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

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Part III

Normative: Pluralism in Human Rights Protection

6 A Normative Framework on Responsibility

1 Introduction

Having achieved an understanding of responsibility that best fits occasions where the *problem of many hands* appears, namely, responsibility as nexus, we need to examine how this could be translated in the legal framework. Notably, this examination should premise from the concept of shared or joint responsibility, the legal nature of which is studied in this chapter. In the previous chapter, preliminary arguments were made regarding the responsibility of Frontex, in order to counter the claims of irresponsibility and establish whether is it in the first place capable of carrying responsibility. No matter how convincing these arguments are, however, in order for the responsibility to crystalise as a matter of law, issues of attribution and legal personality need to be discussed. Therefore, the appropriate legal framework on responsibility is analysed in this chapter to provide answers to some key questions.

What is the appropriate legal framework? What are the elements of establishing responsibility for an internationally wrongful act? Is Frontex a subject of international law? How can wrongful conduct be attributed to it?

These are the questions that need to be tackled before proceeding in the following chapter to the assessment of the responsibility of Frontex for misconduct during its operations.

2 A normative framework found in the interaction of international and EU law

To start answering the research questions, we need to acknowledge that the liability of Frontex, as an EU agency, is dealt with first and foremost as a matter of EU law, as discussed further in Chapter VIII. In this section, however, I argue that the answer to the question of the legal responsibility of Frontex should be provided in a pluralist environment through the interaction of international and EU law. The interaction of these two legal systems can provide accuracy, clarity and legal certainty to the question of the responsibility within EBCG operations.

International law offers a rich case law for dealing with the international responsibility of states and international organisations. The principles established by international courts are gradually being codified in what can constitute a framework for dealing with responsibility under international

law. In this process, the International Law Commission (ILC) adopted in 2001 the Articles on the Responsibility of States (ARS).[1] When the ARS were almost complete, the UN General Assembly recommended that the ILC[2] engages with the codification of the law on the international responsibility of international organisations.[3]

ILC completed its work in 2011, following the eight reports of General Rapporteur Giorgio Gaja, producing the Draft Articles on the Responsibility of International Organisations (ARIO).[4] These Articles govern the rules under which an international organisation incurs responsibility for breach of its international obligations. They do not contain primary rules, establishing when an organisation is bound by an international obligation, but mainly secondary rules, setting out the rules for dealing with the breach. The ARIO are accompanied by a Commentary issued by the ILC and following judicial precedent, treaties and doctrine, which Commentary is an official source of its interpretation.[5]

Even though the idea of the interplay between international and EU law, does not bring about radical changes in our understanding of the function of the law and the relationships between different legal systems, certain counter-arguments may be envisaged that reject the use of the ILC Articles for the responsibility of Frontex.

I deal below with the three most representative and critical counter-arguments to its application on a EBCG related violations: a) Frontex is not an international organisation, b) violations by Frontex are a matter of EU, not international law, c) the ILC Articles are not binding law.

1 International Law Commission Responsibility of States for Internationally Wrongful Acts 2001, Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, Yearbook of the International Law Commission, 2001, vol. II (Part Two).

2 The International Law Commission is a subsidiary organ to the UN General Assembly, established in 1947 with the mandate to progressively develop and codify international law. Statute of the International Law Commission in United Nations General Assembly Resolution 176/II, 21 November 1947.

3 United Nations General Assembly, Resolution 56/82 of 12 December 2001. This mandate includes 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet sufficiently developed in the practice of State' and 'the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. Article 15 International Law Commission Statute.

4 Draft articles on responsibility of international organisations, with commentaries. Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011 (A/66/10and Add.1).

5 Article 20 International Law Commission Statute.

2.1 Responsibility of Frontex or the Union?

A question of accuracy and precision that should be tackled is whether we should be referring to the responsibility of Frontex or the European Union (EU). I have been referring so far to the responsibility of the agency, but is it, in fact, the responsibility of the Union that would be engaged in case of violations during EBCG operations? As understood in international law, and the work of the ILC in particular, responsibility is reserved for entities with international legal personality, i.e. the capacity to bear rights and duties under international law. Such are states or international organisations. As Frontex is clearly not a state, this raises the following questions: a) is Frontex an international organisation, b) is the EU an international organisation, and c) should we refer to Frontex or the EU when talking about violations during EBCG operations?

Article 56(1) EBCG Regulation stipulates that Frontex has legal personality. However, this, does not refer to an international legal personality, but merely theagency's capacityy to bear rights and duties under EU law. Thus, for the answer, we have to turn to international law.

Defining an 'international organisation' is one of the most fundamental questions in international law

and yet it has proven impossible to agree in one single definition. Rarely, an international organisation is identified as such in its constituent document. Such an exceptional case is the Southern African Development Community (SADC).[6] More commonly, international organisations are recognised on the basis of certain common characteristics they share.[7] However, these common characteristics do not create an outcome written in stone. The founders of such organisations are not driven by the purpose of creating an international organisation as such, but by functional and teleological considerations. These entities are a means to an end and are simply bestowed with such powers and mandates that allow them to fulfil that end. The common characteristics are more the result of this effort than they are intentional. In other words, these may be shared features, but are not establishing or constitutive features, in the sense that they have to be present if an organisation is to be considered subject of international law. As observed by Klabbers, 'Usually, those organisations will have a number of characteristics in common, although, in conformity with the fact that their founding fathers are relatively free to establish whatever they wish, those characteristics are not more than characteristics. The fact that they do not always hold true does not, as such, deny their value in general'.[8]

6 H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within Diversity*, Leiden: Brill Academic Publishers 2011, p. 36.

7 Klabbers 2009, p.p.: 6, 7; Schermers and Blokker 2011, p. 36.

8 Klabbers 2009, p. 7.

As a rough attempt of a definition on the basis of these characteristics, as they are usually identified in literature,[9] international organisations are entities created by two or more states by means of a treaty governed by international law, and which have at least one organ with a distinct will of its own.

a) *created by two or more states:* Although the creation by two or more states is more common, an international organisation may be created even without the explicit decision of government representatives.[10] Moreover, other international organisations or bodies can also be founding members of international organisations. For instance, the European Communities was a founding member of the World Trade Organisation, while the Joint Vienna Institute was established exclusively by other international organisations. Vice versa, not all entities created by states, constitute international organisations. Such a creation may be the bearer of legal personality only under domestic or regional legal systems. Also, at first sight, an entity may look like an international organisation, but be, in fact, merely an organ of an international organisation. Such is the case of the European Court of Human Rights that is not an international organisation in its own right, but an organ of the Council of Europe.[11] There are authors, however, that suggest that organs with decision-making powers are in fact international organisations in sheep's clothing.[12]
b) *created by means of a treaty governed by international law:* A treaty is defined in the Vienna Convention on the Law of the Treaties as a written agreement, governed by international law.[13] In some cases, international organisations are created by informal or other types of agreement or by a legal act of the founding international organisation. Furthermore, there is significant uncertainty as to the legal nature of the constituent documents of several bodies that creates further uncertainty as to their official status as international organisations (for example Organisation for Security and Co-operation in Europe (OSCE)).[14] In any case, the existence of an international agreement is considered by the UN as the main distinguishing element between an international organisation and an NGO.[15]

9 Klabbers 2009, p.p.: 6-12; Schermers and Blokker 2011, p. 36.
10 Schermers and Blokker 2011, p. 38.
11 Klabbers 2009, p.p.: 7, 8; Schermers and Blokker 2011, p.p.: 38, 39.
12 Klabbers 2009, p. 9, fn 31 referring to D. Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine' in A. Barav et al. (eds.), *Scritti in onore di Giuseppe Federico Mancini, Volume II*, 1998, p.p.: 227-256.
13 Article 2(1)(a), Vienna Convention on the Law of the Treaties.
14 Klabbers 2009, p.p.: 7, 8; Schermers and Blokker 2011, p.p.: 37, 46, 47.
15 United Nations Economic and Social Council Resolution 1996/31 of 25 July 1996, Consultative relationship between the United Nations and non-governmental organisations.

c) *with a distinct will:* An international organisation must have at least one organ with its own will that is distinct from that of its founders. This element signifies the autonomy of the organisation that allows it to have legal personality and distinguishes it from treaty organs. Usually, an international organisation is endowed with legal personality, i.e. the capacity to bear rights and obligations under the law. Exceptionally, also due to realpolitik considerations, not all entities formally recognised as international organisations possess this characteristic, while even organs of international organisations often enjoy themselves a degree of autonomy and independence.[16]

It becomes obvious that we cannot base an answer on whether Frontex is an international organisation, solely on the above open-ended and versatile features. The ARIO offer a less demanding definition for the purposes of that document[17]:

> *"International organisation" means an organisation established by a treaty or other instrument governed by international law, and possessing its own international legal personality.*

Based on the aforementioned attempts for a definition, or at least for defining characteristics, authors contest the fact that Frontex constitutes an international organisation,[18] arguing that Frontex does not possess international personality, and thus, cannot be the bearer of responsibility for the commission of an internationally wrongful act. It is only the EU, as an international organisation that can be a subject of international law.

