is often the case in international law, it is rather fluid. ARIO is in principle not binding. Some of its articles are binding, as they reflect customary international law, while others may codify interpretations found in the jurisprudence of international courts.

The remaining content of the Articles represents the ILC's understanding of progressive development of the law, as that is interpreted through academic work and less established legal thinking. Because of its fluidity, this framework is not written in stone. It is rather still developing, and this makes it flexible enough to incorporate on the one hand and complement on the other legal rules and jurisprudence from different legal orders. This may seem odd to positivist national or EU lawyers, but in the spirit of legal pluralism, the normative reality of international law needs to be taken into account.

In particular, both the ARS and the ARIO are sources of international law and are legally binding to the extent that they codify rules of customary international law. ARS have generally been well received and have been cited by the ICJ.[61] The authority of the ARIO though, due to limited international practice,[62] is not equal to the corresponding ARS articles, and 'will depend upon their reception by those to whom they are addressed'.[63]

With regard to Articles 14-16 ARIO, for instance, covering the responsibility of an organisation in relation to acts committed by a state, there are reasons to suggest that they reflect customary law. The corresponding articles on state responsibility are indeed customary law.[64] The ARIO are not situated in the same established state practice, but according to the ARIO Commentary, 'parallel situations could be envisaged with regard to international organisations'. It is further supported that 'For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organisation aiding or assisting a State or another International Organisation from that of a State aiding or assisting another State'.[65] Drawing these parallels, we can conclude that it is conceivable that the ARIO also reflect customary law.

For the rest, the ILC Articles represent evidence of law in the meaning of Article 38 (1) of the Statute of the ICJ. In this regard, the ARIO have been

61 e.g. ICJ Reports 1997, Gabčíkovo-Nagyamaros Project *(Hungary/Slovakia)*, at 7.

62 ARIO Commentary, p. 2; K. E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations', The Yale Journal of International Law Online, 2011, p.p.: 8.

63 ARIO Commentary, p. 3.

64 e.g. ICJ Reports 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia/Serbia)*, p. 150, par. 420; H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2011, p.p.: 97-191.

65 Commentary to Chapter IV ARIO, par. 1, Commentary to Article 14 ARIO, par. 1.

considered extensively by the ECtHR,[66] and national courts.[67] It is argued here, under the following section that they should also be used, as a source of inspiration and in a heuristic way in order to cover existing gaps, by the CJEU when considering the responsibility of the EU agencies, and Frontex in particular.

Thus, even in their non-binding form as customary law, they have legal value as sources of inspiration for the courts. They can indeed prove a valuable guide in the academic study of the responsibility of Frontex, as they convey useful internationally recognised principles that can be used as a source of inspiration by the European Courts, especially in dealing with complex issues of allocation of responsibility during joint operations.

Practically speaking, the ARIO cannot be relied upon directly, as they cannot be invoked by an entity other than a state or international organization (Article 43). However, they are still valuable either as a codified customary law or as a template or toolbox for courts confronted with questions of responsibility.

3 The ARIO principles and the angles of attribution

After tackling the arguments opposing the applicability of the ARIO, I proceed in dealing with the relevant provisions of the ARIO and their interpretation by international courts and by the ECtHR, in view of identifying a framework for the responsibility of Frontex. This analysis will allow us to identify the internationally wrongful act and the responsible actor.

It will become clear in the following sections that there are two sets of rules, under which the responsible actor can be identified: the rules on attribution of conduct (who has acted) and the rules on attribution of responsibility (who is responsible). As will become clear in the following sections, the main rule of attribution of responsibility is the principle of independent responsibility, which is based on the attribution of conduct (responsible is the organisation that has acted). There are however exceptions to it that allow for the responsibility to be attributed to an organisation that has not acted if it has contributed to the wrongful conduct. The principle of independent responsibility leads to 'direct' responsibility, while its exceptions to 'indirect' or 'derivative' responsibility (rules of indirect attribution of responsibility).

66 e.g. *Behrami and Behrami v France*; *Saramati v France, Germany and Norway; Al-Jedda v The United Kingdom*; ECtHR 20 November 2014, Judgment, App. No. 47708/08 *(Jaloud v the Netherlands)*, par. 98.

67 e.g. UKHL 12 December 2007 House of Lords, Judgment- R *(FC/Secretary of State for Defence)* (on the application of Al-Jedda); Supreme Court of the Netherlands 6 September 2013, Judgment 12/03324 (*The State of the Netherlands v. Hasan Nuhanović*).

3.1 The internationally wrongful act

According to Article 3 ARIO, when an international organisation commits an internationally wrongful act, its responsibility is engaged. Article 4 sets out the constitutive elements of an internationally wrongful act. Accordingly, an internationally wrongful act is committed by an international organisation when a certain conduct a) can be attributed to that organisation under international law, and b) constitutes a breach of an international obligation. Damage is not a necessary requirement for incurring international responsibility, according to the ARIO.

There are three elements in the definition of the internationally wrongful act that require our attention, namely 'act', 'breach of an international obligation' and 'attributed' to that organisation.

With respect to the 'act', the conduct of the organisation that violates international law can be in the form of an act or an omission (failure to act) in case the organisation is under the positive obligation to prevent its member states from committing an internationally wrongful act.[68] In this case, the obligation of the international organisation lies with prevention, 'for instance if an international organisation fails to comply with an obligation to take preventive measures(…).'[69]

A 'breach of an international obligation' concerns the infringement of such an international obligation that is binding upon that organisation (Article 11), regardless of the origin or character of that obligation (Article 10). This obligation may be derived from a treaty binding upon the international organisation, or any other source of international law, including general rules of international law, their own constitutions and international agreements to which they are parties.[70] Article 5 ARIO clarifies that whether certain conduct constitutes an internationally wrongful act is governed by international law. International law determines both what constitutes a breach of an international organisation and when conduct is to be attributed to an international organisation.[71]

The act that has breached an international obligation needs to be 'attributed' to an organisation. This essentially refers to the question of who has acted, and who, therefore, should take responsibility for the breach. The issue of attribution of conduct is given closer attention in the following section.

68 Commentary to Article 4 ARIO, par. 1.
69 Commentary to Art.1 ARIO, par. 5.
70 ICJ, advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports1980, p.p.: 89–90, para. 37.
71 Commentary to Article 5 ARIO, par. 1.

3.2 Attribution of conduct

In principle, the organisation that has acted is the one that should bear responsibility for the violation. This principle is enshrined in Articles 6-9 that reflect the main rule of attributing responsibility, i.e. the principle of independent responsibility.

According to the principle of independent responsibility, *responsibility is attributed to an international organisation if that organisation, through its organs and agents, commits an internationally wrongful act*. In accordance with this understanding, the ARIO adopt, what has been identified by Kuijper and Paasivirta as the 'organic model' of attribution of responsibility.[72] The 'organic model' stipulates than an organisation acts through its organs and is, therefore, also responsible for the acts of its organs or its agents (Article 6).

According to Article 6, the conduct of an organ or agent of an organisation is attributed to that organisation. This provision, and in particular the term 'agent' is interpreted by the ILC and the ICJ 'in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.'[73] The ICJ continued in a separate opinion: 'The essence of the matter lies not in their administrative position but in the nature of their mission'.[74] Thus, a *de jure* relationship suffices to trigger the responsibility of an organisation through attribution, but in the absence of such a formal link, the conduct of *de facto* organs can also bind the organisation.[75]

Article 6 narrows down the scope of attribution of conduct to acts that are conducted in the performance of the duties and functions of that organ or agent. These are generally determined by their official mandate.[76] This is intended to distinguish from circumstances, where the agent has been acting in a private capacity. It does not exempt from attribution acts that have been conducted *ultra vires.* This is dealt with further under Article 8.

Finally, even if conduct may have otherwise not been attributable to an international organisation, it can still be considered its own conduct *ex post facto,* if and to the extent that the organisation has acknowledged and adopted the conduct in question. The ILC, however, has not clarified what

72 P. J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives,* Oxford and Portland: Hart Publishing 2013, p. 49.

73 *United Kingdom/Albania*, p. 177; Commentary to Article 6 ARIO, par. 2.

74 ICJ 20 July 1989, Elettronica Sicula SpA (ELSI), ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989) (*United States v Italy*), p. 194, par. 47.

75 Commentary to Article 5 ARS, par. 7.

76 Commentary to Article 6 ARIO, par. 9.

should be understood as acknowledgement. The Commentary to the ARIO adds an important rule of interpretation, according to which this criterion of attribution by acknowledgement of conduct as one's own, may be considered before the criteria of Articles 6-8; 'it can be applied even when it has not been established whether attribution may be effected on the basis of other criteria'.[77] Nevertheless, it can also play a role in support of other criteria on attribution.[78] It should be noted that even though there are examples of organisations acknowledging conduct as their own, the existing practice of attribution of conduct due to acknowledgment is far from stable and there is a number of questions that remain open.[79] It should be noted that the fact of the acknowledgement alone is not enough to establish responsibility,[80] but is only one of the elements of the balancing act.

Thus, acts attributed to an organisation are those conducted by an (de jure or de facto) organ or agent of that organisation, as long as these were acting in their official capacity. If the organisation has acknowledged the conduct as its own, this should also be taken into account.

All these segments of the principle of independent responsibility presented here in abstracto are applied in the next Chapter to EBCG operations in order to identify the responsibility of Frontex.

3.3 Agents of an international organization

Agents of an international organisation may be persons hired by the international organisation or seconded to it by a state.[81] However, the seconded organ may still in part act as an organ of the seconding state. Such is the case of UN peacekeepers, which are put at the disposal of the UN by states, which retain 'disciplinary powers and criminal jurisdiction over the members of the national contingent'.[82]

Who should then the conduct be attributed to: the seconding state or the receiving organisation?

As specified in Article 7, the decisive question to determine this is who exercises effective control over the conduct of the agent, taking into account 'the full factual circumstances and particular context'.[83]

---

77 Commentary to Article 9 ARIO, par. 2. It has been argued that this could perhaps be considered as a case of attribution of indirect responsibility rather than direct attribution of conduct. F. Messineo, 'Attribution of Conduct' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law)*, Cambridge: Cambridge University Press 2014, p. 66.

78 Commentary to Article 9 ARIO, paras. 1, 2.

79 Casteleiro 2016, p.p.: 76-77.

80 ECtHR, Makuchyan and Minasyan v. Azerbaijan and Hungary, Application No. 17247/13, of 26 May 2020.

81 Commentary to Article 6 ARIO, par. 6.

82 Commentary to Article 7 ARIO, par. 1.

83 Commentary to Article 67 ARIO, par. 4.

Article 7 provides:

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

Thus, when organs or agents of a state are placed at the disposal of an international organisation, their conduct is attributed to that organisation, if it can be proven that the organisation exercises effective control over their conduct.[84]

In the example of the UN peacekeeping forces, the fact that the seconding state retains control over disciplinary and criminal matters may have direct consequences to the attribution of the acts of peacekeeping forces.[85] It becomes obvious that the issue of effective control does not necessarily always have a straightforward exclusive ('either-or') answer. This requires us to look deeper, in the following section, into the precise meaning of effective control and the criteria that determine it.

3.4 Exercise of effective control

The precise meaning of effective control is covered by ambiguity, as different interpretations have been given to the term, which is understood either as 'ultimate authority and control' or as 'effective operational control'. This section focuses, first, on understanding this distinction, and, next, on the specific criteria on the basis of which it is determined who exercises effective control.

The principle of effective control has been recognised by the ECtHR, which explicitly referred to the work of the ILC, in *Behrami and Behrami v France and Saramati v France, Germany and Norway* in relation to the NATO forces in Kosovo.[86] The ECtHR accepted though that the decisive element for its interpretation was whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated'.[87] Thus, the Court interpreted the effective control criterion as the '*ultimate authority and control*', which was placed on a higher position than 'operational command'. In that case, the ECtHR ruled that the UN had, in fact, ultimate authority and control as the Security Council had authorised the NATO force, had itself delegated a broad operational control

84 ICJ 27 June 1986, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v the United States of America*), Merits, 27 June 1986, ICJ Reports 1986, par. 115.

85 Commentary to Article 7 ARIO, par. 7.

86 *Behrami v. France*, and *Saramati v. France, Germany and Norway*.

87 *Behrami v. France*, and *Saramati v. France, Germany and Norway*, par. 133.

to NATO and kept receiving regular reports on the development of the operations.[88]

This interpretation was criticised as not capturing the spirit of the term, as it was envisaged by the ILC.[89] In fact, the United Nations Secretary General has distanced himself from this reading, stating that 'it is understood that the international responsibility of the United Nations will be limited in the extent of its *effective operational control*.'[90] The ECtHR interpretation has also been heavily criticised in literature.[91] The ECtHR however, did not move from its original position, which was retained to a large part in later case law.[92]

In line with how the ILC had envisaged effective control, was the decision of the House of Lords in *Al-Jedda*,[93] concerning British troops in Iraq, authorised by the UN Security Council. Without fully disregarding the interpretation of the ECtHR, the House of Lords found that this case was different from *Behrami and Saramati* in that there had been here no delegation of powers from the UN. Thus, the 'ultimate control' test would not apply.

This reasoning was also accepted by the ECtHR, which ruled that 'the United Nations Security Council had neither effective control nor ultimate authority and control'.[94] Essentially, the ECtHR introduced in its case law the language of effective control as it was meant by the ILC, but without fully retracting its earlier *Behrami and Saramati* position. One possible way of reading the two judgements together is to acknowledge the recognition of the effective control criterion by the ECtHR, with the existence of an additional ultimate control criterion when there is delegation of powers. Still, no new light was shed on the meaning of effective control and ambiguity remains. Therefore, while the focus in this study is on operational command and control, the ultimate control test cannot be disregarded.

88 *Behrami v. France*, par. 132-41.

89 Commentary to Article 7 ARIO, par. 10, referring to legal doctrine.

90 Commentary to Article 7 ARIO, par. 10, referring to S/2008/354, par. 16.

91 A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', *Human Rights Law Review*, 8, 2008, p. 162-165; M. Milanović, and T. Papić, 'As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law', *International and Comparative Law Quarterly*, 58, 2, 2009, p.p.: 274, 281-285.

92 ECtHR 5 July 2007, Decision on Admissibility, App. No. 6974/05 *(Kasumaj v Greece)*; ECtHR 28 August 2007, Decision on Admissibility, App. No. 31446/02 *(Gajic v Germany)*; ECtHR 16 October 2007, Judgment, App. Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793 and 25496/05 *(Beric and Others v Bosnia and Herzegovina)*.

93 *FC v Secretary of State for Defence*, par. 5.

94 *Al-Jedda v. The United Kingdom*, par. 84. The Court differentiated the two cases in their facts, paras. 74-77.

We can establish from the above that the effective control test is understood as *operational command and control* under the interpretation of the ILC. At the ECtHR, effective operational control applies primarily, if the factual circumstances do not support an examination of the *ultimate control* test.

Having established the decisive test, I now move on to examine the criteria that help determine when effective control is exercised. As these are not apparent from the letter of Article 7 ARIO, they can be extracted from doctrine and jurisprudence.

3.4.1 Normative power

It has been argued that the normative control the EU exercises over its member states, due to the fact that the latter implement EU law, or due to the judicial control by the CJEU, constitutes effective control.[95] Nevertheless, such control is generally considered too weak,[96] while it does not constitute either factual or operational control, as it is required by Article 7 ARIO.[97] Therefore, it is not taken into account in this study.

3.4.2 Decision-making power (operational command and control)

The ILC has noted that effective control belongs to the one who has decision-making power over the wrongful conduct, in other words, to the one who gives the orders. This was the approach taken by the UN Commission of Inquiry established to investigate armed attacks on UMOSOM II personnel,[98] and of the Court of First Instance of Brussels in a case concerning the United Nations Assistance Mission for Rwanda.[99]

Specifically, with regard to joint operations, an important consideration is the operational command and control. According to the UN Secretary General has noted, 'in joint operations, international responsibility (…) lies where operational command and control is vested' in accordance with the formal arrangements made. [100]

95 Steinberger 2006, p. 851.

96 P. J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', *International Organizations Law Review,* 1, 1/111, 2004, p. 127.

97 Casteleiro 2016, p. 74.

98 Report of the Commission of Inquiry established to investigate armed attacks on UMOSOM II personnel on 5 June 1993, S/1994/653, 01.07.1994.

99 Brussels Court of First Instance, 8 December 2010, 04/4807/A and 07/15547/A, (*Mukeshimana-Ngulinzira and others v Belgium and others*), para. 38.

100 Commentary to Article 7 ARIO, par. 9; UN Secretary General ,A/51/389, p. 6, paras. 17, 18.

3.4.3 *De facto power*

There is, further, a strong emphasis on the factual criterion. Effective control is synonymous to 'factual control', as the examination should take into account the "full factual circumstances and particular context."[101] Such factual circumstances can override the formal arrangements regarding the command and control structure. The ILC gives the example of the UN claiming exclusive command and control over peacekeeping forces, while, in practice, their conduct can and has been attributed to sending states.[102] It should be noted here that the ILC has clarified in the ARIO Commentary that the question of who has effective control is not to be applied in a general manner to the overall conduct of the organ, but to the specific unlawful act in question.

3.4.4 *Disciplinary power*

The ILC notes in the Commentary to Article 7 ARIO that an international organisation has no effective control when the home state retains disciplinary powers and criminal jurisdiction. This seemingly absolute assertion has become more nuanced as interpreted by the ECtHR in *Behrami and Saramati*. There the Court underlined that the retention of disciplinary powers and criminal jurisdiction may not undermine effective operational control.[103] This finding is endorsed by the ILC in the Commentary to Article 7 ARIO. Bringing these complementary interpretations together, Mungianu correctly concludes that retention of such powers cannot exclude effective control, but this retention 'may be an element in favour of such exclusion'.[104]

3.4.5 *Power to prevent a violation*

Another element was identified in the case of the Dutch contingent in the United Nations Protection Force (Dutchbat) in Srebrenica, dealt with by the District Court of the Hague.[105] The District Court held that the acts and omissions of the Dutchbat should be attributed to the United Nations. The Court of Appeal overturned that decision and reached the conclusion that the Dutch state was in fact responsible for its involvement of the massacre of Srebrenica because it could have prevented the outcome. Effective control was given there a wide enough meaning also to include the positive obliga-

101 Commentary to Article 6 ARIO, par. 4.
102 Commentary to Article 7 ARIO, par. 9. UN Secretary General, A/51/389, p. 6, paras. 17,18.
103 *Behrami v. France*; *Saramati v. France, Germany and Norway*, par. 139.
104 Mungianu 2016, p. 67.
105 Judgment of 10 September 2008, case no. 265615/HA ZA 06-1671, par. 4.8. in English at http://zoeken.rechtspraak.nl; Hoge Raad der Nederlanden 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Netherlands/Nuhanovic*); Hoge Raad der Nederlanden 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*State of the Netherlands v Mustafic´ et al.*).

tions of the state or international organisation, when no orders have been given.[106] The evidence of this criterion in jurisprudence and doctrine does not establish it beyond doubt in international law. It is, however, a strong indication, and it would be an omission not to take it into account in Frontex cases, where the agency has strict formalised positive obligations to protect human rights.

3.4.6 Degree of effective control

In sum, the criteria that can determine effective control, are a) giving orders under formal arrangements of command and control, b) if the factual circumstances are not different, c) retention of certain powers by the state, such as disciplinary powers and criminal jurisdiction, and finally c) the possibility to prevent a violation.

The variety of different criteria can lead to different answers as to who exercises effective control. A singular answer is not necessary, though. What is important, especially with respect to joint operations, is the extent or degree of effective control. If formal arrangements are not available, responsibility is determined on a case by case basis according to the 'degree of effective control exercised by either party'.[107] In the determination of the extent of control the different criteria may be taken into account, as is, for instance, the due care exercised to prevent the wrongful conduct.[108]

3.5 Dual attribution of conduct

There is no mutual exclusivity or explicit strict hierarchy among the different criteria of effective control. Their parallel application can lead to the same wrongful act being attributed to more than one actor. Similarly, an agent could, at the same time be under the instructions or the direction and control of more than one actor.[109] Different degrees of effective control can also result from the formal establishment of a joint organ which acts on behalf of more than one states and/or international organisations.[110]

---

106 This finding was later confirmed by the Court of Appeal and the Supreme Court, and is also found in academic literature. The Courts followed the interpretation of T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member States Troop Contingents as United Nations Peacekeepers', *Harvard International Law Review*, 51, 2010, p.p.: 113, 157.

107 Commentary to Article 7 ARIO, par. 9; A/51/389, p. 6, paras. 17, 18.

108 Gaja 2004, p.p.: 20-21.

109 Messineo 2014, p. 77.

110 e.g. ICJ, Preliminary Objections, Reports 1992, 240 (*Certain Phosphate Lands in Nauru – Nauru/Australia*), par. 240; The Channel Tunnel Group Ltd & France-Manche S.A.v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'equipement, des transports, de l'ame ´nagement du territoire, du tourisme et de la mer du Gouvernement de la Republique française, Partial Award, (2007) 132 ILR 1 (*Eurotunnel Arbitration*).

The question that arises then is to whom the wrongful conduct should be attributed when effective control is exercised by more than one actor. It is in these cases that we can consider dual attribution.

Dual attribution may seem an odd notion for those familiar with the international responsibility of states. Under ARS, when an agent of a state exercises governmental authority of another state, this transfer of authority is exclusive and cannot lead to multiple attribution (exclusive attribution).[111] In fact, it has been argued that Article 7 ARIO does not support dual attribution either.[112] Mungianu recognises the possibility of a wrongful act needing to be attributed to more than one actors, but does not examine dual attribution in Frontex operations, arguing that neither the ARIO nor the commentary to Article 7 seems to recognise it.[113] While it is factually correct that the commentary to Article 7 does not mention dual attribution, a more careful reading reveals that dual attribution is covered under the commentary to the general heading of Chapter II, where Article 7 belongs.[114]

The ILC states that dual or even multiple attribution cannot be excluded, although this may not frequently be the case in practice. In particular, it notes that attribution of certain conduct to a state or international organisation does not rule out the attribution of the same conduct to another state or international organisation. The focus on the degree of effective control that each actor has upon the conduct of seconded organs provides enough flexibility to allow for dual or multiple attribution of that conduct.[115] The presence of dual attribution in the ARIO has been supported by a number of other scholars,[116] while courts have also considered this possibility.

---

111 Research into the drafting history and the commentaries to Article 6 ARS show that the application of Article 6 ARS breaks the original link with the home country. When the authority is not exclusive, but an organ is under the shared authority of two entities, the threshold of Article 6 ARS is not met. Thus, the different attribution rules of Arts. 4 and 6 ARS cannot be simultaneously applied. Contrary to Article 6 ARS, Article 7 ARIO does not require exclusivity of control. Fink 2017, p.p.: 138-145, 150, 156-157; Contrary to that, it is argued that the complete transfer should be seen as an exception rather than the rule in Article 6 ARS. Messineo 2014, p.p.: 84-88.

112 F. Hoffmeister, 'Litigating against the European Union and its member states: Who responds under the ILC's Draft Articles on International Responsibility of International Organizations', *The European Journal of International Law,* 21, 2010, p. 723.

113 Mungianu 2016, p. 62, fn 60.

114 Commentary to Chapter II ARIO, par. 4.

115 C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', *Melbourne Journal of International Law,* 10, 2009, p. 362.

116 Among others, Messineo 2014, p.p.: 81-5; Sari 2008, p. 166; K. M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *The European Journal of International Law*, 19, 2008, p.p.: 517-24. T. Dannenbaum, 'Dual Attribution in the Context of Military Operations, in A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill- Nijhoff 2016, p. 122; F. Aspects, R. Murphy and S.Wills, 'United Nations Peacekeeping Operations' in A.Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2017, p. 597.

In the early drafting stages of the ARS and the ARIO, there did not seem to be an opening towards dual attribution. In the landmark case of *Behrami v France*[117] the ECtHR attributed the conduct of the NATO forces in Kosovo to the UN. One year later, the District Court in the Hague examined and rejected dual attribution to both the UN and the Netherlands in *HN v the Netherlands*.[118] In both these cases, dual attribution would only have been an option if the actors were, in fact, a collective forming a joint organ.[119]

However, when it was realised that single attribution could prove to be a serious obstacle to accountability, different perspectives started making their appearance in the case law.[120] In Al-*Jedda v the UK*, the Court started distancing itself from the *Behrami* case, for the first time considering the possibility of dual attribution resulting from the application of the effective control criterion.[121] The possibility of dual attribution was since affirmed in the cases *Mustafic* and *Nuhanovic*, where the Dutch Supreme Court opined that Article 48 ARIO on the responsibility of an international organisation and one or more states or international organisations expressly leaves open the possibility of dual attribution.[122] Finally, the *Mothers of Srebrenica* is seen as the 'zenith of the (…) openness to dual attribution'.[123]

In sum, regardless of the 'early hostility', there is undoubtedly a 'growing openness' to dual attribution both in the literature and in the case law.[124] However, the number of cases in which dual attribution has actually been applied remains limited. Some have seen this as an indication that dual attribution is a minority view and rather a rarity in international law.[125] If that were the case, though, this would mean that 'the system of international responsibility would be fundamentally ill-equipped to deal

117 *Behrami v. France*.

118 ECtHR 31 March 2011, App No 20651/11, (H.N. v the Netherlands).

119 Dannenbaum 2016, p.p.: 122-124.

120 Dannenbaum 2016, p. 122.

121 *Al-Jedda v The United Kingdom*, par. 80; A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill-Nijhoff 2016, p. 125; Messineo 2014, p. 94.

122 *Netherlands v Nuhanovic*, par. 3.9.4. This case upheld the Nuhanovic appellate judgment, which had overruled the *H.N. v the Netherlands*; *State of the Netherlands v. Mustafic' et al*. For a comprehensive summary of the Dutch sequence of cases, see Messineo 2014, p.p.: 94-96.

123 Supreme Court of the Netherlands 13 April 2012, Judgment 10/04437 (*Mothers of Srebrenica et al v State of The Netherlands and the United Nations*); Dannenbaum 2016, p. 130.

124 Dannenbaum 2016, p.p.: 122, 136; e.g. *Nuhanovic v the Netherlands*; *Mothers of Srebrenica v the Netherlands*, par. 4-45.

125 A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law, 34, 2, 2013*, at 383. The authors have argued instead that a state and an international organisation may be both held responsible for the same conduct, but not on the basis of dual attribution. This should be established rather on the basis of 'parallel attribution based on independent acts'. A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', SHARES Research Paper 03 (2011 – revised in 2012), ACIL 2011–07, p. 111, http://www.sharesproject.nl/wp-content/uploads/2012/05/SHARES-RP-03-final.pdf.

with issues of shared responsibility'.[126] It would be rather more appropriate for the limited application of dual attribution to be seen as a matter of an underdeveloped system of invocation of responsibility when multiple actors are concerned.[127] We should rather have more confidence in the flexibility and resilience of the attribution rules.[128] Still, the factual failure of courts so far to attribute wrongful conduct to more than one actor leaves the particular modalities of dual attribution to be fleshed out.

3.6 Rules of indirect attribution of responsibility

The principle of independent responsibility (Articles 3, 6, 7 ARIO) discussed so far, although the starting point, is by no means an absolute rule for the attribution of responsibility. In this section, I discuss the exceptions to this rule according to which the international responsibility of an international organisation may occur in connection with the acts of a member state, as indirect or derivative responsibility. These rules can be identified as rules of indirect attribution of responsibility, as opposed to the principle of independent responsibility, which represents a rule of direct attribution of responsibility, directly to the actor to which the wrongful conduct itself is attributed.

Indirect attribution of responsibility can be the case a) when an organisation contributes to the wrongful act of a state (Article 14), b) when the relationship between an organisation and a state is such that allows the former to influence the conduct of the latter, either by exercising direction and control over the conduct of the state (Article 15), or by coercing the state into committing the internationally wrongful act, and finally, c) when an international organisation circumvents its international obligations by adopting a decision binding its members to commit an internationally wrongful act (Arts. 16, 17).[129]

Thus, international responsibility may arise from an act that does not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state.

---

126 Messineo 2014, p. 63.

127 Messineo 2014, p. 82.

128 Messineo 2014, p. 63. Nollkaemper seems to be convinced by Messineo's analysis, moving away from his earlier disregard of dual attribution. A. Nollkaemper et al., 'Conclusions: Beyond the ILC Legacy' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge: Cambridge University Press 2014, p.p.: 344-345.

129 Articles 16 and 17 ARIO, regulating coercion and circumvention are less relevant for this study, as they require the complete lack of effective choice on the part of the coerced party, which is not expected to be the case in EBCG operations. Therefore, they will not be analysed further. Their relevance in the context of EBCG operations may be with respect to the normative control the EU as whole exercises over member states, a topic that falls out of the scope of the present research. Further on this, see Casteleiro 2016, p. 83. Possible future relevance could be foreseen if the right of the EU to intervene without the consent of a member state expands in future amendments of the EBCG Regulation.

3.7 Aid and Assistance

Article 14 covers the attribution of responsibility to an organisation for an internationally wrongful act committed by a state, on the occasion that the organisation has aided or assisted the state in this. The organisation would be held responsible under the conditions that a) it was in knowledge of the circumstances under which the wrongful act took place, and b) that the act itself would also have been internationally wrongful if committed by the organisation.

A further requirement introduced with the interpretation of the provision by the ILC, is that the aid or assistance needs to contribute 'significantly' to the commission of the act to justify the international responsibility of the organisation.[130] It is not required however that the contribution has been essential to the completion of the wrongful act. Examples of such aid or assistance may be financing an activity that results in a violation[131] or providing logistic or service support.[132] In this sense, the requirements of the ILC Articles correspond to the causal connection that is an element of *Liability – Responsibility*. According to this element, the act needs to have a causal or other form of connection to the act, in a way that the outcome is not too remote of a consequence for the act to count as the cause. However, the connection or relationship does not need to be so close as to say that the agent directly caused the harm. The latter is, in fact, a requirement of liability in EU law[133]

Knowledge and willful blindness

The knowledge element has been identified by Hart as a determinate mental criterion for attributing *Liability-Responsibility*. Accordingly, here, it represents the international law requirement that protection shall be provided not against all threats, but against threats of which the actor had knowledge.

Different interpretations have been proposed regarding the mental element of aid and assistance. Following the letter of the provision, it can be interpreted as 'knowledge' of the wrongful act, and it, therefore, needs to be proven that the aiding actor had knowledge of the illegality of the conduct. Related to that is the interpretation of 'wilful blindness', according to which, it suffices to prove that the actor was consciously turning a blind eye to the violation committed under its auspices, even though it had access to credible information.[134]

130 Commentary to Article 14 ARIO, par. 6.
131 Commentary to Article 16 ARS, par. 6. The text of Article 16 ARS is identical to that of Article 14 ARIO and are interpreted in parallel to each other by the ILC.
132 Commentary to Article 14 ARIO, par. 6.
133 Chapter VII, section 7.
134 M. Jackson, *Complicity in International Law*, Oxford: Oxford University Press 2015, p. 54.

A view in the Commentary of the ILC Articles, reveals one more possible interpretation. That of 'intention'. By virtue of Article 14 ARIO, responsibility arises when the international organisation intended to facilitate the occurrence of the wrongful conduct committed by a state.[135] While the previous two interpretations are rather broad, the latter may prove too restrictive to be meaningful. In fact, if it is read narrowly, as malicious intent or dolus,[136] it would restrict potential responsibility so much that it would defeat the purpose of Article 14 ARIO and would make derivative responsibility through aid and assistance almost impossible.[137] It would place an unreasonable burden of proof, as one could imagine very few cases where a state or international organisation would admit to a desire as such to cause harm, such as torture.[138] Moreover, such a requirement for the aiding party would not withstand the test of reasonableness, as it is not a condition for establishing the primary responsibility of the author of the act.

Therefore, knowledge and willful ignorance seem more plausible interpretation options. The purpose test could also be read as 'incorporating a more oblique form of intent for example, that a particular consequence is to be regarded as intended if the relevant state organ is aware that it will occur in the ordinary course of events', as the mental element of intent is defined in Article 30(2)(b) of the Rome Statute of the International Criminal Court.[139] This reading reconciles the three interpretations and makes the requirement indeed feasible.

This reconciliation or the combination of the knowledge and willful blindness readings is the way the mental element has been interpreted in practice. In other words, responsibility is triggered, as established by the ICJ in the *Corfu Channel case*[140], by 'presumed knowledge', under which the actor knew or should have known about the wrongful act. The requirement of knowledge can be limited to 'predictable reliable threats'.[141] This is interpreted broadly by the United Nations Legal Council, recognising

135 Commentary to Article 14 ARIO, par. 4. See also Commentary to Article 16 ARS, paras. 5, 9.

136 The reading of the mental requirement as intent has been supported by J. Crawford, Special Rapporteur, *Second Report on State Responsibility,* UN Doc A/CN.4/498, Fifty-First Session, 1999, p. 406.

137 K. Nahapetian, 'Confronting State Complicity in International Law', *UCLA Journal of International Law,* 7, 99, 2002, p.p.: 126–7.

138 B. Graefrath, 'Complicity in the Law of International State Responsibility', *Revue Belge de Droit International,* 29, 370, 1996; H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2013, p. 236; J. Quigley,' Complicity in International Law: A New Direction in the Law of International Responsibility', *British Yearbook of International Law*, 57, 1986, p. 77.

139 R. Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity', *EJIL: Talk!* 2018, https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/; In support see Crawford 1999, p. 840, par. 72 and R. Ago, Special Rapporteur, *Seventh Report on State Responsibility*, UN Doc A/CN.4/307, Thirtieth Session, 1978, par. 52.

140 *United Kingdom v. Albania.*

141 H. Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy*, 1980, p. 33.

international responsibility if the aiding actor 'has reason to believe' that an internationally wrongful act is being committed under their aid. In this case, an international organisation 'may not lawfully continue to support that operation, but must cease its participation in it completely. [It] (…) may not lawfully provide logistic or "service" support to any (…) operation (…).' [142]

3.8 Direction and Control

The same conditions (knowledge and wrongfulness of the act if committed by the organisation) apply in the case of Article 15, according to which an organisation, which exercises direction and control over the conduct of a state in the commission of an internationally wrongful act, must assume responsibility for that act.

Concerning the relations between an international organisation and its member states, this 'direction and control' may take the form of normative control or in other words, a decision taken by the international organisation binding its members. Important here is that the dependent state does not have sufficient discretion in complying with the decision in a way that does not violate international law. Notably, mere 'influence', 'concern', or 'oversight' over the activities of the member state cannot qualify as 'control'. Moreover, 'direction' cannot be based on mere 'incitement or suggestion', but should rather reflect 'direction of an operative kind'.[143]

Notably, under certain circumstances, the international responsibility of an organisation arises with the adoption of a binding act by the latter.[144] A further circumstance of direction and control through binding decisions appears in Article 17 (Circumvention of an international obligation through decisions and authorisations addressed to members). Following Article 15 and Article 17 (1), such binding decisions would not result in the international responsibility of the organisation, if sufficient discretion were given to the member state. Such discretion should allow the state to carry out the given instruction and abide by the decision without violating international law. This, exceptionally, does not absolve the organisation from its responsibility in the case a) the organisation authorises the member state to commit an act, and b) the said state makes use of that authorisation, actually committing the act (Article 17 (2)). As noted by the ILC, '(…) by authorising

142 Commentary to Article 14 ARIO, par. 6, referring to documents published in the New York Times, 9 December 2009, www.nytimes.com. The case at hand of the UN Legal Counsel concerned the UN Organisation Mission in the Democratic Republic of Congo aiding the armed forces of the Democratic Republic of Congo.

143 International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), Yearbook of the International Law Commission, 2001, vol. II (Part Two) and corrigendum, p. 69; Commentary to article 17 ARIO par. 7; Commentary to Article 15 ARIO, par. 4; Commentary to Article 17 ARIO, par. 7.

144 Commentary to Article 15 ARIO, paras. 4, 5. Possible overlap with Article 17 is not problematic, since both provisions would provide the same outcome on attribution of responsibility.

an act, the organisation generally expects the authorisation to be acted upon'.[145] Joint exercise of direction and control is also deemed conceivable, at least when two international organisations are involved.[146]

It is hard not to notice the similarity between the concepts of direction and control and of effective control, discussed as part of direct attribution. There is indeed an overlap between Arts. 7 and 15, which makes a hard and fast distinction difficult in practice.[147]

4 Conclusions

Chapter VI has prepared the ground for the examination of responsibility in the framework of the EBCG, which is dealt with in the next chapter. In particular, it is a presentation of the applicable legal framework and the main normative principles.

I have argued here that the responsibility of Frontex even though dealt with within the framework of EU law, should be viewed in light of the legal framework on international responsibility, in particular the ARIO and their interpretation by international courts. The interaction of these two legal systems, within a pluralist legal environment, can provide accuracy, clarity and legal certainty to the question of responsibility within EBCG operations.

In sum, the main rule of attribution of responsibility (who is responsible) to an international organisation is the principle of independent responsibility, which focuses on the attribution of conduct. This principle leads to direct responsibility: if an internationally wrongful act can be attributed to an organisation, then that organisation is responsible for that wrongful act. As wrongful act, we can identify any sort of conduct, either act or omission, that constitutes a breach of an obligation under international law.

The acts that can be attributed to an organisation are, according to the rules on attribution of conduct (who has acted), those that are conducted by organs or agents of the organisation. This can be either the organisation's own personnel or seconded parties to the extent that the organisation exercised effective control over their wrongful conduct. Effective control is determined with the examination of a variety of criteria: a) decision-making power, b) de facto power, c) retention of disciplinary power and d) power to prevent a violation. There is no strict hierarchy in the application of these rules, which are also not mutually exclusive. Moreover, determinate is the degree of effective control exercised by an organisation. Thus, dual or even multiple attribution of conduct (and thus, of responsibility) can be envisaged.

145 Commentary to Article 17 ARIO, paras. 7, 8.

146 ICJ 15 December 2004, Preliminary Objections, *Legality of the Use of Force* (*Yugoslavia v France*), p. 33, par. 46.

147 A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', *International Organizations Law Review*, 7, 63, 2010, p. 77.

As exceptions to the principle of independent responsibility (direct responsibility), the rules of indirect responsibility have been presented. According to these rules, an organisation may still be responsible for an act that is not attributed to it. This can be the case when the organisation has a certain relation to the act, either because it has aided and assisted in it, or because it has exercised direction and control over it without leaving sufficient discretion to the state to carry out the instruction without engaging in illegal conduct. Protection is afforded in the case of aid and assistance not against all breaches, but against those that the organisation had knowledge of or, at least, against predictable, reliable threats.

The above summarised principles will be applied in the following chapter in the context of the EBCG.

7 Application of the legal framework to the EBCG

1 Introduction

The purpose of this chapter is to apply the principles and legal framework, and the conceptual framework on responsibility and accountability, discussed in the previous chapters to EBCG operations and Frontex in particular.

Therefore, this chapter's central questions are whether Frontex can independently or together with the member states bear responsibility for breaches of its international obligations and how such responsibility can be realised within the legal framework. In this chapter, I develop the appropriate legal structure under which such responsibility should be addressed.

For this reason, I apply the legal framework, in particular regarding the rules of attribution of conduct and the rules of attribution of responsibility to the EBCG, looking into the direct and indirect responsibility of Frontex. Further, I deal with the examination of the Nexus theory within this legal framework concerning the responsibility of multiple actors and study the powers and limitations of the Nexus theory in its practical implementation in joint operations.

The focus of the chapter remains on the responsibility of Frontex, but the responsibility of the host and participating states is also partially examined when necessary to provide a holistic picture of responsibility in the EBCG operations.

The chapter examines, first, the possibility of direct responsibility, as a result of the main rule of attribution of responsibility, i.e. the principle of independent responsibility, and asks whether Frontex exercises effective control over the deployed agents. Next, it examines the possible indirect responsibility of the agency applying the other rules of attribution of responsibility, especially with regard to aid and assistance. Finally, the *problem of many hands* is discussed as it presents itself in EBCG operations, as well as its solution in the context of the Nexus theory, rules of invocation of responsibility, and the model of *systemic accountability*.

2 Direct responsibility

For the agency to bear direct responsibility for harm done, the wrongful conduct needs to be attributed to it through its agents or organs. This most certainly includes employees of the agency. In fact, Frontex acknowledges that their acts entail the responsibility of the agency, as it becomes apparent

in 'The Agency's Rules on the Complaints Mechanism' drafted by the Executive Director. According to this internal document, however, only complaints that concern Frontex staff members and seconded personnel based in Warsaw will pass the admissibility stage and will be dealt with by the agency.[1] However, the underlying assumption is that these are the only agents that can bind the agency in terms of its international responsibility.

This view is undoubtedly put in perspective after the 2019 amendment of the EBCG Regulation that grants Frontex a standing corps of border guards, which includes its own personnel (Article 71). This chapter does not present a complete legal analysis of responsibility issues resulting from the 2019 Regulation, which is not feasible without a clearer picture of how the new Regulation will be implemented in practice. Nevertheless, attention is paid to the development of the responsibility of the agency as a result of the standing corps, that is expected to be operational only after 2020.

Moreover, the responsibility rule of Article 6 ARIO should be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Thus, de facto organs acting in their formal capacity can also bind the organisation, whether they acted in accordance with their mandate or ultra vires.

2.1 Are the agency's new statutory staff de jure agents of Frontex?

According to the latest amendment of the EBCG Regulation, a standing corps of 10.000 operational staff is composed that newly includes statutory staff employed by the agency (Article 71). The Regulation understands operational staff as border guards, return escorts, return specialists and other relevant staff participating as members of the EBCG teams, as well as staff responsible for the functioning of the ETIAS Central Unit.[2]

The statutory staff that participate in the teams will be deployed on the ground, will have executive powers and can operate the agency's own equipment. Their executive powers are similar to the border guards and return specialists of the member states. They will be able to authorise or refuse entry at border crossing points, issue or refuse visas at the borders, stamp travel documents, patrol borders, and intercept or apprehend persons crossing irregularly. Besides, they will perform identity and nationality checks using the False and Authentic Documents Online system, which the agency will take over from the Council General Secretariat,[3] and

1 Frontex Executive Director Decision No R-ED-2016-106 on the Complaints Mechanism, Annex1 'The Agency's Rules on the Complaints Mechanism', Article 10(1). The document was published before the 2019 amendment of the EBCG Regulation, which also provides for Frontex staff present on the field.

2 Preambular paragraph 16 EBCG Regulation.

3 Migration and Home Affairs, False and Authentic Documents Online (FADO), https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/false-and-authentic-documents-online_en.

register fingerprints of those apprehended in Eurodac. They will be able to liaise with third countries to facilitate returns, and escort returnees subject to forced-return. Finally, the power to carry weapons will extend from the deployed national border guards to all members of the standing corps, including agency staff.

In the context of such extensive powers, members of the statutory staff may commit a wrongful act, as understood by Article 4 ARIO, that is in breach of an international obligation and affects the rights of individuals (Article 11 ARIO).

The fact that the statutory staff is employed by the agency and Frontex has disciplinary powers over them constitutes them de jure agents that bind the agency with their conduct. Following the principle of independent responsibility, any such wrongful conduct of the agency's operational staff is attributed to Frontex, and thus, it gives rise to the responsibility of the agency (Articles 6-9 ARIO).

2.2 Do non-staff members of the standing corpse constitute de facto organs of Frontex?

I now deal with the members of the standing corps that are not employed by the agency. These may concern 1) staff seconded from member states available for long term, 2) staff provided by member states for short-term operational deployment, and finally 3) the rapid reaction pool composed of member states staff that are available for rapid border interventions (Art. 54 EBCG Regulation).

The seconded or short-term deployed agents, including those from the rapid reaction pool, are officials of their respective states. Their conduct is attributed in accordance with Article 4 ARS and Article 6 ARIO. For their conduct to be attributed to the EU, they need to be seen as de facto organs or agents of the EU.

The view that such agents are a sort of 'dédoublement fonctionnel' acting as EU organs when they are under the EU's normative control, as they simply execute EU law, has been supported by Kuijper and Paasivirta.[4]

This approach has not been favourably looked upon in legal doctrine, as it is argued that the actual degree of control by the EU over the member state organs is too weak to justify them being considered de facto EU organs.[5]

4 Kuijper and Paasivirta 2004, p.p.: 124-127.

5 P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels: Bruylant 1998, p.p.: 385, 386, referenced in Kuijper and Paasivirta 2004, p. 126; For the opposite view see M. P. Moelle, *The International Responsibility of International Organizations: Cooperation in Peacekeeping Operations*, Cambridge: Cambridge University Press 2017, p.p.: 160-202; Casteleiro 2016, p.p.: 79-109, 235.

In the absence of compelling arguments to the contrary, it should be concluded that the conduct of the national border guards, cannot be attributed to the EU on the basis that the normative control the EU exercises over them constitutes them de facto EU organs. Participating border guards exercise governmental functions and remain organs of their respective member state. Their actions are considered to be actions of that member state in the sense of Article 4 ARS.[6] They could still engage the responsibility of the international organisation if that organisation has effective control over them. Thus, the question of the attribution of their acts to the EU should be referred to Article 7 ARIO.

2.3 Does Frontex have effective control over the conduct of the seconded officers?

Border guards are organs of their respective state. If they have been made available to Frontex, their secondment or short-term deployment does not automatically transfer the responsibility to the international organisation, as the guest officers remain to certain extent organs of their home state. In such cases, the Commentary to Article 7 ARIO acknowledges that it is difficult to distinguish whether the conduct is attributed to the state or the organisation. The decisive element is that of 'effective control'.

The question of who has effective control over the officers participating in Frontex operations is a rather complicated one.[7] Different levels of control by different actors are interlaced in a way that a singular answer becomes almost impossible.

The applicable test, in this case, would be that of operational command and control, taking into account the factual circumstances. We have also examined the 'ultimate control' test adopted by the ECtHR.[8] This would not be called for here, as the case of Frontex does not involve delegation of powers between the agency and the host state.[9] The analysis of the case law in the previous chapter regarding the meaning of effective control has identified several elements that are decisive in the determination of who has effective control. None of these elements is exclusive, and a complete answer calls for a balanced consideration of them all. These include: decision-making powers, de facto powers, disciplinary powers, including criminal jurisdiction, as well as positive obligations to prevent a violation.

6 Fink 2017 and Mungianu 2016 reach the same conclusion. Fink excludes staff that is fully seconded to the agency. Fink 2017, p. 151). On criticism of the division between fully-seconded and other deployed personnel, see A. Sari, 'UN Peacekeeping Operations and Art. 7 ARIO: The Missing Link', *International Organizations Law Review*, 9, 77, 2012.

7 Chapter VI, section 3.4.

8 Chapter VI, section 3.4.

9 Al-Jedda v. The United Kingdom.

It is derived from the EBCG Regulation that the decision-making powers, in the meaning of 'who gives the orders' belong mainly to the host state (Arts. 21(1), and 40(3) EBCG Regulation).

However, the instructions of the host state are not independent, but shall be in implementation of and should comply with the Operational Plan (Article 43(1) EBCG Regulation), which is drafted by the agency. The Frontex Coordinating Officer also communicates the agency's views regarding the instructions of the host state. These views shall be taken into consideration and be followed upon to the extent possible (Article 43(2) EBCG Regulation).[10] It has been observed that the teams are in fact deployed "under the supervision" of the Frontex Coordinating Officer[11] and that he is, in fact, the one who retains responsibility for the instructions given."[12]

Moreover, Frontex sets the environment on the basis of which operations take place, financing operations, deploying the teams and technical equipment, while it may initiate an operation. It further, conducts research and risk analysis on the basis of which all decisions regarding an operation are made and coordinates the work of the different member states. Thus, although Frontex will at no point issue instructions directly towards the seconded officers, there are several levels of orders and control that are above the day-to-day command of the operation.[13]

Furthermore, it is not only the formal arrangements but also the factual circumstances that need to be considered. In this case, one more actor is added to the list of decision-makers. Fink finds that when decisions are made that affect a plane or other large asset of a participating state, the consent of that member state is sought. Even though the participating member state does not have formal veto powers over the decision, in practice no decision is made until consensus is reached. Thus, there is a certain level of authority still exercised by the participating member state over its asset, arguably including the personnel deployed in that asset.[14]

---

10 Fink observes that the operational plans describe in more detail the control regime, or as it is referred to there, the operational and tactical command and control. However, they don't manage to create a comprehensive or consistent formal regime over the types of authority each actor exercises over the guest officers. Fink 2017, p.p.: 82, 83.

11 S. Carrera, L. den Hertog and J. Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control', *European Journal of Migration and Law*, 15, 4, 2013, p.p.: 340. 69.

12 Amnesty International and ECRE 2010, p. 6.

13 For other authors, the lack of direct instructions to the deployed personnel excludes the possibility of effective control by Frontex. 'Article 7 (ARIO) would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU' Fink 2017, p. 165. Rijpman and Mungianu, as well do not deal with the direct responsibility of Frontex due to effective control.

14 Fink 2017, p.p.: 85, 86.

On a different note, the law of the host state governs the activities during an operation. Exceptionally, the national law of the home state applies regarding authorisation to carry weapons and relevant equipment. The consent of the host state is also needed in this respect. The law that applies with respect to the use of force is that of the host member state (Article 92 EBCG Regulation). At the same time, the home member states retain disciplinary powers over their deployed personnel (Article 43 EBCG Regulation), while guest officers are subject to the civil and criminal jurisdiction of the host state (Arts. 42 and 43 EBCG Regulation).

Moreover, the agency is vested with adequate legal power to prevent wrongdoings. Its formal monitoring and supervisory obligations, along with the duty of the Executive Director to terminate or suspend an operation, as well as the training it provides to border guards are procedural manifestations of the positive fundamental rights obligations of Frontex.

Finally, if in a particular case, even if it is not immediately concluded that the act can be directly attributed to Frontex, Article 9 ARIO can still be relevant. As mentioned, according to Article 9 ARIO, acknowledgement (or adoption) of the conduct by an international organisation, can lead to the attribution of the conduct to that organisation. This can be connected to the argument theoretically phrased by Guild, the representation doctrine, according to which Frontex taking credit for the success of the operations is only the one side of a coin, of which the other side is assuming responsibility in case of wrongdoings.[15] Thus, the impression that Frontex operations give, and the claim of credit of their success by the agency, may be regarded as adoption of the conduct, which can lead to the attribution of the conduct to the organisation and the direct responsibility of the agency. This is understandably, not a stand-alone argument, but its legal value is notable when taken together with the overall circumstances of the case.

From the above, we conclude that the argument that Frontex may not bear responsibility for wrongdoings, or that it is only responsible for its own personnel, is incorrect. Frontex can have, in fact, effective control over the seconded personnel through its various organisational, supervisory and other powers.[16]

The second conclusion that we can draw is that the effective control of Frontex does not exclude the effective control of the member states. In fact, none of the actors has exclusive control. It has been shown that the largest portion of effective control over agents that are not part of the agency's statutory staff belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control.

15 Chapter IV, section 4.4.

16 Similar conclusions have been drawn by several authors, among which, A. T. Gallagher and F. David, 'The International Law of Migrant Smuggling', *The American Journal of International Law*, 110, 4, 2016, pp. 347–348; Majcher 2015, p.p.: 60-64.

2.4 Dual attribution of responsibility in EBCG operations

This non-singular answer to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the 'degree of effective control exercised by either party' that is important. Guy Goodwin-Gill has already in 2011 argued that it is both Frontex and the member state that have effective control. [17] This is unequivocally supported by the findings of the above analysis. Therefore, in cases where Frontex can be proven to have effective control over the seconded personnel, their acts can be attributed to the agency, which bears thus, direct responsibility. The same acts may be attributed to the member states (dual attribution).

The above analysis sets the framework for responsibility during EBCG operations. It cannot, however, serve as a template for all cases. In the end, it all depends upon the particular factual circumstances of each case. Moreover, further empirical research is needed to achieve an understanding of the full range of implications of the command and control structure in practice, which is undoubtedly constrained by the lack of transparency into Frontex operations.

Although there are strong arguments in favour of the direct responsibility of Frontex and dual attribution of the act, this is not supported in one voice in the literature. Both the authorship or attribution of an act to Frontex and the potentiality of dual attribution itself are controversial issues.[18] Moreover, there is no hierarchy among the criteria and we cannot predict what weight the courts will give to each of them.[19]

The arguments for the direct responsibility of the agency, however, are strengthened, as the agency will soon operate with its own personnel that will have executive powers and conduct operations in the agency's own vessels and aircrafts.

In any case, as pointed out by Special Rapporteur Gaja, 'responsibility of an organisation does not necessarily have to rest on attribution of conduct to that organisation'.[20] We can, thus, move on to the less contested arguments on indirect responsibility.

17 Goodwin-Gill 2011; See also, Majcher I2015, p.p.: 58-64.

18 For instance, Mungianu 2016 objects dual attribution, while Papastavridis 2015 follows the competence model, reaching a different conclusion.

19 Fink, for instance, weighing the same elements, even in the absence of factual disagreement, reaches the opposite conclusion that the threshold of Article 7 ARIO is not met with respect to Frontex. Fink 2017, p. 164.

