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

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# 7 Application of the legal framework to the EBCG

## 1 Introduction

The purpose of this chapter is to apply the principles and legal framework, and the conceptual framework on responsibility and accountability, discussed in the previous chapters to EBCG operations and Frontex in particular.

Therefore, this chapter's central questions are whether Frontex can independently or together with the member states bear responsibility for breaches of its international obligations and how such responsibility can be realised within the legal framework. In this chapter, I develop the appropriate legal structure under which such responsibility should be addressed.

For this reason, I apply the legal framework, in particular regarding the rules of attribution of conduct and the rules of attribution of responsibility to the EBCG, looking into the direct and indirect responsibility of Frontex. Further, I deal with the examination of the Nexus theory within this legal framework concerning the responsibility of multiple actors and study the powers and limitations of the Nexus theory in its practical implementation in joint operations.

The focus of the chapter remains on the responsibility of Frontex, but the responsibility of the host and participating states is also partially examined when necessary to provide a holistic picture of responsibility in the EBCG operations.

The chapter examines, first, the possibility of direct responsibility, as a result of the main rule of attribution of responsibility, i.e. the principle of independent responsibility, and asks whether Frontex exercises effective control over the deployed agents. Next, it examines the possible indirect responsibility of the agency applying the other rules of attribution of responsibility, especially with regard to aid and assistance. Finally, the *problem of many hands* is discussed as it presents itself in EBCG operations, as well as its solution in the context of the Nexus theory, rules of invocation of responsibility, and the model of *systemic accountability*.

## 2 Direct responsibility

For the agency to bear direct responsibility for harm done, the wrongful conduct needs to be attributed to it through its agents or organs. This most certainly includes employees of the agency. In fact, Frontex acknowledges that their acts entail the responsibility of the agency, as it becomes apparent

in 'The Agency's Rules on the Complaints Mechanism' drafted by the Executive Director. According to this internal document, however, only complaints that concern Frontex staff members and seconded personnel based in Warsaw will pass the admissibility stage and will be dealt with by the agency.[1] However, the underlying assumption is that these are the only agents that can bind the agency in terms of its international responsibility.

This view is undoubtedly put in perspective after the 2019 amendment of the EBCG Regulation that grants Frontex a standing corps of border guards, which includes its own personnel (Article 71). This chapter does not present a complete legal analysis of responsibility issues resulting from the 2019 Regulation, which is not feasible without a clearer picture of how the new Regulation will be implemented in practice. Nevertheless, attention is paid to the development of the responsibility of the agency as a result of the standing corps, that is expected to be operational only after 2020.

Moreover, the responsibility rule of Article 6 ARIO should be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Thus, de facto organs acting in their formal capacity can also bind the organisation, whether they acted in accordance with their mandate or ultra vires.

### 2.1 Are the agency's new statutory staff de jure agents of Frontex?

According to the latest amendment of the EBCG Regulation, a standing corps of 10.000 operational staff is composed that newly includes statutory staff employed by the agency (Article 71). The Regulation understands operational staff as border guards, return escorts, return specialists and other relevant staff participating as members of the EBCG teams, as well as staff responsible for the functioning of the ETIAS Central Unit.[2]

The statutory staff that participate in the teams will be deployed on the ground, will have executive powers and can operate the agency's own equipment. Their executive powers are similar to the border guards and return specialists of the member states. They will be able to authorise or refuse entry at border crossing points, issue or refuse visas at the borders, stamp travel documents, patrol borders, and intercept or apprehend persons crossing irregularly. Besides, they will perform identity and nationality checks using the False and Authentic Documents Online system, which the agency will take over from the Council General Secretariat,[3] and

1 Frontex Executive Director Decision No R-ED-2016-106 on the Complaints Mechanism, Annex1 'The Agency's Rules on the Complaints Mechanism', Article 10(1). The document was published before the 2019 amendment of the EBCG Regulation, which also provides for Frontex staff present on the field.

2 Preambular paragraph 16 EBCG Regulation.

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

register fingerprints of those apprehended in Eurodac. They will be able to liaise with third countries to facilitate returns, and escort returnees subject to forced-return. Finally, the power to carry weapons will extend from the deployed national border guards to all members of the standing corps, including agency staff.

In the context of such extensive powers, members of the statutory staff may commit a wrongful act, as understood by Article 4 ARIO, that is in breach of an international obligation and affects the rights of individuals (Article 11 ARIO).

The fact that the statutory staff is employed by the agency and Frontex has disciplinary powers over them constitutes them de jure agents that bind the agency with their conduct. Following the principle of independent responsibility, any such wrongful conduct of the agency's operational staff is attributed to Frontex, and thus, it gives rise to the responsibility of the agency (Articles 6-9 ARIO).

### 2.2 Do non-staff members of the standing corpse constitute de facto organs of Frontex?

I now deal with the members of the standing corps that are not employed by the agency. These may concern 1) staff seconded from member states available for long term, 2) staff provided by member states for short-term operational deployment, and finally 3) the rapid reaction pool composed of member states staff that are available for rapid border interventions (Art. 54 EBCG Regulation).

The seconded or short-term deployed agents, including those from the rapid reaction pool, are officials of their respective states. Their conduct is attributed in accordance with Article 4 ARS and Article 6 ARIO. For their conduct to be attributed to the EU, they need to be seen as de facto organs or agents of the EU.

The view that such agents are a sort of 'dédoublement fonctionnel' acting as EU organs when they are under the EU's normative control, as they simply execute EU law, has been supported by Kuijper and Paasivirta.[4]

This approach has not been favourably looked upon in legal doctrine, as it is argued that the actual degree of control by the EU over the member state organs is too weak to justify them being considered de facto EU organs.[5]

4 Kuijper and Paasivirta 2004, p.p.: 124-127.

5 P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels: Bruylant 1998, p.p.: 385, 386, referenced in Kuijper and Paasivirta 2004, p. 126; For the opposite view see M. P. Moelle, *The International Responsibility of International Organizations: Cooperation in Peacekeeping Operations*, Cambridge: Cambridge University Press 2017, p.p.: 160-202; Casteleiro 2016, p.p.: 79-109, 235.

In the absence of compelling arguments to the contrary, it should be concluded that the conduct of the national border guards, cannot be attributed to the EU on the basis that the normative control the EU exercises over them constitutes them de facto EU organs. Participating border guards exercise governmental functions and remain organs of their respective member state. Their actions are considered to be actions of that member state in the sense of Article 4 ARS.[6] They could still engage the responsibility of the international organisation if that organisation has effective control over them. Thus, the question of the attribution of their acts to the EU should be referred to Article 7 ARIO.

