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

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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 counter-balance 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 resettlement² and humanitarian visas³ 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

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- 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=2ahUKEwki8fdwMnuAhVhEWMBHekNDPIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.refworld.org%2Fpdfid%2F588b4af44.pdf&usq=AOvVaw2uijy3vs77kSgzhlSztflQm>.
 - 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 Netherlands*).

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 irregular 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 statutory 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 operations 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 implemented, 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_Member_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 Council²⁹ or even the CJEU³⁰ 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 law³² 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

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- 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.