20 Gaja 2004, p. 8.

3 Indirect responsibility

As discussed in Chapter VI, there are exceptions to the rule of direct attribution of responsibility (principle of independent responsibility), according to which an organisation may be held responsible for an act that is attributed to the member state if it is proven that it has contributed to it. This may result in the indirect or derivative responsibility of the organisation.[21] This contribution can take the form of either aid and assistance or direction and control.

3.1 Is Frontex responsible due to aid and assistance?

Frontex finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as EUROSUR and the new, since 2019, centralised return management platform. Any of these powers and competences and indeed their combination can be regarded as significantly contributing to the commission of a wrongful act during an EBCG operation. It could be argued that the particular sensitivities, such as a regular practice of push-back pre-existed Frontex operations, or perhaps that the presence of Frontex officers has, in fact, contributed to fewer violations. However, whether the aid or assistance was essential to the completion of the wrongful act is not significant for the purpose of determining international responsibility.

Indirect responsibility through aid and assistance though is dependent upon two conditions. Firstly, the act itself should also have been internationally wrongful if committed by Frontex itself. Frontex is bound by the same human rights obligations as the member states as they are derived from the Charter and the Frontex Sea Operations Regulation.[22]

Secondly, following the generally accepted interpretation of the mental element of Article 14 ARIO, it needs to be established that the organisation knew or should have known of the wrongful act. Frontex has extensive monitoring and supervisory duties and systems, such as the serious incidents reporting, that allow it to be able to detect human rights sensitivities in each country. More concretely, when the 2019 EBCG Regulation is implemented human rights monitors belonging to the agency's own staff will supervise return flights. If the violation is recurring or based on structural deficiencies of the system of the host state, it may be reasonably presumed that it was in knowledge of the agency. That is especially the case when these violations have been documented in credible NGO and media reports. Another instance when such knowledge can be presumed is whether the violation should be reasonably assumed to result from the operational plan itself, whether this leads to the violation by default or whether the

21 Commentary to Chapter IV ARS, par. 8.
22 Chapter IV, section 4.1.

operational plan does not provide for adequate guarantees to avoid it. In accordance with the Frontex Sea Operations Regulation, guarantees such as the availability of shore-based medical staff, interpreters, legal advisers and other relevant experts need be included in the operational plan. Failure of the operational plan to make such provisions can give rise to a predictable and reliable threat of violations of the right to access asylum or the prohibition of refoulement,

Thus, if it can be reasonably presumed that the agency was aware of a violation or that it should have known, but it willfully turned a blind eye, its indirect responsibility may arise from the financial, operational and practical aid and assistance it has provided.[23]

3.2 Is Frontex responsible through direction and control?

As I already established, effective control by Frontex over seconded personnel and therefore direct responsibility is arguable, but not beyond doubt. If the arguments against effective control or dual attribution prevail before courts, it does not mean that the influence of the agency over the operation should necessarily be ignored.[24] It can still play a role in the context of derivative responsibility if it is proven that the agency exercises direction and control over the conduct of the state in the commission of the internationally wrongful act.

It has been suggested that Frontex does not exercise direction and control over a wrongful act, because it does not adopt any binding decisions.[25] 'Decision' though, should be understood broadly. Direction and control is not read as complete power over an act,[26] but as a state of control that overlaps with effective control. It does not necessarily represent a formally binding act, but any act that either de jure or de facto does not leave adequate discretion to the member state to implement it without violating primary rules of human rights protection.[27]

Such decisions that limit the discretion of the member state could be, for instance, the operational plan that is drafted by the agency, in conjunction with the orders and the supervision of the Frontex Coordinating Officer. It will need to be established in each individual case that the decisions would arguably lead to violations and that the said state did not have sufficient discretion in complying with them in a manner that does not violate international law. A difficulty of proof is the lack of access to the operational plan and the instructions provided by the Frontex officer, as well as the relevant internal documents of the agency, such as serious incidents reports.

---

23 See among others, Papastavridis 2015, p.p.: 258-260.
24 Section 2.
25 Mungianu 2016, p. 76, fn. 111.
26 ASR Commentary, at p. 69, para. 7.
27 ARIO Commentary, p.p.: 38-39, par. 4.

Notwithstanding the practical difficulties, such direction could in principle constitute a form of direction and control over the conduct of the state, if for instance, the operational plan provides for return to the port of embarkation in the absence of adequate guarantees for the right to non-refoulement and the right to asylum. The control of the agency over the acts of the state would be strengthened even more if the operation were a result of the right of the EU to intervene and impose measures of border control upon the host state, a decision which is first essentially made at the level of the agency.

It is possible that each one of these elements separately and independently would not necessarily reach the level of direction and control, but if considered together, and even in combination with the financial control of the agency over the operation, they would create an environment where the discretion of the member state would be significantly restricted.[28]

A relevant argument owed careful consideration has been developed by Madalina Busuic. She points out that agencies have certain advisory functions, that although not formally binding, they are in practice quite influential, due to the research and technical expertise of the agency.[29] In this sense, they become de facto binding over the final act of the member state. The argument will be developed further with respect to the risk analysis of the agency in Chapter VIII. This can also become particularly relevant in view of the new power of Frontex to prepare return decisions. Such decisions will not be binding in nature and will aim at advising and assisting the member state, which will have the final say in the return decision. Despite the official mandate, however, it can be imagined that these advisory preparatory decisions can gain beyond mandate influence, as it happened in the case of EASO drafting the vulnerability decisions for the Greek asylum service.[30]

With respect to the remaining conditions necessary for Article 15 to apply, what has been discussed earlier concerning wrongfulness of the act and knowledge apply here as well. Similarly, joint exercise of direction and control is also conceivable.

4 De jure or de facto competence

A separate issue that needs to be discussed is that of the nature of the competences the agency exercises. The agency emphasises that any potential responsibility can occur only in the context of its de jure competences, i.e. the activities directly defined within its mandate.[31] This would absolve the agency of wrongful acts committed outside its mandate, which would

28 see also Moreno-Lax and Giuffré 2017, p.p.: 20-23.

29 Busuioc 2013, p. 192.

30 European Ombudsman 2017.

31 Frontex Fundamental Rights Strategy, point 13, http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf; European Ombudsman 2013a.

not be permissible of the basis of the principle of effective legal protection. In order for the protection offered by the Charter and the ECHR to be practical and effective rather than theoretical and illusory, all acts of the agency, including its de facto competences, should be able to engage the agency's responsibility. Responsibility over the de jure as well as the de facto competence constitutes a principle of international law,[32] and has been recognised by the ECtHR in *Medvedyev*[33] and *Hirsi Jamaa*.[34] The ECtHR has further ruled that liability may be incurred 'by reason of its (the actor) having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment' regardless of the official mandate.[35] Frontex is bound by its obligations irrespective of whether it had competence for the committed acts under its internal rules.[36] Article 8 ARIO provides that an act is still attributed to an organisation, even if conducted by an agent or organ in excess of the authority formally provided to them.[37] Such conduct may even exceed the competence of the organisation itself.[38]

This may prove relevant on several occasions, where Frontex has acted ultra vires or created its own de facto competences. One such instance concerns EUROSUR, which was operational before the Regulation came in force. The EUROSUR Regulation was adopted on 22 October 2013. EUROSUR's operations officially started on 2 December 2013, but in practice, the system had already been operational on the ground, while its legal basis was still under negotiation.[39]

In another example, Frontex did not have the competence to process personal data until the 2011 amendment.[40] However, it has long before that amendment been processing personal data in the context of joint return operations,[41] allegedly without adopting any measures for the implementation of data protection legislation.[42]

Finally, Frontex had already been participating in operations in the context of bilateral agreements with third countries, for example, Hera Operation, 2006, before that was foreseen in the 2011 amendment of its

32 e.g. Law of the Sea and ARS.
33 ECtHR 29 March 2010, App. No. 3394/03, (*Mededyev v France*), paras. 66, 67.
34 *Hirsi Jamaa and Others v. Italy*, par. 80.
35 ECtHR 4 February 2005, Judgment, App. Nos. 46827/99 and 46951/99 (*Mamatkulov and Askarov v Turkey*), par. 67.
36 For instance, the mandate for Operations Poseidon and Nautilus seems unstable. Papastavridis 2010; S. Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Aja: Martinus Nijhoff Publishers 2005, p. 416.
37 Also applied in ICJ 20 July 1962, advisory opinion Certain expenses of the United Nations, I.C.J. Reports 1962, p. 168.
38 Commentary to Article 8 ARIO, par. 1.
39 Frontex 2012b, p. 20; European Commission 2011a, p. 2.
40 Article 11(b) and (c) Frontex Regulation.
41 EDPS 2010.
42 Data Protection Regulation; Statewatch and Migreurop 2012, p.p.: 11, 12.

Regulation. Finally, Frontex may not reject any responsibility, for instance, with respect to assisting Greece in violating migrants' rights in detention, on the basis that it has no mandate over that detention.

5 The problem of many hands in EBCG operations

The previous sections have shown that the agency may incur responsibility either directly or indirectly for acts or omissions of its statutory staff or the seconded personnel. Examining the application of the above principles to EBCG operations, however, we can observe that other actors also bear responsibility.

By virtue of Arts. 4-11 ARS, governing the attribution of an act to a state, the responsibility of the host member state seems to be an obvious conclusion. That state hosts and carries out the operation conducted in its territory, and the members of the deployed teams are under its command. Any violation arising during such an operation, for instance, a push back or abuse of those apprehended can be directly attributable to that state.[43]

The same holds in case a third state is in charge of an operation in its own territory. While the responsibility of an EU member state hosting an operation can be easily resolved within EU liability law and the ECHR, the application of international law is essential for third states as they are not bound by EU law and potentially not even by the ECHR.

Similarly to the agency, states participating in an operation may also incur responsibility for aiding or assisting in a violation conducted by the host state (Article 16 ARS), for instance to the extent that they have contributed with personnel or assets, as well as funding, technical and logistical support to an operation, which resulted in a violation. In this regard, the participating states cannot be exempt from responsibility on the basis that their personnel was under the authority of the host state. This could be the case only if the host state exercised exclusive command and control over the guest officers (Article 6 ARS), which is not apparent in EBCG operations.[44]

To sum up, both hosting member states or third states, and participating states may be responsible for a violation, while Frontex itself can incur responsibility either directly for acts of its own statutory staff and through effective control over seconded personnel, or indirectly through aiding and assisting in a violation or through direction and control. At the same time, none of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a rather confusing picture regarding responsibility that has been conceptualised earlier as the *problem of many hands*.

43 For a more detailed view on the responsibility of states involved in EBCG operations, see Fink 2017.

44 Papastavridis 2010, p. 107.

6 The Nexus theory and the responsibility of multiple actors

It has been argued that the solution to the *problem of many hands* is to be found with the help of the Nexus theory, according to which when this problem arises not one actor is entirely and independently responsible for the outcome, which outcome is rather the collective result of the interlinked responsibilities that take place.[45] It is in a nexus that the separate responsibilities meet and interact through the cooperation of the different actors. Only when the responsibilities meet, the harmful result can occur. Therefore, we should view these responsibilities not separately, but as a nexus and deal with them as being collective. This can be done in a framework of joint responsibility.

This section deals with the normative applications of the Nexus theory through joint responsibility. It starts from the examination of the relevant rules and principles of EU law, and proceeds with the relevant general principles of international law.

6.1 Joint Responsibility in general EU law and the EBCG Regulation

First, it should be examined whether EU law has already provided an answer as a matter of pure EU law. The Treaties themselves do not contain any secondary rules concerning the joint responsibility of the EU and its member states. However, joint responsibility is not foreign to EU law.

The CJEU has dealt with joint responsibility under mixed agreements, stating that in the absence of derogations to the opposite, such as declarations of competence where responsibility would be apportioned accordingly, the EU and its member states are jointly liable for the fulfilment of their obligations towards the ACP States [States of Africa, the Caribbean and the Pacific] in the context of the Lomé Convention.[46] According to this, when member states and the EU are bound by the same obligations derived from an agreement to which they are both parties, they are automatically jointly liable regardless of the rules of attribution.[47] This could potentially, and by way of analogy, become relevant in the context of EBCG operations once the EU accedes the ECHR. The CJEU could then choose to draw arguments from the way the EU treats joint responsibility in its international relations (specifically in mixed agreements). This could indeed offer an acceptable solution resembling the way the CJEU handles mixed agreements, which could give rise to their joint liability where action is taken

45 Chapter IV, section 5.

46 CJEU 2 March 1994, C-316/91, ECLI:EU:C:1994:76 (*European Parliament v Council of the European Union*), par. 296.

47 M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Law Working Paper 2006/22, 19, 2006, p. 19; Gaja, 2004, par. 5.

jointly by both actors.[48] An example of such an instance was *Parliament v. Council*, where the CJEU held that the Community and its member states were jointly liable for the fulfilment of any obligation arising from the agreement since the agreement was concluded in common by the Community and its member states and there are no derogations in the Convention itself that point to the opposite conclusion.[49]

However, it should still be highlighted that this case concerns mixed agreements, while this study focuses on the non-contractual liability of Frontex. What is more, we can hardly deduce a general principle regarding mixed agreements from what the Court said in this case, as it could be particular to the bilateral nature of the cooperation in this Convention, which reflects reciprocal relations between two blocks, the EU and its member states representing one block and the ACP States the other.[50] Thus, we have no way of predicting whether the CJEU will treat that as a general rule and afford the same solution with respect to non-contractual liability issues when both the EU and member states are involved.

Besides, such a general rule that the EU and its member states are jointly liable when they are both bound by the same set of international obligations unless there is an a priori agreement allocating responsibility, regardless of their actual involvement in the act, could diminish the autonomous legal personality of the international organisation. An act of a member state automatically engaging the responsibility of the EU and vice versa would be at odds with the institutional structure of the EU that is independent from its member states.[51]

Therefore, being bound by the same obligations does not unconditionally result in the joint responsibility of the EU and its member states.[52] However, this is an indication that a solution in the direction of joint liability would resonate within EU law.

The CJEU has dealt with the joint responsibility of the EU and its member states in cases of non-contractual liability in *Kampffmeyer*, which is discussed in more detail in the next chapter.

Another place where we could look for specific provisions within EU law is the EBCG Regulation, in particular, Article 7(1), entitled Shared Responsibility, which states that

48 For further read: C. Tomuschat, 'Liability in mixed agreements' in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983; G. Gaja, 'The European Community's rights and obligations under mixed agreements', in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983.

49 *European Parliament v Council of the European Union*, p.p.: 661, 662. Certain mixed agreements expressly allocate competence and responsibility for positive breaches either to the Member State or the EU

50 Casteleiro 2016, p. 65.

51 Casteleiro 2016, p. 67.

52 Casteleiro 2016, p. 66.

> *'The European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management (…). Member States shall retain primary responsibility for the management of their sections of the external borders.'*

Notably, Article 7(1) covers what we have identified in as *Role-Respon*sibility (Hart) or *responsibility as task and virtue* (Bovens).[53] *Role-Responsibility* is understood in relation to the assignment of specific tasks and duties to an agent, given its role or position; duties that belong in one's sphere of responsibility. This does not necessarily correspond to *Liability – Responsibility* (Hart) or *responsibility as accountability* (Bovens) that is our main focus in this chapter. More specifically, the article identifies in broad strokes the roles, and range of duties and tasks of the agency and the member states, and sets basic foundations for awareness of each actor's own obligations. The Regulation is not specific about attribution of responsibility. The *Role-Responsibility* covered here does not directly correspond to the attribution of responsibility on each actor, as *Liability – Responsibility*, but it can be related to it.

This provision was introduced in the EBCG Regulation in 2016 (then Article 7(1)) in response to the Ombudsman's request for further clarity into the allocation of responsibility between Frontex and the member states.[54] The Ombudsman undoubtedly was concerned with the *Liability – Responsibility* of the agency. Therefore, this provision can be read as intended to indeed provide further clarity on this issue.

Even though the provision does not directly allocate responsibility ex ante, it provides some guidance. In particular, it puts border management in the sphere of the shared responsibility of the agency and the member states, highlighting the primary responsibility of the host state.

We can thus conclude that even though joint responsibility is not foreign either to EU liability law as a whole or to the ECBG Regulation in particular, the EU legal framework does not provide us with stable answers as to its exact content and the specific characteristics. Therefore, we may turn for guidance to the relevant international law.

6.2 The Meaning and Practical Implications of Joint responsibility

Given that the international environement becomes more and more complex, also including an increased activity of non-state actors, situations regarding the responsibility of international organisations, it may prove quite common that more than one actor, member state or international organisation, is responsible for the same wrongful act.

53 Chapter IV, section 2.1.
54 European Ombudsman 2013c.

This can be the result of double or multiple attribution of the same act to several actors. Moreover, several rules of attribution can apply simultaneously, for instance, the principle of independent responsibility along with aid and assistance, pointing at the direct responsibility of one actor and the indirect responsibility of another.[55]

This can be the case in EBCG operations, with respect to Frontex and the state hosting the operation, as well as participating states. The responsibility of Frontex, in this case does not result in the host state being absolved of responsibility.

By virtue of the ILC Articles, the responsibility of one actor is without prejudice to that of another and the parallel responsibility of multiple subjects of international law is envisaged in the same set of circumstances.[56] In particular, according to the UN Special Rapporteur on the Responsibility of International Organisations, if an internationally wrongful act can be attributed to one or more states or international organisations, the actors involved are jointly responsible.[57]

The parallel responsibility of more subjects of international law is covered under the rule of invocation of responsibility, Article 48(1) ARIO, according to which an internationally wrongful act can be attributed to one or more states or international organisations.[58] The 'joint responsibility' of an international organisation is envisaged in connection with the wrongful act of a member state in the meaning of Articles 14-18 ARIO.[59]

Aiming to elaborate on the meaning and practical implications of joint responsibility as that has been developed by the ILC, we first need to clarify the appropriate terminology.

An all-encompassing term referring to any situation where multiple actors have contributed to a harmful outcome and legal responsibility needs, thus, to be allocated to them all, is *shared responsibility*.[60] This single harmful outcome may be the result of several wrongful acts of different actors (Type A situations), or the same wrongful act, which is the effect of actors acting together (Type B situations).[61]

---

55 Chapter, VI, sections 3.5. and 3.6.

56 Articles 19 and 63 ARIO, Commentary to Article 3 ARIO par. 6.

57 Gaja, 2004, paras. 8, 9. The joint responsibility between member states and agency has also been proposed among others by Goodwin-Gill 2011, p. 447; LIBE 2011, p. 92-95; Weinzierl and Lisson 2007, p. 72.

58 Chapter VI, section 3.6.

59 On the responsibility of a state in connection to an act of an international organisation, see: Casteleiro 2016, p.p.: 90-105.

60 A. Nollkaemper, 'Introduction' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2014, p. 7.

61 P. D'argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law)*, Cambridge: Cambridge University Press 2014, p.p.: 211, 212.

Nollkaemper and Plakokefalos have attempted the categorisation of shared responsibility into the following subcategories:

– *Concurrent responsibility*, when each actor's contribution constitutes a wrongful act that is the independent cause of the harmful outcome. In this case, each individual contribution in itself is independently sufficient to cause the harm.[62]
– *Cumulative responsibility*, when each contribution would have not necessarily been sufficient in itself to cause the harm, yet it is sufficient to trigger the responsibility of the author.[63]
– *Joint responsibility*, when multiple actors commit together the same wrongful act, which causes the harm.[64]

The first two, *concurrent* and *cumulative responsibility* fall under Type A situations, while *joint responsibility* falls under Type B.

Complicity in the form of aid or assistance and the instance of direction and control discussed in the previous section can be examined under this light. Aiding or assisting is considered as an act distinct from that of the assisted state (Type A), and is considered to fit under *cumulative responsibility*.[65] *Cumulative* can be the responsibility of Frontex on the basis of the argument that it assists a host member state in a violation, by, for instance, continuing to finance and coordinate an operation, upon the knowledge that violations are being committed.

Joint responsibility, where the different actors have committed the same wrongful act (Type B), is relevant in cases of direction and control,[66] or when two or more actors work together in carrying out an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation.[67] *Joint responsibility* can also apply to Frontex, given, for instance, the control of the host state over the deployed personnel and the agency's involvement in research and risk analysis and drafting the operational plan, which covers all the essential aspects of an operation and is binding upon all actors involved. Conversely, an instance where a wrongful act is committed by the agency's statutory staff under the day-to-day command of the host state can also give rise to *joint responsibility*.

The above categorisation is valid as the result of rigorous academic study but does not constitute binding legal terminology. It will be used in this study to the extent that it proves helpful for our conceptual understanding, but it will be derogated from, later in section 6.5. where *joint*

62 Nollkaemper 2014, p. 9.
63 Nollkaemper 2014, p. 10.
64 Nollkaemper 2014, p. 10.
65 D'argent 2014, p. 214.
66 Commentary, n.1 to Article 47 ARS, par.2; D'argent 2014, p. 222.
67 D'argent 2014, p. 222; ARS Commentary, n. 1, p. 124, par, 2.

responsibility comes closer to the way the term *joint responsibility* is referred to in the official Commentary to the ARIO,[68] and in EU law, and has been understood by the theory so far. [69]

The ILC Articles explicitly deal only with *joint responsibility* (as meant by Nollkaemper and Plakokefalos)[70] in Article 48 (1) ARIO, which states that:

> *'Where an international organisation and one or more States or other international organisations are responsible for the same internationally wrongful act, the responsibility of each State or organisation may be invoked in relation to that act.'*

The exact content of *joint responsibility* and its modalities, if not the terminology itself, are still to be determined. While international law recognises the circumstance of *shared responsibility*, it does not provide adequate guidance as to exactly how responsibility or reparation should be shared, while the relevant case law is limited.[71] This leaves room for interpretation and progressive development of the law. Admittedly 'the law as formulated by the ILC will offer substantial flexibility to address questions of shared responsibility', while the ILC itself appraises the progressive development of the law on the basis of proposals and identifiable trends in state practice.[72]

In other words, the ILC Articles are not written in stone and they do not provide all the answers. Instead, normative thinking is necessary, for which we can use the principles of international law as guidance. The lack of settled case law and concrete a priori settlement of responsibility leaves room for constructing the law as it should be.

It is in this space left for interpretation and progressive development that this study is placed, as it attempts to develop solutions for the *problem of many hands* in the context of Frontex joint operations, partly identifying them in the existing framework and partly constructing them anew, inspired by identifiable trends in state practice.

6.3 The nexus in the rules of attribution of responsibility

Getting deeper into questions as to who is responsible for providing reparations to an injured party, in other words, how responsibility is attributed to each actor, we need to start from the main principle of attribution of responsibility, the principle of independent responsibility. Accordingly, every internationally wrongful act of a state or an international organisation

68 Commentary to Article 48 ARIO, par. 1.
69 Goodwin-Gill 2011, p. 447; See further Casteleiro 2016, p.p.: 63, 64. The joint responsibility between Frontex and the member states, in particular, has also been proposed among others by Weinzierl and Lisson 2007, p. 72.
70 D'argent 2014, p.p.: 249-250.
71 Nollkaemper 2014, p.p.: 13, 14.
72 Nollkaemper 2014, p. 16.

entails the international responsibility of that state or international organisation. In other words, each actor is independently responsible for the conduct attributed to it and needs to provide reparations that correspond to that independent responsibility.[73] The principle of independent responsibility advocates a simple linear relationship, depicted in Image 1, connecting the wrongful act with the responsibility of the author of the act and the reparation that is due for the harm caused. This linear relationship is, in principle, independent of acts and responsibilities of others.

Image 1: Linear relationship

This is a general principle in international law,[74] which also means that it is not absolute, and does not exclude other responsibility relations. In fact, responsibility may also be attributed by virtue of Arts. 14-16 ARIO, for an act that is by itself not an unlawful act, but is linked to one. The principle of independent responsibility only addresses situations, where there is the same wrongful act (Type B situations).

In cases of complicity (Type A situations), where the act of aiding is considered a separate act from the main wrongful act, there is room for *cumulative responsibility*, where Frontex may be responsible for an act attributed not to the agency, but to the host state. It is in such cases, that the linear relationship advocated by the principle of independent responsibility becomes inadequate, as the image can get obscured by the different responsibilities. Trying to disentangle this web of responsibilities of the different actors, who through the integration of their conduct, lead collectively to the harmful outcome, can become a complicated process. As a result, it is understandable that responsibility would be sought in practice only from the actor that is more closely connected to the act, ignoring the other interconnected responsibilities. This approach does not address the *problem of many hands* and can result in blame-shifting and substantive gaps in accountability. Therefore, in EBCG operations, the responsibilities should be seen not as a simple linear relationship but rather collectively as a nexus.

6.4 Rules of Invocation of Responsibility

As per the ARIO Commentary, Article 48(1) ARIO discusses the joint responsibility of multiple authors of the same act, stipulating that:

> *'Where an international organisation and one or more States or other international organisations are responsible for the same internationally wrongful act, the responsibility of each State or organisation may be invoked in relation to that act.'*

73 ARS Commentary, n. 1, 124, para. 3.93; J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press 2002, p. 272.

74 Commentary, n.1, to Article 47 ARS, par. 3.

This does not seem to derogate as such from the principle of independent responsibility, when the same wrongful act is attributed to multiple actors. Thus, we could imagine several linear connections that start from the same act and end at each one of the different actors separately.

However, Article 48(1) ARIO is more than a mere repetition of the principle of independent responsibility or an alternative rule of allocation of responsibility. It is a rule of invocation of responsibility.[75] Instead of 'who has the responsibility' it responds to the question 'against whom may the responsibility be invoked', looking at the issue not from the perspective of the actor, but of that of the victim. In this sense, it is closer to the notion of liability.[76]

According to this rule, the responsibility of each actor may be invoked for the same act. The relationship of each actor with the wrongful act remains separate from the relationship of the other actors with the same act. Even though states and international organisations may act jointly, they will each be separately responsible for the same wrongful act of which they are co-authors.[77] Therefore, what we learn from the letter of Article 48(1) ARIO regarding joint responsibility is this *principle of separate invocation of responsibility*.

Nevertheless, a textual interpretation of Article 48(1) ARIO does not provide absolute clarity as to the way this separate invocation of responsibility should work out in practice. The letter of the provision leaves certain questions open: Should the portion of the responsibility be invoked against each actor in separate proceedings? Should all different proceedings be brought to achieve full reparation? Thus, the principle of separate invocation of responsibility requires further qualification.

The invocation of the responsibility of several actors may be separate but, 'shared responsibility is not simply the aggregation of two or more individual responsibilities'.[78] The defining feature is that the multiple actors stand in some relationship with each other and the responsibility of the one mutually influences the responsibility of the other.[79] As we also established earlier, when discussing the idea of the nexus of responsibilities, the interaction of the separate responsibilities gives rise to a collective element. As such, the violation in many-hands situations is the collective outcome of the conduct of different actors, which stand in relationship with one another. These actors may have acted separately but it was through their interaction that the harmful result occurred. Thus, in such situations, the different responsibilities may be those of separate actors, but they should be dealt with in a manner that also acknowledges this collective element.

75 D'argent 2014, p. 238.
76 Chapter IV, section 2.2.
77 Messineo 2014, p. 81.
78 Nollkaemper 2014, p. 12.
79 Nollkaemper 2014, p. 12.

It is, thus, argued here that, on the basis of this understanding of the different responsibilities in many-hands situations as a nexus, joint responsibility in Article 48(1) ARIO should be interpreted in terms of invocation of responsibility as *joint and several responsibility*. This construction allows for the *principle of separate invocation of responsibility* to be expressed in a manner that acknowledges the collectivity, as it renders each actor liable for the acts of the others. Article 48(1) ARIO expresses this collective element and responds to the *problem of many hands*.

This interpretation is not uncontested in international law. The ICJ has avoided to authoritatively rule on the issue in Nauru judgment,[80] while the ILC clarified that the equivalent provision of the ARS, Article 47 'neither recognises a general rule of *joint and several responsibility*, nor does it exclude the possibility (…).' It noted that whether this would be the case depends on the particular circumstances and the international obligations of the actors concerned.[81]

Such international obligations could impose a restriction on *joint and several responsibility* and settle the matter otherwise. This could be the case, for instance, in the context of mixed agreements, when the EU and its member states have concluded an agreement that also provides for the a priori apportionment of responsibilities.[82] In the absence of such international obligations and given the particular circumstances of situations where the *problem of many hands* appears, Article 48(1) ARIO should be interpreted as *joint and several responsibility.*

Joint and several responsibility must be understood as each actor being responsible for the acts of the others (collective) and may be individually[83] asked to make full reparation (separate).[84] This, in practice, means that the injured party may bring a case against each of the responsible parties and hold them to account, for the wrongful act as a whole, rather than for the part of the act that is attributable to it. The only condition of Article 48(3)(a) ARIO is the prohibition of double recovery, according to which the injured party is prohibited from recovering compensation that exceeds the damage it has suffered.

Such a construction allows for the most equitable result if its principles would inform a case regarding violations in a Frontex joint operation. In particular, it would fulfil the principle of effective legal protection, not

80 ICJ 15 June 1954, Monetary Gold Removed from Rome in 1943, Preliminary Question, ICJ Reports 1954, 19 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), p.p.: 19-32; *Certain Phosphate Lands in Nauru v Nauru/Australia*, p.p.: 261, para. 55.

81 Commentary to Article 47 ARS.

82 D'Argent 2014, p. 30.

83 Independence of each bilateral relationship between the responsible and the injured party. Even when states act jointly, they will be separately responsible for the same act, and the responsibility of each can be invoked separately.

84 D'argent 2014, p. 244.

requiring the victim to investigate the precise degree of participation of each actor to the wrongful act and calculate their proportional apportionment of the damages so that she can go to court against each one of them accordingly for their proportion of the damage. To the contrary, it would allow the injured party to address one of the jointly responsible actors for the full extent of the damage. At the same time, it would prevent the victim of a violation from acquiring full reparation from more than one actor (prohibition of double recovery, Article 48(3)(a) ARIO). An equitable result can be further ensured with the right of recourse the actor who has provided reparation may have against the other responsible states or international organisations (Article 48(3)(b) ARIO).

While there are supporters of this interpretation,[85] it should be noted that the notion of *joint and several responsibility* is not well-established in customary international law.[86] It is, however, widely discussed in the literature,[87] and reference to it can be found in treaty provisions.[88] Moreover, its introduction in the framework of EU (non-contractual) liability law would be in accordance with Article 340 TFEU, which states that the non-contractual liability of the EU and its agencies shall be implemented in accordance with the general principles common to the member states. *Joint and several responsibility* is indeed such a principle, as it is of domestic private law origin, and its content is determined from comparative domestic law.[89]

In sum, even though not most authoritatively established in customary international law, *joint and several responsibility*, as the interpretation supported by the Nexus theory, is a favoured meaning of Article 48 ARIO, as it is interpreted on the basis of EU domestic traditions. It is argued here that it constitutes the implementation of the Nexus theory in terms of invocation of responsibility, or in other words, liability, and that it should be used as a rule for invoking responsibility in cases where such responsibility is shared between Frontex and the member states.

85 J. E. Noyes and B. D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', *The Yale Journal of International Law,* 13, 1988; A. Orakhelashvili, 'Division of Reparation Between Responsible Entities', in J. Crawford, A. Pellit and S. Olleson (eds.), *The Law of International Responsibility,* Oxford and New York: Oxford University Press 2010, p.p.: 647-665.

86 Leck 2009, p.p.: 363-364.

87 Kuijper and Paasivirta 2004, p.p.: 120, 122; D'argent 2014, p. 245.

88 E.g. Article 6.2 of Annex IX to the Law of the Sea Convention deals with the sharing of responsibility following a request for declaration of competence. Specifically, referring to the EU and its member states, it stipulates that if the EU and its member states fail to provide information as to who has responsibility in respect of any specific matter, after such a request has been made, or provide contradictory information, they shall be held jointly and severally liable.

89 D'argent 2014, p. 245.

6.5 The advantages of the Nexus theory in EBCG operations

The Nexus theory can advance our understanding of the complicated responsibility relations that constitute the *problem of many hands*. It leads us to conclude that responsibilities in many-hands situations should not be seen as linear connections but as a nexus, as they collectively result in the harmful outcome. This analysis explains the responsibility relations in such situations in a more complete manner than the typical linear understanding does.

In terms of practical implementation, the Nexus theory, firstly, suggests that the appropriate way to deal with such situations is shared responsibility, in order to accommodate the collective element that develops from the interconnections amongst the conduct of the different hands. This concept is already widely invoked in international law, but its presence in EU law remains marginal. The Nexus theory argues for the utilisation and further development of this concept in all legal orders where the *problem of many hands* can appear, including EU law that is most relevant in the context of EBCG operations.

The Nexus theory suggests that the way to address the *problem of many hands* is to regard the responsibility of the different actors involved as collective. When no single actor is entirely and independently responsible for the outcome, the actors should be jointly responsible.

It is important to note that the term 'jointly responsible' does not fully correspond to *joint responsibility* as defined by Nollkaemper and Plakokefalos above. It is broader and covers both cases of *joint* and *cumulative responsibility*. It refers to the instance where 'more states or international organisations may be liable for conduct in breach of international law'.[90] It is also in this sense that the term *joint responsibility* is referred to in the official Commentary to the ARIO.[91] It is in this sense that joint responsibility is used in this study, while Nollkaemper's and Plakokefalos' *joint responsibility*, could for clarity be named *joint responsibility stricto sensu*.

As can be observed from the section above, international law is helpful in providing certain answers and guidelines for addressing the *problem of many hands*, but it is not fully developed. The Nexus theory can further contribute to the interpretation and progressive development of the rules on invocation of responsibility.

In particular, in the context of its practical implementation, it suggests that the rule that applies to the invocation of responsibility, i.e. *the principle of separate responsibility* (Article 48(1) ARIO) should be interpreted as *joint and several responsibility*. This is indeed a possible, but not fully established interpretation for Article 48 ARIO. Here, I use the nexus argument to

90 Goodwin-Gill 2011, p. 447; See further Casteleiro 2016, p.p.: 63, 64. The joint responsibility between Frontex and the member states, in particular, has also been proposed among others by Weinzierl and Lisson 2007, p. 72.

91 Commentary to Article 48 ARIO, par. 1.

support this interpretation as the most equitable result that also reflects the collective element of responsibility in many-hands situations. I furthermore suggest that this principle should apply not only to instances of *joint responsibility stricto sensu* but also to those of c*umulative responsibility*. I do not intend to propose a general rule that applies to all cases of responsibility of multiple actors but only to cases where the *problem of many hands* appears.[92]

In such cases, if inspiration were drawn from the construction of Article 48(1) ARIO, the victim could invoke the responsibility of and sue for damages each and any responsible actor. Full reparation would be due by each 'hand'. The degree of participation in the harmful outcome should not be decisive, as long as it is adequate to invoke the responsibility of the actor, and apportionment of damages should not be relevant at this stage. This can become relevant when the actor who paid compensation makes use of their right of recourse and seeks to deduce the share of damages of other responsible actors. Furthermore, an equitable result could only be ensured if a prohibition of double recovery applies.

6.6 The limitation of the Nexus theory and a systemic accountability solution

The Nexus theory can provide interpretative solutions on the basis of international law, through the principle of joint responsibility, which are, to a great extent, satisfactory for addressing the *problem of many hands*. Nevertheless, it has certain practical limitations in the practice of EBCG operations. While it resolves issues of responsibility, gaps remain with respect to accountability.

Article 48(2) ARIO distinguishes responsibility to primary and subsidiary responsibility, stipulating that subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.[93] Primary responsibility is generally understood to be derived from the rules of attribution of conduct, while subsidiary responsibility can result from an act that is connected to the primary act, such as providing aid or assistance to the conduct of the wrongful act.[94] Thus, if the rule of Article 48(2) ARIO were to be applied in EBCG operations, in cases where the agency has only indirect responsibility, the individual would first need to undertake legal action against the host state, and only hold the agency to account if the host state has failed to provide reparations.

This judical construction is based in conciderations of *individualist accountability*, i.e. addressing the violation for a particular individual. An assessment of this solution from this perspective, would need to focus on

92 Cases, where there is, for instance, a priori allocation of responsibility and agreed upon rules of distribution of obligations for reparation may be handled differently.

93 Article 48 (2) ARIO: 'Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.'

94 Commentary to Article 48 ARIO, p. 89.

an evaluation of the effectiveness of the available legal remedies. Nevertheless, even if this evaluation were positive and the victim was able to receive compensation by invoking the primary responsibility, gaps would still remain in practice.

Even though this rule is not formally found in the normative understanding of joint responsibility in EU liability law,[95] in practice, an individual whose rights have been violated in the context of a joint operation would arguably opt to bring a case against the host member state, as the legal, procedural, and factual facets of the case are more straightforward than in a case against Frontex. There are adequate judicial precedents, and the judicial avenues are already established. The host state would then have the right of recourse against Frontex, claiming the appropriate deduction from the full reparation it has provided. This is a theoretically equitable result. Realpolitik considerations, however, and the practice so far suggest that the state will not make use of the right to recourse, and a case against Frontex will most probably never be brought before courts. This leaves a gap as to the accountability of Frontex, which would not be held to account and would not be answerable for its part in the violation. This is precicely where the limitations of the model of *individualist accountability* become apparent. It could lead to remedying the situation for the particular applicant, but without addressing the accountability of the agency and building towards more structural changes that can ensure human rights standards in all joint operations.

The *systemic accountability* approach has the potential to fill this gap, as it requires that all actors responsible for a violation are held to account. In particular, while the Nexus theory suggests that reparation should come *from any* of the responsible actors, the model of *systemic accountability* suggests that it should also come *from both*. This translates in the case at hand in legal proceedings that involve all actors, including Frontex. Thus, in order for the Nexus theory to fully address the *problem of many hands*, it needs to be accompanied by the model of *systemic accountability*. The application of this principal solution will be shown in the following chapters.

7 Conclusion

This chapter has dealt with the responsibility of Frontex within the framework of EU law and international law on responsibility. The application of the legal framework challenges the view that the agency may only incur responsibility from wrongful acts conducted by its own staff, and only when the act falls within their de jure competencies. These claims have been

95 This rule and the distinction between primary and subsidiary responsibility are not necessarily common in EU liability law. Fink 2017, p. 214.

strongly contested in recent years by a number of writers.[96] This Chapter goes one step further, putting these criticisms in a concrete, applicable and enforceable legal context.

The above analysis, which incorporates elements of international and European law leads us to conclude that there are instances where a wrongful act may be attributed to Frontex, thus, incurring direct responsibility. It has been shown, in sum, that the violation of the human rights obligations of the agency constitutes a breach of an international obligation that can bring about the international responsibility of the agency, if the wrongful conduct can be attributed to it. This can be either due to wrongful conduct of its own statutory staff or via exercising effective control over the conduct of seconded personnel.

The agency may still also be held responsible if it has only contributed to an act that is not attributed to it. In the case of wrongful conduct of its own staff, or in case that it exercises effective control over the deployed personnel, the agency would be directly responsible in application of the principle of independent responsibility, while in the latter it would be indirectly responsible due to aiding and assisting in a violation or due to having direction and control over the wrongful act, in knowledge or presumed knowledge of the circumstances. Frontex may incur responsibility either via an act or via an omission to prevent an internationally wrongful act, given its positive human rights obligations and its widespread supervisory powers.

The responsibility of Frontex does not exclude that of other actors. In fact, there are multiple actors involved in an operation, each with their level of involvement that is nevertheless not entirely clear or independent from the involvement of others. As the study of the relevant European and international legal framework has shown, this includes undoubtedly the host state, either EU member state or third state, but also the participating states to the extent of their involvement, as well as Frontex. None of the actors may deny their responsibility on the ground of the responsibility of another actor or shift the blame to one of them. This creates a rather confusing picture regarding responsibility that has been conceptualised as the *problem of many hands*.

The embodiment of the Nexus theory in the legal framework is found in the ILC Articles as the principle of joint responsibility. It is important to realise, though that the ILC Articles are not the end, but the beginning of the discussion on responsibility. The full meaning and potential of joint responsibility has not yet been elaborated to the fullest, which leaves considerable gaps, but also room for interpretation and progressive development, including by the CJEU.

96 Chapter IV, section 4.4.

The Nexus theory sheds new light on joint responsibility, which is understood as the instance where 'more states or international organisations may be liable for conduct in breach of international law'.[97] Viewed through the nexus, joint responsibility is seen as a collective responsibility. In practice, it takes the form of *joint and several liability*, where the collective responsibility may be invoked against any of the responsible actors, and the afflicted individual is entitled to full compensation from each of them. While this approach seems appropriate to deal with *many-hands situations*, in EBCG operations, it also comes across certain limitations in the political reality of EU border management. These limitations leave certain gaps in accountability, which may be mitigated if the Nexus theory is complemented by the model of *systemic accountability*. This way, compensation can be sought not only from either of the responsible actors but from both. This translates here in legal proceedings that involve all actors, including Frontex. Such legal proceedings should aim to address the joint responsibility of all actors involved and will be studied further, along with their practical applications, in the following chapter.

97 Fink 2017, p.p.: 72, 92

Part IV

Applied: Legal Remedies and Litigation Avenues

8 Legal Accountability in Practice: CJEU

1 Introduction

The previous chapters have focused on describing the work of the agency and the different actors that participate in joint EBCG operations, the possible human rights breaches, the allocation of responsibility, and the appropriate accountability framework that fits the aims and needs of such operations. The Nexus theory and joint responsibility have been presented as a solution to the *problem of many hands*, and the need has been noted for the legal accountability of Frontex within a framework of *systemic accountability*.

The notion of *systemic accountability* as it is applied in EBCG operations revolves around the idea of holding all actors responsible for a violation to account, including Frontex, to provide structural solutions and achieve systemic change. Notwithstanding its essential role as a matter of principle in an academic or political context, in order for the idea of *systemic accountability* to lead to realisable conclusions, it needs to be backed up with arguments that weigh more in the world of legal practice. An argument, supporting the attribution of (shared) responsibility to all actors involved in a violation of rights, can be constructed outside the library to fit in the reality of courtrooms.

While institutions, academics, and civil society organisations have been insisting on the need for the agency to be held accountable before courts for a breach of human rights law, no such case has seen the light yet. Next to the complications regarding the allocation of responsibility and the lack of transparency, which inhibits evidence-collection, one of the reasons that explain the lack of legal action against Frontex is procedural difficulties, which include limited access to justice and lack of clarity regarding the nature of the specific legal routes to achieve accountability.

Therefore, the core purpose of the last two chapters is to sketch these litigation routes by studying legal accountability in practice in the case of Frontex, and examining how joint responsibility, the Nexus theory, and *systemic accountability* can come together under one roof. In particular, the questions asked are: Which are the potential litigation routes that can be followed to ensure the legal accountability of Frontex, as the main application of *systemic accountability*? How can any potential obstacles in this process be overcome? How can they accommodate the joint responsibility of all the different actors involved in a violation, which follows from the Nexus theory?

Chapter VIII deals in particular with the possible litigation routes before the CJEU, through which the enforcement of legal obligations can be achieved, and the model of *systemic accountability* can be actualised. The victim of a violation has the opportunity to access the CJEU either in an indirect manner, following the preliminary reference procedure and through the EU Institutions, or directly, bringing an action for annulment or action for damages and requesting interim measures.[1] In the following sections, a concise account is given of the different litigation routes, in an attempt to identify the different possible courses of action in a case regarding Frontex, in the context of *systemic accountability*.

The goal is to map possibilities that the system of judicial protection at the CJEU provides and identify possible procedural boundaries in bringing a case against Frontex. Possible procedural solutions are proposed for these problems, and possible judicial tactics are identified. I start with an examination of accountability in the EBCG Regulation. Following that, the available legal remedies are presented separately, categorised as providing indirect or direct access to the Court for individuals. These are presented first in general terms, before delving into their more particular requirements, especially as these apply in the case of Frontex.

2 Legal accountability in the EBCG regulation

A natural first step in the process of studying the practical legal accountability of Frontex is looking into relevant provisions of the agency's own Regulation. Typically, next to the general framework on liability provided by primary EU law (TFEU), the contractual and non-contractual liability of agencies is covered in their founding Regulation. Commonly, contractual liability is governed by the law applicable to the contract and jurisdiction is given to the CJEU. Concerning non-contractual liability, the Regulations, except for the agencies established by the Council, commonly follow the pattern of Article 340(2) TFEU stating that 'The agency shall, in accordance with the general principles common to the laws of the Member states, make good any damage caused by it or its servants in the performance of their duties'.[2]

1 Article 256 TFEU.
2 Craig 2012, p. 157.

Concerning the review of legality of the agency's actions, the founding Regulations differ significantly.[3]

The Frontex Regulation, notwithstanding its numerous amendments and the extensive calls for improved accountability, for many years remained silent as to the liability of the agency itself and the possibility of legal remedies. Since 2016, however, the EBCG Regulation (now Article 97(4)), has followed the common pattern on non-contractual liability and provides that the agency 'shall, in accordance with the general principles common to the laws of the Member states, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers'. Article 97 (5) gives jurisdiction to the CJEU in related disputes.

Article 84 of the EBCG Regulation covers matters of liability regarding the member states and attributes liability for any damage caused by members of a team deployed in a member state to that member state, in accordance with its national laws. Exceptionally, in cases of gross negligence and willful misconduct, the host state may turn to the home state for part of or the whole sum paid in damages. Article 85, covering the criminal liability of the deployed team members stipulates that they are subject to the national law of the host in the same way as officials of that state.

The acknowledgement in Article 97 of the potential liability of the agency constitutes a step forward compared to past Regulations, which only acknowledged the personal liability of the agency's staff members, rather than that of the agency. There are no specific rules that determine a priori the attribution of responsibility amongst the different actors involved, which could prevent the *problem of many hands*. Moreover, it should be investigated how Article 97 of the EBCG Regulation is to be actualised within the general EU public liability regime.

Finally, a notable change brought by the 2019 amendment of the ECBG Regulation is Article 98, which for the first time deals with the review of the legality of the agency's actions. Even though the gap until now could still be remedied within the general EU legal framework on judicial review, the Regulation now explicitly gives jurisdiction to the CJEU to hear proceedings for the annulment of acts of the Agency that are intended to produce legal effects vis-à-vis third parties, and for failure to act.

---

3 Some Regulations establish a detailed system of internal appeal followed by legal review by the EU Courts (e.g. EASA). Others provide for the judicial review before the CJEU under Article 263 TFEU (e.g. EUMC). They may also empower the Commission to decide on such issues, its decision being challengeable before the CJEU (e.g. ECDC). Others yet do not explicitly pronounce the possibility to challenge the Commission's decision, but such a decision is bound to have binding legal effects and would be therefore reviewable under Article 263 TFEU (e.g. EU-OSHA). In cases where the final decision is made by the Commission, there does not seem to be a legal gap, since it is that act, rather than that of the agency, that is reviewable. Yet in other Regulations, no mention is made of legality review (e.g. EMSA). This is mostly the case with agencies created by act of the Council.; Craig 2012, pp.: 157, 158.

3 Legal remedies and the jurisdiction of the CJEU

The CJEU has been set up to ensure the uniform interpretation and application of EU law across the EU, and settle legal disputes amongst EU institutions and member states. Individuals can, under certain conditions, also take action before the Court claiming the infringement of their rights.

The CJEU may issue preliminary rulings upon request of national courts to interpret or determine the validity of EU law. It may enforce the law through the process of infringement proceedings initiated by the EC of a member state against another member state for failure to comply with EU law. It may also annul EU acts (action for annulment) or ensure that the EU takes action (action for failure to act) if an EU act or omission is in violation of the Treaties or the EU Charter. Finally, it rules upon the liability of and sanctions EU institutions through an action for damages, while it can issue interim measures in case a serious violation is imminent.

4 Preliminary reference procedure

The preliminary reference procedure is the most common way to approach the CJEU. The CJEU has competence to give preliminary rulings on disputed questions of EU law, concerning the interpretation of the Treaties and the validity and interpretation of acts of EU agencies, among other EU bodies and institutions.[4] A preliminary ruling is binding upon the referring court and all domestic courts in the EU.

An applicant can challenge the validity of EU acts indirectly by inviting their national court to send the CJEU a request for a preliminary ruling. This procedure could be used, for instance, to determine the mandate of Frontex to engage in certain activities, such as cooperation with third states in the context of AFIC in the absence of working arrangements. Such a relevant question could concern the distinction between operational and technical assistance and whether the cooperation with Niger in this context can be deemed as technical assistance within the meaning of Article 54(9) of the EBCG Regulation. Another instance where the preliminary reference procedure could be useful is with respect to determining questions regarding the distribution of responsibility between a host state and the agency. Such a question could arise in the context of an action for damages against the host state before its national courts, where the host state would deny part or the whole of the responsibility and engage the responsibility of the agency. Finally, in a request for a preliminary ruling, the Court could be asked to rule on the validity of an act of Frontex, for instance, a decision in the context of the individual complaints mechanism.

4 Article 267 TFEU.

This procedure provides a useful path around the direct access to the Court, which is highly restricted, as will be shown below. The obvious drawback of this route is that the individual needs to go through the domestic procedure and rely on the discretion of the national court to bring the matter before the CJEU.[5] An applicant cannot usually claim a legal right for the domestic court to send a request for preliminary ruling to the CJEU.[6] The preliminary reference procedure is not, strictly speaking, a remedy but a prerogative of the national court.[7] Nevertheless, the domestic court is obliged, according to the jurisprudence of the ECtHR to give reasons for not sending a preliminary reference to the CJEU. Failure to do so can lead to a violation of the right to a fair trial under Article 6 ECHR.[8]

Delays and costs stemming from the preliminary reference procedure would also weigh upon the decision of the applicant to use this route. Although, according to justice Koen Lenaerts, president of the ECJ, the annual productivity of the Court is at a historical level,[9] the process is slow and statistics concerning the backlog of cases pending and the overall duration of the proceedings, show discouraging delays.[10]

What is also important to note is that in the preliminary reference procedure, the CJEU has jurisdiction to provide genuine interpretation of the law and acts of the agency. It cannot, however, judge on the facts of the given case, find a violation, nor rule on damages. In that case, the proceedings would need to continue at the national level or through one of the remedies of direct access to the CJEU. In practice, this route cannot be followed if there is no national implementing measure against which a case would be brought at the domestic courts of a member state. While this would be the case regarding a violation occurring in the context of a EBCG joint operation, where domestic proceedings could start against the host state, this may prove more difficult regarding the conduct of Frontex within the AFIC network and the cooperation of the agency with third countries more generally.

Moreover, this measure cannot lead on its own to the liability of the agency and will not be adequate to hold it accountable, as the agency will not be asked to answer for any wrongdoings or make amends. This proce-

5 Article 267 TFEU. Only courts and tribunals of last instance are under the obligation to refer the case to the CJEU.

6 CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452 (*Firma Foto-Frost v Hauptzollamt Lübeck-Ost*); D. Chalmers, G. Davies and M. Giorgio, *European Union Law, Cases and Materials*, Cambridge: Cambridge University Press 2010, p.p.: 159, 160.

7 C. Timmermans, 'Some Personal Comments on the Accession of the EU to the ECHR', in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 334.

8 ECtHR 8 April 2014, Judgment, App. No. 17120/09 (*Dhahbi v Italy*); ECtHR 21 July 2015, Judgment, App. No. 38369/09 (*Schipani et al. v Italy*).

9 Court of Justice of the European Union, *Annual Report 2018. Year in review*, Luxembourg: Court of Justice of the European Union 2019, p.p.: 9, 159, 161.

10 Court of Justice of the European Union 2018, p.p.: 118, 159, 244, 245.

dure may not provide adequate scrutiny of the agency's activities,[11] but the possibility still exists to start judicial proceedings on the national level and reach the CJEU through the preliminary reference procedure. While not providing the full answer, the benefit of this route is that it has a relatively low access threshold and it can prove useful as a first step towards an action for damages. Finally, what could also prove helpful is the openness of the Court to use this procedure to hear questions concerning the non-binding instruments, which could cover, for instance, operational plans or working arrangements of the agency with third countries.[12]

5 Complaints by priviledged applicants

The Commission, the Parliament, the Council, and member states are 'privileged applicants', and may thus bring an action for the Court to review the legality of EU acts (action for annulment or failure to act) directly, without the need to fulfil any special accessibility requirements, like in the case of individual applicants.[13]

An action for annulment can be brought by an EU institution against an EU agency on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any other legal rule related to their application, or misuse of powers.[14] One of the EU institutions may also ask the Court to have an infringement established due to failure of an agency to act.[15]

The procedure described here does not constitute a judicial remedy strictly speaking, as an EU institution bringing such an action does not do so on behalf of an individual, who is also not a party to the proceedings. Nevertheless, the victim and civil society organisations can petition one of the privileged applicants to request the review of the legality of an act, circumventing, thus, the difficulties of the preliminary reference procedure, and those of direct individual access to the Court.

In cases regarding the legality review of the conduct of Frontex, EU institutions may act on their own initiative, but individuals may also submit a formal complaint, for instance, with the EP and lobby so that the latter makes a direct appeal to the CJEU. Such an action would be brought directly to the Court of Justice, rather than the General Court, as the Court of Justice has sole jurisdiction over inter-institutional actions.[16]

11 LIBE 2011, p. 82.
12 LIBE 2011, p. 82.
13 Section 6.1.
14 Article 263(2) TFEU.
15 Article 265(1) TFEU.
16 Article 51 Statute of the Court of Justice, Protocol 3 to the TFEU. An example of such action is *European Parliament v Council of the European Union*.