However, it has also been reasonably suggested that Frontex shares the characteristics of an international organisation, namely it is established under international law and on the basis of a treaty governed by international law, is set up by states or other international organisations, and enjoys certain operational and budgetary autonomy towards its creators, and it has been endowed with legal personality under EU law and enjoys the most extensive legal capacity accorded to legal persons under the laws of the member states. This includes being party to legal proceedings.[19] Furthermore, the agency incurs contractual and non-contractual liability,[20] and has extended external relations power, as it has, for instance, concluded headquarters agreements with Poland, under which Frontex is treated as

16 Klabbers 2009, p.p.: 9, 10; Schermers and Blokker 2011, p.p.: 40, 41, 44, 45.
17 Article 2(a) ARIO.
18 Mungianu 2016, p. 35; Fink 2017, p. 40.
19 Article 15(1) Frontex Regulation; Majcher 2015, pp.: 48-52.
20 Article 69 EBCG Regulation; The first actions against Frontex with respect to its contractual liability have been brought before the CJEU, e.g. CJEU 17 May 2017, T-583/16, *(PG v Frontex*); CJEU 22 April 2015, T-554/10, ECLI:EU:T:2015:224 *(Evropaïki Dynamiki v Frontex)*.

a subject of international law,[21] which has been argued to be an indication of international legal personality.[22] If the agency had not had its own legal personality at least for the matters dealt with in the agreement, the agreement itself would have been concluded by the EU in the name of the agency in accordance with Article 218 TFEU.

These arguments do not necessarily cover the international legal personality of an entity.[23] They may suggest at least a limited international legal personality (for example power to conclude treaties with respect to their headquarters), but cannot necessarily carry safely and without doubt the argument of a complete legal personality. It could even be argued that any such agreements are concluded under the EU's international legal personality.[24] Although Frontex has a certain degree of autonomy, it cannot be safely argued that it is a completely autonomous and separate entity. For instance, Frontex working arrangements are subject to the prior opinion of the Commission,[25] the agency's Management Board is composed of representatives of the member states and the Commission, and its Executive Director is appointed by the Management Board on the Commission's proposal. It can be noted, though, that there are multiple understandings of autonomy (e.g. financial, political, institutional) and different international organisations present varying levels of automomy, while others albeit enjoying conciderable autonomy are not universally considered international organisations (UNICEF).

Nevertheless, even though the agency does not fit in the traditional definition of an international organisation at first glance, and given the fluidity of that definition, it does share certain characteristics that make the distance between Frontex and a traditional international organisation rather short.

Moreover, as observed by Klabbers, the ILC clarifies that:

21 Frontex, Frontex and Poland sign the headquarters agreement, 09 March 2017, https://frontex.europa.eu/media-centre/news-release/frontex-and-poland-sign-the-headquarters-agreement-Tx15sl; Memorandum of Understanding between the Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Minister of the Interior and Administration of the Republic of Poland on the headquarters and certain other issues related to the functioning of Frontex in Poland, Warsaw, 26 March 2007; Frontex, European Border and Coast Guard Agency concluded HQ Agreement negotiations, 21 January 2017, https://frontex.europa.eu/pressroom/news/european-border-and-coast-guard-agency-concluded-hq-agreement-negotiations-L6FKqz?q.

22 G. Schusterschitz, 'European Agencies as Subjects of International Law', *International Organizations Law Review*, 1, 1, 2004, p.p.: 171-174. The conclusion of working arrangements between Frontex and third states is not an argument in favour of the agency's international legal personality, as these explicitly not considered as treaties under international law. M. Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"', *Merkourios*, 28, 2012, p. 26.

23 M. N. Shaw, *International Law*, Cambridge: Cambridge University Press 2008, p. 195.

24 Fink 2017, p. 40.

25 Article 68(2) EBCG Regulation.

'[the] fact that an international organisation does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organisation.'[26]

In the light of the above, given the parallels with an international organisation and the authoritative clarification of the ILC, it can be convincingly supported that the ARIO can, at least, be applied by analogy to Frontex in the context of international law.[27]

The status of the EU as an international organisation is more straightforward, as argued by Mungianu.[28] Article 47 TEU formally affirms the legal personality of the EU, while the EU is afforded the most extensive legal capacity accorded to legal persons in each of the member states (Article 335 TFEU), and has contractual and non-contractual liability (Article 340 TFEU). Furthermore, the CJEU has already in the *European Agreement on Road Transport* case, interpreted Article 210 EEC Treaty (now Article 47 TEU) as granting the EEC international legal personality.[29] We have no reason to doubt that the CJEU would follow the same interpretation with respect to Article 47 TEU.[30]

Thus, the EU is indeed an international organisation.[31] Frontex does not entirely fall under the traditional definition of an international organisation, but the more accurate question is in fact whether it can be considered as an international organisation for the purpose of attribution of international responsibility. This should be answered in the affirmative given the shared characteristics of Frontex with an international organisation combined with

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26 International Law Commission, *Report on the work of its sixty-third session (26 April – 3 June and 4 July – 12 August 2011)*, UN General Assembly, A/66/10, 2011, p. 74.

27 e.g. Majcher 2015, pp.: 48-52; International Law Commission 2011, p. 74: '[the] fact that an international organisation does not possess one or more of the characteristics set forth (…) does not imply that certain principles and rules states in the following articles do not apply also to that organisation'.

28 Mungianu 2016, p.p.: 49-51.

29 CJEU 31 March 1971, C-22/70, ECLI:EU:C:1971:32 *(Commission of the European Communities v Council of the European Communities)*, paras.: 13-15.

30 M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A. Dashwood and M. Marescaeau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, p. 38.

31 On debates concerning the international legal personality of the EU and its scope see Casteleiro 2016, pp.: 11- 30; P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing 2015, p. 14; Klabbers 2009) p. 50; G. I. Hernandez, 'Beyond the Control Paradigm? International Responsibility and the European Union', *Cambridge Yearbook of European Legal Studies*, 15, 2014, p.p.: 643, 648. Nevertheless, 'there is no doubt that the EU is an international subject with its own legal personality that, by virtue of the powers conferred to it, can be bound by international law, breach it, and be held responsible for those breaches where the extent of the EU's responsibility would boil down to how its relationships with its Member States are characterised.' Casteleiro 2016, p. 15.

the fluidity of the definition itself, as well as the authoritative clarification of the ILC. In other words, the ARIO can, in principle, be applied to Frontex.

This normative debate can be brought to a close with an indisputable positivist argument. In particular, a more concrete picture can be drawn, looking at the question of the bearer of responsibility from a pragmatic point of view, namely taking into account the judicial fora that would need to determine the issue of responsibility.

Thus, from a pragmatic point of view, an individual complaint brought before the ECtHR, pending the accession of the EU to the ECHR,[32] would implicate the EU, which holds responsibility for acts of its agencies.[33] Looking at EU law, by virtue of Article 51 of the Charter, the Charter can apply to EU agencies separately from the Union. Furthermore, Article 93(1) EBCG Regulation gives Frontex legal personality, which allows it to be held liable before the CJEU independently from the Union. Finally, the CJEU has the competence (Article 263 TFEU) to look into the legality of acts of agencies, and thus into the responsibility of these bodies.[34] Hence, an action for liability would be brought before the CJEU against the agency itself.[35] Even though, in general, it is the EU rather than the agency that shall compensate for any damage caused (Article 340 (2) TFEU), in the case of Frontex its founding Regulation states that the agency is itself liable for any damage caused by its departments of staff (Article 107(3) EBCG Regulation).

In conclusion, the analysis of the legal and doctrinal framework covering international organisations, as well as the particular regime of Frontex, suggest that the EU is an organisation with legal personality under international law, but Frontex itself is not an international organisation stricto sensu. However, due to its closeness to an international organisation, given the fluidity of the definition, and the flexible interpretation given by the ILC, it can be argued that the ARIO can be applied to Frontex in questions of its international responsibility. In pragmatic terms, the question of whether we should speak of the responsibility of the Union or Frontex is resolved by the court which we are addressing. The CJEU can judge the responsibility of the agency itself, while the ECtHR will rule on the responsibility of the EU (represented by the Commission).

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32 With the entry into force of the Lisbon Treaty, the European Union has committed to acceding to the ECHR. However, the CJEU has heavily discouraged the proponents of the accession with its Opinion 2/13 of 18 December 2014, where it ruled that the draft accession agreement is not compatible with EU law. CJEU 18 December 2014, Opinion 2/13, Opinion pursuant to Article 218(11) TFEU (*Opinion 2/13*).