### 2.3 Does Frontex have effective control over the conduct of the seconded officers?

Border guards are organs of their respective state. If they have been made available to Frontex, their secondment or short-term deployment does not automatically transfer the responsibility to the international organisation, as the guest officers remain to certain extent organs of their home state. In such cases, the Commentary to Article 7 ARIO acknowledges that it is difficult to distinguish whether the conduct is attributed to the state or the organisation. The decisive element is that of 'effective control'.

The question of who has effective control over the officers participating in Frontex operations is a rather complicated one.[7] Different levels of control by different actors are interlaced in a way that a singular answer becomes almost impossible.

The applicable test, in this case, would be that of operational command and control, taking into account the factual circumstances. We have also examined the 'ultimate control' test adopted by the ECtHR.[8] This would not be called for here, as the case of Frontex does not involve delegation of powers between the agency and the host state.[9] The analysis of the case law in the previous chapter regarding the meaning of effective control has identified several elements that are decisive in the determination of who has effective control. None of these elements is exclusive, and a complete answer calls for a balanced consideration of them all. These include: decision-making powers, de facto powers, disciplinary powers, including criminal jurisdiction, as well as positive obligations to prevent a violation.

6 Fink 2017 and Mungianu 2016 reach the same conclusion. Fink excludes staff that is fully seconded to the agency. Fink 2017, p. 151). On criticism of the division between fully-seconded and other deployed personnel, see A. Sari, 'UN Peacekeeping Operations and Art. 7 ARIO: The Missing Link', *International Organizations Law Review*, 9, 77, 2012.

7 Chapter VI, section 3.4.

8 Chapter VI, section 3.4.

9 Al-Jedda v. The United Kingdom.

It is derived from the EBCG Regulation that the decision-making powers, in the meaning of 'who gives the orders' belong mainly to the host state (Arts. 21(1), and 40(3) EBCG Regulation).

However, the instructions of the host state are not independent, but shall be in implementation of and should comply with the Operational Plan (Article 43(1) EBCG Regulation), which is drafted by the agency. The Frontex Coordinating Officer also communicates the agency's views regarding the instructions of the host state. These views shall be taken into consideration and be followed upon to the extent possible (Article 43(2) EBCG Regulation).[10] It has been observed that the teams are in fact deployed "under the supervision" of the Frontex Coordinating Officer[11] and that he is, in fact, the one who retains responsibility for the instructions given."[12]

Moreover, Frontex sets the environment on the basis of which operations take place, financing operations, deploying the teams and technical equipment, while it may initiate an operation. It further, conducts research and risk analysis on the basis of which all decisions regarding an operation are made and coordinates the work of the different member states. Thus, although Frontex will at no point issue instructions directly towards the seconded officers, there are several levels of orders and control that are above the day-to-day command of the operation.[13]

Furthermore, it is not only the formal arrangements but also the factual circumstances that need to be considered. In this case, one more actor is added to the list of decision-makers. Fink finds that when decisions are made that affect a plane or other large asset of a participating state, the consent of that member state is sought. Even though the participating member state does not have formal veto powers over the decision, in practice no decision is made until consensus is reached. Thus, there is a certain level of authority still exercised by the participating member state over its asset, arguably including the personnel deployed in that asset.[14]

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10 Fink observes that the operational plans describe in more detail the control regime, or as it is referred to there, the operational and tactical command and control. However, they don't manage to create a comprehensive or consistent formal regime over the types of authority each actor exercises over the guest officers. Fink 2017, p.p.: 82, 83.

11 S. Carrera, L. den Hertog and J. Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control', *European Journal of Migration and Law*, 15, 4, 2013, p.p.: 340. 69.

12 Amnesty International and ECRE 2010, p. 6.

13 For other authors, the lack of direct instructions to the deployed personnel excludes the possibility of effective control by Frontex. 'Article 7 (ARIO) would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU' Fink 2017, p. 165. Rijpman and Mungianu, as well do not deal with the direct responsibility of Frontex due to effective control.

14 Fink 2017, p.p.: 85, 86.

On a different note, the law of the host state governs the activities during an operation. Exceptionally, the national law of the home state applies regarding authorisation to carry weapons and relevant equipment. The consent of the host state is also needed in this respect. The law that applies with respect to the use of force is that of the host member state (Article 92 EBCG Regulation). At the same time, the home member states retain disciplinary powers over their deployed personnel (Article 43 EBCG Regulation), while guest officers are subject to the civil and criminal jurisdiction of the host state (Arts. 42 and 43 EBCG Regulation).

Moreover, the agency is vested with adequate legal power to prevent wrongdoings. Its formal monitoring and supervisory obligations, along with the duty of the Executive Director to terminate or suspend an operation, as well as the training it provides to border guards are procedural manifestations of the positive fundamental rights obligations of Frontex.

Finally, if in a particular case, even if it is not immediately concluded that the act can be directly attributed to Frontex, Article 9 ARIO can still be relevant. As mentioned, according to Article 9 ARIO, acknowledgement (or adoption) of the conduct by an international organisation, can lead to the attribution of the conduct to that organisation. This can be connected to the argument theoretically phrased by Guild, the representation doctrine, according to which Frontex taking credit for the success of the operations is only the one side of a coin, of which the other side is assuming responsibility in case of wrongdoings.[15] Thus, the impression that Frontex operations give, and the claim of credit of their success by the agency, may be regarded as adoption of the conduct, which can lead to the attribution of the conduct to the organisation and the direct responsibility of the agency. This is understandably, not a stand-alone argument, but its legal value is notable when taken together with the overall circumstances of the case.

From the above, we conclude that the argument that Frontex may not bear responsibility for wrongdoings, or that it is only responsible for its own personnel, is incorrect. Frontex can have, in fact, effective control over the seconded personnel through its various organisational, supervisory and other powers.[16]

The second conclusion that we can draw is that the effective control of Frontex does not exclude the effective control of the member states. In fact, none of the actors has exclusive control. It has been shown that the largest portion of effective control over agents that are not part of the agency's statutory staff belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control.

15 Chapter IV, section 4.4.

16 Similar conclusions have been drawn by several authors, among which, A. T. Gallagher and F. David, 'The International Law of Migrant Smuggling', *The American Journal of International Law*, 110, 4, 2016, pp. 347–348; Majcher 2015, p.p.: 60-64.