The effectiveness of this path is disputable, as the individual needs to rely on the discretion of the institutions and the political balances within the Union since these are not under an obligation to take up such a case. The unwillingness of the EC to start infringement proceedings on matters of systematic violations of human rights in immigration and asylum law is notable in this respect.[17] Nevertheless, the possibility exists depending on the circumstances surrounding a particular case, and this route could prove to be a strategic choice.

Having discussed the major forms of indirect access to the ECJ, we can now move to a discussion of forms of direct access.

6 Action for annulment and failure to act

The legality review procedure can be used in order to ask for the review of the legality of acts of Frontex (and of other institutions, offices, bodies, and agencies of the EU) (Article 263 TFEU) or of failure to act (Article 265 TFEU) on the ground of infringement of the Treaty or of any rule of law relating to its application, as also provided in Article 98 EBCG Regulation. This obviously includes breaches of the Charter, as well as human rights as they have developed in the context of general principles of EU law. If the claim is successful, the Court declares the act void (Article 264 TFEU), or declares the failure to act contrary to the Treaties (Article 265 TFEU). Following the Court's ruling, the agency will be required to undertake the necessary action in order to comply with the judgement (Article 266 TFEU). In case the agency does not comply with the judgement, the applicant may ask the Court to enforce the decision, by requesting to be granted a warrant of execution, an attachment of earnings order or a third party debt order or a European enforcement order in the case of cross-border claims.[18]

Despite the substantive potential of the legality review, applicants and litigators may hesitate to use it as a litigation strategy due to the restrictive standing requirements of Article 263 TFEU, which are often discussed as a

17 The first judgment on the CJEU on infringement proceedings on migration and asylum was published in December 2020. CJEU 17 December 2020, C-808/18, OJ C 155, 6.5.2019 (*European Commission v Hungary*).

18 Procedures for enforcing a judgment, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-en.do?clang=en; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

thorny issue in the direct access to the CJEU.[19] Contrary to member states, the Commission, the Council and the EP, individual claimants have the status of non-privileged applicants before the Court and their possibilities to start a review procedure are significantly restricted.

Despite the difficulties, however, direct access to the court through an action for annulment or failure to act is not impossible. The following sections focus on discussing the issues that originate from the strict locus standi requirements for individuals in a case regarding the review of a Frontex act before we move on to the more substantive discussion of which acts of the agency could be reviewable before the Court. These issues will be discussed first in abstract terms, laying out the legal framework and the discussions surrounding its interpretation, before applying them to Frontex.

6.1 Individual access hindrances in an action for annulment

The strict admissibility criteria, placed by the EC Treaty, have also been interpreted narrowly by the Court of Justice, causing widespread criticism among legal academics.[20]

The locus standi requirements are covered in Article 263(4), which states that:

> *"Any natural or legal person may (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*

"against an act"

The formulation of former Article 230 (4) TEC permitted the challenging of a 'decision', while drafters of the Lisbon Treaty broadened the scope of the provision permitting the challenging of an 'act'. The Court of Justice had already interpreted the term broadly allowing for the admission of cases

19 Among others, H. Rasmussen, 'Why is Art 173 Interpreted Against Plaintiffs?', *European Law Review,* 5, 1980. p. 114; P. Craig, 'Standing, Rights, and the Structure of Legal Argument', *European Public Law,* 9, 4, 2003, p. 493; S. Enchelmaier, 'No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Article 230(4) EC', *Yearbook of European Law*, 24, 1, 2005, p. 173; S. Flogaitis and A. Pottakis, 'Judicial Protection Under the Constitution', *European Constitutional Law Review,* 1, 1, 2004, p. 108; C. Harding, 'The Impact of Article 177 of the EEC Treaty on the Review of Community Action', *Yearbook of European Law*, 1, 1, 1981, p. 93; and C. Harlow, 'Towards a Theory of Access for the European Court of Justice', *Yearbook of European Law*, 12, 1, 1992, p. 213.

20 Among others, Rasmussen 1980, p. 114; Craig 2003, p. 493; Enchelmaier 2005, p. 173; Flogaitis and Pottakis, p. 108; Harding, 1981, p. 93; and Harlow 1992, p. 213.

concerning legislative regulations,[21] and even directives, in case that they are substantially clear, precise and unconditional to be able to produce legal effects vis-à-vis individuals before their transposition.[22] This amendment is seen as 'a welcome and overdue clarification,' since it represents a more expansive approach that would allow even international agreements – such as Frontex agreements with third countries, to be challenged by individuals.[23]

According to the established case law of the CJEU, an 'act' refers to any measure the legal effects of which are binding on[24] and capable of affecting the interests of the applicant by bringing distinct change in his legal position.[25] This covers acts of general application, legislative or otherwise, and individual acts. The CJEU has so far seen 'acts' quite broadly at times covering even oral statements.[26]

"of direct and individual concern"

The *direct concern* requirement is fulfilled, according to the case law,[27] when the challenged act affects the legal position of the individual directly and has automatic application. The applicant must establish a direct link or an unbroken chain of causation between the act of the agency and the damage sustained. The measure needs to impose obligations on the applicant without leaving a member state discretion in implementation. It must be the contested measure that was sufficient in itself to cause the change in the applicant's legal position and which did so directly. In other words,

---

21 Peers and Costa 2012, p. 83; CJEU 6 September 2011, T-18/10, ECLI:EU:T:2011:419 *(Inuit Tapiriit Kanatami and Others v. Commission) ;* CJEU 25 October 2011, T-262/10, ECLI:EU:T:2011:623 *(Microban v. Commission)*; Joined Cases CJEU 21 February 1984, C-239 and 275/82, ECLI:EU:C:1984:68 (*Allied Corporation and others v Commission*); CJEU 16 May 1991, C-358/89, ECLI:EU:C:1991:214 (*Extramet v Council*); and CJEU 18 May 1994, C-309/89, ECLI:EU:C:1994:197 (*Codorniu v Council*).

22 CFI EU 27 June 2000, Joined cases T-172/98, T-175/98 to T-177/98, ECLI:EU:T:2000:168 (*Salamander and others v Parliament and Council*).

23 Chalmers, Davies and Monti 2010, p. 141.

24 CJEU 11 November 1981, C-60/81, ECLI:EU:C:1981:264 (*IBM v Commission*), par. 9; *Commission of the European Communities v Council of the European Communities,* par. 42; *European Parliament v Council of the European Union*, par. 8; CJEU 24 November 2005, C-138/03, C-324/03 and C-431/03, ECLI:EU:C:2005:714 (*Italy v Commission a*), par. 32; CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727 (*Italy v Commission b*) par. 19; CJEU 1 October 2009, C-370/07, ECLI:EU:C:2009:590 (*Commission v Council*), par. 42.

25 *IBM v Commission*, par. 9; CJEU 17 July 2008, C-521/06, ECLI:EU:C:2008:422 (*Athinaïki Techniki v Commission*), par. 29; CJEU 18 November 2010, C-322/09, ECLI:EU:C:2010:701 (*NDSHT v Commission*), par. 45; CJEU 13 October 2011, C-463 and 475/10 P, ECLI:EU:C:2011:656 (*Deutsche Post and Germany v Commission*), par. 37.

26 CFI EU 24 March 1994, T-3/93, ECLI:EU:T:1994:36 (*Air France v Commission*); LIBE 2011, p. 2.

27 CJEU 13 May 1971, C-41-44/70, ECLI:EU:C:1971:53 (*NV International Fruit Company and others v Commission*) ; CJEU 23 November 1971, C-62-70, ECLI:EU:C:1971:108 (*Bock v Commission*); CJEU 16 June 1970, C-69-69, ECLI:EU:C:1970:53 (*Alcan and others v Commission*).

a contested act of the agency is not of direct concern to the applicant if it required implementation measures by the member state.[28]As a second dimension of direct concern is that measure must affect a legal entitlement of the applicant rather than any other interest.[29]

There have been instances in the case law of the Court, where the criterion of direct concern has been applied with certain flexibility. First of all, actions concerning EU competition law have been deemed admissible even though the effects on the applicants were not legal, but merely factual.[30] Second, a limited margin of discretion left to the member state did not automatically disqualify the action in cases where discretion would be exercised in a manner that could be predicted with sufficient probability.[31]

The *individual concern* requirement is applied more restrictively and has been proven to be a significant impediment for individual applicants. 'Individual concern' means that the challenged act affects the person because of a real situation, which personalises her in a way comparable to one of the addressees of the act and so the result of the procedures could improve her legal position[32]. The prevailing interpretation of individual concern dates back to the development of the '*Plaumann test*', which requires the non-privileged applicant to prove that she is in a unique position towards the contested act and no one else could be affected by it in the same way at any given time in the future.[33] Due to this extremely narrow interpretation, it is hardly possible to imagine cases, where an act would be eligible and in fact, the requirements have been met only in very few cases.[34]

More liberal interpretations of the 'individual concern criterion', based on the principle of effective judicial protection, have been proposed by the Court of First Instance in *Jégo-Quéré v Commission* case[35] and by the

28 CJEU 23 April 1986, C-294/83, ECLI:EU:C:1986:166 (*Les Verts v Parliament*).

29 Chalmers, Davies and Monti 2010, p.p. : 41, 417.

30 CJEU 28 January 1986, C-169/84, ECLI:EU:C:1986:42 (*Cofaz and others v Commission*); and CJEU 22 November 2007, C-525/04 P, ECLI:EU:C:2007:698 (*Spain v Lenzing*) ; CFI EU 3 April 2003, T-114/02, ECLI:EU:T:2003:100 (*BaByliss v Commission*), par. 89; CFI EU 30 September 2003, T-158/00, ECLI:EU:T:2003:246 (*ARD v Commission*), par. 60.

31 *Bock* v *Commission*, paras.: 6-8; CJEU 17 January 1985, 11/82, ECLI:EU:C:1985:18 (*Piraiki-Patraiki and Others* v *Commission*), para. 8-10; CJEU 5 May 1998, C-386/96 P, ECLI:EU:C:1998:193 (*Dreyfus v Commission*), par 44.

32 G. Siouti, *Environmental Law*, Athens: Ant. N. Sakkoulas Publishers 2003, p 95.

33 CJEU 15 July 1963, C-25-62, ECLI:EU:C:1963:17 (*Plaumann v Commission*); C. Kiss and P. Černý, *The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases*, Czech Republic: Justice and Environment 2008, Chapter 1; Chalmers, Davies and Monti 2010, p. 419.

34 For instance: CFI EU 17 June 1998, T-135/96, ECLI:EU:T:1998:128 (*UEAPME v Council*); Joined Cases CJEU 11 July 1985, C-87 and 130/77, C-22/83 and C-9-10/84, ECLI:EU:C:1985:318 (*Salerno v Commission*).

35 The suggestion of the Court of First Instance was that an individual is regarded as individually concerned if the measure 'affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'. CFI EU 3 May 2002, T-177/01, ECLI:EU:T:2002:112, (*Jégo-Quéré et Cie SA v Commission*), par. 51.

Advocate-General Jacobs in *UPA* case.[36] However, the Court of Justice rejected these arguments and reaffirmed the *Plauman test*,[37] shifting the responsibility to the domestic courts to establish a system of legal remedies that can ensure the right to effective judicial protection, allowing thus the challenging of any decision.[38]

'and against a regulatory act'

The third admissibility criterion of Article 263(4) TFEU opens a window of opportunity for individuals to bring actions for annulment, as it allows for the challenging of an act of general application that is only of direct concern to the applicant, circumventing, thus, the unaccommodating *Plauman test* of individual concern.

However, besides the fact that the considerable limitations of the 'direct concern' requirement still remain, further problems arise with respect to the meaning and scope of the 'regulatory act'. The Court had the opportunity to interpret it in *Inuit Tapiriit Kanatami*,[39] a case concerning the interests of 50,000 Inuit people represented by a Canadian NGO. The applicant challenged a Regulation of the Parliament and the Council on seal products, arguing that it constituted a regulatory act, thus allowing them access to the Court.

The CJEU, agreeing with the prevailing interpretation in the field,[40] concluded that the meaning of a regulatory act must be understood as covering non-legislative acts of general application.[41] According to Article 289(3) TEU a legislative act is a legal act adopted by one of the EU legislative procedures. These can take the form of directives, regulations, or decisions, adopted under the ordinary or the special legislative procedure. *A contrario*, delegated (Article 290 TFEU) and implementing acts (Article 291 TFEU), such as recommendations and opinions should count in principle as regulatory acts.[42] Regulations, directives or decisions may also constitute

36 The Advocate General proposed a new test for individual concern: 'the measure has, or is liable to have, a substantial adverse effect on [the applicant's] interests'. CJEU 25 July 2002, C-50/00, ECLI:EU:C:2002:462 (*Union de Pequenos Agricultores v Council*), points 60, 75.

37 *Union de Pequenos Agricultores v Council*.

38 *Union de Pequenos Agricultores v Council*, paras. 41, 42, 45; *Jégo-Quéré et Cie SA v Commission*, par. 33 and 34. The opportunity was provided again after the Lisbon Treaty in Inuiit case, but the Court concluded that the wording of the provision had not changed and there was nothing to suggest that there had been such intention, reaffirming once more the Plauman formula. EGC 6 September 2011, T-18/10, ECLI:EU:T:2011:419 (*Inuit Tapiriit Kanatami and Others v Parliament and Council)*, paras. 55, 70.

39 CJEU 3 October 2003, C-583/11 P, ECLI:EU:C:2013:625 (*Inuit Tapiriit Kanatami and Others v Parliament and Council*).

40 M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', *Common Market Law Review*, 45, 3, 2008, p. 77; Chalmers, Davies and Monti 2010, p. 415.

41 *Inuit Tapiriit Kanatami and Others v Parliament and Council*.

42 Chalmers, Davies and Monti 2010, p. 415; Peers and Costa 2012, p.p.: 87, 88.; Order of 6 September 2011, *Inuit Tapiriit Kanatami and Others v. Commission*; *Microban v. Commission*.

non-legislative acts,[43] as do acts of the bodies, offices and agencies of the EU.[44] The first example of regulatory act accepted by the Court was a decision of the Commission concerning the withdrawal of the material triclosan from the list of permitted additives indented to come into contact with foodstuffs, in the landmark case of *Microban*.[45] The Court held that the decision constituted a non-legislative act, adopted through the commitology procedure that 'applies to objectively determined situations' and produces legal effects vis-à-vis a general and *in abstracto* defined category of persons.

In the same case, the Court has expressly ruled that the criterion of direct concern when viewed in the context of contesting a regulatory act cannot be interpreted any more restrictively than its definition in the pre-Lisbon case law.[46] This has been read as leaving some hope that it may be interpreted more generously in the future.[47] However it would be questionable if the Court would allow the same term to be interpreted differently in the third limb of Article 263(4) than in the second limb.[48]

As far as the requirement for the regulatory act not entailing any implementing measures is concerned, the Court held in *Microban* that the case is admissible if any implementing measures adopted are of ancillary nature rather than *necessary* (emphasis added) to implement legally binding Union acts.[49] The Court chose here a more restrictive interpretation of the term, which, since it concerns a restriction, leaves more space for the direct challenging of non-legislative acts of general application.

6.1.1 Public interest litigation

The doors of the CJEU have been half-closed for public interest groups representing the interests of specific groups of individuals or the general public. A case concerning the responsibility of Frontex can be considered a public interest action challenging the legality of actions conducted during joint operations for the interest of the large and unidentified group of affected individuals but also in order to prevent further breaches of fundamental rights in the future.

---

43 Article 297(2) TEU.

44 Opinion of A-G Kokott in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, points 49-56, and the Commission's

argument at par. 41; CJEU 22 January 2014, C-270/12, ECLI:EU:C:2014:18 (*United Kingdom v Parliamant and Council*).

45 *Microban v. Commission*.

46 *Microban v. Commission*, par. 32.

47 Peers and Costa 2012, p. 91; *Inuit Tapiriit Kanatami and Others v. Commission ; Microban v. Commission*.

48 The Court has already ruled that the meaning of direct concern in the second limb of Article 263(4) remains unchanged after the revision of the locus standi requirements by the Lisbon Treaty. *Inuit Tapiriit Kanatami and Others v Parliament and Council*, par. 70.

49 *Microban v. Commission*, par.: 33-38.

Public interest litigation, as a form of strategic litigation has been identified as one of the applications of *systemic accountability*.[50] In practice, interest groups and civil society organisations which could bring such actions before the CJEU need to abide by the same rules of standing as individuals. Since direct and individual concern is highly unlikely to be established in their case,[51] access to the CJEU seems improbable. Therefore, a case concerned with the accountability of Frontex would still need to be brought by an individually concerned victim.

The option for collective interests to trigger rights-based litigation before the CJEU appears mostly in the areas of environmental law, consumer law, and access to documents.[52] Although the CJEU has at times accommodated public interest litigation,[53] these instances remain exceptional. As a rule, the Court has not been welcoming to civil society representatives.[54]

6.2 Admissibility in EBCG operations

Regarding the locus standi criteria, we observe that the activities of the agency are structured in such a way, taking the character of coordination and assistance, that the agency avoids direct contact with the individual.[55] Therefore, the applicant would be unlikely to be the addressee of the act. However, in the context of the increase of the operational competences of the agency, it becomes more likely that Frontex addresses an act to an individual.[56] In addition to that, commentators have expressed the hope that the Court will choose a flexible approach to the admissibility criteria to include 'less traditional acts of EU agencies', as it has already done in the *Sogelma* case.[57] This, however, may prove not more than wishful thinking in light of the *Plauman* line of cases.

50 Chapter V, section 3.11.

51 e.g. CJEU 2 April 1998, C-321/95, ECLI:EU:C:1998:153 (*Greenpeace and Others v Commission*); CJEU 11 July 1996, C-325/94, ECLI:EU:C:1996:293 (*WWF v Commission*).

52 C. Warin, 'Individual rights and collective interests in EU law: Three approaches to a still volatile relationship', *Common Market Law Review,* 56, 2, 2019, p.p.: 463–488.

53 e.g. CJEU 25 October 1977, C-26/76, ECLI:EU:C:1977:167 (*Metro-SB-Großmaerkte GmbH v Commission*); O. De Schutter, 'Public Interest Litigation before the European Court of Justice', *Maastricht Journal of European and Comparative Law*, 13, 1, 2006, p.p.: 9-34.

54 C. Harlow, *Accountability in the European Union (Collected Courses of the Academy of European Law*, New York: Oxford University Press 2002, p. 150.; H. W. Micklitz and N. Reich, *Public Interest Litigation before European Courts*, Baden-Baden: Nomos 1996.

55 LIBE 2011, p.p.: 82, 83.

56 LIBE 2011, p.p.: 82, 83.

57 LIBE 2011, p.p.: 82-86, CFI EU 8 October 2008, T-411/06, ECLI:EU:T:2008:419 (*Sogelma v AER*), The court then extended the scope of judicial redress to agency acts, even though that was not possible then under the Treaty.

The strict interpretation of the element of direct concern can, in fact, block access to the CJEU in the cases that are the object of this study. For instance, an applicant wanting to challenge the practice of Frontex to surrender intercepted aliens to the Greek authorities, which then would detain them in inhumane conditions, would be automatically excluded. This is because the acts of the Greek authorities would be regarded as measures implementing the Returns Directive, which would, thus, interrupt the direct concern.

Things seem more manageable with respect to the second dimension of direct concern, i.e. the nature of the interest affected by the Union measure. According to the reading of the CJEU, the measure must affect a legal entitlement of the applicant rather than any other interest.[58] This requirement is not expected to hinder the access of individuals affected by acts of Frontex, as their human rights are predominantly legal interests.

Equally unproblematic can be the element of individual concern. Frontex acts are unlikely to concern a particular individual, but they usually concern specific or unspecified groups of people. To the extent that the group in question is sufficiently individualised, for example, people on boat X, the *Plauman* test is satisfied. From a different perspective, several operational activities of the agency that are of a technical nature, such as the risk analyses and plans, are conducted at the Frontex headquarters in Warsaw. Due to their abstract nature, it is argued that they cannot affect individuals in the manner defined under the *Plauman* test. Thus, in principle they cannot affect the rights of individuals in the direct and individual way envisaged by the CJEU in its case law,[59] not allowing the individual to use the direct path to address the Court. Finally, the third element of Article 263(4) TFEU, regulatory acts, seems, at first sight, to be promoting the accountability of Frontex, since the acts of the agency seem to be non-legislative in nature.

In sum, in light of the above regarding individual access to the CJEU as a whole, and in the case of Frontex in particular, we can conclude that the admissibility obstacles may be large, but they are not insurmountable, especially if an argument on the basis of Article 47 of the Charter on effective legal remedy is pursued. Moreover, as the agency acquires more powers and competences, the likelihood increases that the requirements of Article 263(4) are met.[60]

As long as a case passes that first admissibility stage, the next step would be to look at the reviewability of the contested act, which will be investigated in the following section.

58 Chalmers, Davies and Monti 2010, p.p.: 41, 417.
59 Fischer-Lescano and Tohidipur 2007, p. 32.
60 LIBE 2011, p. 84.

6.3 Reviewable acts of the agency

Next to the accessibility criteria, another point of friction in a case regarding Frontex would be the reviewability of its acts, given the position that the agency's acts are rather of a technocratic nature and not sufficiently operational.[61] This requires us to look at the meaning and scope of 'act' within Article 263(4).

The CJEU has so far seen 'acts' quite broadly at times covering even oral statements.[62] However, this case law is not settled and commentators fear that development to the opposite direction could prove to be too restrictive. If the Court interprets the term narrowly, i.e. as acts that can bring about a change in a party's legal position, then most of Frontex activity 'would fall outside the radar'.[63]

By virtue of Article 263 TFEU, the CJEU can look into the legality of acts of agencies that have legal effects vis-à-vis third parties. In other words, the contested acts need to be, as a general rule, legally binding, in order to cover the material scope of admissibility for an action for annulment or failure to act. More precisely, if an act by an agency, in particular Frontex, is to be challenged before the CJEU, it should be able to produce legal effects, which are binding in their own right and which are capable of affecting the interests of the individual.[64] No act that falls short of that requirement can, in principle, be susceptible to the judicial review of the CJEU for breach of the Charter.

Following the line of argumentation that Frontex only has a coordinating role in the operations, and that its acts are not final and do not produce legal effects vis-à-vis individuals, one major issue for applicants would be finding acts of the agency that can be reviewed under Article 263 TFEU. As already shown, however, the merely coordinating role for the agency, the acts of which have no effects vis-à-vis individuals, is largely disputable.[65] In the following section, we give examples of such potentially reviewable acts.

6.3.1 The reviewability of the decision on individual complaints mechanism

First of all, the reviewability of the decision of the Executive Director in the context of the individual complaints procedure is proposed. Article 111 EBCG Regulation provides for an individual complaints mechanism that monitors and ensures the respect for fundamental rights in all the activities of the agency. Through this mechanism, any person who is 'directly affected' by the actions 'of staff' of the agency during an operation, resulting

61 LIBE 2011.
62 *Air France v Commission*; LIBE 2011, p. 82; section 6.1.
63 Chalmers, Davies and Monti 2010, p. 421.
64 CJEU 1 December 2005, C-46/03, ECLI:EU:C:2005:725 (*United Kingdom v Commission*); *IBM v Commission*, par. 9.0.
65 See also LIBE 2011, p.p.: 85-95.

in a breach of their human rights, will be able to submit a complaint to the agency. The FRO is responsible for handling the complaints at the first stage, deciding on the admissibility of a complaint. She further forwards the admissible complaints that concern the agency to the Executive Director and those that concern national border guards to the host member state. This means that the FRO essentially decides on the prima facie attribution of responsibility. Subsequently, the Executive Director decides on the substance of the complaint and will ensure appropriate follow-up, the nature of which has not been adequately specified in the Regulation.[66]

Article 111 does not constitute a system of legality review as such.[67] However, there are reasons to suggest that such an individual complaints mechanism is part of a more extensive system of legality review. Specifically, this internal administrative process can be seen as the first line of legality review. Such a system has been exemplified in the founding Regulations of other agencies, with this first line of legality review being executed either by the Management Board of the agency (EASA) or the Commission (ECDC).[68]

The inclusion of Article 111 within a broader system of legality review can be argued on the basis of the aims and objectives of this provision, the will of the drafters, as well as the nature of the mechanism itself, but also placing the provision within its context and interpreting it in relation to Regulations of other agencies with respect to the legality review procedure. In particular, the mechanism is derived from the recommendations of the European Ombudsman, following an own initiative inquiry on the implementation by Frontex of its fundamental rights obligations,[69] which also led to the adoption of a resolution by the EP.[70] The Ombudsman called for a 'monitoring mechanism'. Despite its name, it becomes obvious from the text of the Ombudsman's report that it does not only concern monitoring, but also remedying of violations. The purpose was to promote and monitor compliance with fundamental rights obligations, while the Ombudsman also specifically requested the establishment of concrete measures for the follow-up of complaints.[71] The same aim of monitoring and ensuring the respect for fundamental rights is expressed in the main body of the EBCG Regulation itself (Article 111(1)), as well as in the Explanatory Memorandum

66 For further detail on the individual complaints mechanism, see Chapter V, section 3.5.5.

67 The complaints mechanism of the Border Guard Regulation is too restrictive in the sense that it concerns only the staff, rather than the responsibility of the agency as a whole with respect to the organisation, execution, or consequences of a joint operation. Furthermore, disciplinary measures are not sufficient to ensure compliance with fundamental rights and an effective legality review. Finally, it becomes obvious that it falls short of the standards of a legality review since it only concerns compliance with fundamental rights, rather than all legal obligations of the agency.

68 Craig 2012, p.p.: 157, 158.

69 European Ombudsman 2012; European Ombudsman 2013c.

70 European Parliament 2015.

71 European Ombudsman 2013b.

accompanying the Regulation Proposal.[72] It becomes obvious that the purpose of the provision, supported by the intention of the drafters is to ensure compliance with fundamental rights in a forum, where the legality of acts can be reviewed against human rights standards and possible violations can be remedied. This constitutes the essence of legality review or legal accountability more generally.

In conclusion, the decision of the Executive Director is essentially a decision on the legality of an act of the agency. Specifically, he will decide whether the agency has violated human rights. The same holds with respect to the FRO, who decides on the admissibility of the claim and on the allocation of responsibility. In cases where an agency's founding Regulation empowers the Commission to rule upon issues of legality, that decision of the Commission is, according to Paul Craig, reviewable under Article 263 TFEU whether this is explicitly mentioned in the Regulation or not.[73] Similarly, I suggest the reviewability of the decision of the Executive Director and/or of the Fundamental Rights Officer in this respect.[74]

6.3.2 Reviewability of the risk analysis

Secondly, I suggest the reviewability of the risk analysis conducted by the agency. Frontex has important advisory functions through the research and risk analysis it conducts, which constitute the necessary basis for every operation. In fact, according to the former Frontex Executive Director: 'All Frontex activities are based on risk analyses, the "engine" of Frontex activities'.[75] The results of the risk analysis are reflected in the operational plan, which is drafted by the agency and approved by the host member state.

Madalina Busuioc, writing in the context of agencies more broadly, describes such advisory functions as offering scientific advice to member states upon which they base their decision.[76] Such opinions are not final acts, but rather preparatory. They are however essential for the operation, which heavily relies upon them. This advice, although not formally binding, would be hard to circumvent due to the research and technical expertise of the agency.

---

72 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision, 2005/267/EC, COM(2015) 671 final, 2015/0310 (COD) of 15/12 /2015.

73 Craig 2012, p. 158.

74 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms*, Refugee Law Initiative (RLI) Working Paper, London: School of Advanced Study, University of London 2018, p. 6.

75 I. Laitinen, *Introductory talk to the Joint Parliamentary Meeting initiated by the European Parliament and the Parliament of Finland: 'From Tampere to the Hague'*, Brussels: European Parliament 2006.

76 Busuioc 2013, p. 192.

Such considerations lead Busuioc to the observation that often the boundaries between scientific advice and decision-making become obscured in practice and, as a result, the final decision belongs de facto to the agency. Therefore, she makes the bold suggestion to review the legality of non-binding acts. Busuioc's argument is that although doing that sounds provocative if not, that would mean an insurmountable gap in the accountability of the 'de facto operative decision maker'.[77]

Paul Craig agrees that if judicial review is to be effective, it needs to be capable of being applied to 'the institution that made the operative decision'. He gives an example concerning the supervision of medicinal products developed for use in the EU, where the Commission, who is the formal decision-maker, heavily relies upon the recommendations of the European Medicines Agency (EMA). He argues that reviewing the Commission decision would not suffice, since normally the Commission would simply adopt the recommendation of the agency without independent input. Therefore, judicial control needs to focus on the reasoning of the recommendation that lies behind the final decision.

Although provocative, the argument is convincing and is supported by judicial precedent in the case of *Artegodan*.[78] This case is innovative in many respects. Next to developing the essence of the precautionary principle, the obligation for EU institutions 'to prevent specific potential risks',[79] the Court also introduced the reviewability of non-binding acts. The case concerned Commission Decisions to withdraw marketing authorisations for medicines of the pharmaceutical company *Artegodan*, which contained 'amfepramone', an agent with anorectic properties. The Commission had based its decision on the opinion of the Committee from Proprietary Medicinal Products (CPMP), a scientific committee of EMA. Although the CFI recognised that the opinion was not formally binding, it considered that the consultation with the CPMP was mandatory and that the Commission was not able to make an individual assessment of the product. It had to base its reasoned decision on the scientific evidence produced by the CPMP.[80] The Court then held that the first step of the review process was the review of the lawfulness of the scientific opinion.[81]

The Court applied a marginal legality review test, as it is not empowered to examine the substance of the scientific opinion. In particular, it considered the proper functioning of the CPMP, the internal consistency of the opinion and whether there was a comprehensible link between the medical evidence relied on and the conclusions of the scientific committee.

77 Busuioc 2013, p. 193. Perhaps it is important to note that Busuioc does not talk about Frontex in particular.

78 *Artegodan v Commission*.

79 *Artegodan v Commission*, par. 184; J. L. da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU law*, Oxford and Portland: Hart Publishing 2014, p. 350.

80 *Artegodan v Commission*, par. 198.

81 *Artegodan v Commission*, par. 199.

In that respect, the CPMP was obliged to refer to the scientific reports on which it based its opinion and explain why it disagreed with the reports and expert opinions presented by Artegodan.[82] Finally, the CFI found that the Commission had exceeded its competences and annulled the Commission decisions.[83]

Should this line of argument be applied in the case of Frontex, the final decision belongs to the host member state that has the power of command. However, the advice produced as a result of research and risk analysis conducted by the agency, although not formally binding, is so influential, that it makes the agency the de facto decision maker. Therefore, the advice should be reviewable in those cases.

6.3.3 Reviewability of the refusal to access documents

Last but not least, the reviewability of the refusal to access to documents is proposed. The lack of transparency on the part of the agency has been criticised as a structural problem of Frontex. The EP has noted that a 'culture of secrecy' characterises the work of the agency. This issue becomes most vivid when it comes to the right to public access to documents, which has been included in the Charter as a fundamental right. Freedom on information requests are often refused, and more often than not, the released documents are extensively redacted on the ground of public security concerns.[84]

Access to documents is enshrined in Article 42 CFR, in accordance to which, any citizen or resident of the Union, has a right of access to EP, Council and Commission documents. The right has been extended with Article 15(3) TFEU to cover documents of institutions, bodies and agencies of the Union.

The decision of the agency for total or partial refusal of access to requested documents is an act of direct effect conducted by the agency and can, therefore, be reviewed by the CJEU. Not every unlawful refusal of access to documents constitutes a human rights violation, and the limits and conditions for which provision has been made in Article 15(3) TFEU will need to be taken into account. Factors that can be taken into account in this regard is the extent and the systematic nature of refusals, that will need to be established on a case-by-case basis. Applicants can also bring an action for annulment under Article 230 EC against decisions on access to documents taken by the agency pursuant to Article 8 of Regulation (EC) No

82 *Artegodan v Commission*, par. 200.

83 The decision was upheld on appeal. However, the case before the ECJ did not concern the issue at stake here. CJEU 24 July 2003, C-39/03, ECLI:EU:C:2003:418 (*Commission v Artegodan and Others*).

84 See for more information, Chapter V, section 3.3.

1049/2001 regarding access to EU documents.[85] In fact, a stepping stone in this direction could be a case before the CJEU regarding the refusal of access to documents.[86]

7 Action for damages

This section examines a remedy with a lower access threshold for individuals compared to the action for annulment, the action seeking to establish the liability of the Union and award compensation. The issue of admissibility and the examination of the merits of this remedy are first studied regarding a case of Frontex liability, before going in detail into more particular procedural problems, such as establishing liability based on non-binding opinions.

This remedy, which obliges the EU to make good any damage caused by its institutions, was already introduced by the Treaty of Rome, establishing the European Economic Community from the very beginning.[87] Since then, modest use has been made of the remedy. According to the statistics of the Court of Justice, only 29 claims for damages were brought before the General Court in 2018. Although the number has been doubled since 2011, it still corresponds to less than 3.5% of the activity of the Court, compared to 35% which is the percentage of actions for annulment.[88]

The right to claim for damages has also been introduced as an expression of the right to good administration in Article 41(3) of the Charter. The provision reiterates the text of the Treaties, merely adding a fundamental rights angle to it.[89] A generous time-limit of five years from the time the harmful event took place, allows applicants to bring a liability action relatively long after the damage has occurred, which can prove particularly helpful in the case of long-lasting related national proceedings, for instance on the issue of the liability of the host state. In a case concerning the liability

85 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

86 Such a case was heard by the General Court, where the applicants, two freedom of information activists and journalists, Arne Semsrott and Luisa challenged the agency's refusal to provide information about the vessels deployed by the agency during the Joint Operation Triton. The General Court dismissed the action, ruling that the agency had rightfully refused access to the requested documents. EGC 27 November 2019, T-31/18, ECLI:EU:T:2019:815 (*Izuzquiza and Semsrott v Frontex*).

87 Articles 178 and 215(2) EEC. The provisions were renumbered in the Amsterdam Treaty provisions as Arts. 235 and 288(2) EC, respectively. Lisbon Treaty in Article 340 TFEU has not changed the substantive content of these provisions.

88 Court of Justice of the European Union 2018, p. 237.

89 Advocate General Dutheillet de Lamothe had already in 1972 stated that the action for damages was essentially the exercise of a substantive right. CJEU 13 June 1972, C-9 and 11/71, ECLI:EU:C:1972:52 (*Compagnie d'Approvisionnement v Commission*), par. 411.

of Frontex, the time-limit also accommodates the sensitive situation of irregular migrants facing the risk of deportation and other related risks and difficulties, such as lack of access to information.[90]

Such an action for damages can be brought for instance, regarding allegations that Frontex has failed to use its supervisory powers to prevent violations during return flights,[91] or with respect to the agreements of Frontex with third countries. In fact, there is relevant case-law on the liability of the Community for external agreements.

In *Odigitria* the Court of First Instance examined in its substance a claim regarding damages caused to European fishers due to the non-renewal of the fishing agreement between the EC and Morocco.[92] Also, according to an earlier opinion of Advocate General Darmon,[93] the examination of liability claims for external agreements is in principle possible since the Court has jurisdiction over an *a posteriori* review of such agreements. A difficulty foreseen by Fines would be to establish the applicable legal basis.[94]

7.1 Admissibility

The exclusive competence in disputes relating to the Union's non-contractual liability belongs to the CJEU.[95] Thus, before entering into the merits of the case, the Court needs to decide upon its jurisdiction of the case, namely decide whether the conduct it is asked to adjudicate upon is attributable to the EU.[96] According to Article 340 TFEU, the Union, in case of

90 Relevant for the case of irregular migrants, which may lack the necessary information as to the facts of the harmful event or be ambiguous as to the division of responsibility in a Frontex joint operation, is also that the claimant's ignorance as to the origin of the injury can postpone the commencement of the limitation period. CJEU 7 November 1985, C-145/83, ECLI:EU:C:1985:323 (*Adams v Commission*). See T. Heukels and A. McDonnell, 'Limitation of the Action for Damages Against the Community: Considerations and new Developments' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 225-229.

91 N. Nielsen and A. Fotiadis, ''Inhuman' Frontex forced returns going unreported', *EUobserver,* 2019, https://euobserver.com/migration/146090; CPT 2018.

92 CJEU 6 July 1995, T-572/93, ECLI:EU:T:1995:131 (*Odigitria v Council and Commission*).

93 Opinion in CJEU 1 June 1989, Case C-241/87, [1990] ECR I-1790 (*Maclaine Watson v Council and Commission*).

94 '(…) in French law, for example, the *Conseil d'Etat* has established strict liability with regard to treaties, for "rupture de l'egalité devant les charges publiques", while in Community law the judges do not recognise this basis.', F. Fines, 'A General Analytical Perspective on Community Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 11-40, p. 27.

95 Article 268 TFEU.

96 This question is commonly decided upon at the admissibility stage of the proceedings. However, cases have been noted where the Court deals with attribution as a fourth element of the liability test, belonging in the substantive part of the proceedings. Fink 2017, p. 281.

non-contractual liability, needs to rectify any damage caused by its institutions or its servants in the performance of their duties. The same provision is made in the EBCG Regulation with respect to the liability of Frontex in particular (Article 97).[97] Moreover, the acts of staff members give rise to the liability of Frontex, as long as they have acted in the performance of their duties (Article 340 (2) TFEU).

The TFEU provides for two separate regimes with respect to EU liability: one regarding the liability of the Union, and one regarding the conduct of its servants acting outside the performance of their duties. This distinction and the interpretation of the element of 'in the performance of their duties' can be of relevance to EBCG operations in terms of the admissibility of an action for annulment.

In this respect, a distinction can be made between official acts, performed by employees in the performance of their duties, and private acts, performed by the public servants in their capacity as private individuals. This does not prevent the attribution to the organisation of acts that have been conducted ultra vires.[98] It is only when the agent has acted in a private capacity, or in the language of the CJEU, not 'in performance of their duties', that the act will not be attributed to the organisation and the liability of the EU will not be in question.

The CJEU has interpreted 'in performance of their duties' rather narrowly in *Sayage v Leduc*, limiting the concept to acts that 'by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions'.[99] Here the CJEU has held that a servant of the Union, entrusted with escorting two representatives of private firms on a visit to a nuclear plant, was not acting in the performance of his duties when causing a car accident driving them there in his private car.[100]

This interpretation differs, in fact, from the interpretation of the same principle in state liability by the CJEU. In *A.G.M.-COS.MET* the CJEU rules that the decisive factor is whether the person to whom a certain statement (in that case) is addressed can reasonably suppose that these are official positions taken by the state, i.e. that it was the state acting, rather than personal opinions of the public servant.[101]

---

97 On questions regarding the appropriate authority to bear responsibility (the EU rather than Frontex), see Chapter VI, section 2.2.

98 Article 6 ARIO.

99 CJEU 10 July 1969, C-9/69, ECLI:EU:C:1969:37 (*Sayage and Others v Leduc and Others*), par. 7; see H. G. Schermers and C. R. A. Swaak, 'Official Acts of Community Servants and Article 215(4) EC' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 168-171.

100 *Sayage and Others v Leduc and Others*, paras. 10-11.

101 CJEU 17 April 2007, C-470/03, ECLI:EU:C:2007:213 (*AGM-COS.MET v Suomen valtio and Tarmo Lehtinen*), paras. 84-85.

In considering state liability, the Court comes closer to the principles existing in international law, according to which all acts, including both de jure and de facto competences, are able to engage the responsibility of the actor unless they are made in a private capacity.[102] The interpretation adopted by the Court in *Sayage v Leduc,* however, would leave here a considerable gap, as it would consider an act not attributable to the agency when the latter has exceeded its de jure competencies. Such an interpretation would create an accountability gap, also affecting the effectiveness of legal protection.

The contrast between the interpretation in *Sayage v Leduc* and in *A.G.M.-COS.MET* is inconsistent with the Court's priorities. In particular, in the interest of establishing a fundamental common law on liability, the CJEU has been progressively converging the criteria of member state and Union liability.[103] Evidently, the interpretation of the element of 'in performance of their duties' has not yet reached the desired level of convergence, when applied in state liability and when applied in EU liability. In this vein, the Court could strive to further harmonise the two types of liability, drawing inspiration from the principles of international law so as to cover accountability gaps.

Thus, it is suggested here that in a case concerning the liability of Frontex, the CJEU uses the interpretation of Art 6 ARIO in international law[104] as a form of inspiration, in order to interpret 'acting in the performance of their duties', as including all acts resulting from both de jure and de facto competences, unless they are made in a private capacity. This would also be in accordance with the aim of the Court to converge the standards between state and EU liability and establish a fundamental common law on liability.

Consequently, if a standard closer to *A.G.M.-COS.MET* was to be adopted in a case concerning the responsibility of Frontex, then the impression given by the members of the border guard teams to migrants on the ground could make their acts attributable to the agency, even if the conduct were outside the agency's de jure competencies. This could apply for instance, in a case where Frontex officers would perform ultra vires executive powers, such as identity checks and refusal of entry.

In case the Court chooses to insist on the interpretation of *Sayage v Leduc* and consider acts conducted outside the de facto competences as not incurring the liability of the EU, the injured party may still initiate legal proceedings against the servant of the Union personally under national law. Usually, under national law, any non-contractual liability for damages is

102 Chapter VI.

103 CJEU 4 July 2000, C-352/98 P, ECLI:EU:C:2000:361 (*Bergaderm and Goupil v Commission*); Joined Cases CJEU 5 March 1996, C-46 and 48/93, ECLI:EU:C:1996:79 (*Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*), par. 42.

104 Commentary to Article 5 ARS, paras. 7 - 9.

to be incurred by the employer and not the staff member personally. As a national court does not have the competence to rule on the liability of the employer, which in this case is the EU, and the CJEU has already declared that the EU is not liable, the national court would need to dismiss the action, leaving a gap with respect to access to court. The only avenue left would be starting criminal proceedings at the national level.[105] In this case, they would not be covered under the immunity of officials and servants of the Union from legal proceedings, as the act in question was not in the performance of their official capacity.[106]

7.2 Merits

In an action for damages, the Court applies a non-contractual liability test structured around three cumulative criteria. Namely, an action can be brought against a) an illegal act of the Union for b) damage, which c) was directly caused by the aforementioned Union act.[107]

It should be noted, that in contrast to the ARIO framework, EU liability law does not distinguish between direct responsibility, resulting from the attribution of conduct, as based on the exercise of effective control on the one hand, and indirect responsibility due to aid and assistance on the other. It applies the same test and standards to both.

We shall now take these elements one by one.

7.3 Illegal act

The wrongful act or omission needs to be attributed to one of the institutions, organs and agencies of the Union. The infringed principle must be intended to confer rights on individuals[108] and must be sufficiently serious[109]. The additional requirement of it also being a 'superior rule of law' in the case of legislative action, introduced with *Schöppenstedt*, is no longer relevant since *Bergaderm*.[110] These two cases were the foundations on which the criteria of unlawfulness have been developed.

---

105 A solution to this problem has been proposed by Schermers and Swaak 1997, p.p.: 172, 173.

106 Article 11 (a) of Protocol (No 7) to the Lisbon Treaty on the privileges and immunities of the European Union.

107 CJEU 28 April 1971, C-4/69, ECLI:EU:C:1971:40 (*Lütticke v Commission*), par. 337; CJEU 10 December 2002, C-312/00, ECLI:EU:C:2002:736 (*Commission v Camar and Tico*), para. 53. The landmark case in this context is *Bergaderm and Goupil v Commission*, para. 42.

108 CJEU 13 March 1992, C-282/90, ECLI:EU:C:1992:124 (*Vreudenhil v Commission*); *Commission v Camar and Tico*, para. 53.

109 *Bergaderm and Goupil v Commission*, para. 43.

110 CJEU 2 December 1971, C-5/71, ECLI:EU:C:1971:116 (*Aktien-Zuckerfabrik Schöppenstedt v Council*), para 11; *Bergaderm and Goupil v Commission*, para. 42.

The requirement of fault is strictly interpreted as the existence of a 'sufficiently flagrant violation of a rule of law'.[111] The violation is sufficiently serious when the EU institution concerned 'manifestly and gravely disregarded the limits on its discretion'.[112] However, when the institution has significantly reduced (or no) discretion, the mere infringement of EU law may suffice to fulfil the criterion.[113] In this respect, the Court will take into account, in particular the freedom of action of institutions, the difficulties in the application or interpretation of the law, and the complexity of the particular circumstances.[114] There are instances where the Court uses additional criteria, such as the clarity and precision of the provision.[115]

Discretion is a key determining factor, which can play a role in the case of Frontex, for instance, with respect to the obligation of the Executive Director to suspend or terminate an operation. The General Court considers it possible that the requirement of fault is also fulfilled in the case of manifest and serious errors in the analysis on which a policy decision is based.[116] This can be the case with respect to the risk analysis conducted by Frontex. However, other factors, such as the complexity of the factual circumstances or the degree of clarity or precision of the infringed rule,[117] can in any case affect the outcome of whether the breach was sufficiently flagrant.

The requirement for the breached provision to confer individual rights is meant as protective of individual interests rather than the public good and the interests of the general society.[118] Otherwise, this condition is interpreted rather generously by the CJEU.[119] In exceptional circumstances, liability can also be incurred for acts, where the element of illegality is

111 *Aktien-Zuckerfabrik Schöppenstedt v Council*, para 11; CJEU 25 May 1978, C-83 and 94/76, C-4, 15 and 40/77, ECLI:EU:C:1978:113 (*HNL and Others v Council and Commission*); CJEU 4 October 1979, C-64 and 113/76, C-167 and 239/78 and C-27-28 and 45/79, ECLI:EU:C:1979:223 (*Dumortier Fréres v Council*).

112 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 55; CJEU 7 October 1996, C-178 and 179/94, C-188 and 189/94 and C-190/94, ECLI:EU:C:1996:375 (*Dillenkofer and Others v Germany*), par. 25; *Bergaderm and Goupil v Commission*, par. 43.

113 *Bergaderm and Goupil v Commission*, par. 44.

114 CJEU 30 January 1992, C-363 and 364/88, ECLI:EU:C:1992:44 (*Finsider and Falck v Commission)*; CFI EU 4 May 2005, T-86/03, ECLI:EU:T:2006:90 (*Holcim v Commission*), paras. 98-118.

115 CFI EU 26 January 2006, T-364/03, ECLI:EU:T:2006:28 (*Medici Grimm KG v Council*), paras. 82-98; EGC 3 March 2010, T-429/05, ECLI:EU:T:2010:60 (*Artegodan v Commission b*), paras 59-62.

116 CFI EU 11 July 2007, T-351/03, ECLI:EU:T:2007:212 (*Schneider Electric v Commission*); par. 129.

117 CJEU 25 January 2007, C-278/05, ECLI:EU:C:2007:56 (*Robins and Others v Secretary of State for Work and Pensions*), par. 73.

118 CFI EU 19 October 2005, T-415/03, ECLI:EU:T:2005:365 (*San Pedro and Others v Council*), par. 86.

119 Fink 2017, p. 238.

absent, under the condition that the applicant has suffered 'direct, special and abnormal' harm.[120]

An action for damages against Frontex in the context discussed in this study may concern, for instance, a violation of the right to non-refoulement, the right to asylum, or the rights of the child. Thus, in discussing the illegality criterion, it is important to look at the particular nature of fundamental rights. It is argued here that due to its nature, a breach of fundamental rights law constitutes by definition a sufficiently serious infringement. This can also be read in the case law of the Court, especially with respect to absolute rights,[121] but also regarding violations of fundamental rights law in general.[122] The Court has not always been consistent in its case law.[123] In any respect, while a more in-depth examination into the fulfilment of criteria may be in order with respect the right to property and private life, it can be reasonably expected that the Court would find a violation of basic rights that are at stake in an action for damages against Frontex to be sufficiently serious.

7.4 Damage

The damage sustained by the victim needs to be actual and certain.[124] Merely potential or hypothetical damage is not adequate to support a claim for non-contractual liability.[125] Imminent damage, however, that is foreseeable with sufficient certainty is permissible.[126]

The Court may not consider damage that is not quantifiable in monetary terms, as it would not be sufficiently concrete.[127] This, interpreted broadly, can exclude from the definition compensation in kind, such as in the form

120 CJEU 13 July 1961, C-14, 16, 17, 20, 24, 26 and 27/60 and 1/61, ECLI:EU:C:1961:16 (*Meroni & Co. and Others v High Authority*); H. J. Bronkhorst, 'The Valid Legislative Act as Cause of Liability of the Communities' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 153-165.

121 EGC 8 July 2008, T-48/05, ECLI:EU:T:2008:257 (*Franchet and Byk v Commission*), par. 219.

122 Joined Cases CJEU 20 September 2016, C-8-10/15 P, ECLI:EU:C:2016:701 (*Ledra Advertising v Commission and ECB*), par. 69-70.

123 EGC 23 November 2011, T-341/07, ECLI:EU:T:2011:687 (*Sison v Council*), par. 80.

124 Joined Cases CJEU 17 March 1976, C-67-85/75, [1976] ECR 391 (*Lesieur v Commission*), par 408; CJEU 17 December 1959, C-23/59, ECLI:EU:C:1959:33 (*F.E.R.A.M. v High Authority*), par. 250; *Meroni & Co. and Others v High Authority*, par. 170; *San Pedro and Others v Council*, paras 101-146.

125 CFI EU 27 June 1991, T-120/89, ECLI:EU:T:1991:32 (*Stahlwerke Peine-Salzgitter v Commission*), paras. 320, 321.

126 CJEU 2 March 1977, C-44/76, ECLI:EU:C:1977:37 (*Milch-, Fett- und Eier-Kontor v Council and Commission*), par. 407; *Aktien-Zuckerfabrik Schöppenstedt v Council*, p. 89.

127 *Aktien-Zuckerfabrik Schöppenstedt v Council*, p.p.: 983, 984; *San Pedro and Others v Council*, par. 110.

of injunctions to prevent future violations.[128] Non-material damage, such as mental and moral suffering sustained in the case of human rights violations, qualifies as damage.[129]

Finally, the damage must be proven with the burden of proof lying with the applicant.[130] The standard required by the Court in proving damage and causality, discussed in the next section, has been criticised as disproportionately high, making it excessively difficult for the applicant to produce the evidence.[131]

7.5 Causal link

This element does not merely require the damage to have been the result of the wrongful act of an institution of the Union. The causal link between the wrongful act and the damage needs to be direct, immediate and exclusive.[132] It is shown here and in section 8.2. that this creates a binary distinction on the issue of causality that allows for only one actor to be held accountable. This would not comply with the principle of *systemic accountability* and the Nexus theory, and would exacerbate the *problem of many hands*. I will address this difficulty in section 8.4.

In a strict interpretation of this requirement, liability cannot be established, if the same result could have occurred in the same way even in the absence of the conduct of the institution (conditio sine qua non).[133] Moreover, the Union's conduct needs to be the sole act, which caused the damage, since the latter needs to be the direct and immediate consequence of that act. The act itself, exclusively, without the intervention of a third party, needs to have caused the damage sustained by the injured parties.[134] Any such intervention could break the chain of causation.

---

128 CFI EU 10 May 2006, T-279/03, ECLI:EU:T:2006:121 (*Galileo International Technology and Others v Commission*), para. 63 with respect to injunctions; CFI EU 16 December 2010, T-19/07, ECLI:EU:T:2010:526 (*Systran and Systran Luxembourg v Commission*) on confiscation and distraction of material, publication of the decision etc.

129 CJEU 10 December 2015, C-350/14, ECLI:EU:C:2015:802 (*Lazar v Allianz SpA*).

130 CJEU 6 June 1964, C-55-59 and 61-63/63, ECLI:EU:C:1964:37 (*Modena and Others v High Authority*), p. 229; CJEU 4 February 1970, C-13/69, ECLI:EU:C:1970:5 (*Van Eick v Commission*), p. 14.

131 A. G. Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 184. See further Chapter VIII, section 8.4.

132 *Lütticke v Commission*; CJEU 7 June 1966, C-29, 31, 36, 39-47, 50 and 51/63, ECLI:EU:C:1966:29 (*Usines de la Providence v High Authority*); CJEU 14 July 1967, C-5, 7 and 13-24/66, ECLI:EU:C:1967:31 (*Kampffmeyer and Others v Commission);* EGC 18 March 2010, T-42/06, ECLI:EU:T:2010:102 (*Gollnisch v Parliament*); See further Chapter VIII, section 8.2.

133 CJEU 16 January 1992, C-358/90, ECLI:EU:C:1992:16 (*Compagnia Italiana Alcool v Commission*), par. 2505.

134 *Commission v Camar and Tico*, para. 53. The landmark case in this context is *Bergaderm and Goupil v Commission*, par. 42.

I should be mentioned that this would be particularly strict compared to the international law framework, where the causality requirement does not exist as such. Something that resembles this relationship in the ARIO is found in the discussion about aid and assistance.[135] However, this corresponds rather to the causality requirement of *Liability – Responsibility*, according to which, the harmful result should not be too remote of a consequence for an act to count as the cause. Still, the connection or relationship does not need to be so close so that the agent directly causes the harm, without any other intervention.