33 Article 340(2) TFEU.

34 On the autonomous nature of agencies within EU law, see, for instance, M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers 2009; M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers 2010.

35 For instance, *Evropaïki Dynamiki v. Frontex*. The case concerns non-contractual liability in the context of public procurement.

2.2 Frontex as a matter of international law: a pluralist interpretation of EU law

It can be argued that the proper context to address questions regarding Frontex would be EU law, rather than international law. Without diminishing the primary importance of EU law, this section aims to argue that the framework concerning Frontex responsibility needs to include consideration of the relevant international law. It does so, on two levels. First, it discusses the place of EU law within international law, adopting a pluralist perspective. Second, it focuses on the added value of the ARIO in the present legal environment of EU liability.

This study starts from the premise of constitutional or legal pluralism. This notion reflects here how the different legal frameworks and judicial actors interact within the common environment of a coherent legal architecture of public international law that is neither solid nor fixed, but represents, as some authors have put it, a 'common space for human rights protection is Europe'.[36]

The international and the EU legal orders constitute distinct legal frameworks, which meet and merge into a consistent legal order. International law has, in fact, functioned as an instrument of European integration.[37] The regional system, within which EU law falls, in particular, the Charter and the ECHR as well as the jurisprudence of the two European High Courts, constitutes a coherent legal order in itself. However, it does not exist in isolation but is part of the broader normative system of international law. It builds upon an already existing international framework, while it also impacts upon its surrounding legal system. As the CJEU has held in the classic cases of *Van Gend en Loos* and *Costa E*NEL, the EU (then the Community) constitutes 'a new legal order of international law'.[38]

Pernice, has visualised the integration between national and supranational legal orders, emphasising the idea of complementarity amongst them, with the term 'multilevel constitutionalism'.[39] On a similar line of thought, Besselink proposes instead the notion of 'composite constitution', seeing the different elements of national law and EU law as parts of the same legal order.[40] Following their reasoning, their conclusions can be applied by

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36 V. Kosta, N. Skoutaris and V.P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford: Hart Publishing 2014, p. 21.

37 B. de Witte, 'Using International Law for the European Union's Domestic Affairs' in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011, p. 134.

38 CJEU 5 February 1963, C-26/62, ECLI:EU:C:1963:1 *(Van Gend en Loos v Nederlandse Administratie der Belastingen)*; CJEU 15 July 1964, C-6/64, ECLI:EU:C:1964:66 *(Costa v ENEL)*.

39 I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?', *Common Market Law Review*, 1999, p.p.: 703-750.

40 L. F.M. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen: Europa Law Publishing 2007, p.52.

analogy concerning the interaction between the EU and the international legal order.

Also, Ratcovich, arguing that rules on disembarkation should be interpreted within international law, stresses that international law is one legal system, rather than simply disconnected legal instruments.[41] This view finds normative inspiration and support in the Vienna Convention on the Law of the Treaties (Vienna Convention).[42] In particular, Article 31(3)(c) of the Vienna Convention, a rather neglected provision of international law, requires the interpreter to take into account 'any relevant rules of international law applicable in the relations between the parties', introducing the 'principle of systemic integration'.[43] The ECtHR widely adopted this approach: 'The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties'.[44]

It becomes evident that treaties, as 'creatures of international law',[45] are part of a system of international law and should be 'applied and interpreted against the background of the general principles of international law'.[46] Especially on issues as important as these, legal isolation and fragmentation[47] are not in accordance with the rule of law. Therefore, to avoid such fragmentation and promote coherence in law, it is important that the different fields of law are to a certain extent, integrated and studied next to each other.

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41 M. Ratcovich, *The Notion of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?* (Paper for the conference 'Regulating "Irregular" Migration: International Obligations and International Responsibility', National and Kapodistrian University of Athens), 2015, p.p.: 3-8.

42 To the extent that the Charter and the ECHR do not provide for their own rules of interpretation, the general rules on interpretation of Treaties apply, which are set out in the Vienna Convention on the Law of the Treaties. The CJEU has consistently observed that even though the EU is not bound by the Vienna Convention as such, as it is not a signatory party to it, the rules of customary international law reflected in it form part of the EU legal order. E.g. CJEU 25 February 2010, C-386/08, ECLI:EU:C:2010:91 *(Brita GmbH v Hauptzollamt Hamburg-Hafen)*.

43 Not to be confused with '*systemic accountability*'.

44 *Hirsi Jamaa v. Italy*. See also ECtHR 21 November 2001, Judgment, App. No. 35763/97, § 55 *(Al-Adsani v the United Kingdom)*, and ECtHR 30 June 2005, Judgment, App. No. 45036/98, § 150 *(Bosphorus Hava Yolları Turizm ve Ticaret)*.

45 C. Mclachlan, 'The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention', *The International and Comparative Law Quarterly*, 54, 2, 2005, p. 280.

46 L. McNair, *The Law of Treaties*, Oxford: Oxford University Press 1961, p. 466.

47 On the risk of fragmentation of international law, see for instance I. Brownlie, 'The Rights of Peoples in Modern International Law' in J. Crawford (ed.), *The Rights of Peoples*, Oxford: Clarendon Press 1988, p. 15; International Law Commission feasibility study, Hafner, Risks ensuing from Fragmentation of International Law, Official Records of the General Assembly, Fifty-fifth session, Supplement No 10 (A/55/10), annex 321; Mclachlan 2005, p.p.: 284-286.

This pluralistic tendency is evident also in the Treaty of Lisbon, which compared to previous EU Treaties adopts a clearly open attitude towards international law. Article 3(5) TEU urges the EU to contribute to the strict observance and development of international law. This has been interpreted as a general duty to respect international law, covering both international agreements and customary law, which has been affirmed by the case law of the CJEU.[48] The Court has further held that such law is 'binding upon the Community institutions and [. . .] part of the Community legal order'.[49]

Thus, the interaction between international and EU law is not inconceivable as they are both complementary systems forming parts of a consistent legal order. In particular, the EU is bound by international treaties it concludes, but the Court has also treated other conventions to which only its member states were parties as a sort of soft law,[50] and has attempted to interpret EU law in conformity with them.[51] It follows from the above that rules of international law, to the extent that they codify principles of international law can be used in the EU context if the situation falls within the scope of public international law. Even if the situation does not fall directly within the scope of public international law, the convincing power and juristic value of arguments taken from international law can be utilised.

Certainly, the application of the ARIO within EU law is not without limitations. These rules are without prejudice to municipal rules (lex specialis), in this context EU law.[52] Thus, when a conflicting rule exists under EU law, that rule will apply instead of the ARIO.[53] It is when the matter is not adequately regulated within EU law that general principles of international law become relevant. The lex specialis exception can be activated when there are special rules on responsibility that are enshrined in express provisions in the particular specific legal framework. Any different

48 A. Gianelli, 'The Silence of the Treaties with Regard to General International Law', in R.A. Wessel et al. (eds.), *International Law as Law of the European Union*, Leiden and Boston: Martinus Nijhoff Publishers 2011, p.p.: 93, 94; ECJ, CJEU 24 November 1992, C-286/90, ECLI:EU:C:1992:453 *(Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp)*, para. 9; CFI, CJEU 22 January 1997, T-115/94, *ECLI:EU:T:1997:3 (Opel Austria GmbH v Council)*, para. 90.

49 CJEU 16 June 1998, C-162/96, ECLI:EU:C:1998:293 *(A. Racke GmbH & Co. v Hauptzollamt Mainz)*, para. 46. Still, the role custom plays in EU law is more complex. Gianelli 2011, p.p.: 93, 95-108.

50 E.g. CJEU 12 December 1996, C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, ECLI:EU:C:1996:486 *(RTI and others v Ministero delle Poste e Telecomunicazioni)*.

51 CJEU 30 July 1996, C-84/95, ECLI:EU:C:1996:312 *(Bosphorus v Minister for Transport, Energy and Communications and others)*, para 14, C. Eckes, 'International Law as Law of the EU: The Role of the Court Of Justice', *CLEER Working Paper Series 2010/6*, 2010, p. 12.

52 Commentary of Article 1 Ario, par 3; Article 64 ARIO.

53 Article 64 ARIO is a general lex specialis provision, which applies to all Draft Articles. Special rules do not always prevail. See Commentary to Article 10 ARIO par 9 and Commentary TO Article 64 ARIO.

interpretation, would 'allow general law to be excluded on the bases of internal, or quasi-domestic, arrangements'.[54]

This brings us to the consideration of arguments questioning the added value of the ARIO within a system as solid and autonomous as EU law, which is also supported by the jurisprudence of the ECtHR. The EU has established its own framework concerning the liability of its member states, or its own institutions, organs, and agencies, acting therefore as 'lex specialis'. Still, there are instances, such as in the case where multiple actors are involved in a violation, that it does not provide concrete authoritative answers on issues of responsibility. Specifically, that there are no express provisions in EU law that set down special rules on responsibility of the EU or the member states, and rules on attribution in particular. This could also be due to the fact that EU law has not had adequate experience with the responsibility of agencies, which involve a combination of EU and member state action, since the jurisdiction of the CJEU over EU agencies is relatively recent, while the ECtHR has not yet dealt with international organisations. In comparison, international law, developed from state practice, has had more experience in this area and can be of help in addressing such questions of allocation of responsibility. It is in such cases that we may turn for inspiration to international law to complement EU liability law and the jurisprudence of the ECtHR.