## 2.4 Dual attribution of responsibility in EBCG operations

This non-singular answer to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the 'degree of effective control exercised by either party' that is important. Guy Goodwin-Gill has already in 2011 argued that it is both Frontex and the member state that have effective control. [17] This is unequivocally supported by the findings of the above analysis. Therefore, in cases where Frontex can be proven to have effective control over the seconded personnel, their acts can be attributed to the agency, which bears thus, direct responsibility. The same acts may be attributed to the member states (dual attribution).

The above analysis sets the framework for responsibility during EBCG operations. It cannot, however, serve as a template for all cases. In the end, it all depends upon the particular factual circumstances of each case. Moreover, further empirical research is needed to achieve an understanding of the full range of implications of the command and control structure in practice, which is undoubtedly constrained by the lack of transparency into Frontex operations.

Although there are strong arguments in favour of the direct responsibility of Frontex and dual attribution of the act, this is not supported in one voice in the literature. Both the authorship or attribution of an act to Frontex and the potentiality of dual attribution itself are controversial issues.[18] Moreover, there is no hierarchy among the criteria and we cannot predict what weight the courts will give to each of them.[19]

The arguments for the direct responsibility of the agency, however, are strengthened, as the agency will soon operate with its own personnel that will have executive powers and conduct operations in the agency's own vessels and aircrafts.

In any case, as pointed out by Special Rapporteur Gaja, 'responsibility of an organisation does not necessarily have to rest on attribution of conduct to that organisation'.[20] We can, thus, move on to the less contested arguments on indirect responsibility.

17 Goodwin-Gill 2011; See also, Majcher I2015, p.p.: 58-64.

18 For instance, Mungianu 2016 objects dual attribution, while Papastavridis 2015 follows the competence model, reaching a different conclusion.

19 Fink, for instance, weighing the same elements, even in the absence of factual disagreement, reaches the opposite conclusion that the threshold of Article 7 ARIO is not met with respect to Frontex. Fink 2017, p. 164.

20 Gaja 2004, p. 8.

## 3 Indirect responsibility

As discussed in Chapter VI, there are exceptions to the rule of direct attribution of responsibility (principle of independent responsibility), according to which an organisation may be held responsible for an act that is attributed to the member state if it is proven that it has contributed to it. This may result in the indirect or derivative responsibility of the organisation.[21] This contribution can take the form of either aid and assistance or direction and control.

### 3.1 Is Frontex responsible due to aid and assistance?

Frontex finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as EUROSUR and the new, since 2019, centralised return management platform. Any of these powers and competences and indeed their combination can be regarded as significantly contributing to the commission of a wrongful act during an EBCG operation. It could be argued that the particular sensitivities, such as a regular practice of push-back pre-existed Frontex operations, or perhaps that the presence of Frontex officers has, in fact, contributed to fewer violations. However, whether the aid or assistance was essential to the completion of the wrongful act is not significant for the purpose of determining international responsibility.

Indirect responsibility through aid and assistance though is dependent upon two conditions. Firstly, the act itself should also have been internationally wrongful if committed by Frontex itself. Frontex is bound by the same human rights obligations as the member states as they are derived from the Charter and the Frontex Sea Operations Regulation.[22]

Secondly, following the generally accepted interpretation of the mental element of Article 14 ARIO, it needs to be established that the organisation knew or should have known of the wrongful act. Frontex has extensive monitoring and supervisory duties and systems, such as the serious incidents reporting, that allow it to be able to detect human rights sensitivities in each country. More concretely, when the 2019 EBCG Regulation is implemented human rights monitors belonging to the agency's own staff will supervise return flights. If the violation is recurring or based on structural deficiencies of the system of the host state, it may be reasonably presumed that it was in knowledge of the agency. That is especially the case when these violations have been documented in credible NGO and media reports. Another instance when such knowledge can be presumed is whether the violation should be reasonably assumed to result from the operational plan itself, whether this leads to the violation by default or whether the

21 Commentary to Chapter IV ARS, par. 8.
22 Chapter IV, section 4.1.

operational plan does not provide for adequate guarantees to avoid it. In accordance with the Frontex Sea Operations Regulation, guarantees such as the availability of shore-based medical staff, interpreters, legal advisers and other relevant experts need be included in the operational plan. Failure of the operational plan to make such provisions can give rise to a predictable and reliable threat of violations of the right to access asylum or the prohibition of refoulement,

Thus, if it can be reasonably presumed that the agency was aware of a violation or that it should have known, but it willfully turned a blind eye, its indirect responsibility may arise from the financial, operational and practical aid and assistance it has provided.[23]

### 3.2 Is Frontex responsible through direction and control?

As I already established, effective control by Frontex over seconded personnel and therefore direct responsibility is arguable, but not beyond doubt. If the arguments against effective control or dual attribution prevail before courts, it does not mean that the influence of the agency over the operation should necessarily be ignored.[24] It can still play a role in the context of derivative responsibility if it is proven that the agency exercises direction and control over the conduct of the state in the commission of the internationally wrongful act.

It has been suggested that Frontex does not exercise direction and control over a wrongful act, because it does not adopt any binding decisions.[25] 'Decision' though, should be understood broadly. Direction and control is not read as complete power over an act,[26] but as a state of control that overlaps with effective control. It does not necessarily represent a formally binding act, but any act that either de jure or de facto does not leave adequate discretion to the member state to implement it without violating primary rules of human rights protection.[27]

Such decisions that limit the discretion of the member state could be, for instance, the operational plan that is drafted by the agency, in conjunction with the orders and the supervision of the Frontex Coordinating Officer. It will need to be established in each individual case that the decisions would arguably lead to violations and that the said state did not have sufficient discretion in complying with them in a manner that does not violate international law. A difficulty of proof is the lack of access to the operational plan and the instructions provided by the Frontex officer, as well as the relevant internal documents of the agency, such as serious incidents reports.

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23 See among others, Papastavridis 2015, p.p.: 258-260.
24 Section 2.
25 Mungianu 2016, p. 76, fn. 111.
26 ASR Commentary, at p. 69, para. 7.
27 ARIO Commentary, p.p.: 38-39, par. 4.

Notwithstanding the practical difficulties, such direction could in principle constitute a form of direction and control over the conduct of the state, if for instance, the operational plan provides for return to the port of embarkation in the absence of adequate guarantees for the right to non-refoulement and the right to asylum. The control of the agency over the acts of the state would be strengthened even more if the operation were a result of the right of the EU to intervene and impose measures of border control upon the host state, a decision which is first essentially made at the level of the agency.