In this sense, the direct causal link may prove too strict of a requirement with respect to Frontex, since its actions occur in a multi-actor environment, where a nexus of responsibilities is created, where more acts and omissions may cause the harmful outcome. The agency's acts usually require a national implementation measure to be completed. The mere involvement of the host state could be sufficient under the Court's case law to break the chain of causation and prevent the liability of the agency from arising.[136]

Nevertheless, it always needs to be examined on a case-by-case basis whether the intervening act was indeed capable of breaking the chain of causation.[137] The Court has held that this is the case when the act has arisen from an independent decision of the member state.[138] Contrary to this, as the Court held in *Krohn*, when the member state was not acting independently but simply carrying out the binding instructions of the Union, the causal link remains intact, and the Court is able to adjudicate on the liability of the Union.[139] In *Krohn*, the damage was caused by protective economic measures introduced by the German Government. These measures had been authorised by the Commission, which brought with it the liability of the Union.

Based on this precedent, the same argument can be reproduced in the case of Frontex and the host member state. If it can be shown that the latter was implementing decisions taken at the agency level and that it had no discretion in carrying out the binding orders of the agency, then the illegal act of the state does not constitute the cause of the damage and is not capable of interrupting the causal link between the act of the agency and the damage. This is a rather difficult argument to make, as the host state still authorises the operational plan. Frontex may have effective control over the conduct of seconded officers, but this control is not exclusive and would not

135 Chapter VI.

136 LIBE 2011, p.p.: 82-86.

137 CJEU 21 May 1976, C-26/74, ECLI:EU:C:1976:69 (*Roquette v Commission*), at 687; Toth 1997, p. 193.

138 CJEU 10 May 1978, C-132/77, ECLI:EU:C:1978:99 (*Société pour l'Exportation des Sucres SA v Commission*), p. 1073.

139 CJEU 26 February 1986, C-175/84, ECLI:EU:C:1986:85 (*Krohn Import-Export v Commission*), p. 768 and [1987] ECR p.p.: 116-120.

factor out the effective control of the host state.[140] Exceptionally, the control of the agency could prove to be exclusive with respect to the outcome of the right to intervene afforded to the agency in the 2016 EBCG Regulation.

Similarly, the member state can be found to have no discretion, if the instructions at the Union level are not binding *sensu stricto*, but are able to put substantial pressure on the member state. This instance is illustrated in the *KYDEP* case, where the Commission had not been expressly provided with the power to issue binding communications, but the member states were in practice obliged to follow them, under threat of refusal of reimbursement by the Commission of their expenditure.[141] This was adequate for the Court to review the liability of the Union. Thus, if it can be proven that the control and command of the agency over the unlawful act of the host Member State was of a compelling nature *sensu lato*, the involvement of the member states will not result in the interruption of the causal link. This would ensure the liability of the agency.

Likewise, the causal link between the conduct of Frontex and the damage may still remain intact in the case of breach by the agency of its positive obligations, regarding its indirect responsibility for a human rights violation committed by a member state. Even though the member state's act may be the primary cause of the damage, the failure of the agency to 'exercise its powers of supervision with regard to a Member State' makes it 'liable for the damage which follows from the original behaviour of a Member State'.[142]

An occasion where the direct causal link may indeed be interrupted is the situation where the applicant failed to prevent (part of) the damage due to negligence. Applicants need to prove that they have shown due diligence in limiting the extent of the damage. In case they have failed to do so, they may be called to take upon them part of the responsibility. This would result in the proportional reduction of the awarded damages.[143] The Court's past case law points towards discouraging for the applicant predictions in cases where harm was caused on the applicant's bodily integrity. In *Grifoni case*, the Court ruled that the applicant was partly responsible for the damages he suffered having fallen from the roof of a Commission building construction

140 Chapter VII, section 2.3.

141 CJEU 15 September 1994, C-146/91, ECLI:EU:C:1994:329 (KYDEP v Counicl and Commission). Contrary to this, in Emerald Meats, the Commission's communication on tariff quotas was considered part of the internal cooperation with the national authorities on an equal level. CJEU 8 March 1991, C-66/91 and C-66/91 R, ECLI:EU:C:1991:110 (*Emerald Meats Ltd v Commission*).

142 Advocate General's opinion in CJEU, CJEU 12 July 1962, C-9 and 12/60, ECLI:EU:C:1962:25 (*Belgium v Vloeberghs and High Authority*), par. 240; See also Advocate General's opinion in *Kampffmeyer and Others v Commission*, par. 279.

143 CJEU 19 May 1992, C-104/89 and C-37/90, ECLI:EU:C:1992:217 (*Mulder and Others v Commission*); CJEU 10 July 2003, C-472/00 P, ECLI:EU:C:2003:399 (*Commission v Fresh Marine*).

since as a maintenance expert he should have refused to climb the ladder or have taken other precautionary measures.[144] Also, in *Adams* case, the applicant was refused full compensation. Mr Adams sued the EC for disclosing documents to the company 'Roche', violating the confidentiality obligations of Article 214 EC Treaty, and exposing his identity, which subsequently led to his criminal conviction in Switzerland for corporate espionage. The Court accepted the responsibility of the Commission but held that Mr Adams was also partly responsible and the Commission was therefore condemned to pay half the damage claim. One of the reasons for the Court holding Mr Adams partly responsible was that he returned to Switzerland 'while he should have been aware of the risks involved.'[145] It would be regrettable if this line of reasoning were followed in cases of breaches of fundamental rights, incurred in the context of irregular migration, where the victim could be held partially liable for the harm suffered for taking the risk of a dangerous journey or of irregular border-crossing.[146]

Once the Court finds that all the above criteria are fulfilled, illegal act, damage, and causal link, it will order for the responsible institution or agency to rectify the damage. The principle of full compensation also includes the award of interest where that applies.[147]

7.6 Complications of the action for damages in EBCG operations

After having examined the legal remedy in more general terms, this section looks at the action for damages as it can be applied in a case concerning the liability of Frontex. In particular, it zooms in to some more specific elements, which can be important for applying this remedy to Frontex. The aim is to foresee procedural problems that arise from the nature of the remedy itself and the jurisprudence of the Court, but also from the particular nature of Frontex activities, and work out plausible solutions to them.

It does so, first, by critically examining the source of such procedural problems that could inhibit the accountability of Frontex. It discusses, in particular, the limitations of the basic model of responsibility in EU law, i.e. the competence model, and the potential of the organic model to mitigate these limitations. Next, it applies this line of thought with respect to the positive obligations of the agency to prevent a violation and the de facto binding opinions it can issue.

144 CJEU 27 March 1990, C-308/87, ECLI:EU:C:1990:134 (*Grifoni v EACC*).

145 *Adams v Commission*.

146 On the degree of contributory diligence required, see Toth 1997, p.p.: 191-198.

147 On the issue of interest in claims for damages before the CJEU see, A. Van Casteren, 'Article 215(2) EC and the Question of Interest' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 199-216.

7.7 The limits of the competence model

This study has previously discussed 'organic model', adopted by the ARIO. This presents certain tensions with the 'competence model' that the EU adopts as a sui generis organisation.

The organic model is based on the principles of attribution of conduct that leads to direct responsibility and those of attribution of (complementary) responsibility leading to indirect responsibility. The competence model attributes responsibility on the basis of formal decision-making competence within the EU system. In areas where the EU has exclusive competence to adopt binding acts, it also carries the exclusive responsibility for unlawful, harmful outcomes. In areas of shared competence (where EBCG operations can be placed), responsibility is allocated on the basis of priorly agreed upon regimes of formal competencies. Such a priori allocation can be found in mixed agreements.

Such agreements do not ordinarily acknowledge factual control, double attribution or complementary indirect responsibility, which are necessary elements in determining joint responsibility within EBCG operations and the accountability of Frontex. Thus, I show in this section that the competence model is not adequate to fully address the *problem of many hands* as that appears in EBCG operations and that the organic model should be used instead, as that also takes into account de facto competences and factual control.[148] I, first, examine the competence model in more detail as that appears from the Court's case law, and while acknowledging its overarching nature as a sui generis regime and lex specialis (Article 64 ARIO), I also investigate its limits within an action for damages.

The CJEU has often reaffirmed the competence model in its case law, allocating liability on the basis of normative control, or in other words on the basis of legal decision-making powers. The determinative questions are who exercised legal control, whether the actor had the authority to issue legally binding orders, or whether it had formal discretion to determine its conduct. In *Krohn I*, the Court rejected the liability of the member state as it came to the conclusion that it had no formal discretion to derogate from the instructions of the Commission.[149]

In the context of EBCG operations, in order to establish which actor had normative control over the human rights violation that occurred during an operation, the competence of the staff and the offices of the agency and those of the host member state needs to be examined. In accordance with the competence model, the opinion has been expressed in the literature that Frontex is directly liable only for violations directly committed by its own personnel on the ground, such as liaison and coordinating officers that belong to the agency's staff, when they act in their official capacity or viola-

148 See Chapter VII, section 4.

149 CJEU 26 February 1986, C-175/84, ECLI:EU:C:1986:85 (*Krohn Import-Export v Commission*).

tions that are inherent in the design of the operational plan.[150] The degree of normative control by the agency to the deployed personnel has been considered too weak to justify the claim that these act as de facto EU organs.[151] The comments of the coordinating officer, for instance, need to be taken into account by the authorities of the host state, but these are not formally binding, irrespective of the influence these may have on the border guards in practice. It has been noted that Frontex's own staff may only exercise tasks of a coordinating nature, and they do not possess executive or other operational powers which affect human rights directly. Thus, the normative control that the agency possesses over the officers operating on the ground is insufficient in practice to render it directly liable for violations.[152] This would result in the agency not being found responsible for violations that it has contributed to that have not been committed by its staff. Such a gap would have been incompatible with fundamental rights protection, according to the resolution of the European Parliament:

> *"(...) Frontex coordination activity cannot in practice be dissociated from the Member State activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals' rights and trigger, at the very least, the EU's extra-contractual responsibility (...), whereas such responsibility cannot be avoided simply because of the existence of administrative arrangements with the Member States involved in a Frontex-coordinated operation when such arrangements have an impact on fundamental rights".*[153]

Here, the EP, one of the core EU institutions, without rejecting the competence model, openly acknowledges its limits. It holds that in terms of allocating non-contractual liability, the competence model should not enable avoiding responsibility, resulting in a gap in accountability for acts that impact on fundamental rights.

Other commentators have also corroborated this need to cover this gap. David Fernandez Rojo, studying the roles and competences of JHA agencies in the hotspots in Italy and Greece, notes that 'even though the national authorities in the hotspots have exclusive enforcement, decision-making, and discretional powers, the substantial operational assistance that Frontex provides on the ground should be reflected in a legal instrument and be subject to control.[154]

150 Fink 2017, p.p.: 312, 315, 316; similarly, according to Frontex, only complaints against Frontex employees will be attributable to the agency through its individual complaints mechanism, Frontex 2016a.

151 Chapter VII, section 2.2.

152 Fink 2017, p.p.: 282-283, 312, 315, 316.

153 European Parliament 2015, par. 327.

154 D. Fernández-Rojo, 'The European Border and Coast Guard: Towards the centralization of the external border management?', *Blogactiv* 7 February 2017, http://eutarn.blogactiv.eu/2017/02/07/the-european-border-and-coast-guard-towards-the-centralization-of-the-external-border-management, p. 328.

In such instances that the competence model reaches its limits, in order to achieve an equitable result in accordance with the rule of law, the Court can turn for inspiration to the organic model.

Under this model, the investigation does not stop at the formal arrangements[155] but continues through de facto powers and effective control. Even though seconded border guards cannot be considered de facto Frontex organs, the question that would arise in the organic model would be whether the agency would still be considered to have effective control over their conduct.

In the context of such joint operations, different levels of control by different actors have interlaced in a way that a singular answer to this question becomes impossible. The applicable test, in this case, would be that of operational command and control, taking into account the factual circumstances of each particular case.

Under this model, normative control is still important as one of the elements, which appear as a combination of formal arrangements on direction and control (e.g. decision-making powers, disciplinary powers) and factual circumstances. None of them is exclusive, and a complete answer calls for a balanced consideration of them all.

The analysis conducted in Chapter VII shows, first of all, that Frontex has, in fact, effective control over the deployed personnel through its various organisations, supervisory and other powers. Secondly, it shows that the answer to the question of who has effective control over the conduct of the seconded officers is a non-exclusive one. One actor's control does not negate the control and the subsequent responsibility of another actor. It is rather the degree of effective control exercised by either actor and not absolute control that is of importance. Thus, both the host state (and at times the sending state) and Frontex can have effective control leading to dual (or multiple) attribution.

Indeed, the development of the agency's operational powers over the years gives ample reason to apply the organic model, and look into whether the agency can have effective control over the conduct of seconded officers so that it can be held directly liable for a violation. The opportunities for such direct liability increase, as the operational role of the agency, keeps growing with the development of its mandate. This is even more so as the agency moves into its next phase of operational effectiveness and greater autonomy from the member states, acquiring its own operational arm of border guards and return escorts with executive powers parallel to those of the national officers, who will be increasingly operating on the agencies own equipment, such as planes and vessels.[156]

155 Allocation of liability on the basis of normative control e.g. *Krohn Import-Export v Commission*.

156 M. Gkliati, 'The next phase of the European Border and Coast Guard: towards operational effectiveness', *Blog EU Law Analysis*, 2018, http://eulawanalysis.blogspot.com/2018/10/the-next-phase-of-european-border-and.html.

7.8 Non-binding opinions

Similarly, with the action for annulment,[157] a non-binding opinion of the agency (Article 288 TFEU) can potentially give rise to an action for damages. In the framework of the competence model, it has been argued that, according to the Court's case law, mere recommendations, or similar kind of non-binding opinions by an EU body are, as a rule, not able to render that body liable for damages, as the opinion has non-binding effects and the final decision rests with the member states.[158] Although this indeed seems to be the rule that the CJEU has set with respect to non-binding opinions, it is important to note that this line of case law concerns decisions made by the responsible authorities of the member states upon an opinion of the EC.

This distinguishes them from cases where the Commission follows the opinion of a specialised EU agency. In such cases, it is the level of specialisation and technical knowledge as opposed to the broad and non-specific bureaucratic nature of the Commission, that supports arguments as to the de facto binding nature of the opinion.

Moreover, in that line of case law the applicants have been unable to prove that the formally non-binding opinion had de facto binding consequences upon the final decision-makers, in a way that would constitute the authority issuing the opinion a de facto decision-maker and render them liable for the damages.

Such circumstances distinguish cases concerning Frontex opinions from the norm regarding non-binding opinions and create possibilities for the risk analysis, the exercise of the right to intervene, or the newly acquired power of the agency to draft the return decisions to give rise to the liability of the agency.

This line of argumentation is not a straightforward one, as the Court has shown its preference towards a formalistic interpretation of the law, focusing on de jure responsibilities, in other words, a formal obligation to abide by the opinion, rather than de facto powers.[159] Nevertheless, Madalina Busuic and Paul Craig make a convincing argument regarding the 'de facto operative decision maker',[160] while cases such as *Ardegodan* and *KYDEP* create space for such alternative interpretations.[161]

157 Section 6.3.2.

158 Fink 2017, pp.: 294-6.

159 *Krohn Import-Export v Commission*, par. 19-23.

160 Section 6.

161 KYDEP v Counicl and Commission; CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi v Fonds des maladies professionnelles*), paras. 7, 16 and 18; Joint cases CJEU 18 March 2010, C-317-320/08, ECLI:EU:C:2010:146 (*Alassini and Others v Telecom Italia SpA*), par. 40. Contrary to this, in Emerald Meats, the Commission's communication on tariff quotas was considered part of the internal cooperation with the national authorities on an equal level. *Emerald Meats Ltd v Commission*.

Therefore, it can be argued that an act issued by an authority that possesses specialised and technical knowledge can have de facto binding power upon the final decision maker in a way that it can no longer be considered a 'genuine recommendation'. In such cases, as the Court has found in *Belgium v. the Commission*, it can exceptionally be subjected to judicial review.[162]

Finally, the Meijers Committee issued in 2018 a legal brief on soft law instruments, such as opinions, recommendations and guidelines, which may not be binding as such, but have legal effects, as they require EU institutions and national authorities to take them into consideration.[163] The interpretation of such opinions or recommendations can in principle be subject to a preliminary ruling by the CJEU, but they are, as a general rule, excluded from the judicial review of the CJEU under Article 263 TFEU. According to the Meijers Committee, such instruments, especially when they implicate the fundamental rights of individuals, should exceptionally allow for judicial control.

In sum, we can consider as non-genuine recommendations formally non-binding acts, that can, however, have legal effects, as they require national authorities to take them into consideration. These acquire a de facto binding power, as they are issued by an authority with specialised and technical knowledge. This specialised authority can then be considered to be the 'de facto operative decision maker'.[164]

7.9 Positive obligations – breach by omission or failure to act

As an exception to the strict causality criteria, the Court has already found that liability can occur as a result of the breach of positive obligations. This area is the equivalent to the indirect or derivative responsibility met in international law.[165]

Frontex has positive obligations under human rights law, while central, in this respect, are the positive duties that have been set out in the EBCG Regulation, such as the obligation of the agency to supervise the state of fundamental rights during all its activities. Frontex has a number of fundamental rights specific supervisory obligations, which are fleshed out for instance in the vulnerability assessments conducted by the agency, the obligation upon guest officers to report without delay any serious incidents, and in forced-return monitoring.

---

162 CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79 (*Belgium v Commission*), par. 29.

163 Meijers Committee, *1806 Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law*, 2018, https://www.commissiemeijers.nl/sites/all/files/cm1806_note_on_soft_law_instruments.pdf.

164 Busuioc 2013, p. 193.

165 Chapter VI, section 3.6.

Supervisory obligations are the core of the agency's positive duties, but these are transcended by the duty of the Executive Director to suspend or terminate an operation upon serious and consistent violations. To this, the obligation of the agency to include human rights safeguards in the operational plan can be added, such as the provision of interpreters and medical personnel.

As a result, failure to abide by these positive obligations to protect human rights, can make the agency complicit in a violation that could have been prevented with the intervention of the agency. But more importantly, this monitoring obligation, ensures that the agency has 'presumed knowledge' of the situation on the ground, which could trigger its responsibility in case of inaction.[166]

Failure to abide by such positive duties can result in liability if the conduct of the primary actor results in a violation. The requirements of the action for damages, as these are analysed above, especially regarding the nature of the illegal act, apply regardless of the nature of the unlawful conduct as an act or failure to act.[167]

In this regard, particularly relevant in order to establish negligent conduct when the actor has positive obligations, is the criterion of knowledge.[168] Here it becomes part of the assessment of whether the violation was sufficiently serious, as lack of knowledge can excuse inaction.[169] This requirement should be interpreted as a combination of strict definitive knowledge test and willful ignorance, according to which it would suffice to prove that the actor was consciously turning a blind eye even though it had access to credible information. In other words, responsibility can be triggered by presumed knowledge under which the actor knew or should have known about the wrongful act.[170] Thus, protection shall be provided not against all threats, but against threats of which the actor had knowledge, or at least against 'predictable reliable threats'. The extensive monitoring role of the agency, including vulnerability assessments and the recording of serious incident reports, along with the extensive reporting of systemic violations by NGOs and news reports, can, in most cases, lead to the conclusion that Frontex fulfils the requirement of presumed knowledge.

166 Responsibility is triggered, as established by the International Court of Justice in the Corfu Channel case, by 'presumed knowledge'. This principle of 'presumed knowledge' that engages the international responsibility of the actor is reaffirmed in the jurisprudence of the ECtHR, in M.S.S. and in Hirsi. *Hirsi Jamaa and Others v. Italy; United Kingdom v Albania*; *M.S.S. v. Belgium v. Greece*, paras. 160, 314, 348-9.

167 For further analysis of the applications of the illegal act requirement upon positive obligations, see Beijer 2017; See also Fink 2017, p.p.: 328-336.

168 We have seen this as the determinate mental criterion, identified by Hart, for attributing Liability-Responsibility, and as the requirement of international law that protection shall be provided not against all threats, but against threats of which the actor had knowledge.

169 Section 7.3.

170 *United Kingdom v. Albania*; Chapter VI, section 3.

Still, in the context of the illegal act, it is important to note that Frontex has in most cases a certain level of discretion concerning the measures it can take to safeguard fundamental rights. Judging on a case-by-case basis, it will need to be assessed whether the agency has 'manifestly and gravely disregarded the limits on its discretion'.[171] Additionally, the strict causality requirements can still be met in relation to a breach of supervisory obligations and its consequent violation of fundamental rights law.[172] This will need to be examined on a case-by-case basis. Thus, failure to comply with each of the specific supervisory duties of the agency, or with its supervisory duties as a whole, along with its other positive obligations, can give rise to the liability of the agency, as long as the regular requirements of the action for damages, examined above, are met.

8 Action for damages for joint liability

The accountability of Frontex could still potentially be reached with what has been discussed so far regarding the different proceedings. However, the previous chapters have shown that there is an underlying problem, that of *many hands,* which can be resolved with a change of perspective from a linear understanding of responsibility to a nexus of responsibilities, and from individualist to *systemic accountability*.

One of the practical effects of these conceptual constructions is that all actors involved in a violation need to be held accountable and that no one is able to hide their responsibility behind the wall of complications created by the *problem of many hands*.

Another core effect is the desirability for the different actors involved in a violation to be held jointly responsible before a court, in a way that the individual can seek compensation not only from any of the responsible actors (Nexus theory, *joint and several responsibility*) but also from both (*systemic accountability*).

This change of perspective requires us to search for a more holistic solution before the CJEU. Therefore, this section aims to actualise these practical effects by developing the legal routes for Frontex and the host state to be held jointly liable, against the background of the above principles.

8.1 Towards a fundamental common law on joint liability

The application of joint responsibility in the practice of the CJEU is rather challenging. The limited case law produced by the CJEU on the joint liability of the Union and its member states is barely adequate to give an impression of how the issue would be covered in a case concerning breaches

171 Section 7.3.
172 Section 7.

for fundamental rights in EBCG operations, where the responsibility can be attributed to both the agency and the host member state. In fact, bringing an action against both actors stumbles upon several procedural hurdles. An observer has even gone as far as suggesting that there is no place in EU law for concurrent or joint liability.[173] However, other commentators see space for joint liability in the Court's case law, filled with procedural difficulties regarding its implementation.[174]

The strongest jurisprudential evidence of the joint liability of the EU and its member states is to be found in *Kampffmeyer*, which is analysed below. The lack of solid case law leaves a gap that could be filled by resorting to the ARIO, in particular the provisions on joint responsibility. As argued extensively in Chapter VI the CJEU may draw inspiration from arguments taken from international law, where the matter has not been otherwise regulated within EU law.

An additional argument concerning the examination of a claim for damages, in particular, is to be found in Article 340 TFEU, which explicitly states that the Court should resort to the general principles common to the member states to draw inspiration and legitimacy for the rules governing the non-contractual liability of the Union.[175] The Lisbon Treaty and consequently, the CJEU take a comparative law approach in developing the criteria that apply to an action for damages. These 'general common principles' can be extracted from the national laws, but can also be shared fundamental characteristics, inferred from international law, such as the rules of responsibility enshrined in the ARIO.

The purpose of the drafters of the Treaties was to 'establish a fundamental common law',[176] and complement the EU legal order with principles derived from a modern ius gentium, constituting ius commune amongst its member states. This common law already exists as general principles common to the member states at the international level, and given the absence of a concrete rule at the EU level and the explicit intention of Article 340 TFEU to act in accordance with the general principles common to the laws of the member states, it should be expected from the CJEU, given the opportunity, to draw strong inspiration from the ARIO.

---

173 A. W. H. Meij, 'Article 215(2) EC and Local Remedies' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 282-284.

174 P. Oliver, 'Joint liability of the Community and the Member States' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 308; W. Wils, 'Concurrent liability of the Community and a Member State', *European Law Review*, 1992, p. 206.

175 See Fines 1997; The criteria followed by the CJEU draw significantly from State liability from breaches of Union law: *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*; Opinion AG Maduro, CJEU 9 September 2008, Joined Cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476 (FIAMM and others v Council and Commission), par. 55.

176 Fines 1997, p. 13.

Realistically speaking, however, the CJEU has proven quite hesitant to open up to international law. Perhaps the strongest reminder of this reality is Opinion 2/13 concerning the accession of the EU to the ECHR.[177] Moreover, the principle of Article 340 TFEU to follow the 'general principles common to law of the Member States', has not traditionally been abided by in the practice of the Court. A historical comparative law examination shows that the domestic principles 'have made no great contribution to the elaboration of the non-contractual liability of the European Community'.[178] Undoubtedly, elements of national legal mechanisms can be found in the Court's case law, but these are rather rare and cherry-picked,[179] forming a new stricter liability framework for the EU, compared to the national legal orders.

Nevertheless, joint liability is not foreign to the case law of the CJEU. Article 340 TFEU along with the composite legal order arguments can serve as motivations for the Court to receive inspiration from international law, in particular the ARIO.[180] The purpose would be twofold. This would allow the CJEU to firstly, introduce joint liability into its common practice, and develop its mechanisms within EU law, and secondly, to study through international law the intricacies of its application and get inspiration regarding its own interpretation of joint liability.

This proposal does not concern applying international law as such in the EU context, but allowing the Court to be influenced by it regarding the interpretation of a certain principle already existing in EU law, that is in need of further development. The control and ultimate decision-making power remain with the CJEU, while this line of interpretation is in accordance with the Court's own guidelines on developing a fundamental common law on liability.

8.2 The binaries of causality and the competent court

Procedural difficulties constitute considerable hindrances in applying the substantive law on joint liability. These concern the rules on attribution of liability, as discussed above with respect to the causal link, and the distribution of jurisdictional competencies among the courts. Specifically, the causation criterion creates, in most cases a binary distinction in the attribution of responsibility, where either the member state or the agency can be found to have caused the damage.[181]

177 Chapter IX, section 2.2.
178 Fines 1997, p. 32.
179 'We could note the example of a "sufficiently flagrant violation of a superior rule of law or the protection of individulas", a notion which was forged, in part, borrowing from various domestic orders, but it cannot be found in such a form in any one national system.', Fines 1997, p. 32.
180 Chapter IV, section 2.2.
181 Sections 7.5. and 7.9. for ways to circumvent the causality binary.

Such a binary distinction is also found with respect to the jurisdiction between national and EU courts. On the one hand, Article 340 TFEU is applicable 'only to the Community's liability for any damage caused by its institutions or by its servants'.[182] Furthermore, the CJEU has exclusive competence for claims of damages against the EU.[183] On the other hand, state liability for breaches of EU law is covered under 'Francovich liability'. According to the Francovich principle of state liability, in case of breach of EU law attributable to a member state, which causes damage to an individual, the member state incurs liability under EU law and compensation may be claimed before national courts. [184] These rules can only be interpreted as dividing jurisdiction in a way that actions for damages attributed to the Union are dealt with by the CJEU, and those attributed to member states are dealt with by domestic courts.[185] What is more, in cases concerning the implementation of EU law, where the lawfulness of the conduct of both member states and the EU can be contested, a legal remedy should first be sought before the domestic courts.[186]

Applying the above findings, in a case concerning the joint responsibility of Frontex and a host member state, the CJEU will apply the causality test to determine the perpetrator of the wrongful act that caused the damage. If the member state was following the binding instructions of the agency, the wrongful act will be attributed to the agency, and the case will be dealt with by the CJEU.[187] If it is found that the member state had adequate discretion over the implementation of the instructions, it will incur the liability, excluding the liability of the agency, and the applicants should bring the case before national courts.

In a case concerning the responsibility of both Frontex and a member state, two actions will need to be brought, one at the national level concerning a claim for damages against the member state, and one before the CJEU against Frontex. Moreover, the case before the CJEU may be

182 CJEU 13 February 1979, C-101/78, ECLI:EU:C:1979:38 (*Granaria v Hoofdproduktschap voor Akkerbouwprodukten*), paras. : 623-638.

183 CJEU 27 September 1988, C-106-120/87, ECLI:EU:C:1988:457 (*Asteris and Others v Greece and EEC*), par. 5538.

184 CJEU 19 November 1991, C-6 and 9/90, ECLI:EU:C:1991:428 (*Francovich and Others v Italy)*; The conditions of state liability are clarified in *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*. Today, these correspond to the ones for EU liability as detailed above in section 7.

185 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, par. 14.

186 CJEU 15 December 1977, C-126/76, ECLI:EU:C:1977:211 (*Dietz v Commission*).

187 In *Asteris* the Court dismissed an action for damages against the Communities, ruling that the national authorities had no liability because they simply implemented Community regulation. The Community did not incur any liability either, as it ruled that 'the technical error' that resulted in the violation was not a serious breach of a superior rule of law. When the applicants went subsequently before Greek courts to seek compensation against the national authorities, the Court of Justice held that national remedies could not be used, because it had already ruled that Greece was not liable. *Asteris v Commission*.

dismissed on the grounds that the local remedies need to be exhausted before compensation is sought by the Union body before the CJEU.[188]

The issue of the exhaustion of the local remedies could be resolved by arguing the lack of available remedies at the domestic level regarding the liability of the EU, as the CJEU has exclusive jurisdiction. The case law of the Court in *Unifrex*, however, a case concerning a French export company that brought an action for damages against the Commission and the Council for freezing compensation amounts, points in a different direction. There, the Court held that in a case concerning the implementation of an EU measure by the national authorities, the applicant needs to contest the implementation measure before national courts, before resorting to an action for damages against the EU. The availability of domestic remedies depends on whether these are able to ensure effective legal protection and result in compensation for damages.[189]

Thus, if the exhaustion of domestic remedies is interpreted as bringing an action for damages before national courts regarding the host state's responsibility, there would only be room for an action for damages against Frontex before the CJEU if the domestic courts do not award the victim full compensation. This type of case law makes effective legal protection the sole purpose of the justice system, prioritising individualist over *systemic accountability*. The alternative interpretation, proposed here that finds domestic remedies unavailable focuses on the responsibility element of liability. It asks the question of whether there is a domestic remedy available to address the responsibility of the actors and provide compensation (*systemic accountability*). The interpretation given in *Unifrex,* however, that would require the exhaustion of remedies regarding the national implementing measure focuses on the damage. The question it asks is whether there is a domestic remedy that can make good the alleged damage. Its mere aim is to provide compensation to the victim of a violation, rather than to hold to account all actors responsible for it (individualist accountability). Following such case law, a case of Union liability for the misconduct of Frontex may never see the light, and a gap would be left with respect to the accountability of Frontex.

The Court in its case law has brought the two actions for damages for state and Union liability closer, applying a common test, as the Court clarified in *Brasserie*[190] and *Bergaderm*.[191] Specifically, the same criteria that apply with respect to an action for damages against the state, as specified in *Francovich*,[192] should also govern the Union's liability. Nevertheless, while the liability test for the liability of member states and the EU are

188 Fink 2017, p.p.: 305-308. CJEU 12 April 1984, C-281/82, ECLI:EU:C:1984:165 (*Unifrex v Commission and Council*).
189 *Unifrex v Commission and Council*, par. 11.
190 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 42.
191 *Bergaderm and Goupil v Commission*.
192 *Francovich and Others v Italy*.

converging,[193] the remedies still remain separate, and two different proceedings need to be instituted before different judicial fora with respect to either liability. Moreover, there is also the possibility that a case before the CJEU, regarding, for instance, the responsibility of Frontex for aiding and assisting in a push back, or not preventing inhumane treatment taking place during return operations, will be dismissed on account of the liability proceedings against the host state before national courts. This solution does not adequately support joint responsibility and ensure *systemic accountability*, where all actors responsible for a violation are answerable. The following sections focus on finding a solution that does.

8.3 EU joint liability against the background of the nexus and systemic accountability

This section takes a closer look at the application of joint liability in EU law in an example of an EBCG operation against the background of the desirability of the Nexus theory and of *systemic accountability*.

Serious incidents of abuse were recorded by observers of the Committee Against Torture of the Council of Europe (CPT) in the Frontex coordinated return flight from Germany to Afghanistan on 14 August 2018. The CPT observers found the use of force and means of restraint applied by the German Federal Police to two returnees who attempted to forcefully resist removal, to be excessive and inappropriate, and constituting ill-treatment.[194] On the basis of this incident, press reports have called for the accountability of Frontex for failing to properly fulfil its monitoring obligations and prevent such ill-treatment during its return operation.[195] The CPT also noted that 'the current arrangements cannot be considered as an independent external monitoring mechanism'.[196]

If this case were to be brought before the CJEU seeking the liability of both the agency and Germany, in accordance with what was discussed above regarding joint liability in EU law, the Court would dismiss the claim for the part that concerns Germany.[197] It would only accept to hear both claims in case there are no effective remedies at the national level, or

193 This does not reach full harmonisation, as less strict conditions for establishing Member State liability may be applicable under national law. *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 66. Other differences between the two and partial divergence have been observed by several commentators. For an overview, see K. Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', *Common Market Law Review,* 48, 3, 2011, p.p.: 709, 710.

194 CPT 2018, sections 50-56.

195 Nielsen and Fotiadis 2019.

196 CPT 2018, section 60.

197 The CJEU could, of course, deal with the issue in separate proceedings if the domestic court would refer a preliminary question to it regarding the liability of Frontex or the member state.

these have been exhausted ineffectively.[198] In order to do this, following the duality of causality and jurisdiction and its own rule regarding the exhaustion of domestic remedies, the CJEU would reject the case as inadmissible referring to the national court to decide on the responsibility of the member state, as non-exhaustion of domestic remedies, is a reason for inadmissibility of a damages claim. Thus, the national procedures need to finish first, for the action for damages against Frontex before the CJEU to be admissible. As shown above, unless the domestic courts have not ordered full compensation for the damage, counter to *systemic accountability*, the responsibility of Frontex will not be examined, and a gap will be left in accountability.

If we are to aim at *systemic accountability*, the CJEU would not render the claim against Frontex inadmissible, but merely pause the proceedings concerning Frontex waiting for the outcome of the national courts on the responsibility of the member state, in order to take it into account when adjudicating for the liability of Frontex.[199] This could also take the form of the CJEU ruling on the responsibility of the Frontex, but reserving its final ruling on the amount of the compensation owed by the agency.[200]

This is the solution followed by the Court of Justice in *Kampffmeyer I*. The case concerned a safeguard measure enacted by the German government and confirmed by the Commission on the basis of which the applicants were wrongfully refused a levy-free import license. There the Court held:

> *'Before determining the damage for which the Community should be held liable, it is necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany. This being the case, final judgment cannot be given before the applicants have produced the decision of the national court on this matter (…)'*[201]

At this stage, the national court may request a preliminary ruling, which can only be on a matter of law, and not on whether the agency is liable as such, as the CJEU cannot in a preliminary reference ruling adjudicate on matters of fact.[202]

Evaluating this solution provided by the CJEU against the standards of joint responsibility and *systemic accountability*, we note that the CJEU bases its ruling on the implicit assumption that the national authorities are primarily liable, with the Community only incurring subsidiary liability.[203]

198 Section 8.2.

199 This is always under the condition that effective legal remedies are available at the national level. *Roquette v Commission*; CJEU 11 June 1987, C-81/86, ECLI:EU:C:1987:277 (*De Boer Buizen BV v Commission*); *Unifrex v Commission and Council*.

200 Toth 1997, p.p.: 185-186.

201 *Kampffmeyer and Others v Commission*, p. 266.

202 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, p. 638.

203 Oliver 1997, p. 288, footnote 11.

This assumption has been criticised by Paul Craig, who noted that even though in this case the primary liability should lie with Germany, there is, however, 'no reason (…) why the EU's liability should be seen as secondary to that of the Member State'.[204]

In *Kampffmeyer I* the Court, in practice, rejected the possibility for the EU and a member state to be jointly liable for the damage and stated that the Community would be liable to the extent that the damage was not covered through the national courts.[205] This resembles but does not fully reflect the construction of *joint and several responsibility*, according to which the injured party would bring an action for damages against each of the responsible parties, i.e. the member state and Frontex, and hold them to account, for the wrongful act as a whole, rather than for the part of the act that is attributable to it. If the damage is not covered to its full extent by the member state, the applicant may subsequently turn against the agency in a second claim for damages, this time before the CJEU, in a way that safeguards from double recovery. If, on the contrary, domestic courts order the member state to compensate the full damage, it may seek to recover a share of the damages paid, from the agency, by making use of its right of recourse before the CJEU as a privileged applicant (Article 263 TFEU). In particular, the member state may seek 'contribution', i.e. partial reimbursement or an 'indemnity', full reimbursement for an act fully attributable to the agency. This is a theoretically plausible but realistically improbable scenario given the current structures in irregular migration law and policy in Europe.

In any case, while a solution of *joint and several responsibility*, according to which reparation comes *from any* of the responsible actors, is in line with the Nexus theory, and its expression as joint and several responsibility, the model of *systemic accountability* demands that reparation comes *from both*.[206] Still, the solution offered by the CJEU does not fully reflect the notion of *joint and several responsibility,* as the reparation cannot be sought from any of the actors but only from the member state, and to the extent not covered, only then turn to the EU. As such, it is only partially in line with the Nexus theory.

Since *Kampffmeyer,* the Court tends to reject claims for damages against the EU, when the possibility exists to join the case against the member state and the case against the EU in the way described above, in order for compensation to be sought against the member states before the national courts.[207] In the example of the joint liability of Germany and Frontex for abuses during return operations, Germany, if found responsible, would be liable to cover the full amount of damages. Germany could then claim part

204 Craig 2018, p. 755.
205 *Kampffmeyer and Others v Commission*.
206 Chapter V.
207 Oliver 1997, p. 291; e.g. *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*; *Francovich and Others v Italy*; A.G. Slynn in CJEU 6 December 1984, C-59/83, ECLI:EU:C:1984:380 (*SA Biovilac NV v EEC*), par. 4085.

of the compensation paid from Frontex, as part of joint and several liability, something that, as discussed, would be improbable in practice. Only to the extent that this would not be covered fully in the domestic courts, would the victim be able to start liability proceedings against Frontex before the CJEU.

This possible sequence of events would be incompatible with the model of *systemic accountability* and the principles of justice and the rule of law that accompany it, as, even though it provides for the compensation of the victim (*individualist accountability*) it practically renders the EU, in this case, Frontex, unaccountable for the damage caused and does not allow for the investigation of its responsibility (*systemic accountability*).

Moreover, the solution of staying the proceedings before the CJEU can present practical difficulties, such as in *Kampffmeyer*, where the German courts followed the example of the CJEU and ordered a stay of proceedings waiting for a ruling at the EU level. The applicants found themselves engaged in long and complicated legal battles that lasted two decades.[208]

Moreover, even though the applicants may return to the CJEU to seek any residual compensation not awarded in the domestic courts, given all the difficulties regarding the action for damages against the EU, it would be more straightforward for the Afghan returnees to make an application against Germany before the ECtHR, in the example studied in this section, rather than seeking compensation from Frontex before the CJEU. This speculation is in line with the practice so far, which shows that none of the applicants involved in the construction the Court set up in *Kampffmeyer* has returned to the CJEU after completing the domestic proceedings allowing the Court to examine the liability of the EU.[209] Therefore, due to this 'procedural peculiarity', even though the CJEU has dealt with them, it 'has never solved issues of shared responsibility and shared and allocated specific shares of responsibility to the EU and the member states'.[210]

The procedural and practical obstacles to the joint liability of the EU and the member states, caused by the CJEU ruling a stay of proceedings, make this structure incompatible with *systemic accountability*. In seeking an alternative structure that allows for all actors responsible for a violation to be held to account, we draw the conclusion that a structure, compatible with *systemic accountability*, is one that brings the respective actions before a single court that is to adjudicate the responsibility of all actors involved, the member state and the EU/Frontex. The following section suggests a path to such a structure.

208 Oliver 1997, p. 288.

209 P. T. Stegmann, *Responsibility of the EU and the Member States under the EU International Investment Protection Agreements, Between Traditional Rules, Proceduralisation and Federalisation*, Berlin: Springer 2018, p. 297.

210 Stegmann 2018, p. 297.

8.4 A new route for joint liability through the principle of subsidiarity

In order to avoid the dead-end of parallel proceedings or of the case on Frontex liability never getting its day in court, we can look for a solution in the jurisdiction of the CJEU under the principle of subsidiarity (Article 5(3) TEU), which would normally be triggered with the exhaustion of domestic remedies.[211] A teleological and contextual interpretation of Article 5(3) TEU, however, would justify the jurisdiction of the CJEU to adjudicate on the issue of shared responsibility further than it has in *Kampffmeyer* and ensure that the responsibility of the EU is examined.

Article 5(3) TEU states that in areas that the EU does not have exclusive competence, it shall, under the principle of subsidiarity, act only if and to the extent that the objectives of the act cannot be sufficiently achieved by the member states, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Following the model of *systemic accountability*, it can be argued that the objectives of justice and the rule of law, in this case, are not fully covered by *individualist accountability*, in the sense of effective legal protection and of remedying the situation for the particular individual. Systemic problems need to be dealt with in a structural manner, holding all actors responsible to account in an effort to prevent similar violations in the future (*systemic accountability*).

If we interpret the 'objectives' of legal action mentioned in Article 5(3) TEU to be those of *systemic accountability*, which can only be achieved if the possibility exists for addressing the joint responsibility of the different actors, we find that these objectives can indeed not be sufficiently achieved by the domestic courts, as there is no available remedy that can ensure the accountability of Frontex. Following this interpretation, as the CJEU decides whether there are effective remedies at the national level, it can find that the objectives *of systemic accountability* are only achievable if the two cases are dealt with together, under its own jurisdiction in line with the principle of subsidiarity.

Admittedly, the subsidiarity clause cannot create new powers, while the creation of new remedies where none is provided is not allowed in general.[212] It only has regulatory nature. It regulates the exercise of competencies that have already been attributed to the EU and its organs. Namely, the CJEU within the exercise of its powers can have jurisdiction under the principle of subsidiarity, where 'the objectives can (…) be better achieved at Union level'.

---

211 Article 5(3) TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

212 V. Moreno-Lax, *Accessing Asylum in Europe, Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press 2017, p. 431.

The proposition that the CJEU takes a more active role in cases regarding the alleged liability of Frontex is in line with that principle. The CJEU may be responsible as the ultimate arbiter, as all actors, including the host state, operate within the scope of EU law whenever they participate in a joint operation. Therefore, the provisions of the Charter apply (Article 51(1) Charter), for the interpretation of which it is the CJEU that should have the ultimate say, including deciding on division of powers and attribution of responsibility. This is also what the Court itself has unreservedly demonstrated in Opinion 2/13.[213] This solution gives it the opportunity to do so.

In order to implement this solution, there is no need to create a new remedy or to overturn *Kampffmeyer* completely. The Court could instead apply a subsidiarity test on how far it adjudicates issues of *many hands*. Based on the above argumentation, the CJEU can go further within its jurisdiction and examine the claim further. Instead of pausing the proceedings pending the decision of the national court, it can proceed to determine whether the conduct in question of the EU was, in principle, capable of giving rise to EU liability, as the General Court did in *Holcim*.[214] Following this precedent, the Court could give a provisional judgment on the responsibility of Frontex, while the domestic courts will be determining the liability of the member stage and the size of the damage. If the domestic court rules that the national authorities are liable, the cases can be joined before the CJEU for the purpose of the determination of joint liability and the exact allocation of the shares of responsibility of each actor and the corresponding compensation.

The available remedies and related procedures in EU law are not rigid. They are meant to, first and foremost, serve judicial protection, while there are plentiful examples in EU law of the adaptation of national procedural rules to serve the effective application of EU rights.[215] In adopting the role of 'jurisdictional court', however, cases of positive conflicts are imaginable, where both the national court, on the basis of *Francovich* and the CJEU on the basis of Article 5(3) would claim jurisdiction over the claim for damages against the member state.[216] The CJEU assuming jurisdiction can be seen as a 'high jacking' that goes against the principle of national procedural autonomy.[217] Nevertheless, there have been cases in the past where national courts had to give up their competence in favour of that of the CJEU, as the Court has adopted an approach that allows for the subordination of national procedural autonomy to the effectiveness of EU law rights.[218]

213 Chapter IX, section 2.2.
214 *Holcim v Commission*, paras. 79, 80.
215 Moreno-Lax 2017, p. 433.
216 Fines 1997, p. 21.
217 CJEU 16 December 1960, C-6/60-IMM, ECLI:EU:C:1960:48 (*Humblet v Belgium*), par. 559.
218 Moreno-Lax 2017, p. 431.

In sum, it can be argued that, under the current judicial status quo, domestic remedies do not fulfil the requirements of available remedy in terms of *systemic accountability* when it comes to the joint liability of a member state and an EU institution. Therefore Article 5(3) TEU can justify jurisdiction for the CJEU over the national case so that the two liabilities can be dealt with together within a framework of *systemic accountability*. That can be achieved if the CJEU, in line with the principle of subsidiarity, would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. This solution is in accordance with *systemic accountability*, as it ensures that the EU, in this case, Frontex, will be held accountable. Still, its effect on speeding up the proceedings is limited.

In order to truly avoid the risk of decades-long delays, such as in the case of *Kamffmeyer,* we need harmonised law regulating the matter at EU level. This would give primary jurisdiction to the CJEU for joint liability in situations of *many hands*. Such legislative change would require an amendment in the Treaties regulating the EU joint liability framework in general. As this is highly unlikely, an interpretation in accordance with the subsidiarity principle is the more plausible solution at the moment.

This solution provides for the holistic treatment that is required by the Nexus theory and the model of *systemic accountability*. This treatment cannot be given if the cases are split. The *problem of many hand*s should be practically solved by the court that has the most holistic jurisdiction.

8.5 Action for damages summarised

What seems to be the most appropriate litigation route is, in fact, the action for damages of Article 340 TFEU, where the individual who has suffered loss as a result of the acts of the agency, may demand reparation. There are several difficulties, however, that are inherent in this remedy. Experts have claimed that there is a limited degree of protection and a worsening of the treatment of individuals with respect to the action for damages and that the strict requirements account for a relatively large number of inadmissible applications. Indeed, its requirements, for instance, sufficiently flagrant violation, causal link, set a high threshold for the claims for damages. The applicants face an uphill battle with respect to overcoming them.

Firstly, the burden of proof for proving the damage incurred lies with the applicant. The institution responsible is required to assist the applicant in accessing information and documentation that is in its possession. The disproportionately high standard of proof can prove to be an obstacle for the applicant. The case discussed above regarding a Frontex return operation from Germany to Afghanistan is exceptional, as the incidents were reported by the CPT. However, independent observers are only exceptionally on board of return flights, while the Frontex monitoring mechanism is considered ineffective and lacking independence.

Secondly, the causal link between the wrongful act and the damage

needs to be direct, immediate and exclusive. In other words, liability cannot be established for the EU, if the same result could have occurred in the same way even in the absence of the conduct of the institution or agency. Moreover, the Union's conduct needs to be the sole act which caused the damage, since the latter needs to be the direct and immediate consequence of that act. The act itself exclusively, without the intervention of a third party needs to have caused the damage sustained by the injured parties. In this sense, the direct causal link may prove too strict of a requirement with respect to Frontex, since its actions usually require a national implementation measure to be completed. The mere involvement of the member state can be sufficient under the Court's case law to break the chain of causation and prevent the liability of the agency from arising. However, it always needs to be examined on a case-by-case basis whether the intervening act was indeed capable of breaking the chain of causation.

For instance, the Court held in *Krohn* that when the Member State has not been acting independently but simply carrying out the binding instructions of the Union, the causal link remains intact and the Court is able to adjudicate on the liability of the Union. This can also be the case regarding formally non-binding opinions with de facto binding consequences, in a way that constitutes the issuing authority of the opinion, i.e. Frontex, a de facto decision-maker. Hence, if it can be shown that the host state was implementing decisions taken at the agency level and that it had not adequate discretion in carrying out the orders of the agency, then the illegal act of the state does not constitute the cause of the damage and is not capable of interrupting the causal link between the act of the agency and the damage. In this case, the state can still be held liable via different constructions under national law, the Charter, or the ECHR.

Furthermore, the Court makes it theoretically possible in *Kampffmeyer I* for the liability to be attributed to both the member state and the agency, opening the door to joint responsibility. Nevertheless, the procedural and practical difficulties in its implementation warrant the current judicial construction for joint liability ineffective, regarding the responsibility of Frontex and incompatible with a model of *systemic accountability*, where all actors responsible for a violation are held to account. A new construction based on the jurisdiction of the CJEU under the principle of subsidiarity is proposed in this section that can allow for all actors responsible to be held jointly to account before the same forum when the *problem of many hands* appears.

9 Conclusions

This chapter seeks to sketch potential litigation avenues before the CJEU, assess the limitations of these avenues, and pan out procedural hurdles and possible solutions to them. It presents applications of *systemic accountability* and offers recommendations for further development in this direction.

This examination has shown that the reach of legal accountability under the current legal framework is rather short. The Lisbon Treaty may have liberalised the regime with respect to the Court's jurisdiction and the requirements for individual access, but it is still excessively difficult for non-privileged applicants to obtain effective legal remedies in case their rights have been violated through direct access to the Court. Thus, the first and most important obstacle that the victim has to overcome is accessing the court in the first place.

All routes before the CJEU come with considerable obstacles, which make litigation attempts challenging and ambitious. This is partly due to structural problems, such as the strict procedural requirements for direct actions, and partly due to the particular nature of the agency's work, for instance regarding the reviewable acts of the agency. Another important reason is that the current predominant conceptualisation of the system does not take into account the *problem of many hand*s. Nevertheless, the jurisprudence of the CJEU is still developing, and there is room for legal interpretations and judicial constructions that support joint responsibility and are adequate to ensure *systemic accountability*.

This chapter suggests that the CJEU can take the opportunity to cover its gaps in dealing with joint liability by learning and drawing inspiration from international law on the responsibility of international organisations. Such inspiration can be drawn in regard to responsibility for conduct ultra vires, the limits of the competence model, or the adoption of more relaxed application of the causality test, and other issues regarding the facilitation of joint responsibility. This is especially so in the action for damages, for which Article 340 TFEU prompts the Court to draw inspiration from the general principles common to the member states, thus developing a fundamental common law on liability, which should undoubtedly include the ARIO. In this respect, it has been shown that joint liability is not as such foreign to EU law (*Kampffmeyer*) and that the CJEU can still use the experience of international law in order to fine-tune its application and introduce it into its common practice.

The Kampffmeyer construction, however, though opening the door to joint liability, has proven to be ineffective in practice in holding the EU, in this case, Frontex accountable, and thus realising the objectives of *systemic accountability*. In particular, if a case were to be brought against a host member state and Frontex, the judicial precedent indicates that the CJEU would rule a stay of proceedings until the national court issues its ruling regarding the responsibility of the member state. The national court would need to determine the sum to be paid by the state and if the damage is not compensated (fully) only then will the CJEU allow for a review of the liability of the agency. Given that it would be simpler for the individual to resort to the ECtHR with an application against the member state, the outcome in practice would be that the agency will not be held to account. This outcome falls short of the requirements of joint responsibility and *systemic accountability*.

These objectives can, eventually, be fulfilled if the liability of both the member state and the Union/agency is determined by a single court. That can be achieved if the CJEU, in line with the principle of subsidiarity (Article 5(3) TEU), would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. Following that, it would further decide on the shares of damages owed by each actor.

Even though without a legislative change that would regulate the matter of joint liability at EU level and would give primary jurisdiction to the CJEU, its foundations could be precarious, the path to joint liability can still be created through the jurisdiction of the CJEU under the principle of subsidiarity. Then, the victim could seek compensation from both actors, the host state and Frontex, deemed responsible for the violation. Even if it is obstructed by strict admissibility requirements, and binary rules of causality and court jurisdiction, this path can still be utilised for strategic litigation purposes that aim at the accountability of Frontex.

9 Legal Accountability in Practice: ECtHR and Domestic Courts

1 Introduction

The Lisbon Treaty brought one more change relevant for the adjudication of cases concerning the accountability of Frontex for human rights violations, namely the accession of the EU to the ECHR. According to Article 6 TEU, the EU has to accede the ECHR and become subject to the judgment of the ECtHR. The ECtHR has been in several cases confronted with issues regarding the responsibility of the EU (in connection with an act of a member state), but could not examine them due to lack of jurisdiction *ratione personae*.[1] The new provision of the Lisbon Treaty opened a new road for the legal accountability of Frontex, one that would mitigate the accessibility issues to the CJEU, allowing for an individual complaint before the ECtHR. It would allow for the realisation of *systemic accountability*, holding Frontex to account and offer solutions that facilitate joint responsibility.

Regrettably, this possibility has become fairly distant following Opinion 2/13 of the CJEU, in which the Court found the Draft Agreement on the Accession of the EU to the ECHR incompatible with EU law on a large number of points. [2] This section looks into this new potential legal route, which is regarded temporarily closed, but not fully unattainable, in the context of EBCG operations and through the lens of the Nexus theory and the model of *systemic accountability*.