Such gaps arise, for instance, with regard to attribution. Neither the EU Treaties nor the ECHR contains secondary rules regarding attribution. The ECtHR has resorted for that to international law and the ILC Articles in particular. Specifically, the ARIO have been extensively considered by the Court in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[55] and in *Al-Jedda v. the United Kingdom*[56]. Moreover, the ECtHR has only dealt with direct responsibility through attribution of conduct. For cases that concern aid and assistance, the ECtHR finds a practical resort to its own doctrine of positive obligations. As a final argument, neither the CJEU nor the ECtHR have developed specific criteria for the interpretation of effective control. All these are issues with which international law can be of assistance, and will be discussed further in Chapter VIII.

The 'lex specialis' rule should not be interpreted in a way that its existence automatically disqualifies the broader legal framework. Its application is rather more targeted, more specifically, to the extent that there is no contradictory specific rule, the general rule applies. In this regard, EU law

54 J. D'Aspregmont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014 p.p.: 80-81.

55 ECtHR 2 May 2007, Decision on Admissibility, App. No. 71412/01*(Behrami and Behrami v France)*, and ECtHR 2 May 2007, Decision on Admissibility, App. No. 78166/01 *(Saramati v France, Germany and Norway)*.

56 ECtHR 7 July 2011, Judgment, App. No. 27021/08 *(Al-Jedda v The United Kingdom)*.

and the ECtHR in many ways complement the ILC Articles, specifying and applying in more detail the principles enshrined in them. For instance, the element of damage[57] and the subsequent causal relationship between the damage and the wrongful act are not required for establishing responsibility under international law. This requirement is brought in by EU liability law. In international law, there is also no requirement of fault which does exist under EU law. Furthermore, the ECtHR often deals with such cases under its own doctrine of positive obligations. This does not come in opposition to the ILC Articles, but is, in fact, an element of effective control.[58] Finally, the most important element of 'lex specialis' of the regional system is the individual complaints mechanism under the ECtHR, as the ILC Articles can only be invoked by a state or international organisation.[59]

In sum, realising the interconnectedness of the legal orders, we come to the conclusion that EU law does not exist in isolation. In order to avoid fragmentation and promote coherence in law, it needs to be applied in the context of international law, drawing inspiration from it whenever necessary. We can consider customary international law and general principles of international law as part of EU law, to the extent that the situation falls within the scope of public international law. If this is not clearly the case, these principles can still be used in the context of EU law as a source of inspiration for the Court and in order to cover gaps where matters are not adequately regulated within EU law. The application of international law can be excluded when there is an opposing provision of EU law. In accordance with this pluralist interpretation, the relevant international law, as this is represented in the ARIO and the jurisprudence of international courts, even though not directly binding, should be taken into account when discussing responsibility issues arising from EBCG operations. The ARIO does not seek to replace EU law, but only to complement it when genuine gaps arise. In this sense, the primary importance of EU law as 'lex specialis' remains intact.

2.3 Applying non-binding law?

The ILC Articles are often confronted with their status within international law, as they are not a Treaty. Indeed, no more importance should be given to the ARIO than what is due. As Guy Goodwin-Gill remarks: 'A great, indeed damaging disservice is done to the protection of refugees by pretending rules exist where there are none.'[60]

57 Article 268 TFEU.
58 Section 3.4.
59 Articles 43, 49 ARIO.
60 G. S. Goodwin-Gill, 'The international protection of refugees: What future?', *International Journal for Refugee Law*, 12, 1, 2000, p. 6.

The ILC Articles constitute a framework for dealing with responsibility, but this is a framework not as solid as national law or EU Regulations. As it is often the case in international law, it is rather fluid. ARIO is in principle not binding. Some of its articles are binding, as they reflect customary international law, while others may codify interpretations found in the jurisprudence of international courts.

The remaining content of the Articles represents the ILC's understanding of progressive development of the law, as that is interpreted through academic work and less established legal thinking. Because of its fluidity, this framework is not written in stone. It is rather still developing, and this makes it flexible enough to incorporate on the one hand and complement on the other legal rules and jurisprudence from different legal orders. This may seem odd to positivist national or EU lawyers, but in the spirit of legal pluralism, the normative reality of international law needs to be taken into account.

In particular, both the ARS and the ARIO are sources of international law and are legally binding to the extent that they codify rules of customary international law. ARS have generally been well received and have been cited by the ICJ.[61] The authority of the ARIO though, due to limited international practice,[62] is not equal to the corresponding ARS articles, and 'will depend upon their reception by those to whom they are addressed'.[63]

With regard to Articles 14-16 ARIO, for instance, covering the responsibility of an organisation in relation to acts committed by a state, there are reasons to suggest that they reflect customary law. The corresponding articles on state responsibility are indeed customary law.[64] The ARIO are not situated in the same established state practice, but according to the ARIO Commentary, 'parallel situations could be envisaged with regard to international organisations'. It is further supported that 'For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organisation aiding or assisting a State or another International Organisation from that of a State aiding or assisting another State'.[65] Drawing these parallels, we can conclude that it is conceivable that the ARIO also reflect customary law.

For the rest, the ILC Articles represent evidence of law in the meaning of Article 38 (1) of the Statute of the ICJ. In this regard, the ARIO have been

61 e.g. ICJ Reports 1997, Gabčíkovo-Nagyamaros Project *(Hungary/Slovakia)*, at 7.

62 ARIO Commentary, p. 2; K. E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations', The Yale Journal of International Law Online, 2011, p.p.: 8.

63 ARIO Commentary, p. 3.

64 e.g. ICJ Reports 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia/Serbia)*, p. 150, par. 420; H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2011, p.p.: 97-191.

65 Commentary to Chapter IV ARIO, par. 1, Commentary to Article 14 ARIO, par. 1.

considered extensively by the ECtHR,[66] and national courts.[67] It is argued here, under the following section that they should also be used, as a source of inspiration and in a heuristic way in order to cover existing gaps, by the CJEU when considering the responsibility of the EU agencies, and Frontex in particular.

Thus, even in their non-binding form as customary law, they have legal value as sources of inspiration for the courts. They can indeed prove a valuable guide in the academic study of the responsibility of Frontex, as they convey useful internationally recognised principles that can be used as a source of inspiration by the European Courts, especially in dealing with complex issues of allocation of responsibility during joint operations.

Practically speaking, the ARIO cannot be relied upon directly, as they cannot be invoked by an entity other than a state or international organization (Article 43). However, they are still valuable either as a codified customary law or as a template or toolbox for courts confronted with questions of responsibility.

3 The ARIO principles and the angles of attribution

After tackling the arguments opposing the applicability of the ARIO, I proceed in dealing with the relevant provisions of the ARIO and their interpretation by international courts and by the ECtHR, in view of identifying a framework for the responsibility of Frontex. This analysis will allow us to identify the internationally wrongful act and the responsible actor.

It will become clear in the following sections that there are two sets of rules, under which the responsible actor can be identified: the rules on attribution of conduct (who has acted) and the rules on attribution of responsibility (who is responsible). As will become clear in the following sections, the main rule of attribution of responsibility is the principle of independent responsibility, which is based on the attribution of conduct (responsible is the organisation that has acted). There are however exceptions to it that allow for the responsibility to be attributed to an organisation that has not acted if it has contributed to the wrongful conduct. The principle of independent responsibility leads to 'direct' responsibility, while its exceptions to 'indirect' or 'derivative' responsibility (rules of indirect attribution of responsibility).

66 e.g. *Behrami and Behrami v France*; *Saramati v France, Germany and Norway; Al-Jedda v The United Kingdom*; ECtHR 20 November 2014, Judgment, App. No. 47708/08 *(Jaloud v the Netherlands)*, par. 98.

67 e.g. UKHL 12 December 2007 House of Lords, Judgment- R *(FC/Secretary of State for Defence)* (on the application of Al-Jedda); Supreme Court of the Netherlands 6 September 2013, Judgment 12/03324 (*The State of the Netherlands v. Hasan Nuhanović*).