It is possible that each one of these elements separately and independently would not necessarily reach the level of direction and control, but if considered together, and even in combination with the financial control of the agency over the operation, they would create an environment where the discretion of the member state would be significantly restricted.[28]

A relevant argument owed careful consideration has been developed by Madalina Busuic. She points out that agencies have certain advisory functions, that although not formally binding, they are in practice quite influential, due to the research and technical expertise of the agency.[29] In this sense, they become de facto binding over the final act of the member state. The argument will be developed further with respect to the risk analysis of the agency in Chapter VIII. This can also become particularly relevant in view of the new power of Frontex to prepare return decisions. Such decisions will not be binding in nature and will aim at advising and assisting the member state, which will have the final say in the return decision. Despite the official mandate, however, it can be imagined that these advisory preparatory decisions can gain beyond mandate influence, as it happened in the case of EASO drafting the vulnerability decisions for the Greek asylum service.[30]

With respect to the remaining conditions necessary for Article 15 to apply, what has been discussed earlier concerning wrongfulness of the act and knowledge apply here as well. Similarly, joint exercise of direction and control is also conceivable.

## 4 De jure or de facto competence

A separate issue that needs to be discussed is that of the nature of the competences the agency exercises. The agency emphasises that any potential responsibility can occur only in the context of its de jure competences, i.e. the activities directly defined within its mandate.[31] This would absolve the agency of wrongful acts committed outside its mandate, which would

28 see also Moreno-Lax and Giuffré 2017, p.p.: 20-23.

29 Busuioc 2013, p. 192.

30 European Ombudsman 2017.

31 Frontex Fundamental Rights Strategy, point 13, http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf; European Ombudsman 2013a.

not be permissible of the basis of the principle of effective legal protection. In order for the protection offered by the Charter and the ECHR to be practical and effective rather than theoretical and illusory, all acts of the agency, including its de facto competences, should be able to engage the agency's responsibility. Responsibility over the de jure as well as the de facto competence constitutes a principle of international law,[32] and has been recognised by the ECtHR in *Medvedyev*[33] and *Hirsi Jamaa*.[34] The ECtHR has further ruled that liability may be incurred 'by reason of its (the actor) having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment' regardless of the official mandate.[35] Frontex is bound by its obligations irrespective of whether it had competence for the committed acts under its internal rules.[36] Article 8 ARIO provides that an act is still attributed to an organisation, even if conducted by an agent or organ in excess of the authority formally provided to them.[37] Such conduct may even exceed the competence of the organisation itself.[38]

This may prove relevant on several occasions, where Frontex has acted ultra vires or created its own de facto competences. One such instance concerns EUROSUR, which was operational before the Regulation came in force. The EUROSUR Regulation was adopted on 22 October 2013. EUROSUR's operations officially started on 2 December 2013, but in practice, the system had already been operational on the ground, while its legal basis was still under negotiation.[39]

In another example, Frontex did not have the competence to process personal data until the 2011 amendment.[40] However, it has long before that amendment been processing personal data in the context of joint return operations,[41] allegedly without adopting any measures for the implementation of data protection legislation.[42]

Finally, Frontex had already been participating in operations in the context of bilateral agreements with third countries, for example, Hera Operation, 2006, before that was foreseen in the 2011 amendment of its

32 e.g. Law of the Sea and ARS.
33 ECtHR 29 March 2010, App. No. 3394/03, (*Mededyev v France*), paras. 66, 67.
34 *Hirsi Jamaa and Others v. Italy*, par. 80.
35 ECtHR 4 February 2005, Judgment, App. Nos. 46827/99 and 46951/99 (*Mamatkulov and Askarov v Turkey*), par. 67.
36 For instance, the mandate for Operations Poseidon and Nautilus seems unstable. Papastavridis 2010; S. Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Aja: Martinus Nijhoff Publishers 2005, p. 416.
37 Also applied in ICJ 20 July 1962, advisory opinion Certain expenses of the United Nations, I.C.J. Reports 1962, p. 168.
38 Commentary to Article 8 ARIO, par. 1.
39 Frontex 2012b, p. 20; European Commission 2011a, p. 2.
40 Article 11(b) and (c) Frontex Regulation.
41 EDPS 2010.
42 Data Protection Regulation; Statewatch and Migreurop 2012, p.p.: 11, 12.

Regulation. Finally, Frontex may not reject any responsibility, for instance, with respect to assisting Greece in violating migrants' rights in detention, on the basis that it has no mandate over that detention.

## 5 The problem of many hands in EBCG operations

The previous sections have shown that the agency may incur responsibility either directly or indirectly for acts or omissions of its statutory staff or the seconded personnel. Examining the application of the above principles to EBCG operations, however, we can observe that other actors also bear responsibility.

By virtue of Arts. 4-11 ARS, governing the attribution of an act to a state, the responsibility of the host member state seems to be an obvious conclusion. That state hosts and carries out the operation conducted in its territory, and the members of the deployed teams are under its command. Any violation arising during such an operation, for instance, a push back or abuse of those apprehended can be directly attributable to that state.[43]

The same holds in case a third state is in charge of an operation in its own territory. While the responsibility of an EU member state hosting an operation can be easily resolved within EU liability law and the ECHR, the application of international law is essential for third states as they are not bound by EU law and potentially not even by the ECHR.

Similarly to the agency, states participating in an operation may also incur responsibility for aiding or assisting in a violation conducted by the host state (Article 16 ARS), for instance to the extent that they have contributed with personnel or assets, as well as funding, technical and logistical support to an operation, which resulted in a violation. In this regard, the participating states cannot be exempt from responsibility on the basis that their personnel was under the authority of the host state. This could be the case only if the host state exercised exclusive command and control over the guest officers (Article 6 ARS), which is not apparent in EBCG operations.[44]

To sum up, both hosting member states or third states, and participating states may be responsible for a violation, while Frontex itself can incur responsibility either directly for acts of its own statutory staff and through effective control over seconded personnel, or indirectly through aiding and assisting in a violation or through direction and control. At the same time, none of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a rather confusing picture regarding responsibility that has been conceptualised earlier as the *problem of many hands*.

43 For a more detailed view on the responsibility of states involved in EBCG operations, see Fink 2017.

44 Papastavridis 2010, p. 107.

## 6 The Nexus theory and the responsibility of multiple actors

It has been argued that the solution to the *problem of many hands* is to be found with the help of the Nexus theory, according to which when this problem arises not one actor is entirely and independently responsible for the outcome, which outcome is rather the collective result of the interlinked responsibilities that take place.[45] It is in a nexus that the separate responsibilities meet and interact through the cooperation of the different actors. Only when the responsibilities meet, the harmful result can occur. Therefore, we should view these responsibilities not separately, but as a nexus and deal with them as being collective. This can be done in a framework of joint responsibility.