This work primarily focuses on legal accountability before the two European High Courts. However, the role of domestic courts deserves a separate mention.[3] The EU judicial framework does include not only the procedures before the CJEU but also before national courts. The same holds for the procedure before the ECtHR, to the extent that this can be briefly considered here. Therefore, this chapter deals with the role of domestic EU courts in the context of the CJEU and the ECtHR. It does so based on

---

1 E.g. European Commission of Human Rights 10 July 1978, No. 8030/77 (*Confédération Française Démocratique du Travail v European Communities*), par. 3; European Commission of Human Rights 9 February 1990, No. 13258/87 (*M. & Co. v Germany*), p. 138; ECtHR 11 November 1996, Judgment, App. No. 17862/91 (*Cantoni v France*), p. 161; ECtHR 18 February 1999, Judgment, App. No. 24833/94 (*Matthews v United Kingdom*), p. 251; S ECtHR 10 March 2004, Decision on Admissibility, App. No. 56672/00 (*Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and United Kingdom*), p. 331; ECtHR, 30 June 2005, App. No. 45036/98, (*Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*), p. 107.

2 Opinion 2/13 CJEU.

3 Litigation avenues outside the EU fall outside the scope of this research.

the understanding that responsibilities within EBCG operations should be viewed as a nexus construction and asks the question how national courts contribute (and how they can further contribute) to the main application of systemic accountability, namely, not allowing for gaps in accountability and holding Frontex to account.

2 European Court of Human Rights

2.1 Present status of the EU before the ECtHR

Presently, the EU, not being party to the ECHR cannot be held directly responsible for violations of the ECHR (Convention) resulting from its primary or secondary law or its other activities, as any case directed against the EU itself is deemed inadmissible ratione personae. However, EU law itself has been considered by the ECtHR on several occasions in applications against member states, where a violation was brought about as a result of EU law.[4] Such is *Matthews v. the UK*, where the ECtHR held the United Kingdom responsible for a violation rooted in the EC Act on Direct Elections of 1976.[5] The Court then stated that the transfer of competences to international organisations does not affect the responsibility of the member states, while earlier in the case of *Cantoni v. France* it had held that the applicable domestic legislation still fell within the ambit of the ECHR, even though it was based almost word by word on an EC Directive.[6]

Perhaps, the most important of this series of judgements is the *Bosphorus* case[7], which complemented *Matthews*. Here the Court formulated the famous Bosphorus presumption stating that the state will be presumed to have acted in compliance with the Convention as long as the international organisation in question 'is considered to protect fundamental rights (...) in a manner which can be considered at least equivalent to that for which the Convention provides', under the condition that the state had no discretion in implementing the legal obligations flowing from its membership in the organisation.[8] The presumption can be rebutted where the protection in a particular case is deemed 'manifestly deficient'.[9] The Court considered the human rights protection offered by the EU to pass the Bosphorus test in general as well as in that case in particular. The interference with the

4 A list of cases where issues relating to Community law have been raised before the ECtHR is available in the ECtHR, Factsheet – Case-law concerning the EU, July 2019, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiW1PHck7fjAhUEGuwKHTTCC2oQFjAAegQIAhAC&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FFS_European_Union_ENG.pdf&usg=AOvVaw3hxmzjO8lqXQh2OJGT9wsl.

5 ECtHR 18 February 1999, Judgment, App. No. 24833/94 (*Matthews v United Kingdom*).

6 ECtHR 11 November 1996, Judgment, App. No. 17862/91 (*Cantoni v France*), par. 30.

7 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*.

8 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 155, 156.

9 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 156.

applicant's property rights under Article 1 of the Protocol to the ECHR was justified. [10] The decisive factor in these cases is whether the member state in question exercised discretion[11] and had freely accepted the international obligation concerned.[12]

A few years later, the *Connolly* decision[13] clarified that a member state can only be held responsible if the violation came about through a domestic act.[14] This means that in cases where there is no domestic implementing act, the action of the international organisation, namely the EU that violated the Convention could not be attributed to the member states and thus could not be examined by the Court even in this indirect manner.[15]

The current practice before the ECtHR, even though it touches upon questions concerning the compatibility of EU law with the ECHR rights, does not cover the responsibility of the EU as such. Thus, it leaves a significant gap in the human rights protection against EU actions and omissions, even more so in cases such as *Connolly*, where there is no national implementing act. Following the accession of the EU to the ECHR, individual applications against the EU will, in principle, no longer be inadmissible and it will be possible for the EU to be held accountable before the ECtHR, provided that the Bosphorus presumption will not be upheld after the accession.

2.2 The accession of the EU to the ECHR: a recurring promise

The accession of the EU to the ECHR is far from a novelty. In fact, the two bodies, the Council of Europe (CoE) and the European Communities have been trying to find common ground ever since the drafting of the European Political Community Treaty in 1953, with a series of negotiations rounds and political declarations. The accession is now a Treaty obligation for the EU (Article 6(2) TEU). However, the process has been significantly hindered by Opinion 2/13, where the CJEU ruled that the Agreement was incompatible with the TEU.[16]

---

10 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 159-166.

11 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 157.

12 *Matthews v United Kingdom*, paras. 33 and 34; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 157.

13 ECtHR 9 December 2008, Decision on Admissibility, App. No. 73274/01 (*Connolly v 15 Member States of the European Union*).

14 It is clear from Kokkelvisserij case that a request for a preliminary reference by a national court qualifies as a domestic act. ECtHR 20 January 2009, Decision on Admissibility, App. No. 13645/05 (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v Netherlands*).

15 T. Lock, 'Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg' in D. Ashiagbor, N. Countouris and I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge: Cambridge University Press 2012, p. 114.

16 For a concise consideration of the Court's reasoning, see, S. Douglass-Scott, 'The EU as a Member of the ECHR Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice', *Verfassungsblog*, 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

While it would be unrealistic to expect the accession in the near future due to the complex issues raised by the CJEU in Opinion 2/13, and international crises currently occupying the agenda of the EU, the member states of the CoE have decided in the Declaration of Copenhagen to maintain their commitment to the accession and ask the EU institutions to take the necessary steps as soon as possible.[17] According to the Chairperson of the ad hoc accession negotiations group, Tontje Meinich, while striking a new broad compromise will be challenging, 'where there is a will, there is a way'.[18] Negotiations for the accession were resumed in 2020.[19]

Moreover, the present status does not allow for adequate representation of the EU before the ECtHR, and cannot ensure the sustainability and longevity of the practice of the two Courts to maintain consistency in their jurisprudence.[20] In light of the above, it is still worthwhile taking a short look on what legal accountability would look like under the Draft Accession Agreement,[21] and formulating some preliminary observations on the potential of this new legal framework to generate special rules on attribution of responsibility between the EU and its member states, especially from the perspective of the nexus and of *systemic accountability*.[22]

2.3 The Accession Agreement

The Draft Agreement that allows for the accession to the ECHR is based on three principles: equal footing before the ECtHR, autonomy, and subsidiarity.[23] According to the agreement, the accession shall impose on the EU obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf.[24] The EU shall not be required to act outside of its competences, as it had already

17 J. Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences', *Common Market Law Review*, 55, 6, 2018, pp. 1686-1687; Council of Europe, *Copenhagen Declaration on the reform of the European Convention on Human Rights system*, 12-13 April 2018, par. 63.

18 T. Meinich, 'EU accession to the European Convention on Human Rights – challenges in the negotiations', *The International Journal of Human Rights*, 2012, https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1596893, p. 5.

19 European Commission, *The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission*, 29 September 2020.

20 Callewaert 2018, p.p.: 1688 – 1712.

21 The latest Draft Accession Agreement is of 2013. Fifth Negotiation Meeting Between the CDDHD Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 5 April 2013.

22 A more detailed description is deemed unnecessary for the purposes of this dissertation, as there is no way to predict the direction that the re-negotiations would take and what will be the final content of the Accession Agreement. For further discussion, see Kosta, Skoutaris and Tzevelekos 2014.

23 F. Tulkens, Vice-President of the ECtHR, speech at the XXV FIDE Congress, May 30 – 1 June 2012, Tallinn.

24 Article 1 of the Draft Accession Agreement.

been made clear in Article 6(2) TEU. The Convention will become directly binding part of EU law, ranking over secondary law and below primary, including the EU Charter.[25] From a substantive point of view, the accession will not significantly influence the EU system of fundamental rights protection, since the case law of the ECtHR has been a substantial source of inspiration for the ECJ long before the accession. The ECHR rights have found their way in the jurisprudence of the CJEU as general principles of EU law (Article 6 (3) TEU), while the Charter rights need to be interpreted in accordance with the ECHR and the case law of the ECtHR (Article 52(3) Charter). Regarding the rules on attribution of responsibility between the EU and its member states, however, the relevant rules enshrined in the Agreement (for example co-respondent mechanism) will constitute *lex specialis* vis-à-vis the international law framework on responsibility in the meaning of Article 64 ARIO.[26]

Post accession, the EU will be bound not only by the entire content of the ECHR but also by the Protocols to which all its member states are signatories, namely the Protocol (i.e. the first Protocol) concerning property, education, and elections, and Protocol 6, concerning the abolition of the death penalty.[27] The EU may, at a later date, after having become a party to the ECHR, take a separate decision to accede to the other Protocols.[28]

Regulating the involvement of the CJEU, Article 3(6) of the Agreement provides for the prior involvement of the CJEU in order to ensure that CJEU is given the opportunity to assess the compatibility of the provision in question with EU law, in case it has not already done so. The ECtHR would then suspend the proceedings in Strasbourg awaiting for the CJEU to decide on the matter. The EU shall make sure that the ruling is delivered quickly, thus the accelerated procedure will be followed in such cases. Following the decision by the CJEU, the parties will be expected to make observations, while the ECtHR is in no way bound by the assessment of its counterpart in Luxembourg.[29]

Furthermore, a delegation of the EP shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the CoE whenever the Assembly exercises its functions related to the election of

---

25 C. Landenburger, 'European Union Institutional FIDE Report' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, p. 148.

26 D'Aspremont 2014, p. 82.

27 C. Jones, 'Statewatch analysis: The EU's accession to the European Convention on Human Rights: a cause for celebration or concern?', *Statewatch journal*, 21, 4, 2012, http://www.statewatch.org/analyses/no-187-echr.pdf, p. 3.

28 Council of Europe, *Accession by the European Union to the European Convention on Human Rights Answers to frequently asked questions*, 30 April 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/EU_accession-QA_updated_2013_E.pdf.

29 On the details of the negotiations of the different articles, see Jones 2012, p.p.: 2-4.

judges, while the EU will have its own judge at the ECtHR in Strasbourg.[30] In certain cases the EU shall be entitled to participate in the Committee of Ministers, with the right to vote.[31] The Draft Rule will be added to the Rules of the Committee of Ministers for the supervision of the execution of judgements and of the terms of friendly settlements, covering the cases to which the EU is a party.[32]

2.4 The nexus and systemic accountability after the accession

As mentioned above, the ECtHR, has already, even before the accession, dealt with issues related to EU, while Frontex itself has not gone unnoticed. The widely celebrated *Hirsi case* abounds in mentions of the involvement of Frontex during the Nautilus operation of 2009 in facilitating the Italian practice of push backs to Libya,[33] while the interim measures procedure has already been used twice to suspend Frontex return operations from Greek islands to Turkey in the context of the EU-Turkey deal.[34]

However, the legal significance of the accession lies in the fact that Frontex will be submitted to Strasbourg's external control system. The agency itself has taken the accession into account, indicating in its Fundamental Rights Strategy that it should adapt its activities accordingly.[35] Individual applicants will have the right to bring their complaint concerning Frontex acts before the ECtHR, which will have the competence to review them and hold the EU accountable for violations of the Convention. Therefore, the accessibility barriers of the CJEU will be mitigated by a procedure that allows for effective legal protection through an individual complaints mechanism. The admissibility procedure also makes the ECtHR a desirable alternative for strategic litigation initiatives. Moreover, the EU will be subject to the enforcement mechanism of the CoE, consisting mainly of the Committee of Ministers, the policy-making and executive organ that has been assigned the task to supervise the execution of the Court's judgments.[36]

Next to the improved level of individualist accountability that the accession provides, allowing for protection that is practical and effective, other aspects of *systemic accountability* also seem to be accommodated with the process before the ECtHR, which would allow for all actors responsible in a violation to be brought to account, while some of its already existing structures aim by design to addressing systemic issues behind a violation.

30 Article 6 Draft Accession Agreement.
31 Article 7 Draft Accession Agreement.
32 Rule 18 Draft Accession Agreement, Annex III.
33 *Hirsi Jamaa and Others v. Italy*, par. 27-37.
34 Angelidis 2017.
35 Frontex, Fundamental Rights Strategy, p. 3.
36 Article 46(2) ECHR.

These follow the direction of *systemic accountability*, which has been defined here as *accountability aiming at dealing with the systemic issues, which underlie and cause or allow for consistent violations, via focusing on structural solutions*.

Such instances of consistent violations of a systematic nature that affect large numbers of people are the source of inspiration for the model of *systemic accountability*. This aims to address not only a particular violation but also the underlying systemic issues. The consequences of such accountability should reach beyond one particular violation.

Looking at the procedure before the ECtHR, we see that the Court has in place certain measures to address structural issues behind consistent and systemic violations in order to prevent further violations in the future.

Such are the general measures requested by the ECtHR next to the compensation afforded to individuals (*individualist accountability*), which range from practical measures, such as the hiring of judges, to changes of jurisprudence or legislative amendments.[37] For instance, in the case of *Kim v. Russia*,[38] where violations of Articles 3 and 5 ECHR were found with respect to the detention of a stateless person in view of his expulsion, the Court, besides the just satisfaction to Mr Kim, also considered it necessary to request that Russia limits detention periods and provides for a mechanism that would allow individuals to bring proceedings for the examination of the lawfulness of their detention pending expulsion.

Such potential is also found in the infringement proceedings for failure of a state to implement a judgement of the ECtHR (Protocol No. 14), leading to a violation of Article 46(4) ECHR, [39] as long as it is not only implemented in narrow terms and does in fact lead to general measures that can create broader impact. [40]

The pilot judgement procedure, which the Court introduced to deal with 'repetitive cases' resulting from common dysfunctions at the national level, is another such measure. According to this procedure, the Court deals with several applications with the same systemic deficiencies as a cause, by prioritising one of them. The judgment that results from that application is treated as a pilot for the others. There the systemic problems are identified, and concrete measures are requested by the state needed to

37 The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), created by the Committee of Ministers of the Council of Europe has developed an inventory of general measures taken by the ECHR bodies. Available here: www.coe.int/t/DGHL/Monitoring/Execution/Source/Documents/Docs_a_propos/H-Exec(2006)1_GM_960_en.doc.

38 ECtHR 17 July 2014, Judgment, App. No. 44260/13 (*Kim v Russia*).

39 Proceedings under Article 46(4) in the case of Ilgar Mamadov v. Azerbaijan, Application No. 15172/13, of 29 May 2019.

40 See for instance criticism by Strasburg Observers, Toby Collins, The impact of infringement proceedings in the Mammadov/Mammadli group of cases: a missed opportunity, May 2021, https://strasbourgobservers.com/2021/05/28/the-impact-of-infringement-proceedings-in-the-mammadov-mammadli-group-of-cases-a-missed-opportunity/.

address these problems, often even reserving the question of just satisfaction until these measures are adopted.[41] The general measures of the ECtHR and the pilot judgments procedure, one can say, are practical applications of *systemic accountability*. These are also valuable, of course, in the present pre-accession system as far as the acts of member states are concerned, for example, regarding push-backs. Post-accession, however, these applications of systemic accountability could become even more relevant as their subject matter would be Frontex activities. A pilot judgment could concern for instance the supervisory and preventive structures of the agency, while general measures could be ordered with respect to the risk analysis or the operational plans, for instance regarding the presence of interpreters and legal advisors on land in all operations. This has increased potential to improve protection standards in all Frontex-led operations in a top-down manner.

Moreover, regarding issues of allocation of responsibility, I have shown that the ECtHR is familiar with and rules in accordance with the international framework on responsibility and the ILC Articles in particular, while it already has a more established and developed framework of joint liability, compared to that of the CJEU.[42] The ECtHR may even be bound by the ARIO as 'relevant rules of international law applicable in the relations between the parties', to the extent that no more specific provision is made in the Accession Agreement.[43] In this regard, the correspondent mechanism is most relevant.

Furthermore, a possibility opens up before the ECtHR for breaches of the Convention by the EU/Frontex and a member state to be assessed in the same judgement by the ECtHR, such as in the case of *MSS v. Belgium and Greece*. In this landmark case, regarding the transfer under Dublin III Regulation of Mr MSS, an Afghan interpreter, from Belgium to Greece where he suffered inhuman living conditions and risked to be returned to Afghanistan without a serious examination of his asylum claim. The responsibility of both Belgium and Greece were examined in this case regarding Article 3 ECHR and Article 3 in conjunction with Article 13 ECHR. Applying this practice to EBCG operations, we can foresee a case against the EC and an EU member state. More specifically, under Article 3 of the 2013 Draft Accession Agreement, a complaint to the ECtHR may be directed either against a member state or against the EU itself or both. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility.

41 Rule 61 of the Rules of the Court; ECtHR 28 September 2005, Judgment, App. No. 31443/96 (*Broniowski v Poland*).

42 Chapter VI.

43 Article 64 ARIO; Article 31(3) Vienna Convention on the Law of the Treaties; A. Savarian, 'The EU Accession to the ECHR and the Law of International Responsibility' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 89; ECtHR 12 December 2001, Decision on Admissibility, App. No. 52207/99 (*Banković and Others v Belgium*), par. 83.

Still, it should be kept in mind that the co-respondent mechanism in the way it is described in Art. 3 of the Draft Accession Agreement has been rejected by the CJEU as incompatible with the particular characteristics of the EU and EU law and is being currently renegotiated. Thus, what is discussed here is under the reservation of a co-respondent mechanism that is ultimately different at least in its details.[44]

If the complaint is not addressed to the EU, the latter may still become involved in the proceedings through the co-respondent mechanism (Article 3(2) Accession Agreement), which has been introduced to ensure that complaints are addressed to member states and the EU as appropriate. As a result of the co-respondent mechanism, the EU becomes a party to the case even if the initial complaint was not addressed to it, and it is bound by the eventual judgment. Parallel to that, an EU member state may also become co-respondent to a case, where the application is directed against the EU. [45] In other words, the co-respondent mechanism is a construction that ensures the joint participation of the EU and the member states in the proceedings brought against any of them, as a 'way to avoid gaps in participation, accountability and enforceability in the Convention system'.[46]

It is important to note that not all cases that call into question EU law would result in the EU being invited to become co-respondent to the case. Only when the member state, acting as main respondent, has acted on the basis on an EU order, which led to the alleged violation, and when the said violation could only have been avoided by disregarding an obligation under European law, can the EU become co-respondent. Thus, only when the state is deemed to have no discretion under EU law that the co-respondent mechanism can be activated.[47] It is a matter of interpretation for the ECtHR whether it will consider only formally binding rules, or also de facto binding acts of Frontex, as limiting the discretion of the host member state in order for the co-respondent mechanism to be activated. In the latter case, the co-respondent mechanism can prove useful in a case regarding EBCG operations, bringing the different relevant actors before the same forum, realising, thus, the requirements of joint responsibility and *systemic accountability*. However, it should be noted that as a result of the compromise during the negotiations, it was decided that the EU would become co-respondent only if it had so requested, one of the main flaws of the co-respondent mechanism.[48]

---

44 Opinion 2/13 CJEU, par. 215-235.

45 Article 3(3) Draft Accession Agreement. Member states may only join the proceedings that involve primary EU law.

46 Explanatory Report to the Draft Accession Agreement, par. 39.

47 E.g. ECtHR 23 May 2016, Judgment, App. No. 17502/07 (*Avotiņš v Latvia*); Meinich 2012, p. 3.

48 Meinich 2012, p. 4. Article 3(2) and (3) and (5) Draft Accession Agreement. Explanatory Report to the Draft Accession Agreement, par. 53.

In this respect, joint responsibility becomes the general rule on responsibility in the cases concerning the EU and its member states. Article 3(7) of the Accession Agreement provides that in the context of the co-respondent mechanism, the respondent and the co-respondent are jointly responsible for the violation, unless the ECtHR, decides that only one of them should be held responsible. The ECtHR has limited discretion to decide otherwise, only on the basis of reasons given by the main respondent and the co-respondent.[49] The ECtHR, however, will not be responsible for allocating the responsibility between the parties, which is deemed as an internal EU issue. In its earlier Opinion 1/91, the CJEU ruled that no court other than itself should decide on the competences of the EU and its member states,[50] while the Explanatory Report of the Accession Agreement states that the ECtHR apportioning responsibility would risk assessing this very same issue of distribution of competences.[51] Thus, according to the CJEU, the ECtHR should have no discretion whatsoever. Special Rapporteur of the ILC for the Responsibility of International Organisations, Georgio Gaja, doubts that issues of competence would indeed be as common, and commented that 'this issue is viewed as a delicate internal matter, which should be dealt with in the EU "cousin".[52] Thus, no indication of the criteria to be used to allocate responsibility was made in the Accession Agreement. The EU and its member states will be jointly responsible for taking appropriate general or individual measures to remedy the situation and compensate the applicant, but also to avoid the repetition of the violation.[53] This creates, according to De Witte, 'a special post-accession task for the CJEU to define more rigorously the criteria' for allocating responsibility between the EU and the member states.[54]

2.5 The future of the Bosphorus presumption

Delving into the more substantive aspects of the Strasbourg Court's ruling on the responsibility of the EU for Frontex acts, we can ask about the future of the Bosphorus presumption. According to the Bosphorus judgment,

49 Meinich 2012, p. 4.

50 CJEU 14 December 1991, Opinion 1/91, Draft Agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079 at I-6104-5, paras.: 33-36.

51 Draft Accession Agreement, p. 7.

52 G. Gaja, "'The Co-respondent Mechanism" According to the Draft Agreement for the Accession of the EU to the ECHR' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p.p.: 345, 346.

53 M. Claes and J. Gerards, 'Netherlands report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, par. 9.2.

54 B. de Witte, 'Beyond the Accession Agreement: Five Items for the European Union's Human Rights Agenda', in: Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 351.

cases, where the alleged violation was a result of an EU member state applying EU law, which allowed it no discretion, are inadmissible, as the EU is presumed to provide protection equivalent to that offered by the ECtHR.[55] Thus, the presumption is that the EU complies with the ECHR, due to the EU fundamental rights framework (general principles of EU law and Charter), and the judicial protection offered by the EU system.[56] This presumption is, of course, not irrefutable and the individual circumstances of the particular case may find the protection 'manifestly contrary to the principles of the Convention'.[57] The Court has since confirmed the presumption in several cases.[58]

The question of whether the Bosphorus presumption is still justified after the accession, or whether it would nullify the effects of the accession itself has been the topic of debate amongst EU constitutional and human rights experts.[59] The Bosphorus presumption can constitute a substantial barrier to *systemic accountability* in the case at hand, as it shields EU law and the conduct of EU institutions and agencies from the full scrutiny of ECtHR, attending to the responsibility of the host state alone. In the author's view, maintaining the Bosphorus presumption after the accession would be counterproductive, as this would go against the purpose of the accession as a whole and would render it obsolete. Moreover, such preferential treatment of the EU vis-à-vis the other signatories to the ECHR would no longer be justified under the new regime. The survival of Bosphorus is, however, conceivable in an alternative form, for instance 'national courts will not be obliged either to depart from the interpretation of EU law imposed by the CJEU or to prioritise the obligations imposed under the ECHR'.[60] It is up to the ECtHR to resolve this issue after the accession becomes a reality unless the survival of the Bosphorus presumption becomes the subject of the renewed accession negotiations.

A discussion regarding the future of the Bosphorus presumption is relevant however also in the present pre-accession state, following Opinion 2/13, which was received with 'great disappointment' by the ECtHR.[61]

---

55 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 149-158.

56 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras 160-165.

57 Such as in *M.S.S. v. Belgium v. Greece*, paras. 333-340.

58 E.g. ECtHR 10 October 2006, Decision on Admissibility, App. No. 16931/04 (*Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France)*.

59 For an accurate representation of the various arguments, see L. Besslink, 'General Report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, p.p.: 35-37.

60 O. De Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Patries to the Convention' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 184.

61 ECtHR, *Annual Report 2014*, Strasbourg: Registry of the European Court of Human Rights 2015, https://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf, p. 6.

In this regard, appropriate guidance is given by the *Avotiņš* judgment of the ECtHR, which is perceived as a response to the negative Opinion of the CJEU. The case came a few years after Onion 2/13 and concerned a commercial dispute between a Latvia citizen and a Cypriot company. Mr *Avotiņš* was sued and tried in his absence before Cypriot courts and was ordered to pay his debt along with interest. The company requested recognition and enforcement of the judgment, which was eventually issued by the Latvian courts. Mr *Avotiņš* argued that the recognition was in breach of EU law,[62] as the judgement was given in default of appearance, while the appropriate procedure of due notification of the defendant has not been followed. As a result, the applicant claimed a violation of the right to a fair trial, Article 6(1) ECHR. Nevertheless, the ECtHR found no violation, as it held that Latvia was bound by the EU Regulation, and thus, applied the Bosphorus presumption.

In this case, the Court showed its intention to continue applying the Bosphorus presumption, while it upheld the doctrine of equivalent protection by the EU fundamental rights system. However, it is to be noted that the Court gave significant space in the judgment to the consideration of the relevant questions, namely whether the member state had no discretion in the application of EU law and whether the protection provided at the EU level was indeed equivalent. Compared to this laborious consideration, the Court had until then brushed off the issue of equivalent protection in its previous case law, indicating that the reputability of the presumption will be from now on more closely investigated and that it should no longer be taken from granted.[63] As a matter of fact, the Court came close, for the first time, to declaring the protection 'manifestly deficient', and turned the rebuttal of the presumption into a real possibility in the minds of the readers of the ECtHR case law.[64] As a result of the Bosphorus presumption being rebutted, member states that were under the binding control of EU law, may still, in the future, be held responsible before the ECtHR for violations of the ECHR. Thus, awaiting for the accession, the Bosphorus presumption still survives, but is, in any case, awarded closer scrutiny, as the ECtHR seems, already, to be taking a stricter approach towards its preferential treatment of the EU.

62 Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

63 D. Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13* (Lecture of FRAME High-Level Lecture Series, Brussels), 2017, p. 15, http://www.fp7-frame.eu/wp-content/uploads/2017/03/ConventionCJUEdialog.BRUSSELS.final_.pdf.

64 L. R. Glas and J. Krommendijk, 'From Opinion 2/13 to Avoti□š: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', *Human Rights Law Review,* 17, 3, 2017, p. 585.

3 Domestic courts

3.1 Domestic courts complementing the EU system of legal remedies

As far as the EU framework is concerned, Article 19(1) TEU provides that the EU shall provide a system of remedies that can ensure effective legal protection. This constitutes a 'complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions' and is composed of the CJEU on the one hand and the courts and tribunals of the member states on the other.[65] National courts become the first line guardians of the EU legal order, and the two tiers of the judicial system meet at the preliminary reference procedure.[66]

In the context of EBCG operations, the role of domestic courts is obvious regarding the accountability of host and participating member states, as well as regarding the civil and criminal liability of the officers participating in Frontex operations. As far as the accountability of the agency itself is concerned, though, the primary role belongs to the CJEU and the ECtHR. Still, we may regard national courts, especially those of the host member states, as having a role to play in the legal accountability of Frontex.

National courts have a leading role in the preliminary reference procedure, where they may instigate a response from the CJEU by referring a preliminary question to it. According to the Lisbon treaty, all courts may refer a preliminary question to the CJEU, while the higher courts have an obligation to do so. The applicant cannot claim a right, as such, according to EU law for the court to send a preliminary reference.[67] A relevant right may, however, exist, under the jurisprudence of the ECtHR.[68]

With regard to an action for annulment or failure to act, national courts lack the key power to review the legality in terms of EU law of acts of EU institutions and agencies. Prioritising the need for uniformity of EU law, the CJEU has ruled that national courts cannot declare Union acts and omissions invalid.[69] This power belongs to the CJEU, while national judges are

65 CJEU 8 March 2011, C-1/09, Opinion 1/2009, paras. 66, 70,71; Peers and Costa 2012, p. 93, note that 'It is notable that the Court of Justice has stressed the role of national courts pursuant to Article 19(1), even though they are not expressly mentioned in that Treaty provision.'; *Inuit Tapiriit Kanatami and Others v Parliament and Council*; *Microban v. Commission*.

66 Harlow 2002, p. 148.

67 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*; Damian, Gareth and Giorgio 2010, p.p.: 159, 160.

68 Section 3.4.

69 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*; J. Manuel and C. Martín, 'Ubi ius, Ibi Remedium? — Locus Standi of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads', *Maastricht Journal of European and Comparative Law*, p.p.: 233, 251-3.

only empowered to issue provisional measures.[70] In the case *Firma Fotofrost v. Hauptzollamt Luebeck-Ost*,[71] however, the ECJ stated that there is a duty for national courts to allow, in cases where no implementing measure exists, the individual to challenge the legality of EU acts since the case will be subsequently brought before the ECJ as a preliminary question. While, undoubtedly, maintaining its legal value, the enforcement of this duty is rather weak, since the Court has held that there are no sanctions for courts that fail to do that.[72] National courts still may have a role to play in the context of the legality review, and in particular, the strict admissibility requirement of 'direct and individual concern'. Domestic courts are responsible for interpreting and applying the relevant procedural rules in a way that enables the challenging of any decision.[73]

3.2 In search of systemic accountability: the national judge ruling on damages

A claim for damages concerning the non-contractual liability of the EU cannot be brought before domestic courts, by virtue of Article 268 TEU, which has been interpreted as providing the CJEU with exclusive jurisdiction to rule on EU law, whether this concerns the genuine interpretation of EU law, or the legality review of actions by the EU and its institutions, organs and agencies and their liability.[74] The exclusive jurisdiction of the CJEU is basically a manifestation of the immunity of the EU, namely immunity from the jurisdiction of national courts. Thus, the national court can only rule on the liability of the member state. Given the obligation for exhaustion of domestic remedies, the national liability procedures need to finish first before the CJEU hears a related liability case against Frontex. Since *Kampffmeyer,* the CJEU will refuse to hear a claim for damages against the EU, when compensation can be sought against the member state before the national courts.[75] In the example of the Frontex return flight from Germany to Afghanistan discussed in the same section, Germany would be liable before national courts for the full extent of the damage. Only if the domestic courts fail to issue full compensation, or more generally if there is

70 CJEU 21 February 1991, Joined Cases C-143/88 and C-92/89, [1991] ECR I-415 (*Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*); and CJEU 9 November 1995, C-465/93 [1995] ECR I-3761 (*Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*).

71 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*.

72 Damian, Gareth, Giorgio, 2010, p.p.: 159, 160.

73 *Union de Pequenos Agricultores v Council*, paras. 41, 42, 45; CJEU 1 April 2004, C-263/02 P, ECLI:EU:C:2004:210 (*Commission v Jégo-Quéré*), paras. 33 and 34.

74 This is not explicitly stated in the provision but has been read into it by the Court in its established case law. *Asteris and Others v Greece and EEC*; CJEU 14 January 1987, C-281/84, ECLI:EU:C:1987:3 (*Zuckerfabrik Bedburg v Council and Commission*); CJEU 29 July 2010, C-377/09, ECLI:EU:C:2010:459 (*Hanssens-Ensch v European Community*).

75 Chapter VIII, section 8.

no effective national remedy, will the CJEU agree to rule on the remaining amount as part of the liability of Frontex.[76]

As already concluded, the current judicial status quo does not accommodate the Nexus theory, as it does not give the opportunity for the individual to seek damages from any of the responsible actors (*joint and several liability*). It further falls short of the model of systemic accountability as even though it provides for the compensation of the victim (*individualist accountability*) it practically renders Frontex unaccountable for the damage caused and does not allow for the investigation of its responsibility (*systemic accountability*). A structure that allows for all actors responsible for a violation to be held to account is one that brings the respective actions before a single court. It has been argued that this court should be the CJEU.[77] Here, also for the sake of verification of the previous argument, I examine the alternative that would allow for the liability of both the agency and the member state to be examined in joined cases by a domestic court.

In principle, the EU, as an international organisation, can under the rules of international diplomatic law[78] choose not to invoke its immunity for the purpose of local proceedings or the domestic court could exceptionally reject the claim for immunity, arguing that the particular breach cannot be considered as part of the mission of the organisation and supporting its regular function.[79] This could lead to the possibility of the national court becoming the common forum for dealing with the responsibility of both the agency and the member state.

The graveness of the human rights violations at stake and the strict admissibility requirements before the CJEU are compelling reasons to this end. Still, while in theory, the EU may become a party to domestic lawsuits, in practice, waiving of jurisdictional immunity would go against the exclusive jurisdiction of the CJEU, and the rejection of its immunity by domestic courts seems quite unlikely. This would contradict the autonomy of the EU and EU law as well as the exclusive jurisdiction of the CJEU.

For the sake of argument, however, this remote possibility is examined. Thus, the argument could be made that cases dealing with violations during EBCG operations, where both the host state and Frontex may be involved, may be more reasonably heard by a national judge, especially in the context of systemic accountability and the complications of the joint liability frame-

76 Another less possible angle for the CJEU to assume jurisdiction is if the national court rules that the member state bears no responsibility for an existing violation because that has been committed by the agency's deployed personnel without the involvement or knowledge of the host state.

77 Chapter VIII, section 8.4.

78 Vienna Convention on Diplomatic Relations, Customary International Law on the Immunity of International Organisations, 1961.

79 A case in point is Supreme Court of the Netherlands 13 November 2007, LJN: BA9173, 01984/07 CW, (Euratom). The Dutch Appeals court had rejected the claim of immunity by Euratom, but the decision was later overturned by the Dutch Supreme Court.

work.[80] There is, here, an argument to be made in terms of joint responsibility. The domestic court is responsible for dealing with the responsibility of the host state. The non-invocation or rejection of the immunity of the EU, could give the same court the opportunity to also rule on the responsibility of Frontex, thus, making space for dealing with the different responsibilities as a nexus,[81] pursuing their joint responsibility more effectively. As discussed earlier, bringing the two cases under the same judicial roof also allows for the aims of systemic accountability to be fulfilled.

This structure could indeed be another way for systemic accountability to be achieved, while it even has certain benefits compared to the construction based on the jurisdiction of the CJEU under the principle of subsidiarity proposed earlier, according to which the CJEU can claim a more extended role in ruling on the joint liability of the EU and the member state.[82] These benefits include the direct and uninhibited access of individuals to the national courts and the significantly shorter and less costly proceedings compared to the liability procedure before the CJEU. Moreover, starting from domestic courts, a remedy can be further sought before the ECtHR with regard to violations occurring from the decisions of national courts, concerning, for instance, the right to an effective remedy or the right to a fair trial. An added benefit to using the route of national courts is that even though public interest litigation seems improbable before the CJEU, this possibility still exists in some member states, such as the Netherlands or France, depending on national procedural law. In any case, the matter can still be referred to the CJEU for a preliminary reference, thus, also involving the EU Court in the decision-making process. Nevertheless, this argument may be overly ambitious, as it has been suggested that the exclusive jurisdiction of the CJEU may be a mandatory rule, which the EU is not at liberty to waive. As a matter of fact, the CJEU has, so far, treated it as such.[83]

3.3 Ruling on the liability of members of teams

The national judge can rule, in any case, on the responsibility of individual national border guards as a result of a civil action. The national courts of the host state have jurisdiction over the civil liability of members of the teams operating in the host state.[84] A national case on the responsibility

80 Chapter VIII, section 8.3

81 To the extent possible, as the nexus can also include other responsibilities that will not necessarily be part of the same legal action, such as that of participating states, third states, or private actors.

82 Chapter VIII, section 8.4.

83 Oliver 1997, introduction by Schermers p. xiii.

84 Article 84 EBCG Regulation. The national courts also have jurisdiction over the criminal liability of members of the teams. Article 85 EBCG Regulation. In this regard, however, a civil remedy may be proven to be the preferable option for a human rights case, as the burden of proof in criminal cases, may be difficult to reach especially due to the lack of transparency characterising Frontex operations.

of individual border guards could be used as an initial way to reach the CJEU through the preliminary reference procedure.[85] It could be used as an opportunity to ask the CJEU to clarify certain points of EU law related to the responsibility of Frontex. Such can be, for instance, the issue of a border guard's or return escort's conduct being ultra vires based on whether the agency has been acting outside its mandate.

The status of national border guards before domestic courts is quite different compared to that of Frontex officials participating in joint operations. These have immunity from jurisdiction.[86] As a matter of fact, all Union servants are immune from prosecution before national courts for acts performed in their official capacity, i.e. in the performance of their duties, in accordance with Article 12(a) of the Protocol No. 7 on the Privileges and Immunities of the EU. The Court has ruled that the immunity has a purely functional character, and is intended to avoid any interference with the functioning and the independence of the EU.[87] According to H.G. Schermers and C.R.A. Swaak, the meaning of the phrase 'performed by them in their official capacity', allowing for the servant's immunity, is narrower than that of the phrase 'in the performance of their duties', which results in the liability of the Union. The latter includes but is not limited to acts performed in their official capacity.[88]

Immunity should be granted only when necessary for the performance of the Union's tasks, and it can be waived pursuant to Article 17 of the Protocol on Immunities, wherever this is not contrary to the interests of the Communities. This is another area, where there can be space for national courts in the context of accountability within EBCG operations. As a matter of fact, a duty even for the international organisation to waive their immunity (at least on a human rights matter) when there are no alternative remedies, can be induced from the case law of the ECtHR. Looking at the intrinsic difficulties of the procedures before the CJEU, and the uncertain future of the accession to the ECHR, this would not be an unreasonable argument to make before the ECtHR in the case of Frontex.[89] Finally, there have been other attempts in legal doctrine to find more restrictive solutions

85 Chapter VIII, section 4.

86 This, in the period studied in this dissertation, concerns only a very limited number of people, such as the Frontex coordinating officer. However, this will become more relevant in the future as the agency will be increasingly operating with its own border guards.

87 *Claude Sayag and Another v. Jean-Pierre Leduc*, paras. 401-402; CFI EU 29 March 1995, ECLI:EU:T:1995:58 (*Hogan v CJEU*), p. 718, par. 48; An interesting observation has been made by Schermers and Swaak 1997, p.p.: 176, 177: 'Claiming immunity involves liability. Whenever the Community invokes immunity of jurisdiction for a particular act of a servant, it implicitly accepts that the act is an act of the Community, because it has no right to invoke immunity for any other act. The Community can then be held liable'.

88 Schermers and Swaak 1997, p. 177.

89 Majcher 2015, p.p.: 73, 74; S. Carrera, M. De Somer and B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Paper in Liberty and Security in Europe No. 49, 2012, p. 4.

to avoid unlimited immunity for international organisations.[90] With the immunity of Frontex personnel waived, domestic courts may rule on their liability, thus providing an argument in favour or against the liability of Frontex.

3.4 The relevance of national courts in the ECHR legal system

With regard to the proceedings before the ECtHR, a domestic case against a member state or a border guard may lead to an application before the ECtHR. For such a case to be deemed admissible, the exhaustion of domestic remedies is a necessary prerequisite according to Article 35(1) of the ECHR, as the ECtHR is intended to be subsidiary to the national systems. Depending on the circumstances of the case, the ECtHR may then rule on the compatibility with the Convention on the basis of the Bosphorus presumption.

As a matter of fact, there may be a growing relevance for national courts in light of the *Avotiņš* judgment and the development of the Bosphorus doctrine after Opinion 2/13. The ECtHR signalled in *Avotiņš* that it intends to scrutinise more vigorously the requirements of the Bosphorus presumption. If the Bosphorus presumption is rebutted because the EU legal framework is not found to be providing equivalent protection, a member state can still be held liable even though it was following the binding instructions of Frontex. Such manifest deficiency of the protection offered at the EU level could be argued perhaps on the basis of the national court failing to refer a question to the CJEU, thus not giving the EU court the opportunity to rule on the issue, and utilise the full potential of the EU protection framework, but mainly on the basis of the problematic access for individuals to the CJEU.

Still, the Court has shown lenience in *Avotiņš*, where it ruled that there is no need to refer a question to the CJEU when this concerns an acte clair or an acte éclairé. Nevertheless, there should be reasons for the lack of referral, if a request for preliminary reference has been made by the applicant, in order to avoid a violation of Article 6(1) ECHR on the right to a fair trial.[91] Thus, the role of domestic courts may acquire greater importance, seen under the right of a further element of enforcement of the duty to request a preliminary ruling.

The accession of the EU to the ECHR is not expected to affect the role of domestic courts noticeably. After the accession, domestic courts will, naturally, have a role to play in enforcing the accountability of Frontex to

90 A. Reinisch and U. A. Weber, 'In the Shadow of Waite and Kennedy - The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', *International Organizations Law Review*, 1, 1, 2004.

91 *Dhahbi v Italy*; *Schipani et al. v Italy.* For further on the role of domestic courts in the preliminary reference procedure, see section 3.

the extent that they may be called to implement a relevant decision of the ECtHR, including pilot judgments. As far as the exhaustion of domestic remedies is concerned, the references in the Draft Accession Agreement and its Explanatory Memorandum are few and only concern the co-respondent mechanism. Discussing cases in which the EU is a co-respondent, the Explanatory Memorandum notes that the applicant will first need to exhaust domestic remedies available in the national court of the respondent state. The national courts may use the option to send a preliminary reference request to the CJEU, however, as this is not a right of the parties to the proceedings, who may only suggest such a reference, this procedure is not included amongst the national remedies that the applicant needs to exhaust before applying to the ECtHR.[92]

4 Conclusion

This chapter has dealt with ways to address the accountability of Frontex in judicial fora other than the CJEU. It has looked in particular into the role that the ECtHR and domestic EU courts may have in realising the standards of the Nexus theory and systemic accountability.

The gaps and complications in the EU liability framework can be filled with the accession of the EU to the ECHR, when individuals can bring complaints concerning violations by Frontex before the ECtHR in Strasbourg. The accession negotiations had reached an impasse after Opinion 2/13 of the CJEU, in which the Court found the Accession Agreement to be incompatible with the EU Treaties. However, negotiations were recently resumed, and to the extent that the accession remains a Treaty obligation for the EU, the accession is still a future possibility.

As a matter of fact, the route before the ECtHR is more straightforward and is already designed around joint responsibility and an intuitive understanding of *systemic accountability*. In fact, the post-accession procedure before the ECtHR provides for the joint responsibility of EU/Frontex and the host state, which takes the form of *joint and several responsibility*, as the complaint can be addressed to any of the responsible actors. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility.

Moreover, both the co-respondent mechanism and the practice of the Court to join relevant cases can be used to seek damages from all responsible parties, and ensure that they can be held accountable under the same judicial roof, satisfying, thus, the goals of *systemic accountability*. The general measures ordered by the ECtHR and the pilot judgments procedure are further examples of how the *systemic accountability* model can be implemented in practice. Finally, the ECtHR is more familiar with the interna-

92 Draft Accession Agreement, p. 27.

tional law on joint responsibility, while the Accession Agreement itself holds that the respondent and co-respondent are, as a rule, jointly responsible for the violation.

This, however, depends on the decision of the ECtHR upon the future of the Bosphorus presumption. Were the ECtHR to continue prioritising the doctrine of equivalent protection over factual attribution, the accession would not be able to provide protection that is practical and effective, as the EU would continue to be sealed from the full scrutiny of the ECtHR.

Even though a highly desirable legal route, certain procedural and substantial aspects of the accession may prove rather thorny regarding *legal accountability* in joint EBCG operations. Firstly, it can prove problematic if the ECtHR follows the concept of formally binding rules, when determining whether to regard the EU as correspondent to the case, excluding, thus, effective control and de facto binding powers. Moreover, the prior involvement of the CJEU can be time-consuming, while the Bosphorus presumption, if upheld, can become a substantial barrier to *systemic accountability*. Nevertheless, the Strasbourg court seems to be the natural environment for joint responsibility and *systemic accountability* to flourish, which justifies yet another call for the realisation of the accession of the EU to the ECHR. The new rounds of negotiations may be long and painful, but in the words of the Chairperson of the ad hoc accession group, 'where there is a will there is a way'.

In the context of EBCG operations, the role of domestic courts is obvious with respect to complaints against member states and the civil and criminal liability of the deployed officers participating in Frontex operations. Their role may also become growingly relevant in the context of proceedings before the ECtHR in light of the *Avotiņš* judgment and the development of the Bosphorus doctrine after Opinion 2/13. This can lead to further enforcement of the duty of national courts to request a preliminary ruling, in order to avoid a violation of Article 6(1) ECHR on the right to a fair trial.

Related to the proceedings before the CJEU, national courts are the first stop in a preliminary reference procedure, while they may also have a limited role in legality review. In particular domestic courts should interpret and apply rules of procedure in a broad way that enables the challenging of any decision.

Finally, with respect to an action for damages, the aim of bringing the examination of joint responsibility under the same judicial roof in realisation of *systemic accountability* has been discussed in the previous chapter, where a solution based on the jurisdiction of the CJEU under the principle of subsidiarity has been proposed. Here, I examine the possibility of both cases being examined by the domestic court of the host state, provided that the EU waives its jurisdictional immunity, in particular the exclusive jurisdiction of the CJEU. This solution, however, seems less feasible, as the CJEU holds its exclusive jurisdiction to be a mandatory rule, which the EU is not at liberty to waive. Thus, the CJEU remains for the time being the most appropriate forum that can support *systemic accountability*.

10 General Conclusions

1 Forming a hypothesis on responsibility and accountability

The examination of the issues that constituted the subject matter of this thesis is based on the hypothesis that Frontex can bear responsibility for human rights violations conducted during its operations and should therefore be held accountable for it. This hypothesis is based on the sensitivities that are inherent in border surveillance and return operations. When these sensitivities materialise into real violations, the need arises to protect the rights of the individual. The hypothesis is also based on the dynamic growth of the mandate of the agency almost every two years, along with the expansion of its de facto powers and its operational capacity regarding budget, personnel, and the acquisition of its own assets, which have made the EBCGA one of the most important actors in border enforcement in Europe. This study shows that the increased powers of the agency especially after 2019 (e.g. statutory staff, owned large assets) exacerbate the existing risks and magnify the current gaps in the legal protection framework, enhancing the need for structural changes in order to address them. The agency's modus operandi indicates a substantive and steadily growing influence, with its identity remaining, though, mostly ancillary to the work of the host state, and not able to replace as such the border guard functions of the member states, even after the 2019 amendment of the EBCG Regulation.

Notwithstanding its increased influence, the responsibility of Frontex has been contested, under arguments that the agency is merely the coordinator of the operational cooperation of member states, it has no independent executive powers. Accordingly, it is the national authorities that have the operational power and the general command and control of the operation on the ground. They should, therefore bear the full responsibility for possible breaches. It is time and again presented as common wisdom that the activities of the agency are technical, and, as such, do not affect the right of the individuals. At the same time, it faces a 'capacity-expectations gap', which makes the agency dependent upon the voluntary contributions of the member states to actualise its mandate. While this view of absolute irresponsibility has become more nuanced, the underlying assumption still remains that only violations attributed directly to Frontex staff members, until now primarily based in Warsaw, can engage the responsibility of the agency.

Therefore, the hypothesis needed to be explored under the main research questions of this study. In the following sections, I recapitulate upon earlier findings and draw the conclusions that directly respond to the research questions.

Firstly,
How can Frontex be understood to be able to bear legal responsibility for human rights violations that take place during its operations? How can it be held legally accountable for such violations?

2 The fundamental rights obligations of the agency

Frontex is bound by international human rights standards, as well as protection obligations towards migrants, as defined in EU primary and secondary law. The obligation to respect and protect human rights has also been acknowledged in its Regulation since 2011, while respect for non-refoulement and other legal norms on human rights and international projection, is reaffirmed in the Frontex Sea Operations Regulation, the Returns Directive, the Data Protection Directive, and the Schengen Borders Code. More importantly, Frontex, as an EU agency, is bound by the EU Charter, as well as the ECHR and fundamental rights as enshrined in the constitutional traditions of the member states, including those derived from international law (Art. 6(3) TFEU), such as the 1951 Refugee Convention and its 1967 New York Protocol and other international treaties relevant to refugee protection (Article 78(1) TFEU), to the extent that these inform the jurisprudence of the CJEU on general principles of EU law and the interpretation of the EU Charter (Article 52(3) and (4)).

The agency is also bound by positive obligations to protect fundamental rights derived from these documents, always taking into account the limitations presented by its mandate, competencies and actually available resources. These obligations include duties to monitor and supervise the state of compliance with fundamental rights during its operations and prevent violations of which it can be presumed to have knowledge. These obligations have over the years also been specified in its mandate, for instance, in the form of broad monitoring powers, including the Fundamental Rights Officer, vulnerability assessments, and a system or serious incidents reporting, and in the form of an obligation of the Executive Director to suspend or terminate an operation in case serious and consistent violations are taking place. Considering the agency's capacity to intervene and its margin of appreciation, non-compliance with these duties can lead to the engagement of the agency's responsibility.

3 Responsibility in EBCG operations: a matter of interaction between EU and international law

The responsibility of Frontex for human rights infringements is undoubtedly a matter of EU law, and, since the accession of the EU to the ECHR has yet not taken place, the competent Court to rule upon it is the CJEU.

The responsibility of Frontex, though, should be dealt with in a pluralist environment, where EU law allows itself to be inspired by international law on responsibility.

The principles on the international responsibility of states and international organisations, as developed by international courts and state practice and codified in the ILC Articles on the Responsibility of States (ARS) and of International Organisations (ARIO) and their Commentaries, constitute a framework for dealing with responsibility under international law.

Some admissions are essential at this point:

Frontex does not strictly speaking, fit the traditional definition of an international organisation. The ARIO are not a Treaty, and, as an EU agency, Frontex should be dealt with in the context of EU law. Moreover, the CJEU often interprets the Charter in isolation and adopts an overall hesitant stance towards international law.

However, the fluidity and flexibility of the definition of an international organisation and the particular status of Frontex, which suggests at least a limited international legal personality and a number of shared characteristics with an international organisation, suggest that the ARIO can be applied to Frontex by analogy. From a positivist point of view, the application of the Charter to EU agencies and the competence of the CJEU over their actions allow us to speak of the responsibility of Frontex before the CJEU separately from the Union.

The ARIO are only binding as far as they reflect international customary law. In their remaining part, they represent evidence of law (Article 38(1) ICJ Statute) and can be a source of inspiration and a valuable guide for scholars and courts. They invite the progressive interpretation of international law by incorporating and complementing rules from different legal orders.

Moreover, even though EU law constitutes a coherent legal order in itself and always retains its status as prevailing lex specialis, it does not exist in isolation. It is a 'new legal order' integrated into a broader system, a common environment of the coherent legal architecture of international law.[1] The interaction of the different legal frameworks within this common environment avoids fragmentation. It allows for complementarity and cross-fertilisation, that is vital for the protection of the rule of law and human rights.[2]

1 *Van Gend en Loos v Nederlandse Administratie der Belastingen*; *Costa v ENEL*.

2 Chapter VI, section 2.2.

EU law and the jurisprudence of the CJEU alone cannot provide a stable and authoritative answer with regard to questions of attribution, the liability of agencies, and the responsibility of multiple actors. Therefore, the fairly developed framework on responsibility that international law has to offer can prove valuable in cases regarding the responsibility of Frontex. Even within the hesitation of the CJEU towards international law, this pluralist approach can still have a place in the Court's case law not so much as direct application, but as harmonious interpretation, in a way that does not antagonise the internal legal order.

4 The responsibility of Frontex

Under this light of pluralism, complementarity and harmonious interpretation, the questions of attribution of the wrongful conduct, either act or omission, and that of attribution of responsibility have been studied as related to Frontex, with central amongst them, the element of effective control.[3] While arguments on the agency's indirect responsibility for aid and assistance in a violation committed by the host state, seem to land more comfortably and steadily, an argument is still to be made for the direct responsibility of Frontex for acts that can be directly attributed to the agency (Articles 3, 4 ARIO).[4] The direct responsibility of the agency becomes all the more relevant after the 2019 amendment that provides the agency with its own permanent corps of border guards, including Frontex staff members.

4.1 Direct responsibility

This concerns, first of all, the agency's statutory staff newly afforded by the 2019 legislative amendment, as part of a standing corps of 10.000 operational staff. These are de jure organs of Frontex. Following the principle of independent responsibility, any wrongful conduct of theirs is attributed to Frontex. Thus, it gives rise to the responsibility of the agency (Articles 6-9 ARIO).[5]

It also concerns the members of the border guard teams seconded by member states and their role as de facto organs of the agency.[6] The responsibility rule of Article 6 is to be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Looking at the role of deployed border guards through the lens of effective control, persons seconded to Frontex by a member state, can be considered its agents, if it is proven that Frontex exercises effective control over their conduct (Article 7).

3 Chapter VI, section 3.
4 Chapter VII, sections 2 and 3.
5 Chapter VII, section 2.1.
6 Chapter VII, section 2.2.

The waters are not clear as to whether the conduct should be attributed to the seconding state or the receiving organisation. Any conclusive statement on whether the deployed border guards are indeed de facto organs of the agency requires further substantiation from empirical evidence and should be considered on a case-by-case basis.

Even though Frontex will at no point issue instructions directly towards the deployed officers, there are several levels of orders and control that are above the day-to-day command of the operation. The decisive elements on who has effective control over the conduct of the deployed personnel, as they have been interpreted by doctrine and jurisprudence are a) retention of disciplinary powers and criminal jurisdiction by the state, b) decision-making power over the wrongful conduct, or in other words, operational command and control in accordance with formal arrangements and factual circumstances (factual control), c) power to prevent a violation of human rights (positive obligations).