3.1 The internationally wrongful act

According to Article 3 ARIO, when an international organisation commits an internationally wrongful act, its responsibility is engaged. Article 4 sets out the constitutive elements of an internationally wrongful act. Accordingly, an internationally wrongful act is committed by an international organisation when a certain conduct a) can be attributed to that organisation under international law, and b) constitutes a breach of an international obligation. Damage is not a necessary requirement for incurring international responsibility, according to the ARIO.

There are three elements in the definition of the internationally wrongful act that require our attention, namely 'act', 'breach of an international obligation' and 'attributed' to that organisation.

With respect to the 'act', the conduct of the organisation that violates international law can be in the form of an act or an omission (failure to act) in case the organisation is under the positive obligation to prevent its member states from committing an internationally wrongful act.[68] In this case, the obligation of the international organisation lies with prevention, 'for instance if an international organisation fails to comply with an obligation to take preventive measures(…).'[69]

A 'breach of an international obligation' concerns the infringement of such an international obligation that is binding upon that organisation (Article 11), regardless of the origin or character of that obligation (Article 10). This obligation may be derived from a treaty binding upon the international organisation, or any other source of international law, including general rules of international law, their own constitutions and international agreements to which they are parties.[70] Article 5 ARIO clarifies that whether certain conduct constitutes an internationally wrongful act is governed by international law. International law determines both what constitutes a breach of an international organisation and when conduct is to be attributed to an international organisation.[71]

The act that has breached an international obligation needs to be 'attributed' to an organisation. This essentially refers to the question of who has acted, and who, therefore, should take responsibility for the breach. The issue of attribution of conduct is given closer attention in the following section.

68 Commentary to Article 4 ARIO, par. 1.
69 Commentary to Art.1 ARIO, par. 5.
70 ICJ, advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports1980, p.p.: 89–90, para. 37.
71 Commentary to Article 5 ARIO, par. 1.

3.2 Attribution of conduct

In principle, the organisation that has acted is the one that should bear responsibility for the violation. This principle is enshrined in Articles 6-9 that reflect the main rule of attributing responsibility, i.e. the principle of independent responsibility.

According to the principle of independent responsibility, *responsibility is attributed to an international organisation if that organisation, through its organs and agents, commits an internationally wrongful act*. In accordance with this understanding, the ARIO adopt, what has been identified by Kuijper and Paasivirta as the 'organic model' of attribution of responsibility.[72] The 'organic model' stipulates than an organisation acts through its organs and is, therefore, also responsible for the acts of its organs or its agents (Article 6).

According to Article 6, the conduct of an organ or agent of an organisation is attributed to that organisation. This provision, and in particular the term 'agent' is interpreted by the ILC and the ICJ 'in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.'[73] The ICJ continued in a separate opinion: 'The essence of the matter lies not in their administrative position but in the nature of their mission'.[74] Thus, a *de jure* relationship suffices to trigger the responsibility of an organisation through attribution, but in the absence of such a formal link, the conduct of *de facto* organs can also bind the organisation.[75]

Article 6 narrows down the scope of attribution of conduct to acts that are conducted in the performance of the duties and functions of that organ or agent. These are generally determined by their official mandate.[76] This is intended to distinguish from circumstances, where the agent has been acting in a private capacity. It does not exempt from attribution acts that have been conducted *ultra vires.* This is dealt with further under Article 8.

Finally, even if conduct may have otherwise not been attributable to an international organisation, it can still be considered its own conduct *ex post facto,* if and to the extent that the organisation has acknowledged and adopted the conduct in question. The ILC, however, has not clarified what

72 P. J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives,* Oxford and Portland: Hart Publishing 2013, p. 49.

73 *United Kingdom/Albania*, p. 177; Commentary to Article 6 ARIO, par. 2.

74 ICJ 20 July 1989, Elettronica Sicula SpA (ELSI), ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989) (*United States v Italy*), p. 194, par. 47.

75 Commentary to Article 5 ARS, par. 7.

76 Commentary to Article 6 ARIO, par. 9.

should be understood as acknowledgement. The Commentary to the ARIO adds an important rule of interpretation, according to which this criterion of attribution by acknowledgement of conduct as one's own, may be considered before the criteria of Articles 6-8; 'it can be applied even when it has not been established whether attribution may be effected on the basis of other criteria'.[77] Nevertheless, it can also play a role in support of other criteria on attribution.[78] It should be noted that even though there are examples of organisations acknowledging conduct as their own, the existing practice of attribution of conduct due to acknowledgment is far from stable and there is a number of questions that remain open.[79] It should be noted that the fact of the acknowledgement alone is not enough to establish responsibility,[80] but is only one of the elements of the balancing act.

Thus, acts attributed to an organisation are those conducted by an (de jure or de facto) organ or agent of that organisation, as long as these were acting in their official capacity. If the organisation has acknowledged the conduct as its own, this should also be taken into account.

All these segments of the principle of independent responsibility presented here in abstracto are applied in the next Chapter to EBCG operations in order to identify the responsibility of Frontex.

3.3 Agents of an international organization

Agents of an international organisation may be persons hired by the international organisation or seconded to it by a state.[81] However, the seconded organ may still in part act as an organ of the seconding state. Such is the case of UN peacekeepers, which are put at the disposal of the UN by states, which retain 'disciplinary powers and criminal jurisdiction over the members of the national contingent'.[82]

Who should then the conduct be attributed to: the seconding state or the receiving organisation?

As specified in Article 7, the decisive question to determine this is who exercises effective control over the conduct of the agent, taking into account 'the full factual circumstances and particular context'.[83]

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77 Commentary to Article 9 ARIO, par. 2. It has been argued that this could perhaps be considered as a case of attribution of indirect responsibility rather than direct attribution of conduct. F. Messineo, 'Attribution of Conduct' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law)*, Cambridge: Cambridge University Press 2014, p. 66.

78 Commentary to Article 9 ARIO, paras. 1, 2.

79 Casteleiro 2016, p.p.: 76-77.

80 ECtHR, Makuchyan and Minasyan v. Azerbaijan and Hungary, Application No. 17247/13, of 26 May 2020.

81 Commentary to Article 6 ARIO, par. 6.

82 Commentary to Article 7 ARIO, par. 1.

83 Commentary to Article 67 ARIO, par. 4.

Article 7 provides:

> *'The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.'*

Thus, when organs or agents of a state are placed at the disposal of an international organisation, their conduct is attributed to that organisation, if it can be proven that the organisation exercises effective control over their conduct.[84]

In the example of the UN peacekeeping forces, the fact that the seconding state retains control over disciplinary and criminal matters may have direct consequences to the attribution of the acts of peacekeeping forces.[85] It becomes obvious that the issue of effective control does not necessarily always have a straightforward exclusive ('either-or') answer. This requires us to look deeper, in the following section, into the precise meaning of effective control and the criteria that determine it.

3.4 Exercise of effective control

The precise meaning of effective control is covered by ambiguity, as different interpretations have been given to the term, which is understood either as 'ultimate authority and control' or as 'effective operational control'. This section focuses, first, on understanding this distinction, and, next, on the specific criteria on the basis of which it is determined who exercises effective control.

The principle of effective control has been recognised by the ECtHR, which explicitly referred to the work of the ILC, in *Behrami and Behrami v France and Saramati v France, Germany and Norway* in relation to the NATO forces in Kosovo.[86] The ECtHR accepted though that the decisive element for its interpretation was whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated'.[87] Thus, the Court interpreted the effective control criterion as the '*ultimate authority and control*', which was placed on a higher position than 'operational command'. In that case, the ECtHR ruled that the UN had, in fact, ultimate authority and control as the Security Council had authorised the NATO force, had itself delegated a broad operational control

84 ICJ 27 June 1986, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v the United States of America*), Merits, 27 June 1986, ICJ Reports 1986, par. 115.

85 Commentary to Article 7 ARIO, par. 7.

86 *Behrami v. France*, and *Saramati v. France, Germany and Norway*.

87 *Behrami v. France*, and *Saramati v. France, Germany and Norway*, par. 133.

to NATO and kept receiving regular reports on the development of the operations.[88]

This interpretation was criticised as not capturing the spirit of the term, as it was envisaged by the ILC.[89] In fact, the United Nations Secretary General has distanced himself from this reading, stating that 'it is understood that the international responsibility of the United Nations will be limited in the extent of its *effective operational control*.'[90] The ECtHR interpretation has also been heavily criticised in literature.[91] The ECtHR however, did not move from its original position, which was retained to a large part in later case law.[92]

In line with how the ILC had envisaged effective control, was the decision of the House of Lords in *Al-Jedda*,[93] concerning British troops in Iraq, authorised by the UN Security Council. Without fully disregarding the interpretation of the ECtHR, the House of Lords found that this case was different from *Behrami and Saramati* in that there had been here no delegation of powers from the UN. Thus, the 'ultimate control' test would not apply.