This section deals with the normative applications of the Nexus theory through joint responsibility. It starts from the examination of the relevant rules and principles of EU law, and proceeds with the relevant general principles of international law.

### 6.1 Joint Responsibility in general EU law and the EBCG Regulation

First, it should be examined whether EU law has already provided an answer as a matter of pure EU law. The Treaties themselves do not contain any secondary rules concerning the joint responsibility of the EU and its member states. However, joint responsibility is not foreign to EU law.

The CJEU has dealt with joint responsibility under mixed agreements, stating that in the absence of derogations to the opposite, such as declarations of competence where responsibility would be apportioned accordingly, the EU and its member states are jointly liable for the fulfilment of their obligations towards the ACP States [States of Africa, the Caribbean and the Pacific] in the context of the Lomé Convention.[46] According to this, when member states and the EU are bound by the same obligations derived from an agreement to which they are both parties, they are automatically jointly liable regardless of the rules of attribution.[47] This could potentially, and by way of analogy, become relevant in the context of EBCG operations once the EU accedes the ECHR. The CJEU could then choose to draw arguments from the way the EU treats joint responsibility in its international relations (specifically in mixed agreements). This could indeed offer an acceptable solution resembling the way the CJEU handles mixed agreements, which could give rise to their joint liability where action is taken

45 Chapter IV, section 5.

46 CJEU 2 March 1994, C-316/91, ECLI:EU:C:1994:76 (*European Parliament v Council of the European Union*), par. 296.

47 M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Law Working Paper 2006/22, 19, 2006, p. 19; Gaja, 2004, par. 5.

jointly by both actors.[48] An example of such an instance was *Parliament v. Council*, where the CJEU held that the Community and its member states were jointly liable for the fulfilment of any obligation arising from the agreement since the agreement was concluded in common by the Community and its member states and there are no derogations in the Convention itself that point to the opposite conclusion.[49]

However, it should still be highlighted that this case concerns mixed agreements, while this study focuses on the non-contractual liability of Frontex. What is more, we can hardly deduce a general principle regarding mixed agreements from what the Court said in this case, as it could be particular to the bilateral nature of the cooperation in this Convention, which reflects reciprocal relations between two blocks, the EU and its member states representing one block and the ACP States the other.[50] Thus, we have no way of predicting whether the CJEU will treat that as a general rule and afford the same solution with respect to non-contractual liability issues when both the EU and member states are involved.

Besides, such a general rule that the EU and its member states are jointly liable when they are both bound by the same set of international obligations unless there is an a priori agreement allocating responsibility, regardless of their actual involvement in the act, could diminish the autonomous legal personality of the international organisation. An act of a member state automatically engaging the responsibility of the EU and vice versa would be at odds with the institutional structure of the EU that is independent from its member states.[51]

Therefore, being bound by the same obligations does not unconditionally result in the joint responsibility of the EU and its member states.[52] However, this is an indication that a solution in the direction of joint liability would resonate within EU law.

The CJEU has dealt with the joint responsibility of the EU and its member states in cases of non-contractual liability in *Kampffmeyer*, which is discussed in more detail in the next chapter.

Another place where we could look for specific provisions within EU law is the EBCG Regulation, in particular, Article 7(1), entitled Shared Responsibility, which states that

48 For further read: C. Tomuschat, 'Liability in mixed agreements' in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983; G. Gaja, 'The European Community's rights and obligations under mixed agreements', in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, Deventer: Kluwer Law International 1983.

49 *European Parliament v Council of the European Union*, p.p.: 661, 662. Certain mixed agreements expressly allocate competence and responsibility for positive breaches either to the Member State or the EU

50 Casteleiro 2016, p. 65.

51 Casteleiro 2016, p. 67.

52 Casteleiro 2016, p. 66.

> *'The European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management (…). Member States shall retain primary responsibility for the management of their sections of the external borders.'*

Notably, Article 7(1) covers what we have identified in as *Role-Respon*sibility (Hart) or *responsibility as task and virtue* (Bovens).[53] *Role-Responsibility* is understood in relation to the assignment of specific tasks and duties to an agent, given its role or position; duties that belong in one's sphere of responsibility. This does not necessarily correspond to *Liability – Responsibility* (Hart) or *responsibility as accountability* (Bovens) that is our main focus in this chapter. More specifically, the article identifies in broad strokes the roles, and range of duties and tasks of the agency and the member states, and sets basic foundations for awareness of each actor's own obligations. The Regulation is not specific about attribution of responsibility. The *Role-Responsibility* covered here does not directly correspond to the attribution of responsibility on each actor, as *Liability – Responsibility*, but it can be related to it.

This provision was introduced in the EBCG Regulation in 2016 (then Article 7(1)) in response to the Ombudsman's request for further clarity into the allocation of responsibility between Frontex and the member states.[54] The Ombudsman undoubtedly was concerned with the *Liability – Responsibility* of the agency. Therefore, this provision can be read as intended to indeed provide further clarity on this issue.

Even though the provision does not directly allocate responsibility ex ante, it provides some guidance. In particular, it puts border management in the sphere of the shared responsibility of the agency and the member states, highlighting the primary responsibility of the host state.

We can thus conclude that even though joint responsibility is not foreign either to EU liability law as a whole or to the ECBG Regulation in particular, the EU legal framework does not provide us with stable answers as to its exact content and the specific characteristics. Therefore, we may turn for guidance to the relevant international law.

## 6.2 The Meaning and Practical Implications of Joint responsibility

Given that the international environement becomes more and more complex, also including an increased activity of non-state actors, situations regarding the responsibility of international organisations, it may prove quite common that more than one actor, member state or international organisation, is responsible for the same wrongful act.

53 Chapter IV, section 2.1.
54 European Ombudsman 2013c.

This can be the result of double or multiple attribution of the same act to several actors. Moreover, several rules of attribution can apply simultaneously, for instance, the principle of independent responsibility along with aid and assistance, pointing at the direct responsibility of one actor and the indirect responsibility of another.[55]

This can be the case in EBCG operations, with respect to Frontex and the state hosting the operation, as well as participating states. The responsibility of Frontex, in this case does not result in the host state being absolved of responsibility.