The determination of either one of these elements can tip the balance towards the responsibility of either the state or the agency. What adds to the uncertainty over the debate on responsibility is that there is no hierarchical order amongst the different elements, and they can be balanced differently in court/by courts. Furthermore, different courts can take different views on the interpretation of effective control, with the ICC ruling upon 'operational command and control' emphasising factual control, the ECtHR applying the 'ultimate control test', and the CJEU having a precedent, which focuses on formal competences and de jure powers of command and control.

Still, effective control is not necessarily an exclusive quality. The effective control by a member state does not exclude effective control by Frontex. In fact, the largest portion of effective control belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control.[7] This non-singular answer as to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the degree of effective control exercised by either party that is important. In case more than one parties are shown to exercise effective control, their responsibility can be determined under dual or multiple attribution. Thus, only if it can be proven that in a particular case, Frontex has exercised adequate, effective control over wrongful conduct, can its direct responsibility be engaged, and that, alongside the responsibility of the host state.

4.2 Indirect responsibility

Moreover, the agency may incur indirect responsibility for a wrongful act that is not attributed to it but solely to the state if it has contributed to it, facilitating its commission (Article 14 ARIO).[8] Thus, international

7 See Chapter IV.
8 Chapter VII, section 3.1.

responsibility may arise from an act of the agency that does not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state. Frontex may have a significant role in aiding and assisting in a violation. It finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as EUROSUR. Any of these powers and competences and certainly their combination can be regarded as significantly contributing to the commission of a wrongful act during an EBCG operation.

Such assistance can also be the result of failing to utilise its monitoring obligations in light of its positive obligations to prevent a violation. Like in the case of direct responsibility, this will need to be shown on a case-by-case basis, but in principle, it can be safely argued that the agency can be responsible for 'setting the scene that allows the result.'[9] In this case, Vital is whether Frontex knew or should have known about the violation, as this protection is provided not against all threats, but against reliable and predictable threats. Such knowledge can occur through the agency's own internal and external reporting mechanism, including vulnerability assessments, serious incidents reports, and the individual complaints mechanism, or via well-documented credible NGO and media reports of recurring or systemic violations.

Thus, if it can be reasonably presumed that Frontex has been aware of a violation, or willfully ignored it, it may incur indirect responsibility for assisting in that violation by financial, operational and practical means or by failing to exercise its positive obligations to prevent it.

5 Legal accountability difficult but not impossible

When the sensitivities that are inherent in the agency's work materialise into real violations, the need arises to bring issues of responsibility before courts and seek authoritative answers in questions that have until now only been the centre of theoretical examination. Seeking the legal accountability of the agency is essential, especially since the existing framework for the non-legal accountability of Frontex has failed to ensure a sufficient standard of accountability that would help prevent further violations. The different standards and mechanisms of administrative, political, and social accountability of the agency constitute a loose compilation of different fora that do not manage to complement each other. They rather present a fragmented picture, each fragment with its own deficiencies.

The EP does not have but weak political control over the agency, while it still lacks access to essential information concerning the fundamental rights impact of its work. Social accountability is hindered by the secretive

9 Goodwin-Gill 2011, p. 453.

stance of the agency, especially concerning the right of access to documents. A vast number of requests are partly or wholly denied on the ground of exceptions in the name of public interest, which does not facilitate proper scrutiny by civil society. Finally, promising developments at the level of administrative accountability, such as the FRO, the Frontex Consultative Forum, and the crown jewel of administrative accountability, the individual complaints mechanism, have not gone far enough and have failed to satisfy the minimum standards of accountability. The main limitations concern the lack of effective external monitoring and the lack of consequences in case of misconduct.[10]

Therefore, the need for judicial review with enforceable consequences remains potent and urgent. Still, no such action has yet been brought before courts since the establishment of the agency in 2004, and the reasons for this are threefold: legal, procedural, and practical.

Firstly, regarding the legal implications, Frontex implements through its joint operations, a new model of cooperation, where a multiplicity of actors is involved. In such an environment, it is legally challenging to address issues of responsibility.

Secondly, procedural reasons have to do with the inherent systemic difficulties in adjudicating such a case. As the CJEU has exclusive jurisdiction over issues regarding EU agencies, a claim against Frontex cannot be brought before national courts. The most promising legal route for the accountability of Frontex, a complaint before the ECtHR, depends on the accession of the EU to the ECHR, which, although it being a constitutional obligation for the EU since 2009, has yet to be realised. The remaining avenue is before the CJEU, which, however, offers limited possibilities for access to individuals. Each of the remedies available before the CJEU, present their own complications, both in regard to access to justice and in regard to the details of the case at hand (for example finding a reviewable act of an institution, which claims that its acts do not have legal effects vis-à-vis individuals).

Thirdly, practical complications include the lack of transparency over the acts of the agency and the limited knowledge of its work, including its powers and its limitations. This creates insecurity around pursuing litigation, especially in regard to gathering evidence to support the legal claims.

Thus, pursuing the accountability of Frontex adds an extra level of difficulty in factual investigation and legal argumentation. It would also need to break new ground, as the procedural routes of legal accountability are not always straightforward. Despite the limitations, the possibility still exists for holding the agency to account.

10 Chapter V, section 3.

6 Summing up the remedies before the CJEU

The most appropriate litigation route for an individual before the CJEU is the liability action or action for damages under Article 340 TFEU. It addresses the liability of Frontex directly and has the potential to make good any damages caused by the agency in the course of its activities.[11] It comes, nevertheless, with its own unique procedural difficulties. The binary distinctions concerning rules on causality and the division of jurisdiction among competent courts, along with the burden of proof that lies with the applicant present substantial obstacles in holding the agency accountable for fundamental rights violations. Interpreted narrowly, the direct causal link may prove too strict of a requirement for the liability of Frontex, since its actions occur in a multi-actor environment, where a nexus of responsibilities exists, and a severality of acts and omissions by different actors may cause the harmful result.

The mere involvement of the host state could be sufficient for the CJEU to break the chain of causation and prevent the liability of the agency. Still, this needs to be determined on a case-by-case basis. In *Krohn*, the Court held that the causal link is not severed by an implementing act of the state if the latter was not acting independently, but under binding instructions of the Union.[12] Applied to Frontex, this argument can lead to the liability of the agency if it is shown that the host state had no discretion to derogate from decisions taken by the agency. This could potentially, exceptionally, be the case, for instance, with respect to the right of the EU to intervene, and in the context of de jure non-binding but factually substantially influential instructions of the agency. While the CJEU has often affirmed the competence model in its case law, allocating liability on the basis of normative control and de jure powers, it has held in *KYDEP* that such instructions which are treated as de facto binding by the member state, can leave the causal link intact.[13] The limits of the competence model have also been acknowledged by the EP, and academic commentators, if its application would result in unaccountability for acts that impact upon fundamental rights. When the competence model reaches its limits, the Court can take inspiration from the organic model, present in international law, where the investigation spreads beyond the formal arrangements also to cover factual circumstances, de facto powers, and effective control. This can extend to the non-binding instructions of the agency, in case these are no longer considered a 'genuine recommendation', but constitute the agency the 'de facto operative decision-maker', as also discussed in more detail with respect to the action for annulment.

11 Chapter VIII, section 7.
12 *Krohn Import-Export v Commission*.
13 *KYDEP v Counicl and Commission*.

Likewise, the causal link can remain intact in the case of breach by the agency of its positive obligations in the context of its the obligation of the Executive Director to suspend or terminate an operation when serious and persistent violations occur, and the other monitoring powers of the agency. The knowledge of the agency of violations can be presumed on the basis of such powers, while the causality requirements can still be met in relation to a breach of supervisory obligations and its consequent violation of fundamental rights.

While the allocation of *Liability-Responsibility*, as meant by H.L.A. Hart, as assignment of blame for a wrongful act, is best served via an action for damages, accountability is rather a broader concept. Liability embodies the idea of punishment and compensation and often comes as a result of legal responsibility. However, accountability puts the emphasis on answering for the administration of public affairs before a forum and facing the consequences for misconduct, which does not always take the form of financial compensation. Thus, the search for legal accountability can also include other legal remedies before the CJEU.

Alongside an action for damages, and a request for interim measures in cases of imminent irreparable harm stands the action for annulment of Article 263 TFEU. An act of the agency can be declared void, or the failure to act contrary to the Treaties, as a result of the legality review of the Court performed under Article 263 TFEU. In an attempt to seek legality review of acts and omissions of Frontex, the individual faces strict accessibility requirements. While the obstacles to individual access are not insurmountable, there is a role here for the EP, which can use its status as a privileged applicant to appear directly before the Court and seek the review of the conduct of the agency.

In response to the challenge that the agency does not produce acts that have legal effects vis-à-vis individuals that can be reviewed by the CJEU, I argue that the reviewability of certain acts of the agency is still exceptionally possible, under two lines of argumentation.[14]

Firstly, in 2016 the agency's individual complaints mechanism was established, in the context of which, the Executive Director decides upon the legality of an act of the agency. This does not suffice to constitute a system of legality review as such, as shown earlier, but there are reasons to suggest that it is part of a more extensive system of legality review. Like in other EU agencies, this decision can be considered the first line of legality review, as intended by the European Ombudsman, and should be reviewable under Article 263 TFEU. Only this way, the complaints mechanism can fulfil its purpose to ensure the compliance of fundamental rights.

Secondly, Frontex has developed strong non-formally-binding functions, for instance, in the context of its risk analysis, the right of the EU to intervene, and other advisory functions. As observed by Busuic, often

14 Chapter VIII, section 6.3.

the boundaries between scientific advice and decision-making become obscured in practice, as it becomes hard for the member state to circumvent it due to the research and technical expertise of the agency. Thus, the agency becomes the de facto operative decision-maker. A gap would be left in the effectiveness of judicial review if the institution that made the operative decision would remain unchecked. Therefore, judicial control needs to also focus on the reasoning of the recommendation that lies behind the final decision. The reviewability of such non-binding acts, with a marginal legality review test, is also supported by judicial precedent before the CJEU, where the Court annulled, in *Ardegodan*, the Commission's decision, based on the review of the scientific opinion an EU agency.[15]

Finally, even though not a genuine, effective remedy, the preliminary reference procedure can be used to address the CJEU indirectly through a complaint before national courts in order seek the interpretation of EU law as a first step towards more direct action. This route easily reaches its limits, not only in light of delays and costs but also importantly on the need to rely on the discretion of the national judge. Still, the Court could be asked to rule on the validity of an act of Frontex, or respond to questions related to the division of effective control between a state and the agency, thus opening the way for an action for annulment or damages.

Thus, answering the first research questions, Frontex can indeed, under certain circumstances, bear responsibility for human rights violations either direct (via its own statutory staff or effective control to seconded personnel) or indirect (via aid and assistance or, from a different angle, its positive obligations). It can be held accountable for it by the CJEU. The action for damages, the action for annulment and the preliminary reference procedure can be used to that end.

7 Nexus and systemic accountability

We now need to answer the last central question to this research:
What is the appropriate conceptual framework under which the responsibility and accountability of Frontex should be examined in the context of EBCG operations? How can this translate into the applicable legal framework?

However, saying that Frontex can be responsible does not mean that the member state hosting the operation is absolved of responsibility. In practice, the wrongful act would be first and foremost attributable to the member state hosting the operation. Additionally, states participating in the operation may also incur responsibility for aiding or assisting in a violation conducted by the host state. In sum, several actors in an EBCG operation,

15 *Artegodan v Commission*.

host member states or third states, Frontex, and participating states may be responsible for a violation either on its own right or in relation to the violation of another actor. At the same time, none of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a rather confusing picture regarding responsibility that has been conceptualised as the *problem of many hands* by the political philosopher Dennis Thompson.

According to this problematique, which is at the centre of this research, different actors are involved in an operation, each with their separate level of involvement that is nevertheless not absolutely clear or independent from the involvement of others. In such cases, the multiplicity of actors can create confusion as to who bears responsibility, and this may result in gaps in accountability, as each actor tries to shift the blame to the other.

7.1 The Nexus theory

The solution to the *problem of many hands* is found in the Nexus theory. It suggests that when responsibilities become obscured due to the multiplicity of the actors involved, we should regard the responsibility of the different actors as collective.

In such circumstances, a violation is the result of collective action. Trying to allocate responsibility to one actor independently from the others creates gaps in accountability and fails to properly attribute responsibility to all the actors that have contributed to a violation. To prevent these gaps, we need to adjust our way of thinking about responsibility to the particular features of many-hands situations. In these circumstances, responsibility should not be seen in our most common understanding of it, as a linear relationship between the conduct of an actor and the harmful result, but rather as a nexus. In EBCG operations it is usually not the acts of a single actor that lead entirely and independently to human rights violations, in a straight line without interacting with or passing through an act or omission of a different actor. More often than not, it is multiple actions and omissions that result in a violation. We can observe a complicated series of connections among the different components of responsibility that can be visualised as a nexus.

It is in this nexus that the separate responsibilities meet and interact through the cooperation of the different actors. Only then does the harmful result occur, which is the collective outcome of the interlinked responsibilities. Thus, to achieve the optimal result in allocating responsibility there, responsibility, similar to the harmful result, should be viewed as collective.

The Nexus theory can play a catalytic role in achieving a holistically equitable result with regard to responsibility, rather than only dealing with the more obvious and easier to reach responsibility of the host state, in a fragmentary and coincidental manner. This disconnected and partial approach cannot but be incomplete. Through the nexus analysis, we can achieve all responsibilities simultaneously considering them as collective.

This way, the Nexus theory aims to combat gaps in accountability and, through the preventive effect that answerability and consequences have, ensure better compliance with human rights in general.[16]

7.2 Joint responsibility

This theoretical construction helps develop our understanding of responsibility in many-hands situations, but can also be translated into the practice of courts. It is translated within the normative framework as joint or shared responsibility. Since no single actor is entirely and independently responsible for the outcome, the actors should be *jointly responsible*.

Even though the EU Treaties do not contain rules governing the joint responsibility of the EU and its member states, joint responsibility is not as such foreign to EU law. It has dealt with it, for instance, in the context of mixed agreements or in Article 5(1) EBCG Regulation, which mentions the shared responsibility for border control between the agency and the member states. This article has a declaratory nature and refers primarily to Hart's *Role-Responsibility* rather than *Liability-Responsibility*. Thus, even though it is not a complete stranger to it, EU law does not provide us with stable answers as to the exact nature and application of joint responsibility. Therefore, we once again need to turn for guidance to international law.

The parallel responsibility of several actors has been dealt with in international law under Article 48(1) ARIO, according to which an internationally wrongful act can be attributed to one or more states or international organisations. This can be the result of dual or multiple attribution of the same harmful conduct to different actors (principle of independent responsibility), or the simultaneous application of the rule of attribution with a different rule of responsibility, for instance, aid and assistance. If an internationally wrongful act can be attributed to one or more states or international organisations, the actors involved are *jointly responsible*.

Article 48(1) ARIO provides for the principle of separate invocation of responsibility but does not give us adequate clarity as to its interpretation and the more precise inner workings when it comes to its application. The Nexus theory, acknowledging the collective nature of the harmful result and the subsequent responsibility, supports the interpretation of *joint responsibility*, in terms of invocation, as joint and several responsibility. According to this construction, the collectivity is acknowledged in many-hands situations and is dealt with accordingly, as it renders each actor responsible for the acts of the collective. The victim may invoke the responsibility of and sue for damages each and any responsible actor, as long as double recovery is prevented. Each actor will then owe full reparation and can use their right of recourse to claim its share of the damages from the other responsible actors.

16 Chapter IV, section 5.

This interpretation can be introduced in the framework of EU liability law via Article 288 TEU, which states that the non-contractual liability of the EU and its agencies shall be implemented in accordance with the general principles common to the member states. Seen as a modern form of ius gentium, joint and several responsibility is indeed such a principle, as it is derived from domestic private law and its content has been determined by comparative domestic law.

7.3 Systemic accountability

This theory can provide equitable solutions in terms of responsibility, but it still has certain limitations with respect to accountability. In particular, the more likely course of action for the victim of a violation in an EBCG operation would be to bring a case against a host state and receive compensation for damages. The host state would theoretically have the right of recourse against Frontex. However, the practice, where this right of recourse has, to my knowledge, never been used by a state, and political considerations suggest that this occurrence is highly unlikely.

This leaves a gap on the accountability front, as Frontex would not be brought to account and would not be answerable for its part in the violation. This gap can be filled with a new model of accountability, which requires all actors responsible for a violation to be brought to account, namely the model of *systemic accountability*. This is defined as *accountability aiming at dealing with the systemic issues, which underlie and cause or allow for consistent violations, via focusing on structural solutions*.

Our habitual way of assessing the legal framework on accountability is based on access to justice and effective legal protection. I refer to this approach as *individualist accountability, i.e. the traditional approach of answering for human rights violations on the level of the individual applicant with measures that redress the effects of the violation on him alone*.

This approach, largely designed to address the separate responsibilities of distinct actors and offer redress, may be successful in bringing justice to the individual applicant, in the sense of effective legal protection, especially in the case of an isolated violation. However, it is no longer adequate when the problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner. That manner is *systemic accountability.*[17]

The passing from *individualist* to *systemic accountability* is justified with arguments of justice and the rule of law inspired by liberal political philosophy, as well as the practice of courts. Breaking down the model of *systemic accountability*, we can identify some specific characteristics.

17 Chapter V, section 3.7.

- It benefits a large number of people, present and future members of a loosely distinct group.
- It addresses not only a particular violation (effective legal protection) but also the underlying systemic issues.
- Its effects are long-term.
- It aims to hold accountable all actors responsible for the violation in a manner that reflects the nature of their responsibility (for example, joint responsibility).
- It adopts a proactive approach to attain accountability in its own right, rather than depending on the initiative of the victim (responsive nature).
- Its aims go beyond the redress of the violation for the given applicant, which is only part of this approach and aims to achieve justice for all, safeguard the rule of law and bring policy changes on a structural level.

Reflecting upon EBCG operations, three practical applications of this model can be identified.

Firstly, *systemic accountability* should aim to examine the responsibility of all actors involved in a violation and ensure that they are all answerable before courts. In EBCG operation, even though individuals are able to get compensation via the already established judicial avenues against the host state, the responsibility of other actors, including Frontex, should not be ignored. Thus, the gap that the Nexus theory leaves in practice is covered by the model of *systemic accountability*. While the Nexus theory suggests that reparation should come from any of the responsible actors, *systemic accountability* supports that it should come from both. In practical terms, this would translate in legal proceedings that involve Frontex alongside the host state and can address their joint responsibility.

As its second application, *systemic accountability* provides fertile ground for strategic litigation or impact litigation, implemented in practice through the procedures mentioned in Chapters IX and X. This is understood as putting forward a case that, apart from the interests of the individual applicant, also aims at creating broader changes in society.

Finally, as systemic problems require structural solutions, *systemic accou*ntability would have been incomplete without solutions outside courts. This is where the other forms of accountability identified by Bovens come in. Structural solutions can only be achieved through a holistic approach that necessarily includes non-judicial forms of accountability. Therefore, strengthening administrative, political, and social accountability, by enhancing the powers of the Frontex FRO and the CF, reinforcing parliamentary control over Frontex activities, and increasing transparency are necessary steps in the process of *systemic accountability*.

7.4 The solution on joint liability through the principle of subsidiarity

The practical effects of both theoretical constructions of the nexus and *systemic accountability* include that all actors responsible for a violation

should be brought to account and that they should be held jointly responsible before a court, in a way that the individual can seek compensation not only from any of the actors (Nexus theory, joint and several responsibility) but also from both (*systemic accountability*). Attempting to actualise this in the liability jurisprudence of the CJEU stumbles upon certain procedural hurdles. The first concerns the binary distinctions in the Court's case law on the causal link. The causation criterion often creates a binary distinction in the attribution of responsibility, where either the member state or the agency can be found to have caused the damage. The second is another binary distinction regarding the distribution of jurisdictional competencies among courts. According to this, actions for damages attributed to the Union are dealt with by the CJEU, and those attributed to member states are dealt with by domestic courts. What is more, in the context of the rule on exhaustion of domestic remedies, a legal remedy would need to be sought first at the domestic courts, before the CJEU can examine the liability of the Union. A strict interpretation of these principles can create an environment within which a case of Union liability for the misconduct of Frontex may never see the light.

Following the duality of causality and jurisdiction, the CJEU could reject a case on the liability of Frontex as inadmissible referring to the national court to decide first on the responsibility of the host state. The national proceedings need to be completed first for the action for damages against Frontex to be admissible, and unless domestic courts have not ordered full compensation for the damage, the responsibility of the agency will not be examined, leaving a gap in accountability.

A solution closer to *systemic accountability* would be for the CJEU to pause the proceedings concerning Frontex waiting for the ruling of the national courts and take that into account when adjudicating on the liability of Frontex. This is the solution followed in *Kampffmeyer I*. There the Court rejected in practice the possibility for the EU and a member state to be jointly liable and stated that the Community would be liable to the extent the damage was not covered (fully) through the national courts.[18]

The current judicial status quo before the CJEU supports either a strict interpretation of the duality of causality and jurisdiction or a solution where the CJEU pauses the proceedings concerning Frontex waiting for the ruling of the national courts. Neither of these options would satisfy the principles of the Nexus theory and the model of *systemic accountability*.

In seeking an alternative structure that allows for all actors responsible to be held to account in a manner compatible with the above principles, I conclude that that structure is one that brings the respective actors before a single court.

18 *Kampffmeyer and Others v Commission*.

I propose a judicial construction through which, the CJEU can rule upon the joint responsibility of Frontex and the host state so that all actors responsible for a violation are held to account before the same forum. According to this solution, the CJEU could, in line with the principle of subsidiarity (Article 5(3) TEU), adjudicate on the issue of shared responsibility further than it has in *Kampffmeyer* and ensure that the responsibility of the EU is examined. The CJEU may be responsible as the ultimate arbiter, as all actors, including the host state, operate within the scope of EU law whenever they participate in a joint operation. In practice, the CJEU, without creating new competencies for itself, would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. Following that decision, the cases can be joined before the CJEU for the purpose of the exact allocation of the share of responsibility of each actor and the corresponding compensation.[19]

Admittedly, that is a complex judicial construction that is difficult to implement. Arguably, the aims of *systemic accountability*, effective judicial protection, and legal certainty would be better served with a legislative change that would explicitly provide for the liability in EU law of all actors responsible to be examined in the same court. Such legislative change giving primary jurisdiction to the CJEU to examine joint liability between the EU and member states would require Treaties amendments. As this is highly unlikely, an interpretation in accordance with the subsidiarity principle is the more plausible solution at the moment.

7.5 Living up to the standards of responsibility and accountability

Thus, in response to the last research question, the present situation does not live up to the standards of responsibility and accountability. In fact, we need to change the way we view these concepts in order to address the unique circumstances of many-hands situations.

The Nexus theory can advance our understanding of the complicated responsibility relations that constitute the *problem of many hands*. It helps us see responsibilities not as linear connections, but as a nexus, as they collectively result in the harmful outcome. Moreover, the dominant and traditional paradigm on accountability, *individualist accountability*, is inadequate for dealing with complex cooperative endeavours, such as the EBCG. It needs to be replaced by the more holistic model of *systemic accountability*.

In terms of their practical implementation, the Nexus theory supports the utilisation of the concept of joint responsibility that is widely invoked in international law and also present in EU law, to address the *problem of many hands* in EBCG operations. It further contributes to the interpretation and the progressive development of the rules of invocation of responsibility, putting forward the rule of joint and several responsibility.

19 Chapter VIII, section 8.

Our traditional understandings of responsibility and accountability have been proven inadequate to address this new animal of operational cooperation in EU border management. Even though 17 years have passed since the establishment of Frontex and the first calls for accountability in such cooperation[20] we have yet to achieve a good understanding of this animal in terms of its accountability, and we will continue to remain in the dark so long as courts are not presented with critical questions regarding the lawfulness of the conduct of the agency and its responsibility for violations. To the extent that we do not have authoritative answers to these questions, accountability and the rule of law in EU migration law remain at stake.

8 The future of joint liability and systemic accountability before the ECtHR

The path to joint liability in the existing legal framework may be obstructed but can still be created and utilised for strategic litigation purposes. Gaps in *systemic accountability* and joint responsibility still remain though, and they can be filled with the accession of the EU to the ECHR, when individuals can bring complaints concerning violations by Frontex before the ECtHR in Strasbourg.

The route before the ECtHR is more straightforward and is already designed around joint responsibility and an intuitive understanding of *systemic accountability*. In fact, the post-accession procedure before the ECtHR provides for the joint responsibility of EU/Frontex and the host state, which takes the form of joint and several responsibility, as the complaint can be addressed to any of the responsible actors. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility. Both the co-respondent mechanism and the practice of the Court to join relevant cases can be used to seek damages from all responsible parties, and ensure that they can be held accountable under the same judicial roof, satisfying, thus, the goals of *systemic accountability*. The general measures ordered by the ECtHR and the pilot judgments procedure are further examples of how the *systemic accountability* model can be implemented in practice. Finally, the ECtHR is more familiar with the international law on joint responsibility, while the Accession Agreement itself holds that the respondent and co-respondent are, as a rule, jointly responsible for the violation. The Strasbourg court seems to be the natural environment for joint responsibility and *systemic accountability* to flourish, which justifies yet another call for the realisation of the accession of the EU to the ECHR.

20 Peers 2003.

9 Recommendations: the way forward

Moving continuously between theory and practice, this thesis develops legal theory based on societal observations in regard to the agency and its responsibility, only to move back to practice seeking to implement the newly reached understandings. As a final note, some of the most important recommendations are highlighted here, aimed at the realisation of responsibility as nexus and the development of *systemic accountability*. These recommendations take into account both its legal and non-legal elements and are addressed to the EU legislator, the judiciary, and the agency itself.

Our main focus on the enforcement of the existing legislative framework through courts, has, in fact, revealed that much of the burden still lies on the shoulders of the legislator. Courts ought to be the ultimate resort in a democratic system, while the legislator should ensure legal certainty and prevention, especially regarding the protection of human rights.

In particular,

- Further efforts are necessary to determine clear obligations and responsibilities of each of these actors a priori, to achieve clarity in this tangled web of responsibilities in EBCG operations.
- Accountability would be better served with a legislative amendment that would empower the CJEU, giving it primary jurisdiction to examine the joint liability of the member states and the EU in general or Frontex in particular.
- The EC should propose amendments to the Regulation that will ensure the follow-up of individual complaints by the European Ombudsman and their review by the CJEU.
- The FRO's role needs to be strengthened in practice with concrete commitments as to the resources and operational capacity of her Office.
- A robust system of external monitoring is necessary next to the internal mechanisms of administrative accountability. This should involve the EP and the EU Ombudsman, who has full powers of investigation, including all internal documents of the agency, but also other actors with relevant experience in human rights monitoring, such as the CPT and National Human Rights Institutions (NHRIs) and Ombudspersons. In this light, following the improvements in its openness and transparency in 2011, Frontex has a central role to play in amending the impression that it attempts to hide its activities behind a veil of secrecy.
- Transparency is the beginning towards seeking answers to any question. The agency can improve its record in honouring the right of access to documents.
- Frontex can further open a window to its assessment of the human-rights related Serious Incidents Reports it receives and the justification of the decision of the Executive Director to continue an operation, which should have otherwise been suspended or terminated due to serious and continuous violations.

Finally, most of the burden of the judicial accountability of the agency is to be shouldered by the CJEU.

- If the CJEU aspires to become the human rights court of the EU, it does not suffice to use the EU Charter detached from the overall human rights framework and adopt a protectionist stance with respect to its own instruments ignoring the experiences of international law. The Court would then risk being swept away by the rapid political and legislative developments, including the expansive role of EU agencies, securitisation and externalisation. The Court needs not only to keep up, but be ahead of the developments, by adopting a dynamic interpretation of EU law, as it has already done in *Artegodan*, and pro-actively cover the existing gaps in order to ensure the protection of the rights enshrined in the Charter.
- In such a dynamic and pluralist interaction with the law, the CJEU may apply arguments taken from international law directly or draw inspiration from them, in cases where the matter has not been otherwise regulated within EU law. This is in line with Article 340 TFEU, which states that the Court should resort to general principles common to the member states to draw inspiration and legitimacy for the rule governing the non-contractual liability of the Union, thus creating a fundamental common law on liability.
- The unchartered territory of Frontex liability can allow the Court to introduce joint liability into its common practice, and develop relevant mechanisms within EU law, but also to study through international law the intricacies of its application and get inspiration regarding its own interpretation of joint liability. This, finally, presents an opportunity for the CJEU not to submit the supremacy and autonomy of EU law by giving priority to international law, but to progressively develop the international regime on responsibility within its own case law.

Only standing upon such strong accountability foundations can the agency safeguard itself against violations and help bring up human rights standards across its operations in EU countries and beyond.

Summary: A run-through of the dissertation

Frontex operates in a field with high stakes for human rights. When these sensitivities materialise into actual violations, the need arises to examine its legal responsibility and accountability, especially in light of the constant development of its powers and competences.

Hence, the main questions that my research has aimed to answer are:

- Can Frontex bear responsibility for human rights violations that take place during its operations and, if so, how can it be held legally accountable?
- Does the present situation live up to the standards of accountability and responsibility, and how can it best do so?

This research introduces international law on responsibility into the EU context to fill the gaps left by EU law, which is not able on its own to provide a definite answer to the questions related to the responsibility of multiple actors. This innovation can, at first sight, be looked upon with suspicion by the Court of Justice of the European Union (CJEU) that has adopted an overall hesitant stance towards international law. However, this interaction of legal orders that I propose creates an environment, where EU law can allow itself to be inspired by international law on responsibility, in a way that does not antagonise its own internal legal order. This cross-fertilisation is vital for the protection of the rule of law and human rights.

Through this interaction between EU and international law, I show that Frontex can incur legal responsibility mainly indirectly for aiding and assisting in a violation, either by action (e.g. technical, financial and other support) or by omission (e.g. failure to suspend or terminate an operation), as the agency is under the positive obligation to prevent a violation committed by the member states, but also directly for conduct of its statutory staff, or conduct of other members of teams over which it has effective control. At the same time host member states or third states, and participating states may also be responsible for a violation either on its own right or in relation to the violation of another actor. None of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a complex picture regarding responsibility that has been conceptualised by the political philosopher, Dennis Thompson, as the 'problem of many hands', which describes the difficulty of pinpointing responsibility in cases such as Frontex joint operations, where multiple actors are involved. This can essentially function as a wall, behind which actors may hide their own contribution and shift the blame to others.

As a solution to the problem of many hands and building upon the conceptualisations of Mark Bovens and H.L.A. Hart, I propose the *Nexus theory*. This theory suggests that the problem can be solved if we look at responsibility not as a linear relationship between the conduct of an actor and the harmful result, but as a nexus, where all different responsibilities meet and interact to produce the harmful result. Therefore, the responsibility, like the outcome, is a collective one.

This theoretical construction of the nexus helps shape our understanding of responsibility in 'many hands' situations. In order to be transferred into the practice of courts, the theory is transposed into the normative framework as joint or shared responsibility. Since no single actor is entirely and independently responsible for the outcome, the actors should be ideally *jointly responsible*.

In terms of answering for human rights violations, I develop the theoretical model of *systemic accountability*. This comes in contrast to our traditional understanding of accountability as individualist accountability, understood as *the approach of answering for human rights violations on the level of the individual applicant with measures that redress the effects of the violation on him/her alone.*

Systemic accountability, instead, suggests that structural solutions need to be developed to address issues that are persistent and systemic and affect a large number of people. Such solutions should include all different forms of accountability (political, administrative, social, and judicial) and address all actors responsible for the violation. *Individualist accountability* is no longer sufficient when the problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner. That manner is *systemic accountability*, which I define as *accountability, aiming at dealing with the systemic issues that underlie and cause or allow for consistent violations via focusing on structural solutions.*

Finally, the dissertation sketches in concrete and applicable normative and procedural terms, what these approaches can mean in terms of potential litigation strategies before the CJEU, international and national courts. It assesses limitations of each strategy and pans out procedural hurdles and possible solutions to them.

Samenvatting (Dutch Summary): Een sneltreintocht door het proefschrift

Frontex opereert op een terrein waar veel op het spel staat voor de mensenrechten. Wanneer deze gevoeligheden uitmonden in daadwerkelijke schendingen, ontstaat de noodzaak om de juridische verantwoordelijkheid en aansprakelijkheid van Frontex te onderzoeken. Dit is met name belangrijk in het licht van de voortdurende ontwikkeling van bevoegdheden en competenties van Frontex.

De belangrijkste vragen die ik met mijn onderzoek heb willen beantwoorden, zijn dan ook

- Kan Frontex verantwoordelijkheid dragen voor mensenrechtenschendingen die tijdens de operaties van het agentschap plaatsvinden en, zo ja, hoe kan Frontex juridisch ter verantwoording worden geroepen?
- Voldoet de huidige situatie aan de normen voor verantwoordingsplicht en verantwoordelijkheid, en hoe kan dat het beste gebeuren?

Dit onderzoek introduceert internationaal aansprakelijkheidsrecht in de EU-context om de leemten op te vullen die zijn gelaten door het EU-recht. Binnen alleen het EU-recht kan geen definitief antwoord gevonden worden over de verantwoordelijkheid van mensenrechtenschendingen door meerdere actoren. Mijn benadering wijkt op eerste gezicht erg af van het algemene uitgangspunt van het Hof van Justitie van de Europese Unie (HvJEU), dat zich over het algemeen terughoudend opstelt tegenover het internationaal recht. De voorgestelde interactie tussen rechtsordes creëert echter een omgeving waarin EU-recht zich kan laten inspireren door het internationale aansprakelijkheidsrecht, zonder dat de eigen interne rechtsorde in het gedrang komt. Deze kruisbestuiving is van essentieel belang voor de bescherming van mensenrechten en de rechtsstaat.

Door deze wisselwerking tussen het EU-recht en het internationaal recht laat ik zien dat Frontex hoofdzakelijk indirect juridisch aansprakelijk kan worden gesteld voor hulp en bijstand bij een schending, hetzij door optreden (bv. technische, financiële en andere steun), hetzij door nalaten (bv. het niet opschorten of beëindigen van een operatie), aangezien het agentschap de positieve verplichting heeft een door de lidstaten gepleegde schending te voorkomen, en ook direct verantwoordelijk is voor gedragingen van zijn statutair personeel of van andere leden van teams waarover het daadwerkelijk controle uitoefent. Tegelijkertijd kunnen gastlidstaten, derde staten en deelnemende staten ook verantwoordelijk zijn voor een schending, hetzij als zodanig, hetzij in samenhang met de schending van een andere actor. Geen van de actoren kan zijn verantwoordelijkheid

ontkennen op grond van de verantwoordelijkheid van een andere actor. Hierdoor ontstaat een complex beeld van de verantwoordelijkheid, dat door de politiek filosoof Dennis Thompson is omschreven als het "probleem van de vele handen". Het probleem van de vele handen geeft aanhoe moeilijk het is de verantwoordelijkheid vast te stellen in gevallen van gemeenschappelijke verantwoordelijkheid. Dit is ook het geval bij de gezamenlijke operaties van Frontex, aangezien daarbij meerdere actoren betrokken zijn. Het feit dat meerdere actoren betrokken zijn bij een schending functioneert als het wezen als een muur, waarachter actoren hun eigen bijdrage kunnen verbergen en de schuld op anderen kunnen schuiven.

Als oplossing voor het probleem van de vele handen en voortbouwend op de conceptualiseringen van Mark Bovens en H.L.A. Hart, stel ik de *Nexus-theorie* voor. Deze theorie suggereert dat het probleem kan worden opgelost als verantwoordelijkheid niet wordt gezien als een lineair verband tussen het gedrag van een actor en het schadelijke resultaat, maar als een nexus, waarin alle verschillende verantwoordelijkheden samenkomen en op elkaar inwerken om het schadelijke resultaat te produceren. De verantwoordelijkheid is dus, net als het resultaat, collectief.

Deze theoretische constructie van de nexus helpt ons de verantwoordelijkheid in 'vele handen'-situaties vorm te geven. Om toepasbaar te zijn in uitspraken van rechterlijke instanties, wordt de theorie in het normatieve kader omgezet als gezamenlijke of gedeelde verantwoordelijkheid. Aangezien geen enkele actor volledig en onafhankelijk verantwoordelijk is voor het resultaat, zouden de actoren *idealiter gezamenlijk verantwoordelijk* moeten zijn.

In termen van verantwoording voor schendingen van mensenrechten, ontwikkel ik het theoretische model van de *systemische verantwoording*. Dit staat in contrast met onze traditionele opvatting van verantwoordingsplicht als een individualistische plicht, opgevat als de benadering van *het verantwoorden van mensenrechtenschendingen op het niveau van de individuele verzoeker met maatregelen die de effecten van de schending op hem/haar alleen herstellen*.

Systemische verantwoordingsplicht, in plaats daarvan, suggereert dat structurele oplossingen moeten worden ontwikkeld om problemen aan te pakken die hardnekkig en systemisch zijn en een groot aantal mensen treffen. Dergelijke oplossingen moeten alle verschillende vormen van verantwoordingsplicht omvatten (politiek, administratief, sociaal en gerechtelijk) en gericht zijn tot alle actoren die verantwoordelijk zijn voor de schending. *Individualistische verantwoordingsplicht* volstaat niet langer wanneer het probleem niet individueel, maar maatschappelijk van aard is, consistent en systemisch is en een groot aantal mensen treft. Systemische problemen moeten op een structurele manier worden aangepakt. Die manier is *systemische verantwoording*, die ik definieer als *verantwoording, gericht op het aanpakken van de systemische kwesties die ten grondslag liggen aan en de oorzaak zijn van of consequente schendingen mogelijk maken, door zich te richten op structurele oplossingen.*

Deze theoretische uitdaging is een stap verder gebracht door het in een concreet en toepasbaar normatief en procedureel kader te plaatsen. Deze dissertatie schetst mogelijke processtrategieën voor het HvJEU, internationale hoven of tribunalen en nationale rechtbanken. Het beoordeelt de beperkingen van elke strategie en schetst procedurele hindernissen en mogelijke oplossingen daarvoor.

Literature

Aas and Gundhus 2015

K. Franko Aas and H. O.I. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', *British Journal of Criminology* 2015, vol. 55(1).

Andreas and Greenhill 2010

P. Andreas and K. M. Greenhill, 'Introduction: The Politics of Numbers', in: P. Andreas and K. M. Greenhill (eds), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca: Cornell University Press 2010.

Angelidis 2017

D. Angelidis, *Message from the ECtHR, against deportations*, EFSYN, 2017, https://www.efsyn.gr/ellada/dikaiomata/108778_minyma-edda-kata-ton-apelaseon.

Arendt 1964

H. Arendt, *Personal Responsibility under Dictatorship*, The Listener, 6, 1964.

Aspects, Murphy and Wills 2017

F. Aspects, R. Murphy and S.Wills, 'United Nations Peacekeeping Operations' in A.Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2017.

Aust 2011

H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2011.

Aust 2013

H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2013.

Baldaccini 2010

A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea',229-257 in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010.

Barents 2009

R. Barents, *Directory of EU Case Law on the Preliminary Ruling Procedure*, The Hague: Kluwer Law International 2009.

Bargiotti 2010

L. Bargiotti, 'FRONTEX: first ever RABIT operation deployed on 2 November', *Blog FREE Group* 14 November 2010, https://free-group.eu/2010/11/14/frontex-first-ever-rabit-operation-deployed-on-2-november-2/.

Barros, Ryngaert and Wouters 2016

A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill- Nijhoff 2016.

Bebr 1997

G. Bebr, 'The Non-Contractual Liability of the European Coal and Steel Community' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.

Beck 2006

G. Beck, 'Kant's Theory of Rights', *Ratio Juris*, 2006, Vol. 19 № 4.

Beetham and Lord 1998
D. Beetham and C. Lord, Legitimacy and the European Union, London: Longman, 1998.

Beijer 2017
M. Beijer, *Limits of Fundamental Rights Protection by the EU, The Scope for the Development of Positive Obligations*, Intersentia, 2017.

Besselink 2007
L. F.M. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen: Europa Law Publishing 2007.

Besselink 2012
L. Besslink, 'General Report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012.

Besselink 2014
L. Besselink, 'The EU as a Member of the ECHR. Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13', *Verfassungsblog*, 2014, https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/.

Betts 2006
A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin', *International Journal of Refugee Law* 2006, vol. 18(3-4).

Bigo 2005
D. Bigo, 'From foreigners to "abnormal aliens": how the faces of the enemy have changed following September the 11th', in: E. Guild and J. van Selm (eds.), *From Foreigners to Abnormal Aliens: How the Faces of the Enemy Have Changed Following September the 11th*, London: Routledge 2005.

Boon 2011
K. E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations', *The Yale Journal of International Law Online*, 2011.

Bovens 1998
M. Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organizations* Cambridge: Cambridge University Press, 1998.

Bovens 2006
M. Bovens, 'Analysing and Assessing Public Accountability – A Conceptual Framework' (2006) C-06-01, *European Governance Papers (EUROGOV),* http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp_connex_C_06_01.pdf.

Bovens 2007
M. Bovens, *New Forms of Accountability and EU-Governance*, Comparative European Politics, 5(1), 2007.

Bovens, Curtin and 't Hart 2010
M. Bovens, D. Curtin, P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?*, Oxford: Oxford University Press, 2010.

Brock 2009
G. Brock, *Global Justice: A Cosmopolitan Account*, Oxford: Oxford University Press, 2009.

Bronkhorst 1997
H. J. Bronkhorst, 'The Valid Legislative Act as Cause of Liability of the Communities' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.

Brouwer 2008
E. Brouwer, *Digital Borders and Real Rights. Effective Remedies for Third-Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers 2008.

Brownlie 1988
I. Brownlie, 'The Rights of Peoples in Modern International Law' in J. Crawford (ed.), *The Rights of Peoples*, Oxford: Clarendon Press 1988.

Buess 2014
M. Buess, *European Union agencies and their management boards: an assessment of accountability and democratic legitimacy*, Journal of European Public Policy-May (2014).

Busuioc 2009
M. Busuioc, 'Accountability, Control and Independence: The Case of European Agencies', *European Law Journal*, 2009.

Busuioc 2010
M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers 2010.

Busuioc 2013
M. Busuioc, *European Agencies Law and Practices of Accountability*, Oxford University Press, 2013.

Callewaert 2018
J. Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences', *Common Market Law Review*, 55, 6, 2018.

Campbell 2016a
Z. Campbell, 'Shoot First. Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept* 22 August 2016, https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/.

Campbell 2016b
Z. Campbell, 'Over the Line. Bulgaria Welcomes Refugees With Attack Dogs and Beatings', *The Intercept* 3 November 2016, https://theintercept.com/2016/11/03/bulgaria-welcomes-refugees-with-attack-dogs-and-beatings/.

Canivez 2010
P. Canivez, 'Review Essay: Under Consideration', in F. Cerutti and S. Lucarelli (eds.), 'The Search for a European Identity: Values, Policies and Legitimacy of the European Union', *Philosophy and Social Criticism*, 36 (7).

Carrera 2008
S. Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands*, CEPS, 2008.

Carrera and Guild 2010
S. Carrera and E. Guild, *'Joint Operation RABIT 2010' – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System* (CEPS Paper), Brussels: Centre for European Policy Studies November 2010, https://www.researchgate.net/publication/48665031_'Joint_Operation_RABIT_2010'_-_FRONTEX_Assistance_to_Greece's_Border_with_Turkey_Revealing_the_Deficiencies_of_Europe's_Dublin_Asylum_System_CEPS_Liberty_and_Security_in_Europe_November_2010/link/5950b5ce45851543383c3a0e/download.

Carrera and Stefan 2018
S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Brussels: Centre for European Policy Studies (CEPS) 2018.
Carrera, De Somer and Petkova 2012
S. Carrera, M. De Somer and B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Paper in Liberty and Security in Europe No. 49, 2012.
Carrera, den Hertog and Parkin 2013
S. Carrera, L. den Hertog and J. Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control', *European Journal of Migration and Law*, 15, 4, 2013.
Casteleiro 2016
A. D. Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge: Cambridge University Press, 2016.
Chalmers, Davies and Monti 2010
D. Chalmers, G. Davies and M. Giorgio, *European Union Law, Cases and Materials*, Cambridge: Cambridge University Press 2010.
Chetail 2014
V. Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R. Rubio-Marín (ed), *Human rights and immigration*, Oxford: Oxford University Press 2014.
Claes and Gerards 2012
M. Claes and J. Gerards, 'Netherlands report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012.
Craig 2003
P. Craig, 'Standing, Rights, and the Structure of Legal Argument', *European Public Law*, 9, 4, 2003.
Craig 2012
P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2012.
Crawford 2002
J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press 2002.
Crawford 2013
J. Crawford, *State Responsibility: The General Part*, Oxford: Oxford University Press 2013.
Cremona 2006
M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Law Working Paper 2006/22, 19, 2006.
Cremona 2008
M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A. Dashwood and M. Marescaeau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008.

Christides, Freudenthal, Luedke and Popp 2020
G. Christides, E. Freudenthal, S. Luedke and M. Popp 2020, *EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign,* in Spiegel, 2020, https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Finternational%2Feurope%2Feu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7.

Curtin 1998
D. Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine' in A. Barav et al. (eds.), *Scritti in onore di Giuseppe Federico Mancini, Volume II*, 1998.

D'Argent 2014
P. D'argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law)*, Cambridge: Cambridge University Press 2014.

D'Aspregmont 2014
J. D'Aspregmont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.

Da Cruz Vilaça 2014
J. L. da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU law*, Oxford and Portland: Hart Publishing 2014.

Dannenbaum 2010
T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member States Troop Contingents as United Nations Peacekeepers', *Harvard International Law Review*, 51, 2010.

Dannenbaum 2016
T. Dannenbaum, 'Dual Attribution in the Context of Military Operations, in A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill- Nijhoff 2016.

De Boer 2013
N. J. de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy', *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013.

De Burca 2013
G. De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law* 2013.

De Schutter 2006
O. De Schutter, 'Public Interest Litigation before the European Court of Justice', *Maastricht Journal of European and Comparative Law*, 13, 1, 2006.

De Schutter 2014
O. De Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Patries to the Convention' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.

De Witte 2011a
B. De Witte, 'The EU and the International Legal Order: The Case of Human Rights' in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Oxford: Hart Publishing 2011.

De Witte 2011b
B. de Witte, 'Using International Law for the European Union's Domestic Affairs' in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011.

De Witte 2014
B. de Witte, 'Beyond the Accession Agreement: Five Items for the European Union's Human Rights Agenda', in: Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.

Deloitte 2016
Deloitte, *How do EU agencies and other bodies contribute to the Europe 2020 Strategy and to the Juncker Commission Agenda?*, London, November 2016, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/TEMP/Deloitte%20Study_EU%20agencies%20contribution.pdf?_cldee=bWFyaWFuYWdrbEB5YWhvby5ncg%3d%3dandrecipientid=contact-253f7aa82caae111b7e500155d043f10-df2137815e99433886cc66cd9beadfb3andesid=5cff7273-90-bb-e611-80ce-00155d040a3bandurlid=2.

Dembour 2006
M. B. Dembour, *Who Believes in Human Rights*? Reflections on the European Convention, Cambridge University Press, New York 2006.

Den Heijer 2012
M. Den Heijer, Europe and Extraterritorial Asylum, Hart Publishing: 2012.

Den Hertog 2014
L. den Hertog, *The rule of law in the external dimension of EU migration and asylum policy. Organizational dynamics between legitimation and constraint*, Oisterwijk: Wolf Legal Publishers 2014.

Đorđeska 2015
M. Đorđeska, 'The Process of International Law—Making: The Relationship between the International Court of Justice and the International Law Commission', *International and Comparative Law Review,* 15, 1, 2015.

Dougan 2008
M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', *Common Market Law Review*, 45, 3, 2008.

Douglas-Scott 2014
S. Douglass-Scott, 'The EU as a Member of the ECHR Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice', *Verfassungsblog*, 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

Douzinas 2000
C. Douzinas, *The End of Human Rights,* Oxford: Hart Publishing, 2000.

Dubnick 2002
M. Dubnick, *Seeking Salvation for Accountability*, Paper presented at the Annual Meeting of the American Political Science Association, 2002.

Dumery 2013
D. Dumery, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, meeting of the Subcommittee on Human Rights of the European Parliament, PACE, 16 May 2013.
Dworkin 1978
R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1978.
Dyzenhaus 1998
D. Dyzenhaus, *Reuniting the Brain: The Democratic Basis of Judicial Review,* 9 Public Law Review, 1998.
Eckes 2010
C. Eckes, 'International Law as Law of the EU: The Role of the Court Of Justice', *CLEER Working Paper Series 2010/6*, 2010.
Ekelund 2013
H. Ekelund, 'The Establishment of FRONTEX: A New Institutionalist Approach', *Journal of European Integration* 2013, vol. 36(2).
Enchelmaier 2005
S. Enchelmaier, 'No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Article 230(4) EC', *Yearbook of European Law*, 24, 1, 2005.
Fernandez 2016
M. Fernandez 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts', in V. Moreno-Lax and E. Papastavridis (eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach,* Nijmegen: Brill 2016.
Fernández-Rojo 2017
D. Fernández-Rojo, 'The European Border and Coast Guard: Towards the centralization of the external border management?', *Blogactiv* 7 February 2017, http://eutarn.blogactiv.eu/2017/02/07/the-european-border-and-coast-guard-towards-the-centralization-of- the-external-border-management.
Fernández-Rojo 2018
D. F. Rojo, Evolution of the Operational Tasks of Frontex, EASO and Europol towards an Integrated Border Management. Migration And Asylum Administration in the European Union?, PhD thesis, 2018.
Fernández-Rojo 2021
D. Fernández-Rojo, EU Migration Agencies The Operation and Cooperation of FRONTEX, EASO and EUROPOL, Edward Elgar Publishing: 2021.
Fines 1997
F. Fines, 'A General Analytical Perspective on Community Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 11-40.
Fink 2012
M. Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"', *Merkourios*, 28, 2012.
Fink 2017
M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Leiden: Leiden University, EM Meijers Instituut, 2017.
Fisher 2004
E. Fisher, *The EU in the Age of Accountability*, 24 Oxford Journal of Legal Studies, 2004.

Fischer-Lescano and Tohidipur 2007
A. Fischer-Lescano and T. Tohidipur, *Europaisches Grenzkontrollregime. Rechtsrahmen der europaischen Grenzschutzagentur FRONTEX,* 2007, vol. 67(4), https://www.zaoerv.de/67_2007/67_2007_4_b_1219_1276.pdf.

Flogaitis and Pottakis 2004
S. Flogaitis and A. Pottakis, 'Judicial Protection Under the Constitution', *European Constitutional Law Review,* 1, 1, 2004.

Fotiadis 2016
A. Fotiadis, 'E.U. Border Agency Still Unaccountable on Refugees' Rights', *The New Humanitarian* 18 November 2016, https://deeply.thenewhumanitarian.org/refugees/community/2016/11/18/e-u-border-agency-still-unaccountable-on-refugees-rights.

Frenzen 2011
N. Frenzen, Frontex Operation Hermes to Begin on Sunday, 20 Feb.-Push-Back Practice Prohibited, Migrants at Sea, 19 February 2011, https://migrantsatsea.org/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-%E2%80%93push-back-practice-prohibited/.

Fry 2005
J. D. Fry, 'European Asylum Law: Race-to-the-Bottom Harmonization?', *Journal of Transnational Law and Policy* 2005, vol. 15(1).

Giannetto 2018
L. Giannetto, More than consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies. The case of Frontex and its Consultative Forum. PhD thesis, University of Trento, 2018.

Giannetto 2019a
L. Giannetto, *CSOs and EU Border Management: Cooperation or Resistance? The Case of Frontex Consultative Forum*, American Behavioral Scientist 64(4) 2019.

Giannetto 2019b
L. Giannetto, Advocacy Groups targeting the heart of EU Agencies. Frontex in the Focus, in D. Dialer, M. Richter (eds.), Lobbying in the European Union. Strategies, Dynamics and Trends, Springer, 2019.

Gaja 1983
G. Gaja, 'The European Community's rights and obligations under mixed agreements', in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983.

Gaja 2014
G. Gaja, "'The Co-respondent Mechanism" According to the Draft Agreement for the Accession of the EU to the ECHR' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.

Gallagher and David 2016
A. T. Gallagher and F. David, 'The International Law of Migrant Smuggling', *The American Journal of International Law*, 110, 4, 2016.

Gammeltoft-Hansen 2016
T. Gammeltoft-Hansen, 'The Ugly Duckling: Denmark's Anti-Refugee Policies and Europe's Race to the Bottom', *Huffpost*, 2016, https://www.huffpost.com/entry/denmark-refugee-europe_b_9574538?guccounter=1.

Ghezelbash, Moreno-Lax, Klein, and Opeskin 2018
Ghezelbash, D., Moreno-Lax, V., Klein, N., & Opeskin, B. (2018). Securitisation of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia. International and Comparative Law Quarterly, 67(2).