This reasoning was also accepted by the ECtHR, which ruled that 'the United Nations Security Council had neither effective control nor ultimate authority and control'.[94] Essentially, the ECtHR introduced in its case law the language of effective control as it was meant by the ILC, but without fully retracting its earlier *Behrami and Saramati* position. One possible way of reading the two judgements together is to acknowledge the recognition of the effective control criterion by the ECtHR, with the existence of an additional ultimate control criterion when there is delegation of powers. Still, no new light was shed on the meaning of effective control and ambiguity remains. Therefore, while the focus in this study is on operational command and control, the ultimate control test cannot be disregarded.

88 *Behrami v. France*, par. 132-41.

89 Commentary to Article 7 ARIO, par. 10, referring to legal doctrine.

90 Commentary to Article 7 ARIO, par. 10, referring to S/2008/354, par. 16.

91 A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', *Human Rights Law Review*, 8, 2008, p. 162-165; M. Milanović, and T. Papić, 'As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law', *International and Comparative Law Quarterly*, 58, 2, 2009, p.p.: 274, 281-285.

92 ECtHR 5 July 2007, Decision on Admissibility, App. No. 6974/05 *(Kasumaj v Greece)*; ECtHR 28 August 2007, Decision on Admissibility, App. No. 31446/02 *(Gajic v Germany)*; ECtHR 16 October 2007, Judgment, App. Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793 and 25496/05 *(Beric and Others v Bosnia and Herzegovina)*.

93 *FC v Secretary of State for Defence*, par. 5.

94 *Al-Jedda v. The United Kingdom*, par. 84. The Court differentiated the two cases in their facts, paras. 74-77.

We can establish from the above that the effective control test is understood as *operational command and control* under the interpretation of the ILC. At the ECtHR, effective operational control applies primarily, if the factual circumstances do not support an examination of the *ultimate control* test.

Having established the decisive test, I now move on to examine the criteria that help determine when effective control is exercised. As these are not apparent from the letter of Article 7 ARIO, they can be extracted from doctrine and jurisprudence.

3.4.1 Normative power

It has been argued that the normative control the EU exercises over its member states, due to the fact that the latter implement EU law, or due to the judicial control by the CJEU, constitutes effective control.[95] Nevertheless, such control is generally considered too weak,[96] while it does not constitute either factual or operational control, as it is required by Article 7 ARIO.[97] Therefore, it is not taken into account in this study.

3.4.2 Decision-making power (operational command and control)

The ILC has noted that effective control belongs to the one who has decision-making power over the wrongful conduct, in other words, to the one who gives the orders. This was the approach taken by the UN Commission of Inquiry established to investigate armed attacks on UMOSOM II personnel,[98] and of the Court of First Instance of Brussels in a case concerning the United Nations Assistance Mission for Rwanda.[99]

Specifically, with regard to joint operations, an important consideration is the operational command and control. According to the UN Secretary General has noted, 'in joint operations, international responsibility (…) lies where operational command and control is vested' in accordance with the formal arrangements made. [100]

95 Steinberger 2006, p. 851.

96 P. J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', *International Organizations Law Review,* 1, 1/111, 2004, p. 127.

97 Casteleiro 2016, p. 74.

98 Report of the Commission of Inquiry established to investigate armed attacks on UMOSOM II personnel on 5 June 1993, S/1994/653, 01.07.1994.

99 Brussels Court of First Instance, 8 December 2010, 04/4807/A and 07/15547/A, (*Mukeshimana-Ngulinzira and others v Belgium and others*), para. 38.

100 Commentary to Article 7 ARIO, par. 9; UN Secretary General ,A/51/389, p. 6, paras. 17, 18.

3.4.3 *De facto power*

There is, further, a strong emphasis on the factual criterion. Effective control is synonymous to 'factual control', as the examination should take into account the "full factual circumstances and particular context."[101] Such factual circumstances can override the formal arrangements regarding the command and control structure. The ILC gives the example of the UN claiming exclusive command and control over peacekeeping forces, while, in practice, their conduct can and has been attributed to sending states.[102] It should be noted here that the ILC has clarified in the ARIO Commentary that the question of who has effective control is not to be applied in a general manner to the overall conduct of the organ, but to the specific unlawful act in question.

3.4.4 *Disciplinary power*

The ILC notes in the Commentary to Article 7 ARIO that an international organisation has no effective control when the home state retains disciplinary powers and criminal jurisdiction. This seemingly absolute assertion has become more nuanced as interpreted by the ECtHR in *Behrami and Saramati*. There the Court underlined that the retention of disciplinary powers and criminal jurisdiction may not undermine effective operational control.[103] This finding is endorsed by the ILC in the Commentary to Article 7 ARIO. Bringing these complementary interpretations together, Mungianu correctly concludes that retention of such powers cannot exclude effective control, but this retention 'may be an element in favour of such exclusion'.[104]

3.4.5 *Power to prevent a violation*

Another element was identified in the case of the Dutch contingent in the United Nations Protection Force (Dutchbat) in Srebrenica, dealt with by the District Court of the Hague.[105] The District Court held that the acts and omissions of the Dutchbat should be attributed to the United Nations. The Court of Appeal overturned that decision and reached the conclusion that the Dutch state was in fact responsible for its involvement of the massacre of Srebrenica because it could have prevented the outcome. Effective control was given there a wide enough meaning also to include the positive obliga-

101 Commentary to Article 6 ARIO, par. 4.
102 Commentary to Article 7 ARIO, par. 9. UN Secretary General, A/51/389, p. 6, paras. 17,18.
103 *Behrami v. France*; *Saramati v. France, Germany and Norway*, par. 139.
104 Mungianu 2016, p. 67.
105 Judgment of 10 September 2008, case no. 265615/HA ZA 06-1671, par. 4.8. in English at http://zoeken.rechtspraak.nl; Hoge Raad der Nederlanden 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Netherlands/Nuhanovic*); Hoge Raad der Nederlanden 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*State of the Netherlands v Mustafic´ et al.*).

tions of the state or international organisation, when no orders have been given.[106] The evidence of this criterion in jurisprudence and doctrine does not establish it beyond doubt in international law. It is, however, a strong indication, and it would be an omission not to take it into account in Frontex cases, where the agency has strict formalised positive obligations to protect human rights.

3.4.6 Degree of effective control

In sum, the criteria that can determine effective control, are a) giving orders under formal arrangements of command and control, b) if the factual circumstances are not different, c) retention of certain powers by the state, such as disciplinary powers and criminal jurisdiction, and finally c) the possibility to prevent a violation.

The variety of different criteria can lead to different answers as to who exercises effective control. A singular answer is not necessary, though. What is important, especially with respect to joint operations, is the extent or degree of effective control. If formal arrangements are not available, responsibility is determined on a case by case basis according to the 'degree of effective control exercised by either party'.[107] In the determination of the extent of control the different criteria may be taken into account, as is, for instance, the due care exercised to prevent the wrongful conduct.[108]

3.5 Dual attribution of conduct

There is no mutual exclusivity or explicit strict hierarchy among the different criteria of effective control. Their parallel application can lead to the same wrongful act being attributed to more than one actor. Similarly, an agent could, at the same time be under the instructions or the direction and control of more than one actor.[109] Different degrees of effective control can also result from the formal establishment of a joint organ which acts on behalf of more than one states and/or international organisations.[110]

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106 This finding was later confirmed by the Court of Appeal and the Supreme Court, and is also found in academic literature. The Courts followed the interpretation of T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member States Troop Contingents as United Nations Peacekeepers', *Harvard International Law Review*, 51, 2010, p.p.: 113, 157.

107 Commentary to Article 7 ARIO, par. 9; A/51/389, p. 6, paras. 17, 18.

108 Gaja 2004, p.p.: 20-21.

109 Messineo 2014, p. 77.

110 e.g. ICJ, Preliminary Objections, Reports 1992, 240 (*Certain Phosphate Lands in Nauru – Nauru/Australia*), par. 240; The Channel Tunnel Group Ltd & France-Manche S.A.v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'equipement, des transports, de l'ame ´nagement du territoire, du tourisme et de la mer du Gouvernement de la Republique française, Partial Award, (2007) 132 ILR 1 (*Eurotunnel Arbitration*).

The question that arises then is to whom the wrongful conduct should be attributed when effective control is exercised by more than one actor. It is in these cases that we can consider dual attribution.

