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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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PART II

CONCEPTUAL: FROM MANY HANDS TO SYSTEMIC ACCOUNTABILITY

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 L.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 is 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 chapters 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 Électro-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 Preamble 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 years³⁴ 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 (*Staubert 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 *problematic* 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-eda5-1cb9-557b39a38dae&documentId=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 preliminary 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 circumstances 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 responsibilities 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.