Gianelli 2011
A. Gianelli, 'The Silence of the Treaties with Regard to General International Law', in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011.

Gkliati 2011
M. Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece', *Inter-American and European Human Rights Journal* 2011, vol. 4(1).

Gkliati 2017
M. Gkliati, 'The Application of the EU-Turkey Deal: A Critical Analysis of the Decisions of the Greek Appeals Committees', *European Journal of Legal Studies* 2017, vol. 10(1).

Gkliati 2018
M. Gkliati, 'The next phase of the European Border and Coast Guard: towards operational effectiveness', *Blog EU Law Analysis*, 2018, http://eulawanalysis.blogspot.com/2018/10/the-next-phase-of-european-border-and.html.

Gkliati 2019
M. Gkliati, 'The new European Border and Coast Guard: Do increased powers come with enhanced accountability?', *EU Law Analysis*, 2019, http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html.

Gkliati 2020
M. Gkliati, *The next phase of the European Border and Coast Guard: towards operational effectiveness and greater autonomy in returns and externalization*, conference paper presented at "Jean Monnet NOVA EU workshop: Migration and EU Borders", 30-31 March 2020 in Maastricht.

Gkliati 2021a
M. Gkliati, 'Frontex Return Operations and their Human Rights Implications', in I. Soysuren, M. Nedelcu (eds), *Deportation of foreigners in the European context: towards an interdisciplinary, multiscale and multilevel approach*, 2021 (forthcoming).

Gkliati 2021b
M. Gkliati, *The next phase of the European Border and Coast Guard: Responsibility for returns and push-backs in Hungary and Greece*, in A. Ott, L. Tsourdi and Z. Vankova (eds), 'Migration and EU Borders: Foundations, Policy Change, and Administrative Governance', European Papers, 2021 (forthcoming).

Gkliati and Rosenfeldt 2018
M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms*, Refugee Law Initiative (RLI) Working Paper, London: School of Advanced Study, University of London 2018.

Glas and Krommendijk 2017
L. R. Glas and J. Krommendijk, 'From Opinion 2/13 to Avoti□š: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', *Human Rights Law Review,* 17, 3, 2017.

Goodwin-Gill 2000
G. S. Goodwin-Gill, 'The international protection of refugees: What future?', *International Journal for Refugee Law*, 12, 1, 2000.

Goodwin-Gill 2011
G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', *International Journal of Refugee Law*, 23, 2011.

Goodwin-Gill 2015
G. S. Goodwin-Gill (Intervention at conference: Regulating 'Irregular' Migration: International Obligations and International Responsibility, Athens), 2015.

Graefrath 1996
B. Graefrath, 'Complicity in the Law of International State Responsibility', *Revue Belge de Droit International,* 29, 370, 1996.
Groenleer 2009
M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers 2009.
Guild 2014
E. Guild, presentation at seminar 'Migration by sea in the Mediterranean', Nijmegen, 16 May 2014.
Guild, Carrera and Eggenschwiler 2009
E. Guild, S. Carrera and A. Eggenschwiler, *Informing the Borders Debate* (CEPS Background Briefing), Brussels: Centre for European Policy Studies 2009, https://www.ceps.eu/wp-content/uploads/2009/08/1843.pdf.
Gutman 2011
K. Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', *Common Market Law Review,* 48, 3, 2011.
Harding 1981
C. Harding, 'The Impact of Article 177 of the EEC Treaty on the Review of Community Action', *Yearbook of European Law*, 1, 1, 1981.
Harlow 1992
C. Harlow, 'Towards a Theory of Access for the European Court of Justice', *Yearbook of European Law*, 12, 1, 1992.
Harlow 2002
C. Harlow, *Accountability in the European Union (Collected Courses of the Academy of European Law*, New York: Oxford University Press 2002.
Hart 1968
H.L.A. Hart, *Postscript: Responsibility and Retribution, in 'Punishment and Responsibility, Essays in the Philosophy of Law'*, Oxford: Oxford University Press 1968.
Hathaway 1992
J. Hathaway, 'The Emerging Politics of Non-Entrée', 91 *Refugees* 40, 1992.
Haydon 1978
G. Haydon, 'On Being Responsible', *The Philosophical Quarterly* 1978, 28.
Hayes and Vermeulen 2012
Hayes Ben and Vermeulen Mathias , Heinrich Böll Foundation, *'Borderline, The EU's New Border Surveillance Initiatives, Assessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposals',* June 2012.
Heller and Jones 2014
C. Heller and C. Jones, 'Eurosur: saving lives or reinforcing deadly borders?', *Statewatch Journal* 2014, vol. 23.
Hernandez 2014
G. I. Hernandez, 'Beyond the Control Paradigm? International Responsibility and the European Union', *Cambridge Yearbook of European Legal Studies*, 15, 2014.
Hernández-Carretero 2009
M. Hernández-Carretero, *Reconciling Border Control with the Human Aspects of Unauthorized Migration* (PRIO Policy Brief Paper), Oslo: International Peace Research Institute, Oslo 2009, https://www.prio.org/utility/DownloadFile.ashx?id=198andtype=publicationfile.

Herszenhorn and Eder 7 June 2018
D. M. Herszenhorn and F. Eder, 'Brussels readies new border enforcement plan', *Politico* 7 June 2018, https://www.politico.eu/article/jean-claude-juncker-sebastian-kurz-brussels-readies-new-border-enforcement-plan-migration/.

Heukels and McDonnell 1997
T. Heukels and A. McDonnell, 'Limitation of the Action for Damages Against the Community: Considerations and new Developments' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.

Hill 1993
C. Hill, 'The Capability – Expectations Gap, or Conceptualizing Europe's International Role', *Journal of Common Market Studies* 1993, Volume 31, Issue 3.

Hoffmeister 2010
F. Hoffmeister, 'Litigating against the European Union and its member states: Who responds under the ILC's Draft Articles on International Responsibility of International Organizations', *The European Journal of International Law,* 21, 2010.

Horii 2016
S. Horii, *The effect of Frontex's risk analysis on the European border controls*, European Politics and Society, 17(2), 2016.

Horii 2018
S. Horii, *Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis*, Refugee Survey Quarterly, 2018.

Ioannides and Tondini 2010
I. Ioannides and M. Tondini, *Ethical Security in Europe? Empirical Findings on Value Shifts and Dilemmas across European Internal External Security Policies* (Policy Recommendation Report INEX Work Package 3), Oslo: International Peace Research Institute 30 September 2010.

Izuzquiza and Semsrott 2018
L. Izuzquiza, A. Semsrott, Frontex transparency: state of play Izuzquiza and Semsrott v Frontex, November 2018, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj6urKtj6jjAhWKqaQKHQzxA7QQFjAAegQIAhAC&url=https%3A%2F%2Fec.europa.eu%2Finfo%2Flaw%2Fbetter-regulation%2Ffeedback%2F15674%2Fattachment%2F090166e5bf82536a_es&usg=AOvVaw3D5JWPOCCesKddqKjRFPYQ.

Jackson 2015
M. Jackson, *Complicity in International Law*, Oxford: Oxford University Press 2015.

Jeandesboz 2008
J. Jeandesboz, *An analysis of the Commission Communications on future development of Frontex and the creation of a European Surveillance System*, Brussels: Briefing Paper Future development of Frontex and the creation of Eurosur, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2008.

Jensen 2016
N. Jensen, 'EU to use aid and trade to stop Africa migration, *EUObserver* 28 June 2016, https://euobserver.com/migration/134067.

Jones 1999
C. Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 1999.

Jones 2012
C. Jones, 'Statewatch analysis: The EU's accession to the European Convention on Human Rights: a cause for celebration or concern?', *Statewatch journal*, 21, 4, 2012, http://www.statewatch.org/analyses/no-187-echr.pdf.

Jones, Kilpatrick and Gkliati 2020
C. Jones, J. Kilpatrick, M. Gkliati, *Deportation Union Frontex and Return Operations*, 2020.
Jorry 2007
H. Jorry, *Construction of a European Institutional model for managing operational cooperation at the EU's external borders: Is the FRONTEX agency a decisive step forward?* (CEPS Research Paper No. 6), Brussels: Centre for European Policy Studies March 2007.
Justice and Home Affairs Council 2006
Conclusions of the Justice and Home Affairs Council meeting of 4-5 December 2006, preceded by the draft Council Conclusions in Integrated Border Management, document 1422/06, 19 October 2006.
Karamanidou and Kasparek 2020
L. Karamanidou and B. Kasparek, *Consequences and Responses Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency*, in Working Papers Global Migration, 2020.
Keller 2011
S. Keller, Green spokesperson on migration and home affairs, Green-EFA (European Parliament), *2011 FRONTEX/EU border control, Half-hearted improvements on human rights protection fall short*, 13 September 2011, http://www.statewatch.org/news/2011/sep/ep-greens-frontexeu-border-control-prel.pdf.
Keller 2014
S. Keller, 'New rules on Frontex operations at sea', *The Libe Flash* April 2014, https://www.statewatch.org/media/documents/news/2014/apr/ep-green-keler-mep-frontex-operations-at-sea.pdf.
Kelsen 1934
H. Kelsen, *Pure Theory of Law*, Reine Rechtslehre 1934.
Kessler 2013
S. Kessler, Co-Chair of FRONTEX Consultative Forum, at the meeting of the Subcommittee on Human Rights of the European Parliament, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, 16 May 2013.
Koppell 2005
J. Koppell, *Pathologies of Accountability: ICANN and the Challenge of ''Multiple Accountabilities Disorder''*, Public Administrative Review, 65/1: 94-107, 2005.
Kingsley 2016
P. Kingsley, 'Syrian refugees: we were tricked into returning to Turkey', *The Guardian* 1 November 2016, https://www.theguardian.com/world/2016/nov/01/syrian-refugees-tricked-into-returning-to-turkey-greece-eu.
Kiss and Černý 2008
C. Kiss and P. Černý, *The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases*, Czech Republic: Justice and Environment 2008.
Klabbers 2001
J. Klabbers, 'The Changing Image of International Organizations' in J. M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations*, Tokyo: United Nations University Press 2001.
Klabbers 2009
J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press 2009.

Klabbers 2015
J. Klabbers, 'The Transformation of International Organizations Law', *European Journal of International Law*, 26(1), 2015.
Klein 1998
P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels: Bruylant 1998.
Klepp 2010
S. Klepp, 'Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?', *Blog Middle East Institute* 1 August 2010, https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy#edn35.
Kneebone, McDowell and Morrell 2006
S. Kneebone, C. McDowell and G. Morrell, 'A Mediterranean Solution? Chances of Success', *International Journal of Refugee Law*, Volume 18, Issues 3-4, 2006.
Koskenniemi 2004
Koskenniemi, *Study on the Function and Scope of the lex specialis rule and the question of 'self-contained regimes'*, 2004, (ILC(LVI)/SG/FIL/CRD.1 and Add 1).
Kosta, Skoutaris and Tzevelekos 2014
V. Kosta, N. Skoutaris and V.P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford: Hart Publishing 2014.
Koutrakos 2015
P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing 2015.
Kuijper and Paasivirta 2004
P. J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', *International Organizations Law Review,* 1, 1/111, 2004.
Kuijper and Paasivirta 2013
P. J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives,* Oxford and Portland: Hart Publishing 2013.
Kymlicka 2002
W. Kymlicka, *Contemporary Political Philosophy, An Introduction*, Second Edition, Oxford: Oxford University Press, 2002.
Laitinen 2006
I. Laitinen, *Introductory talk to the Joint Parliamentary Meeting initiated by the European Parliament and the Parliament of Finland: 'From Tampere to the Hague'*, Brussels: European Parliament 2006.
Lambert 1999
H. Lambert, 'Protection against refoulement from Europe: human rights law comes to the rescue', *International and Comparative Law Quarterly*, 1999.
Landenburger 2012
C. Landenburger, 'European Union Institutional FIDE Report' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012.
Landman 2006
T. Landman, *Studying Human Rights*, London: Routledge 2006.
Langford 2008
M. Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press 2008.

Larsen 2008
K. M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *The European Journal of International Law*, 19, 2008.
Last and Spijkerboer 2014
T. Last and T. Spijkerboer, 'Tracking Deaths in the Mediterranean', in: T. Brian and F. Laczko (eds.), *Fatal Journeys. Tracking Lives Lost during Migration*, Geneva: International Organization for Migration 2014.
Lavranos 2010
N. Lavranos, 'Protecting European Law from International Law', *European Foreign Affairs Review*, 2010.
Leck 2009
C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', *Melbourne Journal of International Law,* 10, 2009.
Léonard 2009
S. Léonard, 'The creation of Frontex and the politics of institutionalization in the EU external borders policy', *Journal of Contemporary European Research*, 2009.
Léonard 2010
S. Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices', *European Security* 2010.
Lock 2012
T. Lock, 'Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg' in D. Ashiagbor, N. Countouris and I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge: Cambridge University Press 2012.
Mackenzie-Gray Scott 2018
R. Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity', *EJIL: Talk!* 2018, https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/.
Majcher 2015
I. Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?', *Silesian Journal of Legal Studies*, 7, 1, 2015.
Majone 1994
G. Majone, *The rise of the Regulatory State in Europe*, 17 W. European Politics 77, 1994.
Majone 1997
G. Majone, *Causes and Consequences of Changes in the Mode of Governance,* 17 Journal of Public Policy, 1997.
Manuel and Martín 2004
J. Manuel and C. Martín, 'Ubi ius, Ibi Remedium? — Locus Standi of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads', *Maastricht Journal of European and Comparative Law*, 11, 3, 2004.
Marin 2011
L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', *Journal for Contemporary European Research 2011*, vol. 7(4).
Martin 2014
A.C. Martin, *Gil Arias-Fernández: 'the immigration problem in Calais is not so bad'*, 24 November 2014, https://www.euractiv.com/section/justice-home-affairs/interview/gil-arias-fernandez-the-immigration-problem-in-calais-is-not-so-bad/.

McCrudden 2006
C. McCrudden, 'Legal Research and the Social Sciences', *Law Quarterly Review,* 2006.
Mclachlan 2005
C. Mclachlan, 'The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention', *The International and Comparative Law Quarterly*, 54, 2, 2005.
McNair 1961
L. McNair, *The Law of Treaties*, Oxford: Oxford University Press 1961.
Mead 1997
P. Mead, 'The Relationship between an Action for Damages and an Action for Annulment: The Return of Plaumann' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.
Meij 1997
A. W. H. Meij, 'Article 215(2) EC and Local Remedies' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.
Meinich 2012
T. Meinich, 'EU accession to the European Convention on Human Rights – challenges in the negotiations', *The International Journal of Human Rights,* 2012, https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1596893.
Messineo 2014
F. Messineo, 'Attribution of Conduct' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law),* Cambridge: Cambridge University Press 2014.
Micklitz and Reich 1996
H. W. Micklitz and N. Reich, *Public Interest Litigation before European Courts*, Baden-Baden: Nomos 1996.
Milanović and Papić 2009
M. Milanović, and T. Papić, 'As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law', *International and Comparative Law Quarterly*, 58, 2, 2009.
Mitsilegas 2007
V. Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance', in E. Guild, H. Toner and A. Baldaccini (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart, Oxford and Portland, 2007.
Mitsilegas 2010
V. Mitsilegas, *Extraterritorial Immigration Control in the 21st Centrury: the Individual and the State Transformed*, Leiden, Netherlands: Brill, 2010.
Moelle 2017
M. P. Moelle, *The International Responsibility of International Organizations: Cooperation in Peacekeeping Operations*, Cambridge: Cambridge University Press 2017.
Monar 2006
J. Monar, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. Caparini and O. Marenin (eds), *Borders and Security Governance, Managing Borders in a Globalised World*, LIT Verlag Münster, 2006, Chapter 10.

Montesquieu 2006
C. Montesquieu, The Spirit of Laws (Το Πνεύμα των Νόμων), P. Kondylis and K. Papagiorgis (translation), Gnosi editions, Athens, 2006.
Moreno-Lax and Giuffrè 2017
V. Moreno-Lax and M. Giuffré, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', *Research Handbook on International Refugee Law*, 2017.
Moreno-Lax 2008
V. Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', *European Journal of Migration and Law* 2008, vol. 10(3).
Moreno-Lax 2012
V. Moreno-Lax, *Frontex as a Global Actor: External Relations with Third Countries and International Organizations*, in M. Dony (ed.), The External Dimension of the Area of Freedom, Security and Justice, Universite Libre de Bruxelles Press, 2012.
Moreno-Lax 2017
V. Moreno-Lax, *Accessing Asylum in Europe, Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press 2017.
Mulgan 2003
R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies*, London: Palgrave Macmillan 2003.
Mungianu 2016
R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press 2016.
Nahapetian 2002
K. Nahapetian, 'Confronting State Complicity in International Law', *UCLA Journal of International Law,* 7, 99, 2002.
Nau and Tillack 2019
N. Nau, A. Tillack, *Frontex – Eine EU-Agentur und der Umgang mit den Menschenrechten*, Das Erste, 06 August 2019, https://www.br.de/fernsehen/das-erste/sendungen/report-muenchen/videos-und-manuskripte/frontex-eu-menschenrechtsverletzungen-102.html.
Neal 2008
A. W. Neal, 'Securitization and risk at the EU border: the origins of FRONTEX', *Journal of Common Market Studies* 2008, vol. 47(2).
Neyroud and Beckley 2001
P. Neyroud and A. Beckley, *Policing, Ethics and Human Rights*, New York: Routledge 2001.
Nielsen and Fotiadis 2019
N. Nielsen and A. Fotiadis, ''Inhuman' Frontex forced returns going unreported', *EUobserver,* 2019,
https://euobserver.com/migration/146090.
Nollkaemper 2014
A. Nollkaemper, 'Introduction' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2014.

Nollkaemper and Jacobs 2012
A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', SHARES Research Paper 03 (2011 – revised in 2012), ACIL 2011-07, http://www.sharesproject.nl/wp-content/uploads/2012/05/SHARES-RP-03-final.pdf.

Nollkaemper and Jacobs 2013
A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law, 34, 2, 2013*.

Nollkaemper e.a. 2014
A. Nollkaemper et al., 'Conclusions: Beyond the ILC Legacy' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge: Cambridge University Press 2014.

Nowak 2011
M. Nowak, Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (OCHCR Report), Geneva: Office of the United Nations High Commissioner for Human Rights.

Noyes and Smith 1988
J. E. Noyes and B. D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', *The Yale Journal of International Law,* 13, 1988.

Nyers 2011
P. Nyers, 'Forms of irregular citizenship', in Vicki Squire (ed.), *The Contested Politics of Mobility. Borderzones and Irregularity*, London: Routledge 2011.

Oliver 1991
D. Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes, Open University Press, 1991.

Oliver 1997
P. Oliver, 'Joint liability of the Community and the Member States' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.

Oosterom-Staples 2009
H. Oosterom-Staples, ''Effective Rights for Third-Country Nationals', in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishing 2009.

Orakhelashvili 2010
A. Orakhelashvili, 'Division of Reparation Between Responsible Entities', in J. Crawford, A. Pellit and S. Olleson (eds.), *The Law of International Responsibility,* Oxford and New York: Oxford University Press 2010.

Pace 2007
M. Pace, 'Norm shifting from EMP to ENP: the EU as a norm entrepreneur in the south?', *Cambridge Review of International Affairs* 2007, vol. 20(4).

Papastavridis 2010
E. Papastavridis, ''Fortress Europe' and FRONTEX: Within or Without International Law?', *Nordic Journal of International Law* 2010, vol. 79(1).

Papastavridis 2015
E. Papastavridis, 'The EU and the Obligation of Non-Refoulement at Sea' in F. Ippolito and S. Trevisanut (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation,* Cambridge: Cambridge University Press 2015.

Peers 2003
S. Peers, *Development of a European Border Guard Statewatch submission*, 2003, http://www.statewatch.org/docbin/evidence/eurbordergdmay03.html.

Peers 2011
S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2011.
Peers 2014a
S. Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', *Blog EU Law Analysis*, 2014, http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html.
Peers 2014b
S. Peers, 'New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?', *Statewatch Analysis* February 2014, https://www.statewatch.org/media/documents/analyses/no-237-maritime-surveillance.pdf.
Peers 2015
S. Peers, 'The Reform of Frontex: Saving Schengen at Refugees' Expense?', *Blog EU Law Analysis* 16 December 2015, http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html.
Peers 2016b
S. Peers, 'The EU Border Guard takes shape', *Statewatch Analysis* 13 March 2016, https://www.statewatch.org/media/documents/analyses/no-285-eu-border-guard.pdf.
Peers and Costa 2012
S. Peers and M. Costa, 'Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission and Judgment of 25 October 2011, Case T-262/10 Microban v. Commission', *European Constitutional Law Review*, 8, 1, 2012.
Peers and Costa 2016
S. Peers and M. Costa, 'Reassessing the accountability of EU decentralized agencies: Mind the Independence Gap', *European Public Law*, 2016.
Peers and Roman 2016
S. Peers and E. Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?', *Blog EU Law Analysis* 5 February 2016, https://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html.
Perkmann 2003
M. Perkmann, 'Cross-border Regions in Europe: Significance and Drivers of Regional Cross-Border Co-Operation', *European Urban and Regional Studies* 2013, vol. 10(2).
Perkowski 2012
N. Perkowski, *A normative assessment of the aims and practices of the European border management agency Frontex* (Working Paper Series No. 81), Oxford: Refugee Studies Centre, 2012.
Pernice 1999
I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?', *Common Market Law Review*, 1999.
Perre, De Vries, Richards, and Gkliati, 2018
Perre N., De Vries M., Richards H., and Gkliati M., Refugee Crisis: three perspectives on the makings of a crisis. *RLI Blog on Refugee Law and Forced Migration: Refugee Law Initiative*, 16 April 2018, https://rli.blogs.sas.ac.uk/2018/04/16/refugee-crisis-three-perspectives-on-the-makings-of-a-crisis/.

Pirjola 2015
J. Pirjola, 'Flights of Shame or Dignified Return? Return Flights and Post-return Monitoring', *European Journal of Migration and Law* 2015.
Pisa 2011
N. Pisa, 'German mum grabs nine-year-old daughter and flees husband with immigrants to Italy', *Daily Mail Online* 8 March 2011, https://www.dailymail.co.uk/news/article-1364173/German-mum-grabs-year-old-daughter-flees-husband-immigrants-Italy.html.
Polakiewicz 2016
J. Polakiewicz, *Europe's multi-layered human rights protection system: challenges, opportunities and risks* (Lecture, Waseda University Tokyo), 2016, http://eulawanalysis.blogspot.com/2016/03/europes-multi-layered-human-rights.html.
Pollak and Slominski 2009
J. Pollak and P. Slominski, 'Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders', *West European Politics* 2009, vol. 32(5).
Quigley 1986
J. Quigley,' Complicity in International Law: A New Direction in the Law of International Responsibility', *British Yearbook of International Law*, 57, 1986.
Rasmussen 1980
H. Rasmussen, 'Why is Art 173 Interpreted Against Plaintiffs?', *European Law Review,* 5, 1980.
Ratcovich 2015
M. Ratcovich, *The Notion of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?* (Paper for the conference 'Regulating "Irregular" Migration: International Obligations and International Responsibility', National and Kapodistrian University of Athens), 2015.
Rawls 1993
J. Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993.
Reinisch 2010
A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', *International Organizations Law Review*, 7, 63, 2010.
Reinisch and Weber 2004
A. Reinisch and U. A. Weber, 'In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', *International Organizations Law Review,* 1, 1, 2004.
Rijpma 2010
J. Rijpma, 'Frontex: Successful Blame Shifting of the Member States?', *ARI Real Instituto Elcano*, ARI 69/2010, 13 April 2010, https://www.files.ethz.ch/isn/117232/ARI69-2010_Rijpma_Frontex_Memeber_State_European_Union.pdf.
Rijpma 2016
J. Rijpma, *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?*, Brussels: Study for the LIBE Committee, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2016.

Rijpma and Cremona 2007
J. Rijpma and M. Cremona, *EUI Working Papers. The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, Fiesole: European University Institute 2007.
Rose 1999
N. Rose, Powers of Freedom. Reframing Political Thought, Cambridge: Cambridge University Press 1999.
Rosenfeldt 2017
H. Rosenfeldt, *The European Border and Coast Guard Rising: Recent Developments in the Light of EU Accountability Standards and Mechanisms*, SSRN, 2017.
Sandberg 2010
S. Sandberg, 'What can "Lies" Tell Us about Life? Notes towards a Framework of Narrative Criminology', *Journal of Criminal Justice Education* 2010, vol. 21(4).
Schmidt 2013
V.A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, Political Studies, 61, 2013.
Sari 2008
A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', *Human Rights Law Review*, 8, 2008.
Sari 2012
A. Sari, 'UN Peacekeeping Operations and Art. 7 ARIO: The Missing Link', *International Organizations Law Review*, 9, 77, 2012.
Sarvarian 2014
A. Savarian, 'The EU Accession to the ECHR and the Law of International Responsibility' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.
Schedler 1997
A. Schedler, 'Conceptualizing Accountability', in A. Schedler, *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder: Lynne Rienner Publishers 1997.
Schermers and Blokker 2011
H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within Diversity*, Leiden: Brill Academic Publishers 2011.
Schermers and Swaak 1997
H. G. Schermers and C. R. A. Swaak, 'Official Acts of Community Servants and Article 215(4) EC' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.
Schillemans 2011
T. Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies', *Administration and Society* 2011, 43(4).
Schusterschitz 2004
G. Schusterschitz, 'European Agencies as Subjects of International Law', *International Organizations Law Review*, 1, 1, 2004.
Schütze 2009
R. Schütze, 'On "Federal" Ground: The European Unions as an (inter)National Phenomenon', *Common Market Law Review*, 2009.
Shaw 2008
M. N. Shaw, *International Law*, Cambridge: Cambridge University Press 2008.

Shelton 2014
D. Shelton, Article 47 – Rights to an Effective Remedy in S. Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (Steve Peers and others eds, Oxford 2014).
Shue 1980
H. Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy*, 1980.
Siouti 2003
G. Siouti, *Environmental Law*, Athens: Ant. N. Sakkoulas Publishers 2003.
Sirtori and Coelho 2007
S. Sirtori and P. Coelho, *Defending Refugees' Access to Protection in Europe* (ECRE paper), Brussels: European Council on Refugees and Exiles December 2007, https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf.
Sperl 2007
M. Sperl, *Fortress Europe and the Iraqi 'Intruders': Iraqi Asylum-Seekers and the EU, 2003-2007* (UNHCR Research Paper No. 144), Geneva: United Nations High Commissioner for Refugees October 2007, https://www.refworld.org/docid/4c2472ea0.html.
Spielmann 2017
D. Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13* (Lecture of FRAME High-Level Lecture Series, Brussels), 2017, http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf.
Stegmann 2018
P. T. Stegmann, *Responsibility of the EU and the Member States under the EU International Investment Protection Agreements, Between Traditional Rules, Proceduralisation and Federalisation*, Berlin: Springer 2018.
Steinberger 2006
E. Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with EC's and the EC Member States' Membership of the WTO', *The European Journal of International Law*, 17, 4, 2006.
Taekema, van Klink 2011
H.S. Taekema, B.M.J. van Klink, On the Border, Limits and Possibilities of Interdisciplinary Research, in B.M.J. van Klink and H.S. Taekema (eds.), *Law and Method. Interdisciplinary Research into Law*, Tübingen: Mohr Siebeck 2011.
Talmon 2005
S. Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Aja: Martinus Nijhoff Publishers 2005.
Tennant and Janz 2009
V. Tennant and J. Janz, *Refugee protection and international migration: a review of UNHCR's operational role in southern Italy* (UNHCR Policy Development and Evaluation Service Paper), Geneva: United Nations High Commissioner for Refugees September 2009, https://www.unhcr.org/4ac35c600.html.
The Press Project 2017
The Press Project, Λέσβος: Απελαύνουν άρον άρον πρόσφυγες – Παρέμβαση ΕΔΑΔ, 30 April 2017, https://www.thepressproject.gr/article/110765/Lesbos-Apelaunoun-aron-aron-prosfuges---Parembasi-EDAD.

Thompson 1980
D. Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands', *The American Political Science Review* 1980, Vol. 74, No. 4.
Timmermans 2014
C. Timmermans, 'Some Personal Comments on the Accession of the EU to the ECHR', in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014.
Tomuschat 1983
C. Tomuschat, 'Liability in mixed agreements' in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983.
Toth 1997
A. G. Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.
Tulkens 2012
F. Tulkens, Vice-President of the ECtHR, speech at the XXV FIDE Congress, May 30 – 1 June 2012, Tallinn.
Troller 2011
S. Troller, 'On the Borders of Legality. Why Frontex Forces Should Stop Filling Greek Jails with Asylum Seekers', *HRW News* 8 February 2011, https://www.hrw.org/news/2011/02/08/borders-legality.
Van Casteren 1997
A. Van Casteren, 'Article 215(2) EC and the Question of Interest' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997.
Van Hoecke 2002
M. van Hoecke, *Law as Communication*, Oxford/Portland: Hart publishing 2002.
Vandvik 2008
B. Vandvik, 'Extraterritorial Border Controls and Responsibility to Protect: A View From ECRE', *Amsterdam Law Forum* 2008, vol. 1(1).
Warin 2019
C. Warin, 'Individual rights and collective interests in EU law: Three approaches to a still volatile relationship', *Common Market Law Review,* 56, 2, 2019.
Weber and Pickering 2011
L. Weber and S. Pickering, *Globalization and Borders: Death at the Global Frontier*, London: Palgrave Macmillan 2011.
Weinzierl and Lisson 2007
R. Weinzierl and U. Lisson, 'Border Management and Human Rights: A study of EU Law and the Law of the Sea', *German Institute for Human Rights*, 2007, http://www.statewatch.org/news/2008/feb/eu-study-border-management.pdf.
Wils 1992
W. Wils, 'Concurrent liability of the Community and a Member State', *European Law Review*, 1992.
Winner 1978
L. Winner, *Autonomous Technology: Technics-out-of-control as a Theme*, Political Thought, MIT Press, 1978.
Wolff 2008
S. Wolff, 'Border management in the Mediterranean: internal, external and ethical challenges', *Cambrigde Review of International Affairs* 2008, vol. 21(2).

Wolff 2010
S. Wolff, 'EU border policies beyond Lisbon', in R. Zapata-Barrero (Ed.) *Shaping the Normative Contours of the European Union: A Migration-Border Framework*, Barcelona: CIDOB, 2010.
Wolff and Schout 2013
S. Wolff and A. Schout, 'Frontex as Agency: More of the Same?', *Perspectives on European Politics and Society* 2013.
Wriedt and Reinhardt 2017
V. Wriedt, D. Reinhardt, ECCHR, *Opaque and Unaccountable: Frontex Operation Hera*, Statewatch, February 2017, http://www.statewatch.org/analyses/no-307-frontex-operation-hera.pdf.
Young, 2011
I. M. Young, *Responsibility for Justice*, Oxford Scholarship Online, 2011.
Ziegler 2016
K. S. Ziegler, 'The Relationship between EU law and International Law' in D. Patterson and A. Sodersten (eds.), *A Companion to European Union Law and International Law*, Wiley Blackwell, 2016.

Reports and policy documents

Ago 1978
R. Ago, Special Rapporteur, *Seventh Report on State Responsibility*, UN Doc A/CN.4/307, Thirtieth Session, 1978.
Amnesty International 2007
Amnesty International, *The State of the World's Human Rights*, London: Amnesty International 23 May 2007, https://www.amnesty.org/en/documents/pol10/001/2007/en/.
Amnesty International 2008
Amnesty International, *The State of the World's Human Rights*, London: Amnesty International 28 May 2008, https://www.amnesty.org/en/documents/pol10/001/2008/en/.
Amnesty International 2010
Amnesty International, 'Greece: Systematic detention of irregular immigrants and asylum seekers under minimal condition' (in Greek), 2010, available at www.amnesty.org.gr/
Amnesty International 2017a
Amnesty International, *A Blueprint for Despair. Human Rights Impact of the EU-Turkey deal*, London: Amnesty International 14 February 2017, https://www.amnesty.nl/content/uploads/2017/02/EU-Turkey-Deal-Briefing.pdf?x87333.
Amnesty International 2017b
Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees and Migrants*, London: Amnesty International 7 December 2017, https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF.
Amnesty International and ECRE 2010
Amnesty International and ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (FRONTEX), September 2010, https://www.refworld.org/docid/4ca337ca2.html.

Border Violence Monitoring Network
Border Violence Monitoring Network, *Special report: Covid-19 and border violence along the Balkan rout*e, 2020, http://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the- Balkan-route/.
Council of Europe 2018
Council of Europe, *Copenhagen Declaration on the reform of the European Convention on Human Rights system*, 12-13 April 2018.
Council of Europe 2013a
Council of Europe, *Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Final report to the CDDH*, 2013, http://www.statewatch.org/news/2013/apr/eu-echr-accession-final-report-cddh.pdf.
Council of Europe 2013b
Council of Europe, Commissioner for Human Rights, Nils Muižnieks, report following country visit to Greece from 28 January to 1 February 2013, 16 April 2013.
Council of Europe 2013c
Council of Europe, *Accession by the European Union to the European Convention on Human Rights Answers to frequently asked questions*, 30 April 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/EU_accession-QA_updated_2013_E.pdf.
Council of Europe 2006
Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), Committee of Ministers of the Council of Europe, 2006, www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/H-Exec(2006)2_IM_960_en.doc.
Council of the European Union 2002
Council of the European Union, *Feasibility study for the setting up of the "European Border Police"*, Rome, March 2002.
Council of the European Union 2006
Council of the European Union, Justice and Home Affairs, 2768th Council Meeting, Brussels: 4 December 2006, https://ec.europa.eu/commission/presscorner/detail/en/PRES_06_341.
Council of the European Union 2011
Council of the European Union, "Strengthening the European external borders agency Frontex – Political Agreement between Council and Parliament", 11916/11, Presse 192, Brussels, 23 June 2011.
Council of the European Union 2015
Council of the European Union, *Special meeting of the European Council, 23 April 2015 – statement*, Brussels, 23 April 2015, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/.
Council of the European Union 2019
Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May 2019.
Court of Justice of the European Union 2018
Court of Justice of the European Union, *Annual Report 2018. Year in review*, Luxembourg: Court of Justice of the European Union 2019.
COWI Consultants 2009
COWI Consultants, *External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Kongens Lyngby, January 2009.

CPT 2018
European Committee for the Prevention of Torture, Germany: Visit 2018 (return flight), Inf (2019) 14, Section: 12/18, 03/12/2018, https://hudoc.cpt.coe.int/eng#{%22sort%22:[%22CPTDocumentDate%20Descending,CPTDocumentID%20Ascending,CPTSectionNumber%20Ascending%22],%22tabview%22:[%22document%22],%22CPTSectionID%22:[%22p-deu-20180813-en-12%22]}.

Crawford 1999
J. Crawford, Special Rapporteur, *Second Report on State Responsibility*, UN Doc A/CN.4/498, Fifty-First Session, 1999.

Crépeau 2013
Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 2013.

ECOSOC 1996
ECOSOC Resolutions 288 B(X), 1296 (XLIV) and 1996/31.

ECRE 2013
ECRE interview with Adriano Silvestri, Head of Asylum, Migration and Borders Sector at the EU Fundamental Rights Agency, 'Joint operations outside EU waters must not lead to the circumvention of European fundamental rights safeguards', 29 March 2013, http://www.cir-onlus.org/Interview%20with%20Adriano%20Silvestri%20(1).pdf.

ECtHR 2014
ECtHR, *Annual Report 2014*, Strasbourg: Registry of the European Court of Human Rights 2015, https://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

ECRE 2020
ECRE, *Greece: Frontex Denies Involvement in Push-backs, Expert Council Critique of NGO Registration Rules*, 27 November 2020, https://www.ecre.org/greece-frontex-denies-involvement-in-pushbacks-expert-council-critique-of-ngo-registration-rules/.

EDPS 2010
European Data Protection Supervisor (EDPS), *Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (FRONTEX) concerning the "collection of names and certain other relevant data of returnees for joint return operations (JRO)"*, Case 2009-0281, Brussels, 26 April 2010(c).

European Commission 2002
European Commission Communication to the Council and the European Parliament entitled "Towards integrated management of the external borders of the Member states of the European Union", 2002.

European Commission 2006
Commission Communication, COM (2006) 733 final of 30 November 2006, Communication from the Commission to the Council, Reinforcing the management of the European Union's Southern Maritime Borders.

European Commission 2008a
European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM (2008) 68 final.

European Commission 2008b
European Commission, Report on the evaluation and future development of the FRONTEX agency, COM (2008) 67 final, Brussels, 13 February 2008.
European Commission 2010
Communication COM (2010) 673 final of 22 November 2010, The EU Internal Security Strategy in Action: Five steps towards a safer Europe.
European Commission 2011a
European Commission, *Commission Staff Working Paper determining the technical and operational framework of the European Border Surveillance System (EUROSUR) and the actions to be taken for its establishment Council of the European Union*, 2011, SEC 45 final.
European Commission 2011b
European Commission, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) SEC (2011) 1538 final.
European Commission 2013
European Commission, press release, Brussels, 29 November 2013, available at http://europa.eu/rapid/press-release_MEMO-13-1070_en.htm
European Commission 2014
European Commission, *Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean*, Brussels: European Commission 7 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566.
European Commission 2016
European Commission Communication, Model status agreement as referred to in Article 76 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (COM(2016) 747 final).
European Commission 2017a
European Commission, 'Report on the operationalisation of the European Border and Coast Guard', COM (2017) 42 final, 25 January 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/20170125_report_on_the_operationalization_of_the_european_border_and_coast_guard_en.pdf.
European Commission 2017b
European Commission, Second Report from the Commission to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard, Brussels, 2.3.2017, COM(2017) 201 final.
European Commission 2017c
European Commission, Fourth Report from the Commission to the European Parliament, The European Council and the Council on the operationalisation of the European Border and Coast Guard, COM(2017) 325 final, 13 July 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjTqKK13fHdAhXSyqQKHbWnAEQQFjAAegQICRAC&url=https%3A%2F%2Fec.europa.eu%2Fhome-affairs%2Fsites%2Fhomeaffairs%2Ffiles%2Fwhat-we-do%2Fpolicies%2Feuropean-agenda-security%2F20170613_report_on_the_operationalisation_of_the_european_border_and_coast_guard_en.pdf&usg=AOvVaw0y4mNOvBQ_oJ6QVp_xo0Gd

European Commission 2018a
European Commission, Press Release, *Security Union: Commission welcomes agreement on a reinforced Schengen Information System*, Brussels, 12 June 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4133.

European Commission 2018b
State of the Union 2018 – Commission proposes last elements needed for compromise on migration and border reform, Brussels: European Commission 12 September 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5712.

European Commission 2018c
European Commission, State of the Union, A strengthened and fully equipped European Border and Coast Guard, 12 September 2018.

European Commission 2020
European Commission, *The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission*, 29 September 2020.

European Council 2002
European Council, Plan for the management of the external borders of the Member states of the European Union, Council document 10019/02, 14 June 2002.

European Council 2003a
Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions, Brussels: 20 June 2003, https://ec.europa.eu/commission/presscorner/detail/en/DOC_03_3.

European Council 2003b
European Council, Presidency conclusions. European Council meeting in Brussels, 16 and 17 October 2003, Brussels, 15 November 2003, 15188/03.

European Council 2006
European Council, Presidency Conclusions of 15 and 16 December 2005, Brussels, 30 January 2006.

European Court of Auditors 2017
European Court of Auditors, *Report on the Annual Accounts of the European Border and Coast Guard Agency for the Financial Year 2016 Together with the Agency's Reply*, Luxembourg, 6 December 2017, https://www.eca.europa.eu/Lists/ECADocuments/FRONTEX_2016/FRONTEX_2016_EN.pdf.

European Ombudsman 2012
Letter from the European Ombudsman opening own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations, http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark.

European Ombudsman 2013a
European Ombudsman, *Frontex answer on draft recommendations of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, 2013, https://www.ombudsman.europa.eu/en/correspondence/en/51139.

European Ombudsman 2013b
EU Ombudsman, N. Diamandouros, 'Draft recommendation of the European Ombudsman in his own-initiative inquiry 0115/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex)', 09 April 2013, http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/49794/html.bookmark.

European Ombudsman 2013c
Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark.

European Ombudsman 2017
European Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office's' (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews.

European Parliament 2008
European Parliament Report (EU doc. no. A6-0437/2008) on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI))

European Parliament 2009
European Parliament, *Profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control*, P6_TA(2009)0314, 24 April 2009,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:184E:0119:0126:EN:PDF.

European Parliament 2011
Parliamentary Question, E-006760/2011; answer given by Ms Malmström on behalf of the Commission (28 July 2011).

European Parliament 2015
European Parliament, Report on the Special Report of the European Ombudsman in own – initiative inquiry OI/5/2012/BEH – MHZ concerning Frontex, (2014/2215(INI)), 26.11.2015, https://www.mendeley.com/viewer/?fileId=5cf58ba3-af84-eda5-1cb9-557b39a38daeanddocumentId=e4d49c53-7584-37c3-960c-b4aeac54cef6.

European Parliament 2016
European Parliament, European Parliamentary Research Service, *The economic impact of suspending Schengen*, March 2016.

European Parliament, Council of the EU and European Commission 2012
Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies, Common Approach, July 2012, https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf.

FRA 2013a
European Union Fundamental Rights Agency, *Fundamental rights at Europe's southern sea borders*, Luxembourg: European Union Agency for Fundamental Rights 27 March 2013, https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf.

FRA 2013b
European Union Agency for Fundamental Rights, *Fundamental rights-based police training. A manual for police trainers*, Luxembourg, 3 December 2013, https://fra.europa.eu/sites/default/files/fra-2013-fundamental-rights-based-police-training_en_0.pdf.

FRA 2015
European Union Fundamental Rights Agency, Legal entry channels to the EU for persons in need of international protection: a toolbox, 06 March 2015, https://fra.europa.eu/en/publication/2015/legal-entry-channels-eu-persons-need-international-protection-toolbox.

FRA 2019
European Union Agency for Fundamental Rights, *Forced return monitoring systems*, 27 June 2019, https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update.

Frontex 2006a
Frontex, *HERA II Operation to be Prolonged*, Warsaw, 13 October 2006, https://frontex.europa.eu/media-centre/news-release/hera-ii-operation-to-be-prolonged-iWMEF9.

Frontex 2006b
Frontex Annual Report 2006 *Coordination of intelligence driven operational cooperation at EU level to strengthen security at external borders*, Warsaw, 5 December 2007, https://www.europarl.europa.eu/document/activities/cont/200801/20080111ATT18445/20080111ATT18445EN.pdf.

Frontex 2007a
Frontex, 'European Patrols Network and Centralised Record of Available Technical Equipment to be presented at tomorrow's JHA Council', 19 April 2007, https://web.archive.org/web/20070622232920/http://frontex.europa.eu/newsroom/news_releases/art23.html.

Frontex 2007b
Frontex, General Report 2007, Warsaw, 2008, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2007/frontex_general_report_2007_final.pdf.

Frontex 2007c
Frontex, Public Bulletin, Reference Number: 9566/14.09.2007, September 2007.

Frontex 2007d
Frontex, 'Hera III operation', Press Release 13 April 2007, https://frontex.europa.eu/media-centre/news/news-release/hera-iii-operation-It9SH3.

Frontex 2008
General Report 2008, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2009, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2008/frontex_general_report_2008.pdf.

Frontex 2009
Frontex, *HERA 2008 and NAUTILUS 2008 Statistics*, Warsaw, 13 February 2009, https://frontex.europa.eu/media-centre/news-release/hera-2008-and-nautilus-2008-statistics-oP7kLN.

Frontex 2010a
Frontex, 2010 Working programme and related aspects. Presentation by Ilkka Laitinen, FRONTEX Executive Director, to the European Parliament, LIBE Committee, 11 January 2010, http://www.poptel.org.uk/statewatch/news/2010/jan/eu-frontex-work-prog-2010.pdf.

Frontex 2010b
Frontex, *RABIT Operation 2010 Evaluation Report*, Warsaw, August 2011, https://www.yumpu.com/en/document/read/34681466/rabit-operation-2010-evaluation-report-frontex-europa.

Frontex 2011c
Frontex, *Frontex and the RABIT operation at the Greek-Turkish border*, Warsaw, 2 March 2011, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_130.

Frontex 2011d
Frontex, *General Report 2011,* Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2012, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2011/General_Report_2011.pdf.

Frontex 2011e
Frontex, Press Release, *Update to Joint Operation Hermes 2011*, 11 March 2011, http://frontex.europa.eu/news/update-to-joint-operation-hermes-2011-7DI-ILz.

Frontex 2011f
Frontex, Press Release, Hermes Operation Extended, 23 March 2011, http://frontex.europa.eu/news/hermes-operation-extended-OWmwti.

Frontex 2011g
Frontex, Frontex's Reaction to HRW report, 'The EU's dirty hands', 20 September 2011, http://migrantsatsea.files.wordpress.com/2011/09/frontex-_-news-frontexs-reaction-to-hrw-report-2011-20-sept.pdf.

Frontex 2011h
Frontex, Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011.

Frontex 2011i
Frontex, Fundamental Rights Action Plan, 29 September 2011.

Frontex 2012a
Frontex, *Annual Risk Analysis 2012,* Warsaw, April 2012, https://data.europa.eu/euodp/en/data/storage/f/2016-03-07T134213/Annual%20Risk%20Analysis%202012%20final.pdf.

Frontex 2012b
Frontex, *General Report 2012,* Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2013.

Frontex 2012c
Frontex, Response on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11758/html.bookmark.

Frontex 2012d
Frontex, Reply to the LIBE Committee regarding Frontex fundamental rights strategy, 30 May 2012, http://www.statewatch.org/observatories_files/frontex_observatory/Frontex%20June%202012-EP%20LIBE%20Committee%20Questions.pdf.

Frontex 2012e
Frontex, Western Balkans Annual Risk Analysis Report, 2012.

Frontex 2013a
Frontex, *Annual Risk Analysis 2013,* Warsaw, April 2013, http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf.

Frontex 2013b
General Report 2013, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2013, https://op.europa.eu/en/publication-detail/-/publication/03261247-8924-4389-af52-2697164dbe52/language-en.

Frontex 2015a
Frontex, *General Report 2015*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2015, https://op.europa.eu/en/publication-detail/-/publication/474bb018-b537-11e6-9e3c-01aa75ed71a1.

Frontex 2015b
Annual Information on the Commitments of Member states to the European Border Guard Teams and the Technical Equipment Pool Report 2015, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union April 2015, https://eulawenforcement.com/wp-content/uploads/2019/03/20150401_Frontex_Annual_Report_to_the_EP_on_the_commitments_of_the_MS_to_the_EBGT_and_the_TEP.pdf?x81923.

Frontex 2015c
Frontex Programme of Work 2015, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 18 December 2014, https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2015/MB_Decision_01_2015_on_Frontex_programme_of_work_and_budget_2015_incl_establishment_plan.pdf.

Frontex 2016a
Frontex Executive Director Decision No R-ED-2016-106 on the Complaints Mechanism, Annex1 'The Agency's Rules on the Complaints Mechanism'.

Frontex 2016b
Frontex, Budget 2016, 24 December 2016, http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2016.pdf.

Frontex 2016c
Frontex, *Frontex Observations, Situation at the Hungarian-Serbian Border*, 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming-14832.

Frontex 2017a
Frontex, *A Year in Review: First 12 Months of the European Border and Coast Guard Agency*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2017, https://frontex.europa.eu/assets/Publications/General/A_Year_in_Review.pdf.

Frontex 2017b
Frontex, European Border and Coast Guard Agency concluded HQ Agreement negotiations, 21 January 2017, https://frontex.europa.eu/pressroom/news/european-border-and-coast-guard-agency-concluded-hq-agreement-negotiations-L6FKqz?q.

Frontex 2017c
Frontex, Frontex and Poland sign the headquarters agreement, 09 March 2017, https://frontex.europa.eu/media-centre/news-release/frontex-and-poland-sign-the-headquarters-agreement-Tx15sl.

Frontex, 2017d
Frontex launches capacity building project for Africa during AFIC meeting', Warsaw, 29 September 2017, http://frontex.europa.eu/news/frontex-launches-capacity-building-project-for-africa-during-afic-meeting-nqXaPW.

Frontex 2018a
Frontex, *2018 In Brief*, Warsaw 2018, https://frontex.europa.eu/assets/Publications/briefreport2018/2/.

Frontex 2018b
Frontex list of working arrangements with third states, https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries.
Frontex 2018c
Frontex, Code of Conduct for Joint Return Operations Coordinated by Frontex, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.
Frontex 2018c
Frontex, Code of Conduct for all Persons Participating in Frontex Activities, http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf.
Frontex 2019a
Frontex, *Annual information on the commitments and deployments of the Member States to the European border and coast guard teams and the technical equipment pool. Report on the operational resources in 2018*, Warsaw, 5 July 2019, https://op.europa.eu/nl/publication-detail/-/publication/c5a27b03-a131-11e9-9d01-01aa75ed71a1/language-en/format-RDF.
Frontex 2019b
Frontex, Consolidated Annual Activity Report, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2018, 12 July 2019.
Frontex 2019c
Frontex news release, *Frontex launches first operation in Western Balkans*, 11 May 2019, https://frontex.europa.eu/media-centre/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM.
Frontex 2019d
Frontex, Consolidated Annual Activity Report 2018, 12 June 2019, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjHy7XJ8PDuAhXF-qQKHad7BfoQFjAAegQIARAC&url=https%3A%2F%2Fwww.europarl.europa.eu%2Fcmsdata%2F185405%2FCAAR%25202018.pdf&usg=AOvVaw2Cx_hrYTZONN1boU2jSPF8.
Frontex 2020
Frontex news release, *Frontex launches second operation outside EU*, 15 July 2020, https://frontex.europa.eu/media-centre/news-release/frontex-launches-second-operation-outside-eu-1UZt3Q.
Frontex and DG Home 2019
Frontex, DG Home, *Roadmap for the implementation of the European Border and Coast Guard 2.0*, 2019.
Frontex and EASO 2012
Frontex Working Arrangement with EASO, http://www.statewatch.org/observatories_files/frontex_observatory/WA%20EASO-FRONTEX_26092012%20%282%29.pdf.
Frontex and FRA 2010
Frontex Working Arrangement with the FRA, http://www.statewatch.org/observatories_files/frontex_observatory/WA_FRA_26%2005%202010.pdf.
Frontex and Marin 2008
Frontex Working Arrangement with UNHCR, http://www.statewatch.org/observatories_files/frontex_observatory/WA_UNHCR-5542_16%2006%202008.pdf.

Frontex Consultative Forum 2013
Frontex Consultative Forum on Fundamental Rights, *Work Programme 2013*, http://www.statewatch.org/observatories_files/frontex_observatory/CF_work_programme%202013.pdf.

Frontex Consultative Forum 2016a
Frontex Consultative Forum on Fundamental Rights, Annual Report 2016, http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2016.pdf.

Frontex Consultative Forum 2016b
Frontex Consultative Forum on Fundamental Rights, *Recommendation by the Consultative forum to the Executive Director and Management board of the European Border and coast guard Agency*, 2016, https://www.asktheeu.org/en/request/operations_in_hungary#incoming-14832.

Frontex Consultative Forum 2017
Frontex Consultative Forum on Fundamental Rights, *Working Methods of the Consultative Forum 2017*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_Working_Methods_2017.pdf.

Frontex Consultative Forum 2018
Frontex Consultative Forum on Fundamental Rights, *Fifth Annual Report 2017*, 2018, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiZj4i5y8jhAhVHsaQKHYacDVsQFjAAegQIBBAC&url=https%3A%2F%2Fwww.statewatch.org%2Fnews%2F2018%2Fmay%2Feu-frontex-consultative-forum-on-fundamental-rights-report-2017.pdf&usg=AOvVaw08uVyL8-TC5R5QsZr0OV7w.

Gaja 2004
G. Gaja, Special Rapporteur, *Second Report on Responsibility of International Organizations*, UN Doc A/CN.4/541, 2004.

Greek Council for Refugees 2020
Greek Council for Refugees, *Asylum Information Database (AIDA) Country Report Greece*, 2020.

Greek Ombudsman 2017
Greek Ombudsman, *Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues*, Athens: The Greek Ombudsman. Independent Authority April 2017, https://www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017_en.pdf.

House of Lords 2004
House of Lords, Select Committee on European Union, *Ninth Report, CHAPTER 3: integrated border management and a European border guard*, European Union Committee Publications, https://publications.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13305.htm.

House of Lords 2008
House of Lords, 'Frontex: the EU External Borders Agency. Report with Evidence', HL Paper 60, London, 5 March 2008, http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/60/60.pdf.

House of Lords 2016
House of Lords, Frontex Executive Director, Fabrice Leggeri, hearing before UK Parliament, 16 September 2016, http://parliamentlive.tv/Event/Index/1e48fc9c-722d-4cc1-9c85-1e5f772630d9.

Human Rights Watch 2009
Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York: Human Rights Watch September 2009, https://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf.

Human Rights Watch 2011
Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, https://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf.

Human Rights Watch 2019
Human Rights Watch, Libya: Nightmarish Detention for Migrants, Asylum Seekers, 21 January 2019, https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers.