By virtue of the ILC Articles, the responsibility of one actor is without prejudice to that of another and the parallel responsibility of multiple subjects of international law is envisaged in the same set of circumstances.[56] In particular, according to the UN Special Rapporteur on the Responsibility of International Organisations, if an internationally wrongful act can be attributed to one or more states or international organisations, the actors involved are jointly responsible.[57]

The parallel responsibility of more subjects of international law is covered under the rule of invocation of responsibility, Article 48(1) ARIO, according to which an internationally wrongful act can be attributed to one or more states or international organisations.[58] The 'joint responsibility' of an international organisation is envisaged in connection with the wrongful act of a member state in the meaning of Articles 14-18 ARIO.[59]

Aiming to elaborate on the meaning and practical implications of joint responsibility as that has been developed by the ILC, we first need to clarify the appropriate terminology.

An all-encompassing term referring to any situation where multiple actors have contributed to a harmful outcome and legal responsibility needs, thus, to be allocated to them all, is *shared responsibility*.[60] This single harmful outcome may be the result of several wrongful acts of different actors (Type A situations), or the same wrongful act, which is the effect of actors acting together (Type B situations).[61]

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55 Chapter, VI, sections 3.5. and 3.6.

56 Articles 19 and 63 ARIO, Commentary to Article 3 ARIO par. 6.

57 Gaja, 2004, paras. 8, 9. The joint responsibility between member states and agency has also been proposed among others by Goodwin-Gill 2011, p. 447; LIBE 2011, p. 92-95; Weinzierl and Lisson 2007, p. 72.

58 Chapter VI, section 3.6.

59 On the responsibility of a state in connection to an act of an international organisation, see: Casteleiro 2016, p.p.: 90-105.

60 A. Nollkaemper, 'Introduction' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law*, Cambridge: Cambridge University Press 2014, p. 7.

61 P. D'argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (Shared Responsibility in International Law)*, Cambridge: Cambridge University Press 2014, p.p.: 211, 212.

Nollkaemper and Plakokefalos have attempted the categorisation of shared responsibility into the following subcategories:

– *Concurrent responsibility*, when each actor's contribution constitutes a wrongful act that is the independent cause of the harmful outcome. In this case, each individual contribution in itself is independently sufficient to cause the harm.[62]
– *Cumulative responsibility*, when each contribution would have not necessarily been sufficient in itself to cause the harm, yet it is sufficient to trigger the responsibility of the author.[63]
– *Joint responsibility*, when multiple actors commit together the same wrongful act, which causes the harm.[64]

The first two, *concurrent* and *cumulative responsibility* fall under Type A situations, while *joint responsibility* falls under Type B.

Complicity in the form of aid or assistance and the instance of direction and control discussed in the previous section can be examined under this light. Aiding or assisting is considered as an act distinct from that of the assisted state (Type A), and is considered to fit under *cumulative responsibility*.[65] *Cumulative* can be the responsibility of Frontex on the basis of the argument that it assists a host member state in a violation, by, for instance, continuing to finance and coordinate an operation, upon the knowledge that violations are being committed.

*Joint responsibility*, where the different actors have committed the same wrongful act (Type B), is relevant in cases of direction and control,[66] or when two or more actors work together in carrying out an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation.[67] *Joint responsibility* can also apply to Frontex, given, for instance, the control of the host state over the deployed personnel and the agency's involvement in research and risk analysis and drafting the operational plan, which covers all the essential aspects of an operation and is binding upon all actors involved. Conversely, an instance where a wrongful act is committed by the agency's statutory staff under the day-to-day command of the host state can also give rise to *joint responsibility*.

The above categorisation is valid as the result of rigorous academic study but does not constitute binding legal terminology. It will be used in this study to the extent that it proves helpful for our conceptual understanding, but it will be derogated from, later in section 6.5. where *joint*

62 Nollkaemper 2014, p. 9.
63 Nollkaemper 2014, p. 10.
64 Nollkaemper 2014, p. 10.
65 D'argent 2014, p. 214.
66 Commentary, n.1 to Article 47 ARS, par.2; D'argent 2014, p. 222.
67 D'argent 2014, p. 222; ARS Commentary, n. 1, p. 124, par, 2.

*responsibility* comes closer to the way the term *joint responsibility* is referred to in the official Commentary to the ARIO,[68] and in EU law, and has been understood by the theory so far. [69]

The ILC Articles explicitly deal only with *joint responsibility* (as meant by Nollkaemper and Plakokefalos)[70] in Article 48 (1) ARIO, which states that:

> *'Where an international organisation and one or more States or other international organisations are responsible for the same internationally wrongful act, the responsibility of each State or organisation may be invoked in relation to that act.'*

The exact content of *joint responsibility* and its modalities, if not the terminology itself, are still to be determined. While international law recognises the circumstance of *shared responsibility*, it does not provide adequate guidance as to exactly how responsibility or reparation should be shared, while the relevant case law is limited.[71] This leaves room for interpretation and progressive development of the law. Admittedly 'the law as formulated by the ILC will offer substantial flexibility to address questions of shared responsibility', while the ILC itself appraises the progressive development of the law on the basis of proposals and identifiable trends in state practice.[72]

In other words, the ILC Articles are not written in stone and they do not provide all the answers. Instead, normative thinking is necessary, for which we can use the principles of international law as guidance. The lack of settled case law and concrete a priori settlement of responsibility leaves room for constructing the law as it should be.

It is in this space left for interpretation and progressive development that this study is placed, as it attempts to develop solutions for the *problem of many hands* in the context of Frontex joint operations, partly identifying them in the existing framework and partly constructing them anew, inspired by identifiable trends in state practice.

## 6.3 The nexus in the rules of attribution of responsibility

Getting deeper into questions as to who is responsible for providing reparations to an injured party, in other words, how responsibility is attributed to each actor, we need to start from the main principle of attribution of responsibility, the principle of independent responsibility. Accordingly, every internationally wrongful act of a state or an international organisation

68 Commentary to Article 48 ARIO, par. 1.
69 Goodwin-Gill 2011, p. 447; See further Casteleiro 2016, p.p.: 63, 64. The joint responsibility between Frontex and the member states, in particular, has also been proposed among others by Weinzierl and Lisson 2007, p. 72.
70 D'argent 2014, p.p.: 249-250.
71 Nollkaemper 2014, p.p.: 13, 14.
72 Nollkaemper 2014, p. 16.

entails the international responsibility of that state or international organisation. In other words, each actor is independently responsible for the conduct attributed to it and needs to provide reparations that correspond to that independent responsibility.[73] The principle of independent responsibility advocates a simple linear relationship, depicted in Image 1, connecting the wrongful act with the responsibility of the author of the act and the reparation that is due for the harm caused. This linear relationship is, in principle, independent of acts and responsibilities of others.