Dual attribution may seem an odd notion for those familiar with the international responsibility of states. Under ARS, when an agent of a state exercises governmental authority of another state, this transfer of authority is exclusive and cannot lead to multiple attribution (exclusive attribution).[111] In fact, it has been argued that Article 7 ARIO does not support dual attribution either.[112] Mungianu recognises the possibility of a wrongful act needing to be attributed to more than one actors, but does not examine dual attribution in Frontex operations, arguing that neither the ARIO nor the commentary to Article 7 seems to recognise it.[113] While it is factually correct that the commentary to Article 7 does not mention dual attribution, a more careful reading reveals that dual attribution is covered under the commentary to the general heading of Chapter II, where Article 7 belongs.[114]

The ILC states that dual or even multiple attribution cannot be excluded, although this may not frequently be the case in practice. In particular, it notes that attribution of certain conduct to a state or international organisation does not rule out the attribution of the same conduct to another state or international organisation. The focus on the degree of effective control that each actor has upon the conduct of seconded organs provides enough flexibility to allow for dual or multiple attribution of that conduct.[115] The presence of dual attribution in the ARIO has been supported by a number of other scholars,[116] while courts have also considered this possibility.

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111 Research into the drafting history and the commentaries to Article 6 ARS show that the application of Article 6 ARS breaks the original link with the home country. When the authority is not exclusive, but an organ is under the shared authority of two entities, the threshold of Article 6 ARS is not met. Thus, the different attribution rules of Arts. 4 and 6 ARS cannot be simultaneously applied. Contrary to Article 6 ARS, Article 7 ARIO does not require exclusivity of control. Fink 2017, p.p.: 138-145, 150, 156-157; Contrary to that, it is argued that the complete transfer should be seen as an exception rather than the rule in Article 6 ARS. Messineo 2014, p.p.: 84-88.

112 F. Hoffmeister, 'Litigating against the European Union and its member states: Who responds under the ILC's Draft Articles on International Responsibility of International Organizations', *The European Journal of International Law,* 21, 2010, p. 723.

113 Mungianu 2016, p. 62, fn 60.

114 Commentary to Chapter II ARIO, par. 4.

115 C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', *Melbourne Journal of International Law,* 10, 2009, p. 362.

116 Among others, Messineo 2014, p.p.: 81-5; Sari 2008, p. 166; K. M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *The European Journal of International Law*, 19, 2008, p.p.: 517-24. T. Dannenbaum, 'Dual Attribution in the Context of Military Operations, in A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill- Nijhoff 2016, p. 122; F. Aspects, R. Murphy and S.Wills, 'United Nations Peacekeeping Operations' in A.Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2017, p. 597.

In the early drafting stages of the ARS and the ARIO, there did not seem to be an opening towards dual attribution. In the landmark case of *Behrami v France*[117] the ECtHR attributed the conduct of the NATO forces in Kosovo to the UN. One year later, the District Court in the Hague examined and rejected dual attribution to both the UN and the Netherlands in *HN v the Netherlands*.[118] In both these cases, dual attribution would only have been an option if the actors were, in fact, a collective forming a joint organ.[119]

However, when it was realised that single attribution could prove to be a serious obstacle to accountability, different perspectives started making their appearance in the case law.[120] In Al-*Jedda v the UK*, the Court started distancing itself from the *Behrami* case, for the first time considering the possibility of dual attribution resulting from the application of the effective control criterion.[121] The possibility of dual attribution was since affirmed in the cases *Mustafic* and *Nuhanovic*, where the Dutch Supreme Court opined that Article 48 ARIO on the responsibility of an international organisation and one or more states or international organisations expressly leaves open the possibility of dual attribution.[122] Finally, the *Mothers of Srebrenica* is seen as the 'zenith of the (…) openness to dual attribution'.[123]

In sum, regardless of the 'early hostility', there is undoubtedly a 'growing openness' to dual attribution both in the literature and in the case law.[124] However, the number of cases in which dual attribution has actually been applied remains limited. Some have seen this as an indication that dual attribution is a minority view and rather a rarity in international law.[125] If that were the case, though, this would mean that 'the system of international responsibility would be fundamentally ill-equipped to deal

117 *Behrami v. France*.

118 ECtHR 31 March 2011, App No 20651/11, (H.N. v the Netherlands).

119 Dannenbaum 2016, p.p.: 122-124.

120 Dannenbaum 2016, p. 122.

121 *Al-Jedda v The United Kingdom*, par. 80; A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International organizations and member state responsibility: critical perspectives*, Leiden: Brill-Nijhoff 2016, p. 125; Messineo 2014, p. 94.

122 *Netherlands v Nuhanovic*, par. 3.9.4. This case upheld the Nuhanovic appellate judgment, which had overruled the *H.N. v the Netherlands*; *State of the Netherlands v. Mustafic' et al*. For a comprehensive summary of the Dutch sequence of cases, see Messineo 2014, p.p.: 94-96.

123 Supreme Court of the Netherlands 13 April 2012, Judgment 10/04437 (*Mothers of Srebrenica et al v State of The Netherlands and the United Nations*); Dannenbaum 2016, p. 130.

124 Dannenbaum 2016, p.p.: 122, 136; e.g. *Nuhanovic v the Netherlands*; *Mothers of Srebrenica v the Netherlands*, par. 4-45.

125 A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law, 34, 2, 2013*, at 383. The authors have argued instead that a state and an international organisation may be both held responsible for the same conduct, but not on the basis of dual attribution. This should be established rather on the basis of 'parallel attribution based on independent acts'. A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', SHARES Research Paper 03 (2011 – revised in 2012), ACIL 2011–07, p. 111, http://www.sharesproject.nl/wp-content/uploads/2012/05/SHARES-RP-03-final.pdf.

with issues of shared responsibility'.[126] It would be rather more appropriate for the limited application of dual attribution to be seen as a matter of an underdeveloped system of invocation of responsibility when multiple actors are concerned.[127] We should rather have more confidence in the flexibility and resilience of the attribution rules.[128] Still, the factual failure of courts so far to attribute wrongful conduct to more than one actor leaves the particular modalities of dual attribution to be fleshed out.

3.6 Rules of indirect attribution of responsibility

The principle of independent responsibility (Articles 3, 6, 7 ARIO) discussed so far, although the starting point, is by no means an absolute rule for the attribution of responsibility. In this section, I discuss the exceptions to this rule according to which the international responsibility of an international organisation may occur in connection with the acts of a member state, as indirect or derivative responsibility. These rules can be identified as rules of indirect attribution of responsibility, as opposed to the principle of independent responsibility, which represents a rule of direct attribution of responsibility, directly to the actor to which the wrongful conduct itself is attributed.

Indirect attribution of responsibility can be the case a) when an organisation contributes to the wrongful act of a state (Article 14), b) when the relationship between an organisation and a state is such that allows the former to influence the conduct of the latter, either by exercising direction and control over the conduct of the state (Article 15), or by coercing the state into committing the internationally wrongful act, and finally, c) when an international organisation circumvents its international obligations by adopting a decision binding its members to commit an internationally wrongful act (Arts. 16, 17).[129]

Thus, international responsibility may arise from an act that does not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state.

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126 Messineo 2014, p. 63.

127 Messineo 2014, p. 82.

128 Messineo 2014, p. 63. Nollkaemper seems to be convinced by Messineo's analysis, moving away from his earlier disregard of dual attribution. A. Nollkaemper et al., 'Conclusions: Beyond the ILC Legacy' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge: Cambridge University Press 2014, p.p.: 344-345.

129 Articles 16 and 17 ARIO, regulating coercion and circumvention are less relevant for this study, as they require the complete lack of effective choice on the part of the coerced party, which is not expected to be the case in EBCG operations. Therefore, they will not be analysed further. Their relevance in the context of EBCG operations may be with respect to the normative control the EU as whole exercises over member states, a topic that falls out of the scope of the present research. Further on this, see Casteleiro 2016, p. 83. Possible future relevance could be foreseen if the right of the EU to intervene without the consent of a member state expands in future amendments of the EBCG Regulation.

3.7 Aid and Assistance

Article 14 covers the attribution of responsibility to an organisation for an internationally wrongful act committed by a state, on the occasion that the organisation has aided or assisted the state in this. The organisation would be held responsible under the conditions that a) it was in knowledge of the circumstances under which the wrongful act took place, and b) that the act itself would also have been internationally wrongful if committed by the organisation.

A further requirement introduced with the interpretation of the provision by the ILC, is that the aid or assistance needs to contribute 'significantly' to the commission of the act to justify the international responsibility of the organisation.[130] It is not required however that the contribution has been essential to the completion of the wrongful act. Examples of such aid or assistance may be financing an activity that results in a violation[131] or providing logistic or service support.[132] In this sense, the requirements of the ILC Articles correspond to the causal connection that is an element of *Liability – Responsibility*. According to this element, the act needs to have a causal or other form of connection to the act, in a way that the outcome is not too remote of a consequence for the act to count as the cause. However, the connection or relationship does not need to be so close as to say that the agent directly caused the harm. The latter is, in fact, a requirement of liability in EU law[133]

Knowledge and willful blindness

The knowledge element has been identified by Hart as a determinate mental criterion for attributing *Liability-Responsibility*. Accordingly, here, it represents the international law requirement that protection shall be provided not against all threats, but against threats of which the actor had knowledge.