Human Rights Watch 2020
Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported*, 2020 https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border.

Hungarian Helsinki Committee 2012
Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited. An update of the Hungarian Helsinki Committee's 2011 report based on a field mission to Serbia (2-4 April 2012)*, Budapest, June 2012, http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf.

International Law Commission 2000
International Law Commission, *Report on the work of its fifty-second session (1 May – 9 June and 10 July -18 August 2000)*, A/55/10, annex 321, 2000.

International Law Commission 2001
International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), Yearbook of the International Law Commission, 2001, vol. II (Part Two) and corrigendum.

International Law Commission 2011
International Law Commission, *Report on the work of its sixty-third session (26 April – 3 June and 4 July – 12 August 2011)*, UN General Assembly, A/66/10, 2011.

IOM 2017
International Organisation for Migration, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe. A Review of the Evidence*, Geneva: 2017, https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

Laeken Conclusions
Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001, Laeken: European Council 14 and 15 December 2001.

LIBE 2011
European Parliament Civil Liberties, Justice and Home Affairs Department, G. Elspeth, S. Carrera, L. Den Hertog, J. Parkin (Rapporteurs), *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office (EASO)*, 2011, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf.

Meijers Committee 2008
Meijers Committee, 'Views Standing Committee on the evaluation and future development of the FRONTEX agency (COM(2008) 67 final)', addressed to the European Parliament, 4 April 2008.

Meijers Committee 2013
Meijers Committee, *Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex (COM(2013) 197 final)*, Utrecht, 23 May 2013.

Meijers Committee 2018
Meijers Committee, *1806 Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law*, 2018, https://www.commissiemeijers.nl/sites/all/files/cm1806_note_on_soft_law_instruments.pdf.

Migreurop e.a. 2012
Migreurop, Chachipe a.s.b.l., Rom e.V., Köln, Flüchtlingsrat Niedersachsen, Project Roma Center, Göttingen, European Network against Racism (ENAR), *New Group Deportation Flight Coordinated by FRONTEX as means of Collective Expulsion towards Serbia: Rights violation and the impunity of member states*, 20 April 2012.

Migreurop 2011
Migreurop, *Frontex Agency: Which Guarantees for Human Rights?*, March 2011, http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf.

Migreurop and Greens 2011
Greens in European Parliament in collaboration with Migreurop , S. Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, Brussels, March 2011.

Memorandum of Understanding between Frontex and Poland
Memorandum of Understanding between the Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Minister of the Interior and Administration of the Republic of Poland on the headquarters and certain other issues related to the functioning of Frontex in Poland, Warsaw, 26 March 2007.

MSF 2010
Médicins Sans Frontières, *Annual Report 2010*, Geneva, 11 May 2011.

NCHR 2009
National Commission for Human Rights. Annual Report 2009, Athens: National Commission for Human Rights 29 July 2010, https://ec.europa.eu/migrant-integration/librarydoc/national-commission-for-human-rights-in-greece---annual-report-2009.

Office of the Prime Minister Malta 2009
Malta Annual Reports of Government Departments 2009, Valletta: Office of the Prime Minister Malta July 2010, https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Annual%20Government%20Reports/Documents/Annual%20Report%20of%20Government%20Departments%20-%202009.pdf.

OMCT, FIDH and FrontLine April 2010
The World Organisation Against Torture, The International Federation for Human Rights and FrontLine, *Nigeria: Defending Human Rights: Not Everywhere Not Every Right. International Fact-Finding Mission Report*, Geneva, Paris and Dublin, April 2010, https://www.omct.org/files/2010/05/20688/nigeria_mission_report.pdf.

PACE 2013a
PACE Resolution 1932, 'Frontex: human rights responsibilities', 2013, Mr Mikael Cederbratt rapporteur, (Doc. 13161).

PACE 2013b
Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, *Management of mixed migration and asylum challenges beyond the European Union's eastern border*, 8 April 2013, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19549&Language=EN&.

PACE 2012
PACE, Council of Europe, Tineke Strik (Rapporteur), Lives lost in the Mediterranean Sea: who is responsible?, https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf

PACE 2009
PACE, Council of Europe, Resolution 1637 (2008) 'Europe's boat people: mixed migration flows by sea into southern Europe'.

Pro Asyl, Borderline-europe, and Menschenrechte ohne Grenzen 2008
Pro Asyl, Borderline-europe, and Menschenrechte ohne Grenzen, J. Gleitze, *Die Folgen der Abschottung auf See – das Mittelmeer,* in T. Pflüger (in cooperation with Informationsstelle Militarisierung), *Was ist Frontex?*, Januar 2008, http://www.imi-online.de/download/FRONTEX-Broschuere.pdf.

Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants 2007
Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, *The Truth Might Be Bitter, but It Must Be Told': The Situation of Refugees in the Aegean and the Practices of the Greek Cost Guard*, Frankfurt am Main and Athens, October 2007, https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Report_Refugees_in_Greece_The_truth_may_be_bitter_but_it_must_be_told_Oct_2007.pdf.

Ramboll Management Consulting and Eurasylum Ltd 2015
Ramboll Management Consulting and Eurasylum Ltd, *External Evaluation of the Agency under Article 33 of the Frontex Regulation, Final Report*, 2015.

Refugee Council and ECRE 2007
Refugee Council and the European Council on Refugees and Exiles (ECRE) Joint Response to Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry, 2007, https://www.refugeecouncil.org.uk/assets/0001/6311/FrontexSept2007.pdf.

Socialist Group Spain 2011
Socialist Group, Spain, Committee on Migration, Refugee and Population, T. Arcadio Díaz, Rapporteur, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, 2011.

Statewatch 2011
Statewatch, Statewatch News Online, 'Greece-Turkey: 16-year-old sans-papiers killed in FRONTEX-aided police pursuit', December 2011.

Statewatch 2012
Statewatch, *EU: A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)*, 15 May 2012, http://www.statewatch.org/news/2012/may/02-eu-frontex-article26a.html.

Statewatch 2017a
Statewatch, *Rapid introduction of new Frontex powers: EU and Member States prefer to shut the door and return refugees than relocate them*, London: Statewatch 27 January 2017.

Statewatch 2017b
Statewatch, *Press release: EU border agency targeted "isolated or mistreated" individuals for questioning*, London: Statewatch 16 February 2017, https://www.statewatch.org/news/2017/february/press-release-eu-border-agency-targeted-isolated-or-mistreated-individuals-for-questioning/.
Statewatch 2017c
Statewatch, *EU: Tusk on tour: statements from meetings in Bulgaria, Macedonia and Slovenia ignore the reality of the Balkan route*, London: Statewatch 5 April 2017, https://www.statewatch.org/news/2017/april/eu-tusk-on-tour-statements-from-meetings-in-bulgaria-macedonia-and-slovenia-ignore-the-reality-of-the-balkan-route/.
Statewatch 2017d
EU: Deploying armed Frontex teams on the 'Balkan Route': agreements with Serbia and Macedonia on the way, London: Statewatch 1 May 2017, https://www.statewatch.org/news/2017/may/eu-deploying-armed-frontex-teams-on-the-balkan-route-agreements-with-serbia-and-macedonia-on-the-way/.
Statewatch 2018
Statewatch, *EU: Interoperability: Member States want "substantial changes" to Entry/Exit System; questions over "red links" and the role of Frontex*, 09 May 2018, https://www.statewatch.org/news/2018/may/eu-interoperability-member-states-want-substantial-changes-to-entry-exit-system-questions-over-red-links-and-the-role-of-frontex/.
Statewatch 2020a
Statewatch, *EU: German Presidency: how can Frontex help deport unaccompanied children?*, 2020, https://www.statewatch.org/news/2020/september/eu-german-presidency-how-can-frontex-help-deport-unaccompanied-children/.
Statewatch 2020b
Statewatch, *European Parliament: Frontex director should resign, say Socialists & Democrats*, 03 December 2020, https://www.statewatch.org/news/2020/december/european-parliament-frontex-director-should-resign-say-socialists-democrats/.
Statewatch and Migreurop 2012
Statewatch and Migreurop, *Reply to the Ombudsman's request for submission – Frontex's fundamental rights strategy*, London and Paris, 27 September 2012, https://www.statewatch.org/media/documents/analyses/no-193-eu-ombs-inquiry-frontex-evidence.pdf.
Tampere Conclusions 1999
Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Tampere: European Council 15 and 16 October 1999.
The Stockholm Programme 2009
The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, OJ C 115/1.
The Greens/EFA Group in the European Parliament 2014
Rescuing Refugees at Sea. Frontex Treatment of Refugees at Sea to be Retasked Following EP Vote, The Greens/EFA Group European Parliament 9 December 2014, https://www.greens-efa.eu/en/article/press/rescuing-refugees-at-sea-4602/.
Thessaloniki Conclusions
European Council, Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions.

UMOSOM 1994
Report of the Commission of Inquiry established to investigate armed attacks on UMOSOM II personnel on 5 June 1993, S/1994/653, 01.07.1994.
UN General Assembly 1998
United National General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988.
UN General Assembly 2001
United Nations General Assembly, Resolution 56/82 of 12 December 2001.
UNHCR 2007a
UNHCR, 'New Issues in Refugee Research, Research Paper No 144', October 2007.
UNHCR 2007b
United Nations High Commissioner for Refugees, Asylum Levels and Trends in Industrialized Countries Second Quarter 2007-Statistical Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries, Geneva: September 2007, https://www.unhcr.org/46f0e0dd2.pdf.
UNHCR 2007b
UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, Geneva: United Nations High Commissioner for Refugees September 2007 https://www.refworld.org/pdfid/46e159f82.pdf.
UNHCR 2009
UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09)*, Geneva: United Nations High Commissioner for Refugees January 2009, https://www.refworld.org/pdfid/4afd25c32.pdf.
UNHCR 2009
UNHCR, *Refugee protection and international migration: a review of UNHCR's operational role in southern* Italy – Prepublication edition, September 2009, www.unhcr.org/4ac35c600.html.
UNHCR 2010
UNHCR's Observations on the European Commission's Proposal for a Regulation of the European Parliament and the Council Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex), COM (2010)61 Final.
UNHCR 2016
UNCHR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 31 December 2016, https://www.google.com/url?sa=tandrct=jandq=andesrc=sandsource=webandcd=andved=2ahUKEwiki8fdwMnuAhVhEWMBHekNDPIQFjAAegQIAxACandurl=https%3A%2F%2Fwww.refworld.org%2Fpdfid%2F588b4af44.pdfandusg=AOvVaw2ujy3vs77kSgzhlSztfIQm.
UNHCR 2019
UNHCR, Hungary's coerced removal of Afghan families deeply shocking, 8 May 2019, https://www.unhcr.org/news/press/2019/5/5cd3167a4/hungarys-coerced-removal-afghan-families-deeply-shocking.html.
UN Working Group on the Smuggling of Migrants 2012
United Nations, Working Group on the Smuggling of Migrants 2012, Report on the meeting of the Working group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012, CTOC/COP/WG.7/2012/6, http://www.unodc.org/documents/treaties/organized_crime/2012_CTOC_COP_WG7/CTOC_COP_WG7_2012_6/CTOC_COP_WG7_2012_6_E.pdf.

Legislation

Access to Documents Regulation
Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

ARIO
International Law Commissions Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011 (A/66/10and Add.1).

ARS
International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. Yearbook of the International Law Commission, 2001, vol. II (Part Two).

Charter
Charter of Fundamental Rights of the European Union, OJ C 83/02, 30.03.2010.

Convention for the Protection of Personal Data
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

Council Decision 2005/267/EC
Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member states' Migration Management Services (OJ L 83, 1.4.2005.

Data Protection Directive
Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Data Protection Regulation
Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institution and bodies and on the free movement of such data.

Draft Accession Agreement
Fifth Negotiation Meeting Between the CDDHD Ad Hoc Negotiation Group and the European Commission on the Accession Of The European Union to the European Convention on Human Rights, 5 April 2013.

EASO Regulation
Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

EBCG Regulation 2016 Proposal
European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision, 2005/267/EC, COM(2015) 671 final, 2015/0310 (COD) of 15/12 /2015.

EBCG Regulation 2016
Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC.

EBCG Regulation 2019 Proposal
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/631 final.

EBCG Regulation
Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

ECOSOC Statute for Non-Governmental Organisations
United Nations Economic and Social Council Resolution 1996/31 of 25 July 1996, Consultative relationship between the United Nations and non-governmental organisations.

European Enforcement Order Regulation
Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

European Pact on Immigration and Asylum
European Pact on Immigration and Asylum, 13440/08, October 2008.

Eurosur Regulation Proposal
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing the European Border Surveillance System (EUROSUR), 2011/0427 COD.

Eurosur Regulation
Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

Frontex Regulation
Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union.

Frontex Regulation 2011 Proposal
COM(2010)61 final of the European Commission, Proposal for the Regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

Frontex Sea Operations Regulation
Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union.

Frontex Sea Operations Regulation Proposal
Proposal for a Regulation establishing rules for the surveillance of the external sea borders, 2013/0106 (COD) of 12.4.2013.

International Law Commission Statute
Statute of the International Law Commission in United Nations General Assembly Resolution 176/II, 21 November 1947

Liaison Officers Regulation
: Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

Procedures Directive
: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status.

Protocol against Smuggling
: Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000.

RABIT Regulation Proposal
: COM(2006) 401 final, Proposal for the Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism.

RABIT Regulation
: Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams (Rabit Regulation) and Council Regulation (EC) No 1168/2011 of the European Parliament and the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union.

Refugee Convention
: Convention Relating to the Status of Refugees, Geneva, 28 July 1951.

Regulation on Jurisdiction and Enforcement
: Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

Schengen Borders Code
: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Statute of the Court of Justice
: Statute of the Court of Justice of the European Union, 1 May 2019.

TEU
: Treaty on the European Union.

TFEU
: Treaty on the Functioning of the European Union.

The Schengen acquis
: The Schengen acquis – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22/09/2000 P. 0013 – 0018.

Vienna Convention on the Law of the Treaties
: Vienna Convention on the Law of the Treaties, of 23 May 1969, 1155 UNTS 331.

Vienna Convention on Diplomatic Relations
: Vienna Convention on Diplomatic Relations, Customary International Law on the Immunity of International Organisations, 1961.

Case Law

European Courts

Court of Justice of the European Union

CJEU 17 December 1959, C-23/59, ECLI:EU:C:1959:33 (*F.E.R.A.M. v High Authority*).
CJEU 16 December 1960, C-6/60-IMM, ECLI:EU:C:1960:48 (*Humblet v Belgium*).
CJEU 13 July 1961, C-14, 16, 17, 20, 24, 26 and 27/60 and 1/61, ECLI:EU:C:1961:16 (*Meroni & Co. and Others v High Authority*).
CJEU 12 July 1962, C-9 and 12/60, ECLI:EU:C:1962:25 (*Belgium v Vloeberghs and High Authority*).
CJEU 12 July 1962, Case C-18/60, *Louis Worms v. High Authority of the European Coal and Steel Community* [1962] ECR I-195.
CJEU 5 February 1963, C-26/62, ECLI:EU:C:1963:1 *(Van Gend en Loos v Nederlandse Administratie der Belastingen).*
CJEU 15 July 1963, C-25-62, ECLI:EU:C:1963:17 (*Plaumann v Commission*).
CJEU 6 June 1964, C-55-59 and 61-63/63, ECLI:EU:C:1964:37 (*Modena and Others v High Authority*).
CJEU 15 July 1964, C-6/64, ECLI:EU:C:1964:66 *(Costa v ENEL).*
CJEU 7 June 1966, C-29, 31, 36, 39-47, 50 and 51/63, ECLI:EU:C:1966:29 (*Usines de la Providence v High Authority*).
CJEU 15 December 1966, C-59/65, ECLI:EU:C:1966:60 (*Schrekenberg v Commission*).
CJEU 14 July 1967, C-5, 7 and 13-24/66, ECLI:EU:C:1967:31 (*Kampffmeyer and Others v Commission*).
CJEU 10 July 1969, C-9/69, ECLI:EU:C:1969:37 (*Sayage and Others v Leduc and Others*).
CJEU 12 November 1969, C-29/69 ECR 419, ECLI:EU:C:1969:57 (*Stauber v. City of Ulm*).
CJEU 10 July 1969 Case C-9/69, [1969] ECR I-329 (*Claude Sayag and Another v. Jean-Pierre Leduc*).
CJEU 4 February 1970, C-13/69, ECLI:EU:C:1970:5 (*Van Eick v Commission*).
CJEU 16 June 1970, C-69-69, ECLI:EU:C:1970:53 (*Alcan and others v Commission*).
CJEU 17 December 1970, C-11/70, ECLI:EU:C:1970:114 *(Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel).*
CJEU 31 March 1971, C-22/70, ECLI:EU:C:1971:32 *(Commission of the European Communities v Council of the European Communities).*
CJEU 28 April 1971, C-4/69, ECLI:EU:C:1971:40 (*Lütticke v Commission*).
CJEU 13 May 1971, C-41-44/70, ECLI:EU:C:1971:53 (*NV International Fruit Company and others v Commission*).
CJEU 23 November 1971, C-62-70, ECLI:EU:C:1971:108 (*Bock v Commission*).
CJEU 2 December 1971, C-5/71, ECLI:EU:C:1971:116 (*Aktien-Zuckerfabrik Schöppenstedt v Council*).
CJEU 13 June 1972, C-9 and 11/71, ECLI:EU:C:1972:52 (*Compagnie d'Approvisionnement v Commission*).
CJEU 30 April 1974, C-181/73, ECLI:EU:C:1974:41 *(Haegeman v Belgium).*
CJEU 26 October 1975, C-36/75, ECR 1219, ECLI:EU:C:1975:137 (*Rutili v. Ministre de l'Intérieur*).
CJEU 17 March 1976, C-67-85/75, [1976] ECR 391 (*Lesieur v Commission*).
CJEU 21 May 1976, C-26/74, ECLI:EU:C:1976:69 (*Roquette v Commission*).
CJEU 2 March 1977, C-44/76, ECLI:EU:C:1977:37 (*Milch-, Fett- und Eier-Kontor v Council and Commission*).

CJEU 25 October 1977, C-26/76, ECLI:EU:C:1977:167 (*Metro-SB-Großmaerkte GmbH v Commission*).
CJEU 15 December 1977, C-126/76, ECLI:EU:C:1977:211 (*Dietz v Commission*).
CJEU 25 May 1978, C-83 and 94/76, C-4, 15 and 40/77, ECLI:EU:C:1978:113 (*HNL and Others v Council and Commission*).
CJEU 10 May 1978, C-132/77, ECLI:EU:C:1978:99 (*Société pour l'Exportation des Sucres SA v Commission*).
CJEU 13 February 1979, C-101/78, ECLI:EU:C:1979:38 (*Granaria v Hoofdproduktschap voor Akkerbouwprodukten*).
CJEU 4 October 1979, C-64 and 113/76, C-167 and 239/78 and C-27-28 and 45/79, ECLI:EU:C:1979:223 (*Dumortier Fréres v Council*).
CJEU 5 March 1980, C-76/79, ECLI:EU:C:1980:68 (*Könecke v Commission*).
CJEU 11 November 1981, C-60/81, ECLI:EU:C:1981:264 (*IBM v Commission*).
CJEU 26 October 1982, C-104/81, ECLI:EU:C:1982:362 *(Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.).*
CJEU 21 February 1984, C-239 and 275/82, ECLI:EU:C:1984:68 (*Allied Corporation and others v Commission*).
CJEU 12 April 1984, C-281/82, ECLI:EU:C:1984:165 (*Unifrex v Commission and Council*).
CJEU 6 December 1984, C-59/83, ECLI:EU:C:1984:380 (*SA Biovilac NV v EEC*).
CJEU 17 January 1985, 11/82, ECLI:EU:C:1985:18 (*Piraiki-Patraiki and Others* v *Commission*).
CJEU 11 July 1985, C-87 and 130/77, C-22/83 and C-9-10/84, ECLI:EU:C:1985:318 (*Salerno v Commission*).
CJEU 7 November 1985, C-145/83, ECLI:EU:C:1985:323 (*Adams v Commission*).
CJEU 28 January 1986, C-169/84, ECLI:EU:C:1986:42 (*Cofaz and others v Commission*).
CJEU 26 February 1986, C-175/84, ECLI:EU:C:1986:85 (*Krohn Import-Export v Commission*).
CJEU 23 April 1986, C-294/83, ECLI:EU:C:1986:166 (*Les Verts v Parliament*).
CJEU 14 January 1987, C-281/84, ECLI:EU:C:1987:3 (*Zuckerfabrik Bedburg v Council and Commission*).
CJEU 11 June 1987, C-81/86, ECLI:EU:C:1987:277 (*De Boer Buizen BV v Commission*).
CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452 (*Firma Foto-Frost v Hauptzollamt Lübeck-Ost*).
CJEU 2 February 1988, C-67-85/75, ECLI:EU:C:1988:38 (*Van der Kooy v Commission*).
CJEU 27 September 1988, C-106-120/87, ECLI:EU:C:1988:457 (*Asteris and Others v Greece and EEC*).
CJEU 1 June 1989, Case C-241/87, [1990] ECR I-1790 (*Maclaine Watson v Council and Commission*)
CJEU 10 October 1989, C-246/89R, ECLI:EU:C:1989:368 (*Commission v United Kingdom*).
CJEU 18 October 1989, C-374/87, ECR 3283, ECLI:EU:C:1989:387 (*Orkem v. Commission*).
CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi v Fonds des maladies professionnelles*).
CJEU 27 March 1990, C-308/87, ECLI:EU:C:1990:134 (*Grifoni v EACC*).
CJEU 17 May 1990, C-87/89, ECLI:EU:C:1990:213 (*Sonito and Others v Commission*).
CJEU 23 May 1990, C-51 and 59/90 R, ECLI:EU:C:1990:228 (*Cosmos-Tank BV and Others v Commission*).

CJEU 21 February 1991, Joined Cases C-143/88 and C-92/89, [1991] ECR I-415 (*Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*).
CJEU 8 March 1991, C-66/91 and C-66/91 R, ECLI:EU:C:1991:110 (*Emerald Meats Ltd v Commission*).
CJEU 16 May 1991, C-358/89, ECLI:EU:C:1991:214 (*Extramet v Council*).
CJEU 17 May 1991, C-313/90 R, ECLI:EU:C:1991:220 (*CIRFS v Commission*).
CJEU 19 November 1991, C-6 and 9/90, ECLI:EU:C:1991:428 (*Francovich and Others v Italy*).
CJEU 14 December 1991, Opinion 1/91, Draft Agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079 at I-6104-5.
CJEU 16 January 1992, C-358/90, ECLI:EU:C:1992:16 (*Compagnia Italiana Alcool v Commission*).
CJEU 30 January 1992, C-363 and 364/88, ECLI:EU:C:1992:44 (*Finsider and Falck v Commission*).
CJEU 13 March 1992, C-282/90, ECLI:EU:C:1992:124 (*Vreudenhil v Commission*).
CJEU 19 May 1992, C-104/89 and C-37/90, ECLI:EU:C:1992:217 (*Mulder and Others v Commission*).
CJEU 24 November 1992, C-286/90, ECLI:EU:C:1992:453 *(Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp).*
CJEU 2 December 1992, Case C-370/89, Société Générale d'Entreprises Eletro-Mécaniques (SGEEM) v. Roland Etroy v. European Investment Bank [1992] ECR I-2583.
CJEU 1 April 1993, C-25/91, ECLI:EU:C:1993:131 (*Pesqueras Echebastar SA v Commission*).
CJEU 2 March 1994, C-316/91, ECLI:EU:C:1994:76 (*European Parliament v Council of the European Union*).
CJEU 9 March 1994, C-188/92, ECLI:EU:C:1994:90 (*Textilwerke Deggendorf v Germany*).
CJEU 18 May 1994, C-309/89, ECLI:EU:C:1994:197 (*Codorniu v Council*).
CJEU 15 September 1994, C-146/91, ECLI:EU:C:1994:329 (KYDEP v Counicl and Commission).
CJEU 6 July 1995, T-572/93, ECLI:EU:T:1995:131 (*Odigitria v Council and Commission*).
CJEU 19 July 1995, C-149/95 P(R), ECLI:EU:C:1995:257 (Commission v Atlantic Container Line and Others).
CJEU 9 November 1995, C-465/93 [1995] ECR I-3761 (*Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*).
CJEU 5 March 1996, C-46 and 48/93, ECLI:EU:C:1996:79 (*Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*).
CJEU 11 July 1996, C-325/94, ECLI:EU:C:1996:293 (*WWF v Commission*).
CJEU 30 July 1996, C-84/95, ECLI:EU:C:1996:312 *(Bosphorus v Minister for Transport, Energy and Communications and others).*
CJEU 7 October 1996, C-178 and 179/94, C-188 and 189/94 and C-190/94, ECLI:EU:C:1996:375 (*Dillenkofer and Others v Germany*).
CJEU 12 December 1996, C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/
94, ECLI:EU:C:1996:486 *(RTI and others v Ministero delle Poste e Telecomunicazioni).*
CJEU 22 January 1997, T-115/94, ECLI:*EU:T:1997:3 (Opel Austria GmbH v Council).*

CJEU 29 May 1997, C-299/95, ECR I-2629, ECLI:EU:C:1997:254 (*Kremzow v. Austria*).
CJEU 2 April 1998, C-321/95, ECLI:EU:C:1998:153 (*Greenpeace and Others v Commission*).
CJEU 5 May 1998, C-386/96 P, ECLI:EU:C:1998:193 (*Dreyfus v Commission*).
CJEU 16 June 1998, C-162/96, ECLI:EU:C:1998:293 *(A. Racke GmbH & Co. v Hauptzollamt Mainz).*
CJEU 14 September 1999, C-310/97, ECLI:EU:C:1999:407 (*Commission v AssiDomän Kraft Products and Others*).
CJEU 4 July 2000, C-352/98 P, ECLI:EU:C:2000:361 (*Bergaderm and Goupil v Commission*).
CJEU 25 July 2002, C-50/00, ECLI:EU:C:2002:462 (*Union de Pequenos Agricultores v Council*).
CJEU 26 November 2002, T-74/00 DEP, Order – 03/10/2006 (*Artegodan v Commission a*).
CJEU 10 December 2002, C-312/00, ECLI:EU:C:2002:736 (*Commission v Camar and Tico*).
CJEU 10 July 2003, C-472/00 P, ECLI:EU:C:2003:399 (*Commission v Fresh Marine*).
CJEU 24 July 2003, C-39/03, ECLI:EU:C:2003:418 (*Commission v Artegodan and Others*).
CJEU 3 October 2003, C-583/11 P, ECLI:EU:C:2013:625 (*Inuit Tapiriit Kanatami and Others v Parliament and Council*).
CJEU 19 February 2004, C-327/02, ECLI:EU:C:2004:110 *(Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie).*
CJEU 1 April 2004, C-263/02 P, ECLI:EU:C:2004:210 (*Commission v Jégo-Quéré*).
CJEU 15 March 2005, C-160/03, ECLI:EU:C:2005:168 (*Spain v Eurojust*).
CJEU 24 November 2005, C-138/03, C-324/03 and C-431/03, ECLI:EU:C:2005:714 (*Italy v Commission a*).
CJEU 1 December 2005, C-46/03, ECLI:EU:C:2005:725 (*United Kingdom v Commission*).
CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727 (*Italy v Commission b*).
CJEU 23 February 2006, C-346/03, ECLI:EU:C:2006:130 (*Atenzi and Others v Regiona autonoma della Sardegna*).
CJEU 27 June 2006, C-540/03, ECR I-5769, ECLI:EU:C:2006:429 (*Parliament v. Council*).
CJEU 25 January 2007, C-278/05, ECLI:EU:C:2007:56 (*Robins and Others v Secretary of State for Work and Pensions*).
CJEU 17 April 2007, C-470/03, ECLI:EU:C:2007:213 (*AGM-COS.MET v Suomen valtio and Tarmo Lehtinen*).
CJEU 22 November 2007, C-525/04 P, ECLI:EU:C:2007:698 (*Spain v Lenzing*).
CJEU 17 July 2008, C-521/06, ECLI:EU:C:2008:422 (*Athinaïki Techniki v Commission*).
CJEU 9 September 2008, Joined Cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476 (FIAMM and others v Council and Commission).
CJEU 1 October 2009, C-370/07, ECLI:EU:C:2009:590 (*Commission v Council*).
CJEU 18 March 2010, C-317-320/08, ECLI:EU:C:2010:146 (*Alassini and Others v Telecom Italia SpA*).
CJEU 29 July 2010, C-377/09, ECLI:EU:C:2010:459 (*Hanssens-Ensch v European Community*).
CJEU 18 November 2010, C-322/09, ECLI:EU:C:2010:701 (*NDSHT v Commission*).
CJEU 8 March 2011, C-1/09, Opinion 1/2009.
CJEU 6 September 2011, T-18/10, ECLI:EU:T:2011:419 *(Inuit Tapiriit Kanatami and Others v. Commission)*.

CJEU 13 October 2011, C-463 and 475/10 P, ECLI:EU:C:2011:656 (*Deutsche Post and Germany v Commission*).
CJEU 25 October 2011, T-262/10, ECLI:EU:T:2011:623 *(Microban v. Commission).*
CJEU 21 December 2011, C-366/10, ECLI:EU:C:2011:864 *(Air Transport Association of America and Others v Secretary of State for Energy and Climate Change).*
CJEU 21 December 2011, C-493/10, ECLI:EU:C:2011:865 *(M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform).*
CJEU, 5 September 2012, C-355/10, ECLI:EU:C:2012:516 (*European Parliament v. Council*).
CJEU 17 January 2013, C-23/12, ECLI:EU:C:2013:24 *(Zakaria).*
CJEU 26 February 2013, C-617/10, ECLI:EU:C:2013:105 (Åklagaren v. Hans Åkerberg Fransson).
CJEU 22 January 2014, C-270/12, ECLI:EU:C:2014:18 (*United Kingdom v Parliamant and Council*).
CJEU 4 September 2014, C-575/12, ECLI:EU:C:2014:2155 (*Air Baltic Corporation AS v Valsts robežsardze*).
CJEU 10 September 2014, C-491/13, ECLI:EU:C:2014:2187 (*Mohamed Ali Ben Alaya v Germany*).
CJEU 18 December 2014, Opinion 2/13, Opinion pursuant to Article 218(11) TFEU (*Opinion 2/13*).
CJEU 22 April 2015, T-554/10, ECLI:EU:T:2015:224 *(Evropaïki Dynamiki v Frontex).*
CJEU 3 September 2015, C-398/13, ECLI:EU:C:2015:535 (*Inuit Tapiriit Kanatami and Others v. the Commission*).
CJEU 10 December 2015, C-350/14, ECLI:EU:C:2015:802 (*Lazar v Allianz SpA*).
CJEU 15 February 2016, C-601/15 PPU, ECLI:EU:C:2016:84 (*J.N. v. Staatssecretaris van Veiligheid en Justitie*).
CJEU 20 September 2016, C-8-10/15 P, ECLI:EU:C:2016:701 (*Ledra Advertising v Commission and ECB*).
CJEU 7 March 2017, C-638/16, ECLI:EU:C:2017:173 (*PPU X. and X. v. État Belge*).
CJEU 17 May 2017, T-583/16, *(PG v Frontex*).
CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79 (*Belgium v Commission*).
CJEU 17 December 2020, C-808/18, OJ C 155, 6.5.2019 (*European Commission v Hungary*).

Court of first instance
CFI EU 27 June 1991, T-120/89, ECLI:EU:T:1991:32 (*Stahlwerke Peine-Salzgitter v Commission*).
CFI EU 24 March 1994, T-3/93, ECLI:EU:T:1994:36 (*Air France v Commission*).
CFI EU 26 January 1995, T-527/93, ECLI:EU:T:1995:14 (*O v Commission*).
CFI EU 15 March 1995, T-514/93, ECLI:EU:T:1995:49 (*Cobrecaf SA and Othersv v Commission*).
CFI EU 24 September 1996, T-491/93, ECLI:EU:T:1996:127 (*Richco Commodities Ltd v Commission*).
CFI EU 17 June 1998, T-135/96, ECLI:EU:T:1998:128 (*UEAPME v Council*).
CFI EU 19 May 1999, T-203/95, ECLI:EU:T:1999:101 (*Connolly v Commission*).
CFI EU 27 June 2000, Joined cases T-172/98, T-175/98 to T-177/98, ECLI:EU:T:2000:168 (*Salamander and others v Parliament and Council*).
CFI EU 3 May 2002, T-177/01, ECLI:EU:T:2002:112, (*Jégo-Quéré et Cie SA v Commission*).
CFI EU 3 April 2003, T-114/02, ECLI:EU:T:2003:100 (*BaByliss v Commission*).

CFI EU 30 September 2003, T-158/00, ECLI:EU:T:2003:246 (*ARD v Commission*).
CFI EU 23 October 2003, T- 65/98 R, ECLI:EU:T:2003:281 (*Van den Bergh v Commission*).
CFI EU 23 November 2004, T-166/98, ECLI:EU:T:2004:337 (*Cantina Sociale di Dolianova and Others v Commission*).
CFI EU 4 May 2005, T-86/03, ECLI:EU:T:2006:90 (*Holcim v Commission*).
CFI EU 19 October 2005, T-415/03, ECLI:EU:T:2005:365 (*San Pedro and Others v Council*).
CFI EU 26 January 2006, T-364/03, ECLI:EU:T:2006:28 (*Medici Grimm KG v Council*).
CFI EU 10 May 2006, T-279/03, ECLI:EU:T:2006:121 (*Galileo International Technology and Others v Commission*).
CFI EU 11 July 2007, T-351/03, ECLI:EU:T:2007:212 (*Schneider Electric v Commission*).
EGC 8 July 2008, T-48/05, ECLI:EU:T:2008:257 (*Franchet and Byk v Commission*).
CFI EU 8 October 2008, T-411/06, ECLI:EU:T:2008:419 (*Sogelma v AER*).
EGC 3 March 2010, T-429/05, ECLI:EU:T:2010:60 (*Artegodan v Commission b*).
EGC 18 March 2010, T-42/06, ECLI:EU:T:2010:102 (*Gollnisch v Parliament*).
CFI EU 16 December 2010, T-19/07, ECLI:EU:T:2010:526 (*Systran and Systran Luxembourg v Commission*).
EGC 6 September 2011, T-18/10, ECLI:EU:T:2011:419 (*Inuit Tapiriit Kanatami and Others v Parliament and Council).*
EGC 23 November 2011, T-341/07, ECLI:EU:T:2011:687 (*Sison v Council*).
EGC 12 September 2013, T-331/11, ECLI:EU:T:2013:419 (*Besselink v Council*).
CFI EU 29 March 1995, ECLI:EU:T:1995:58 (*Hogan v CJEU*).
EGC 18 September 2014, T-317/12, ECLI:EU:T:2014:782 (*Holcim v Commission*).
EGC 29 November 2016, T-279/11, ECLI:EU:T:2016:683 (*T & L Sugars and Sidul Açúcares v Commission*).
EGC 27 November 2019, T-31/18, ECLI:EU:T:2019:815 (*Izuzquiza and Semsrott v Frontex*).

European Court of Human Rights

ECtHR 06 September 1978, Judgment, App. No. 5029/71, (*Klass v Germany*).
ECtHR 25th March 1983, App. No. App Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, A/61, (*Silver and Others v the United Kingdom*).
ECtHR 11 November 1996, Judgment, App. No. 17862/91 (*Cantoni v France*).
ECtHR 18 February 1999, Judgment, App. No. 24833/94 (*Matthews v United Kingdom*).
ECtHR 13 July 2000, App. No. 39221/98, *(Scozzari and Giunta v Italy).*
ECtHR, 30 June 2005, App. No. 45036/98, (*Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*).
ECtHR 21 November 2001, Judgment, App. No. 35763/97, § 55 *(Al-Adsani v the United Kingdom).*
ECtHR 12 December 2001, Decision on Admissibility, App. No. 52207/99 (*Banković and Others v Belgium*).
ECtHR 10 March 2004, Decision on Admissibility, App. No. 56672/00 (*Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and United Kingdom*).
ECtHR 4 February 2005, Judgment, App. Nos. 46827/99 and 46951/99 (*Mamatkulov and Askarov v Turkey*).
ECtHR 28 September 2005, Judgment, App. No. 31443/96 (*Broniowski v Poland*).

ECtHR 10 October 2006, Decision on Admissibility, App. No. 16931/04 (*Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France).*
ECtHR 11 January 2007, App. No. 1948/04, (*Salah Sheekh v the Netherland*).
ECtHR 2 May 2007, Decision on Admissibility, App. No. 71412/01*(Behrami and Behrami v France).*
ECtHR 2 May 2007, Decision on Admissibility, App. No. 78166/01 *(Saramati v France, Germany and Norway).*
ECtHR 28 August 2007, Decision on Admissibility, App. No. 31446/02 *(Gajic v Germany).*
ECtHR 16 October 2007, Judgment, App. Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793 and 25496/05 *(Beric and Others v Bosnia and Herzegovina).*
ECtHR 4 December 2008, Nos. 30562/04 30566/04, (*Marper v. the United Kingdom*).
ECtHR 9 December 2008, Decision on Admissibility, App. No. 73274/01 (*Connolly v 15 Member States of the European Union*).
ECtHR 20 January 2009, Decision on Admissibility, App. No. 13645/05 (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v Netherlands*).
ECtHR 11 June 2009, App. No. 53541/07, (*S.D. v. Greece*).
ECtHR 26 November 2009, App. No. 8256/07, (*Tabesh v. Greece*).
ECtHR 29 March 2010, App. No. 3394/03, (*Mededyev v France*).
ECtHR 22 July 2010, App. No. 12186/08, (*A.A. v. Greece*).
ECtHR [GC] 21 January 2011, App. No. 30696/09, (*M.S.S. v. Belgium v. Greece*).
ECtHR 31 March 2011, App No 20651/11, (H.N. v the Netherlands).
ECtHR 7 June 2011, App. No. 2237/08, (*R.U. v. Greece*).
ECtHR 21 June 2011, App. No. 33225/08, (*Efremidzi v. Greece*).
ECtHR 23 February 2012, App. No. 27765/09, (*Hirsi Jamaa and Others v. Italy*).
ECtHR 17 July 2012, App. No. 74279/10, (*Lica v. Greece*).
ECtHR 31 July 2012, App. No. 14902/10, (*Mahmundi and Others v. Greece*).
ECtHR 25 September 2012, App. No. 50520/09, (*Ahmade v. Greece*).
ECtHR 6 November 2012, App. No. 58158/10, (*Lin v. Greece*).
ECtHR 7 July 2011, Judgment, App. No. 27021/08 *(Al-Jedda v The United Kingdom).*
ECtHR 8 April 2014, Judgment, App. No. 17120/09 (*Dhahbi v Italy*).
ECtHR 17 July 2014, Judgment, App. No. 44260/13 (*Kim v Russia*).
ECtHR 20 November 2014, Judgment, App. No. 47708/08 *(Jaloud v the Netherlands).*
ECtHR 21 July 2015, Judgment, App. No. 38369/09 (*Schipani et al. v Italy*).
ECtHR 23 May 2016, Judgment, App. No. 17502/07 (*Avotiņš v Latvia*).
ECtHR 21 June 2018, Judgment, App. No. 66702/13, (S.Z. v. Greece)
ECtHR 28 February 2019, Judgment, App. No 19951/16, (*H.A. and others v. Greece).*

European Commission of Human Rights
European Commission of Human Rights 9 February 1990, No. 13258/87 (*M. & Co. v Germany*).
European Commission of Human Rights 10 July 1978, No. 8030/77 (*Confédération Française Démocratique du Travail v European Communities*).

International Courts
International court of justice
ICJ 15 December 1949, *Corfu Channel Case* (*United Kingdom v Albania*).

ICJ 25 March 1951, advisory opinion on the Interpretation of the Agreement between the WHO and Egypt.
ICJ 15 June 1954, Monetary Gold Removed from Rome in 1943, Preliminary Question, ICJ Reports 1954, 19 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*).
ICJ 20 July 1962, advisory opinion Certain expenses of the United Nations, I.C.J. Reports 1962.
ICJ 20 February 1969, *North Sea Continental Shelf* (*Germany v the Netherlands*).
ICJ 27 June 1986, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v the United States of America*), Merits, 27 June 1986, ICJ Reports 1986.
ICJ 20 July 1989, Elettronica Sicula SpA (ELSI), ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989) (*United States v Italy*).
ICJ, 26 June 1992, Preliminary Objections, Reports 1992, 240 (*Certain Phosphate Lands in Nauru v Nauru/Australia*).
ICJ Reports 1997, Gabčíkovo-Nagyamaros Project *(Hungary v Slovakia).*
ICJ 15 December 2004, Preliminary Objections, *Legality of the Use of Force* (*Yugoslavia v France*).
ICJ Reports 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia v Serbia).*

Permanent Court of International Justice
PCIJ, Factory at Chorzow, 1927 (ser. A) No. 9 (Chorzow, *Germany v Poland)*

Arbitration
The Channel Tunnel Group Ltd & France-Manche S.A.v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'equipement, des transports, de l'ame ´nagement du territoire, du tourisme et de la mer du Gouvernement de la Republique française, Partial Award, (2007) 132 ILR 1 (*Eurotunnel Arbitration*).

National Courts

Belgium Court of First Instance
Brussels Court of First Instance, 8 December 2010, 04/4807/A and 07/15547/A, (*Mukeshimana-Ngulinzira and others v Belgium and others*).

District Court of The Hague
District Court of The Hague 10 September 2008, Judgment, case no. 265615/HA ZA 06-1671 *(Nuhanovic v The State of the Netherlands).*

Supreme Court of the Netherlands
Supreme Court of the Netherlands 13 November 2007, LJN: BA9173, 01984/07 CW, (Euratom).
Supreme Court of the Netherlands 13 April 2012, Judgment 10/04437 (*Mothers of Srebrenica et al v State of The Netherlands and the United Nations*).
Supreme Court of the Netherlands 6 September 2013, Judgment 12/03324 (*The State of the Netherlands v. Hasan Nuhanović*).
Supreme Court of the Netherlands 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*State of the Netherlands v Mustafic´ et al*.).

The Hague Court of Appeal

The Hague Court of Appeal 5 July 2011, ECLI:NL:GHSGR:2011:BR5388 (*Nuhanovic v the Netherlands*).

United Kingdom House of Lords

UKHL 12 December 2007 House of Lords, Judgment- R *(FC v Secretary of State for Defence)*.

Curriculum Vitae

Mariana Gkliati is an Assistant Professor of International and EU Law at Radboud University Nijmegen. She has received a Graduate Diploma in Law at the National and Kapodistrian University of Athens (Magna Cum Laude) and a Legal Research Master at Utrecht University (Summa Cum Laude).

She completed her PhD at the Institute of Immigration Law/Europa Institute at Leiden Law School of Leiden University on the legal responsibility and the accountability of Frontex, the European Border and Coast Guard Agency, under the supervision of Prof. Peter Rodrigues (Leiden University) and Prof. Leonard Besselink (University of Amsterdam). The PhD research has been supported by the Meijers Research Institute and Graduate School of the Leiden Law School.

She is further a Research Affiliate to the Refugee Law Initiative (RLI) and teaches on the RLI MA in Refugee Protection and Forced Migration Studies at the University of London. She has previously taught at Leiden University and the Migration Law Clinic of Roma Tre University, and has given several guest lectures and seminars in the Netherlands, the United Kingdom, France, Greece, Belgium, and Italy.

She has published broadly within migration, refugee and human rights law, including on the domestic implementation of the EU Turkey Deal, the reception of refugees, anti-smuggling policies, and the accountability of Frontex.

She currently runs the externally funded project 'European Border and Coast Guard Agency: Systemic Accountability in Practice', which engages a 8-members research team and aims at expanding the research on responsibility and accountability upon the specific activities of the agency, and engaging with evidence-based policy-making in materialisation of systemic accountability.

Mariana regularly undertakes training to lawyers and NGOs, and has been consulted as a legal analyst by several national and international organisations, law firms, and the European Parliament; and written expert reports on migration, borders, and human rights.

She has been visiting Research Fellow at the School of Advanced Study, University of London (2016) and the Amsterdam Centre for Migration and Refugee Law at the the Free University of Amsterdam (2019/2020).

Over the last years, she has acted as PhD representative and member of the Steering Committee of the Netherlands Institute of Human Rights Research, and as co-founder and co-chair of its Migration & Borders Working Group. She has also been a member of the Editorial Bord of the Refugee

Law Initiative Working Paper Series and an External Affiliate to Statewatch (Frontex Observatory).

Prior to starting her PhD, Mariana worked at the EU Fundamental Rights Agency (FRA) in the area of asylum, migration, and borders, and as a legal case reporter and commentator for Oxford Reports on International Law. She has had an earlier carrier as a radio journalist, and has voluntarily worked for the Asylum NGO AITIMA.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020:

MI-335 M.R. Bruning e.a., *Kind in proces: van communicatie naar effectieve participatie*, Nijmegen: Wolf Legal Publishers 2020

MI-336 J. van Kralingen, *De ondeelbaarheid van het pand- en hypotheekrecht; deconstructie van een leerstuk. Een historisch-comparatieve studie*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 782 9

MI-337 J.C.A. van Dam, *Guidance documents of the European Commission in the Dutch legal order*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-338 F. Jiang, *Greening' the WTO Ban on China's Export Duties. Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-339 M.J.R. Broekema, *Cognitive Bias in the Judgment of Business Valuations and Valuators. How Systematic Patterns of Irrationality Affect Entrepreneurs, Legal Professionals and Business Valuators*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-340 H. Horii, *Child Marriage as a Choice. Rethinking agency in international human rights*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-341 R. de Graaff, *Concurrence in European Private Law*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 134 8

MI-342 J.M.M. van der Vliet, *The International Legal Protection of Environmental Refugees. A human rights-based, security and State responsibility approach*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6236 139 3

MI-343 M. Samadi, *Normering en Toezicht in de Opsporing. Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 816 1

MI-344 D.J. Verheij, *Credit rating agency liability in Europe. Rating the combination of EU and national law in rights of redress*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 144 7

MI-345 P. Rustenburg, *Een algemene normtheorie toegepast op open normen in het belastingrecht*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-346 J.V.O.R. Doekhie e.a., *Invoering jeugdstrafrecht in Caribisch Nederland. Een verkenning naar een jeugdstrafrechtmonitor*, Den Haag: Boom criminologie 2020, ISBN 978 94 6236 151 5

MI-347 A. Varga, *Establishing State Responsibility in the Absence of Effective Government*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-348 M. Darouei, *Managing a Sustainable Career in the Contemporary World of Work: Personal Choices and Contextual Challenges*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-349 N. Strohmaier, *Making Sense of Business Failure. A social psychological perspective on financial and legal judgments in the context of insolvency*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-350 S. Kouwagam, *How Lawyers Win Land Conflicts for Corporations. Legal Strategy and its Influence on the Rule of Law in Indonesia*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-351 A.D. Sarmiento Lamus, *The proliferation of dissenting opinions in international law. A comparative analysis of the exercise of the right to dissent at the ICJ and the IACtHR*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-352 B. Ribeiro de Almeida, *Building land tenure systems. The political, legal, and institutional struggles of Timor-Leste*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-353 K.A.M. van der Zon, *Pleegrechten voor kinderen. Een onderzoek naar het realiseren van de rechten van kinderen die in het kader van de ondertoezichtstelling in een pleeggezin zijn geplaatst*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 842 0

MI-354 E.G. van 't Zand e.a., *Bestuurlijke boetes en de Verklaring Omtrent het Gedrag. Een onderzoek naar de realiseerbaarheid en wenselijkheid van het betrekken van bestuurlijke boetes bij de VOG-screening aan de hand van een casestudy naar handhaving en integriteit in de financiële sector*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 843 7

MI-355 J. Boakye, *Understanding Illegal Logging in Ghana. A Socio-Legal Study on (non)Compliance with Logging Regulations*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-356 N.N.A. Sánchez Castillo-Winckels, *International law and the sustainable governance of shared natural resources. A principled approach*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020, ISBN 978 94 0282 145 1

MI-357 S.S. Arendse, *De uiterlijke verschijningsvorm in het strafrecht. Een analyse van de jurisprudentie van de Hoge Raad*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 844 4

MI-358 J. Reef, M. Jeltes & Y.N. van den Brink, *De PIJ-maatregel doorgelicht. Juridische grondslagen, populatiekenmerken, gedragsverandering en recidive*, Nijmegen: Wolf Legal Publishers 2020, ISBN 978 94 6240 608 7

MI-359 S. Guo, *Recognition of Foreign Bank Resolution Actions*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-360 B. Muscat, *Insolvency Close-out Netting: A comparative study of English, French and US laws in a global perspective*, (diss. Leiden), Amsterdam: IpskampPrinting 2020

MI-361 J.M. ten Voorde, S.V. Hellemons & P.M. Schuyt, *Discriminatie als strafbeïnvloedende omstandigheid bij strafbare feiten, Een rechtsvergelijkende studie*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 871 0

MI-362 F. Afandi, *Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the case of Indonesia*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-363 R.M. Koenraadt, M.M. Boone, S.E. Rap & S. Kappert, *Financieel toezicht binnen het (jeugd) strafrecht. Een onderzoek naar het verloop, de resultaten en mogelijke uitbreiding van verplicht financieel toezicht binnen het (jeugd)strafrecht*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 933 5

MI-364 J.J. Asscher, Y.N. van den Brink, H.E. Creemers, E. Huls, E.K. van Logchem, N. Lynch & S.E. Rap, *De strafmaat voor jeugdige daders van ernstige gewelds- en zedenmisdrijven in internationaal perspectief*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 943 4

MI-365 M.P.A. Spanjers, *Belastingbudget. Onderzoek betekenis budgettaire impact belastingen bij parlementaire vaststelling belastingwetgeving*, (diss. Leiden), Den Haag: Flosvier, ISBN/EAN 978 90 8216 072 7

MI-366 J. Zhang, *The Rationale of Publicity in the Law of Corporeal Movables and Claims. Meeting the Requirement of Publicity by Registration?*, The Hague: Eleven International Publishing 2021, ISBN 978 94 6236 210 9

MI-367 B.C.M. van Hazebroek, *Understanding delinquent development from childhood into early adulthood in early onset offenders*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021, ISBN 978 94 6421 272 3

MI-368 M.R. Manse, *Promise, Pretence and Pragmatism. Governance and Taxation in Colonial Indonesia, 1870-1940*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-369 M.E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-370 M.T. Beumers, *De bescherming van immateriële contractuele belangen in het schadevergoedingsrecht*, (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 962 5

MI-371 C.M. Sandelowsky-Bosman, T. Liefaard, S.E. Rap & F.A.N.J. Goudappel, *De rechten van ongedocumenteerde kinderen in Curaçao – een gezamenlijke verantwoordelijkheid*, Den Haag: Boom juridisch 2021, ISBN 978 94 6290 965 6

MI-372 G.J.A. Geertjes, *Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk*, (diss. Leiden), Zutphen, Uitgeverij Paris bv 2021, ISBN 978 94 6251 270 2

MI-373 L. Noyon, *Strafrecht en publieke opinie. Een onderzoek naar de relatie tussen de strafrechtspleging en het publiek, met bijzondere aandacht voor het Openbaar Ministerie*, (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 978 6

MI-374 F. Behre, A *European Ministry of Finance? Charting and Testing the National Constitutional Limits to EU Fiscal Integration*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-375 R. Spence, *Collateral transactions and shadow banking*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-376 B.H.M. Custers, F. Dechesne & S. van der Hof (red.), *Meesterlijk. Liber amicorum ter gelegenheid van het emeritaat van prof. dr. Jaap van den Herik*, Amsterdam: Ipskamp Printing 2021

MI-377 E. Campfens, *Cross-border claims to cultural objects. Property or heritage?*, (diss. Leiden), Den Haag: Boom juridisch 2021

MI-378 S.R. Bakker, *Uitzonderlijke excepties in het strafrecht. Een zoektocht naar systematiek bij de beslissingen omtrent uitsluiting van strafrechtelijke aansprakelijkheid in bijzondere contexten*, Den Haag: Boom juridisch 2021

E.M. MEIJERS INSTITUUT
INSTITUUT VOOR RECHTSWETENSCHAPPELIJK ONDERZOEK

There has never been a more pertinent time to discuss the accountability and the legal responsibility of Frontex, the European Border and Coast Guard Agency, for fundamental rights violations. In a period that hosts the first legal actions vis-à-vis the agency and a series of relevant non-judicial investigations, including by the European Parliament, this dissertation aims to address the main problem underlying these accountability efforts, namely the 'problem of many hands'. As conceptualised by Dennis Thompson, this problem is where the multiplicity of the actors involved obscures the various responsibilities and creates gaps in accountability.

To address it, this work contests the dominant ways of looking at the concepts of responsibility and accountability, and reimagines them for their optimal function.
It adopts a holistic approach, taking into account not only judicial, but also other forms of accountability, studying not only EU liability law, but also other legal remedies before the CJEU, the ECtHR, and domestic courts, building bridges between international and EU law, and traveling from the empirical to the conceptual, to the normative, and from there to the applied.

It creates the foundations for the accountability of the agency inside and outside courts, within the EU borders and beyond.

This is a volume in the series of the Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. This study is part of the Law School's research programme 'Effective Protection of Fundamental Rights in a pluralist world'.