*Image 1: Linear relationship*

This is a general principle in international law,[74] which also means that it is not absolute, and does not exclude other responsibility relations. In fact, responsibility may also be attributed by virtue of Arts. 14-16 ARIO, for an act that is by itself not an unlawful act, but is linked to one. The principle of independent responsibility only addresses situations, where there is the same wrongful act (Type B situations).

In cases of complicity (Type A situations), where the act of aiding is considered a separate act from the main wrongful act, there is room for *cumulative responsibility*, where Frontex may be responsible for an act attributed not to the agency, but to the host state. It is in such cases, that the linear relationship advocated by the principle of independent responsibility becomes inadequate, as the image can get obscured by the different responsibilities. Trying to disentangle this web of responsibilities of the different actors, who through the integration of their conduct, lead collectively to the harmful outcome, can become a complicated process. As a result, it is understandable that responsibility would be sought in practice only from the actor that is more closely connected to the act, ignoring the other interconnected responsibilities. This approach does not address the *problem of many hands* and can result in blame-shifting and substantive gaps in accountability. Therefore, in EBCG operations, the responsibilities should be seen not as a simple linear relationship but rather collectively as a nexus.

### 6.4 Rules of Invocation of Responsibility

As per the ARIO Commentary, Article 48(1) ARIO discusses the joint responsibility of multiple authors of the same act, stipulating that:

> *'Where an international organisation and one or more States or other international organisations are responsible for the same internationally wrongful act, the responsibility of each State or organisation may be invoked in relation to that act.'*

73 ARS Commentary, n. 1, 124, para. 3.93; J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press 2002, p. 272.

74 Commentary, n.1, to Article 47 ARS, par. 3.

This does not seem to derogate as such from the principle of independent responsibility, when the same wrongful act is attributed to multiple actors. Thus, we could imagine several linear connections that start from the same act and end at each one of the different actors separately.

However, Article 48(1) ARIO is more than a mere repetition of the principle of independent responsibility or an alternative rule of allocation of responsibility. It is a rule of invocation of responsibility.[75] Instead of 'who has the responsibility' it responds to the question 'against whom may the responsibility be invoked', looking at the issue not from the perspective of the actor, but of that of the victim. In this sense, it is closer to the notion of liability.[76]

According to this rule, the responsibility of each actor may be invoked for the same act. The relationship of each actor with the wrongful act remains separate from the relationship of the other actors with the same act. Even though states and international organisations may act jointly, they will each be separately responsible for the same wrongful act of which they are co-authors.[77] Therefore, what we learn from the letter of Article 48(1) ARIO regarding joint responsibility is this *principle of separate invocation of responsibility*.

Nevertheless, a textual interpretation of Article 48(1) ARIO does not provide absolute clarity as to the way this separate invocation of responsibility should work out in practice. The letter of the provision leaves certain questions open: Should the portion of the responsibility be invoked against each actor in separate proceedings? Should all different proceedings be brought to achieve full reparation? Thus, the principle of separate invocation of responsibility requires further qualification.

The invocation of the responsibility of several actors may be separate but, 'shared responsibility is not simply the aggregation of two or more individual responsibilities'.[78] The defining feature is that the multiple actors stand in some relationship with each other and the responsibility of the one mutually influences the responsibility of the other.[79] As we also established earlier, when discussing the idea of the nexus of responsibilities, the interaction of the separate responsibilities gives rise to a collective element. As such, the violation in many-hands situations is the collective outcome of the conduct of different actors, which stand in relationship with one another. These actors may have acted separately but it was through their interaction that the harmful result occurred. Thus, in such situations, the different responsibilities may be those of separate actors, but they should be dealt with in a manner that also acknowledges this collective element.

75 D'argent 2014, p. 238.
76 Chapter IV, section 2.2.
77 Messineo 2014, p. 81.
78 Nollkaemper 2014, p. 12.
79 Nollkaemper 2014, p. 12.

It is, thus, argued here that, on the basis of this understanding of the different responsibilities in many-hands situations as a nexus, joint responsibility in Article 48(1) ARIO should be interpreted in terms of invocation of responsibility as *joint and several responsibility*. This construction allows for the *principle of separate invocation of responsibility* to be expressed in a manner that acknowledges the collectivity, as it renders each actor liable for the acts of the others. Article 48(1) ARIO expresses this collective element and responds to the *problem of many hands*.

This interpretation is not uncontested in international law. The ICJ has avoided to authoritatively rule on the issue in Nauru judgment,[80] while the ILC clarified that the equivalent provision of the ARS, Article 47 'neither recognises a general rule of *joint and several responsibility*, nor does it exclude the possibility (…).' It noted that whether this would be the case depends on the particular circumstances and the international obligations of the actors concerned.[81]

Such international obligations could impose a restriction on *joint and several responsibility* and settle the matter otherwise. This could be the case, for instance, in the context of mixed agreements, when the EU and its member states have concluded an agreement that also provides for the a priori apportionment of responsibilities.[82] In the absence of such international obligations and given the particular circumstances of situations where the *problem of many hands* appears, Article 48(1) ARIO should be interpreted as *joint and several responsibility.*

*Joint and several responsibility* must be understood as each actor being responsible for the acts of the others (collective) and may be individually[83] asked to make full reparation (separate).[84] This, in practice, means that the injured party may bring a case against each of the responsible parties and hold them to account, for the wrongful act as a whole, rather than for the part of the act that is attributable to it. The only condition of Article 48(3)(a) ARIO is the prohibition of double recovery, according to which the injured party is prohibited from recovering compensation that exceeds the damage it has suffered.

Such a construction allows for the most equitable result if its principles would inform a case regarding violations in a Frontex joint operation. In particular, it would fulfil the principle of effective legal protection, not

80 ICJ 15 June 1954, Monetary Gold Removed from Rome in 1943, Preliminary Question, ICJ Reports 1954, 19 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), p.p.: 19-32; *Certain Phosphate Lands in Nauru v Nauru/Australia*, p.p.: 261, para. 55.

81 Commentary to Article 47 ARS.

82 D'Argent 2014, p. 30.

83 Independence of each bilateral relationship between the responsible and the injured party. Even when states act jointly, they will be separately responsible for the same act, and the responsibility of each can be invoked separately.

84 D'argent 2014, p. 244.

requiring the victim to investigate the precise degree of participation of each actor to the wrongful act and calculate their proportional apportionment of the damages so that she can go to court against each one of them accordingly for their proportion of the damage. To the contrary, it would allow the injured party to address one of the jointly responsible actors for the full extent of the damage. At the same time, it would prevent the victim of a violation from acquiring full reparation from more than one actor (prohibition of double recovery, Article 48(3)(a) ARIO). An equitable result can be further ensured with the right of recourse the actor who has provided reparation may have against the other responsible states or international organisations (Article 48(3)(b) ARIO).