Different interpretations have been proposed regarding the mental element of aid and assistance. Following the letter of the provision, it can be interpreted as 'knowledge' of the wrongful act, and it, therefore, needs to be proven that the aiding actor had knowledge of the illegality of the conduct. Related to that is the interpretation of 'wilful blindness', according to which, it suffices to prove that the actor was consciously turning a blind eye to the violation committed under its auspices, even though it had access to credible information.[134]

130 Commentary to Article 14 ARIO, par. 6.
131 Commentary to Article 16 ARS, par. 6. The text of Article 16 ARS is identical to that of Article 14 ARIO and are interpreted in parallel to each other by the ILC.
132 Commentary to Article 14 ARIO, par. 6.
133 Chapter VII, section 7.
134 M. Jackson, *Complicity in International Law*, Oxford: Oxford University Press 2015, p. 54.

A view in the Commentary of the ILC Articles, reveals one more possible interpretation. That of 'intention'. By virtue of Article 14 ARIO, responsibility arises when the international organisation intended to facilitate the occurrence of the wrongful conduct committed by a state.[135] While the previous two interpretations are rather broad, the latter may prove too restrictive to be meaningful. In fact, if it is read narrowly, as malicious intent or dolus,[136] it would restrict potential responsibility so much that it would defeat the purpose of Article 14 ARIO and would make derivative responsibility through aid and assistance almost impossible.[137] It would place an unreasonable burden of proof, as one could imagine very few cases where a state or international organisation would admit to a desire as such to cause harm, such as torture.[138] Moreover, such a requirement for the aiding party would not withstand the test of reasonableness, as it is not a condition for establishing the primary responsibility of the author of the act.

Therefore, knowledge and willful ignorance seem more plausible interpretation options. The purpose test could also be read as 'incorporating a more oblique form of intent for example, that a particular consequence is to be regarded as intended if the relevant state organ is aware that it will occur in the ordinary course of events', as the mental element of intent is defined in Article 30(2)(b) of the Rome Statute of the International Criminal Court.[139] This reading reconciles the three interpretations and makes the requirement indeed feasible.

This reconciliation or the combination of the knowledge and willful blindness readings is the way the mental element has been interpreted in practice. In other words, responsibility is triggered, as established by the ICJ in the *Corfu Channel case*[140], by 'presumed knowledge', under which the actor knew or should have known about the wrongful act. The requirement of knowledge can be limited to 'predictable reliable threats'.[141] This is interpreted broadly by the United Nations Legal Council, recognising

135 Commentary to Article 14 ARIO, par. 4. See also Commentary to Article 16 ARS, paras. 5, 9.

136 The reading of the mental requirement as intent has been supported by J. Crawford, Special Rapporteur, *Second Report on State Responsibility,* UN Doc A/CN.4/498, Fifty-First Session, 1999, p. 406.

137 K. Nahapetian, 'Confronting State Complicity in International Law', *UCLA Journal of International Law,* 7, 99, 2002, p.p.: 126–7.

138 B. Graefrath, 'Complicity in the Law of International State Responsibility', *Revue Belge de Droit International,* 29, 370, 1996; H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2013, p. 236; J. Quigley,' Complicity in International Law: A New Direction in the Law of International Responsibility', *British Yearbook of International Law*, 57, 1986, p. 77.

139 R. Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity', *EJIL: Talk!* 2018, https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/; In support see Crawford 1999, p. 840, par. 72 and R. Ago, Special Rapporteur, *Seventh Report on State Responsibility*, UN Doc A/CN.4/307, Thirtieth Session, 1978, par. 52.

140 *United Kingdom v. Albania.*

141 H. Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy*, 1980, p. 33.

international responsibility if the aiding actor 'has reason to believe' that an internationally wrongful act is being committed under their aid. In this case, an international organisation 'may not lawfully continue to support that operation, but must cease its participation in it completely. [It] (…) may not lawfully provide logistic or "service" support to any (…) operation (…).' [142]

3.8 Direction and Control

The same conditions (knowledge and wrongfulness of the act if committed by the organisation) apply in the case of Article 15, according to which an organisation, which exercises direction and control over the conduct of a state in the commission of an internationally wrongful act, must assume responsibility for that act.

Concerning the relations between an international organisation and its member states, this 'direction and control' may take the form of normative control or in other words, a decision taken by the international organisation binding its members. Important here is that the dependent state does not have sufficient discretion in complying with the decision in a way that does not violate international law. Notably, mere 'influence', 'concern', or 'oversight' over the activities of the member state cannot qualify as 'control'. Moreover, 'direction' cannot be based on mere 'incitement or suggestion', but should rather reflect 'direction of an operative kind'.[143]

Notably, under certain circumstances, the international responsibility of an organisation arises with the adoption of a binding act by the latter.[144] A further circumstance of direction and control through binding decisions appears in Article 17 (Circumvention of an international obligation through decisions and authorisations addressed to members). Following Article 15 and Article 17 (1), such binding decisions would not result in the international responsibility of the organisation, if sufficient discretion were given to the member state. Such discretion should allow the state to carry out the given instruction and abide by the decision without violating international law. This, exceptionally, does not absolve the organisation from its responsibility in the case a) the organisation authorises the member state to commit an act, and b) the said state makes use of that authorisation, actually committing the act (Article 17 (2)). As noted by the ILC, '(…) by authorising

142 Commentary to Article 14 ARIO, par. 6, referring to documents published in the New York Times, 9 December 2009, www.nytimes.com. The case at hand of the UN Legal Counsel concerned the UN Organisation Mission in the Democratic Republic of Congo aiding the armed forces of the Democratic Republic of Congo.

143 International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), Yearbook of the International Law Commission, 2001, vol. II (Part Two) and corrigendum, p. 69; Commentary to article 17 ARIO par. 7; Commentary to Article 15 ARIO, par. 4; Commentary to Article 17 ARIO, par. 7.

144 Commentary to Article 15 ARIO, paras. 4, 5. Possible overlap with Article 17 is not problematic, since both provisions would provide the same outcome on attribution of responsibility.

an act, the organisation generally expects the authorisation to be acted upon'.[145] Joint exercise of direction and control is also deemed conceivable, at least when two international organisations are involved.[146]

It is hard not to notice the similarity between the concepts of direction and control and of effective control, discussed as part of direct attribution. There is indeed an overlap between Arts. 7 and 15, which makes a hard and fast distinction difficult in practice.[147]

4 Conclusions

Chapter VI has prepared the ground for the examination of responsibility in the framework of the EBCG, which is dealt with in the next chapter. In particular, it is a presentation of the applicable legal framework and the main normative principles.

I have argued here that the responsibility of Frontex even though dealt with within the framework of EU law, should be viewed in light of the legal framework on international responsibility, in particular the ARIO and their interpretation by international courts. The interaction of these two legal systems, within a pluralist legal environment, can provide accuracy, clarity and legal certainty to the question of responsibility within EBCG operations.

In sum, the main rule of attribution of responsibility (who is responsible) to an international organisation is the principle of independent responsibility, which focuses on the attribution of conduct. This principle leads to direct responsibility: if an internationally wrongful act can be attributed to an organisation, then that organisation is responsible for that wrongful act. As wrongful act, we can identify any sort of conduct, either act or omission, that constitutes a breach of an obligation under international law.

The acts that can be attributed to an organisation are, according to the rules on attribution of conduct (who has acted), those that are conducted by organs or agents of the organisation. This can be either the organisation's own personnel or seconded parties to the extent that the organisation exercised effective control over their wrongful conduct. Effective control is determined with the examination of a variety of criteria: a) decision-making power, b) de facto power, c) retention of disciplinary power and d) power to prevent a violation. There is no strict hierarchy in the application of these rules, which are also not mutually exclusive. Moreover, determinate is the degree of effective control exercised by an organisation. Thus, dual or even multiple attribution of conduct (and thus, of responsibility) can be envisaged.

145 Commentary to Article 17 ARIO, paras. 7, 8.

146 ICJ 15 December 2004, Preliminary Objections, *Legality of the Use of Force* (*Yugoslavia v France*), p. 33, par. 46.

147 A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', *International Organizations Law Review*, 7, 63, 2010, p. 77.

As exceptions to the principle of independent responsibility (direct responsibility), the rules of indirect responsibility have been presented. According to these rules, an organisation may still be responsible for an act that is not attributed to it. This can be the case when the organisation has a certain relation to the act, either because it has aided and assisted in it, or because it has exercised direction and control over it without leaving sufficient discretion to the state to carry out the instruction without engaging in illegal conduct. Protection is afforded in the case of aid and assistance not against all breaches, but against those that the organisation had knowledge of or, at least, against predictable, reliable threats.

The above summarised principles will be applied in the following chapter in the context of the EBCG.