While there are supporters of this interpretation,[85] it should be noted that the notion of *joint and several responsibility* is not well-established in customary international law.[86] It is, however, widely discussed in the literature,[87] and reference to it can be found in treaty provisions.[88] Moreover, its introduction in the framework of EU (non-contractual) liability law would be in accordance with Article 340 TFEU, which states that the non-contractual liability of the EU and its agencies shall be implemented in accordance with the general principles common to the member states. *Joint and several responsibility* is indeed such a principle, as it is of domestic private law origin, and its content is determined from comparative domestic law.[89]

In sum, even though not most authoritatively established in customary international law, *joint and several responsibility*, as the interpretation supported by the Nexus theory, is a favoured meaning of Article 48 ARIO, as it is interpreted on the basis of EU domestic traditions. It is argued here that it constitutes the implementation of the Nexus theory in terms of invocation of responsibility, or in other words, liability, and that it should be used as a rule for invoking responsibility in cases where such responsibility is shared between Frontex and the member states.

85 J. E. Noyes and B. D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', *The Yale Journal of International Law,* 13, 1988; A. Orakhelashvili, 'Division of Reparation Between Responsible Entities', in J. Crawford, A. Pellit and S. Olleson (eds.), *The Law of International Responsibility,* Oxford and New York: Oxford University Press 2010, p.p.: 647-665.

86 Leck 2009, p.p.: 363-364.

87 Kuijper and Paasivirta 2004, p.p.: 120, 122; D'argent 2014, p. 245.

88 E.g. Article 6.2 of Annex IX to the Law of the Sea Convention deals with the sharing of responsibility following a request for declaration of competence. Specifically, referring to the EU and its member states, it stipulates that if the EU and its member states fail to provide information as to who has responsibility in respect of any specific matter, after such a request has been made, or provide contradictory information, they shall be held jointly and severally liable.

89 D'argent 2014, p. 245.

## 6.5 The advantages of the Nexus theory in EBCG operations

The Nexus theory can advance our understanding of the complicated responsibility relations that constitute the *problem of many hands*. It leads us to conclude that responsibilities in many-hands situations should not be seen as linear connections but as a nexus, as they collectively result in the harmful outcome. This analysis explains the responsibility relations in such situations in a more complete manner than the typical linear understanding does.

In terms of practical implementation, the Nexus theory, firstly, suggests that the appropriate way to deal with such situations is shared responsibility, in order to accommodate the collective element that develops from the interconnections amongst the conduct of the different hands. This concept is already widely invoked in international law, but its presence in EU law remains marginal. The Nexus theory argues for the utilisation and further development of this concept in all legal orders where the *problem of many hands* can appear, including EU law that is most relevant in the context of EBCG operations.

The Nexus theory suggests that the way to address the *problem of many hands* is to regard the responsibility of the different actors involved as collective. When no single actor is entirely and independently responsible for the outcome, the actors should be jointly responsible.

It is important to note that the term 'jointly responsible' does not fully correspond to *joint responsibility* as defined by Nollkaemper and Plakokefalos above. It is broader and covers both cases of *joint* and *cumulative responsibility*. It refers to the instance where 'more states or international organisations may be liable for conduct in breach of international law'.[90] It is also in this sense that the term *joint responsibility* is referred to in the official Commentary to the ARIO.[91] It is in this sense that joint responsibility is used in this study, while Nollkaemper's and Plakokefalos' *joint responsibility*, could for clarity be named *joint responsibility stricto sensu*.

As can be observed from the section above, international law is helpful in providing certain answers and guidelines for addressing the *problem of many hands*, but it is not fully developed. The Nexus theory can further contribute to the interpretation and progressive development of the rules on invocation of responsibility.

In particular, in the context of its practical implementation, it suggests that the rule that applies to the invocation of responsibility, i.e. *the principle of separate responsibility* (Article 48(1) ARIO) should be interpreted as *joint and several responsibility*. This is indeed a possible, but not fully established interpretation for Article 48 ARIO. Here, I use the nexus argument to

90 Goodwin-Gill 2011, p. 447; See further Casteleiro 2016, p.p.: 63, 64. The joint responsibility between Frontex and the member states, in particular, has also been proposed among others by Weinzierl and Lisson 2007, p. 72.

91 Commentary to Article 48 ARIO, par. 1.

support this interpretation as the most equitable result that also reflects the collective element of responsibility in many-hands situations. I furthermore suggest that this principle should apply not only to instances of *joint responsibility stricto sensu* but also to those of c*umulative responsibility*. I do not intend to propose a general rule that applies to all cases of responsibility of multiple actors but only to cases where the *problem of many hands* appears.[92]

In such cases, if inspiration were drawn from the construction of Article 48(1) ARIO, the victim could invoke the responsibility of and sue for damages each and any responsible actor. Full reparation would be due by each 'hand'. The degree of participation in the harmful outcome should not be decisive, as long as it is adequate to invoke the responsibility of the actor, and apportionment of damages should not be relevant at this stage. This can become relevant when the actor who paid compensation makes use of their right of recourse and seeks to deduce the share of damages of other responsible actors. Furthermore, an equitable result could only be ensured if a prohibition of double recovery applies.

### 6.6 The limitation of the Nexus theory and a systemic accountability solution

The Nexus theory can provide interpretative solutions on the basis of international law, through the principle of joint responsibility, which are, to a great extent, satisfactory for addressing the *problem of many hands*. Nevertheless, it has certain practical limitations in the practice of EBCG operations. While it resolves issues of responsibility, gaps remain with respect to accountability.

Article 48(2) ARIO distinguishes responsibility to primary and subsidiary responsibility, stipulating that subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.[93] Primary responsibility is generally understood to be derived from the rules of attribution of conduct, while subsidiary responsibility can result from an act that is connected to the primary act, such as providing aid or assistance to the conduct of the wrongful act.[94] Thus, if the rule of Article 48(2) ARIO were to be applied in EBCG operations, in cases where the agency has only indirect responsibility, the individual would first need to undertake legal action against the host state, and only hold the agency to account if the host state has failed to provide reparations.

This judical construction is based in conciderations of *individualist accountability*, i.e. addressing the violation for a particular individual. An assessment of this solution from this perspective, would need to focus on

92 Cases, where there is, for instance, a priori allocation of responsibility and agreed upon rules of distribution of obligations for reparation may be handled differently.

93 Article 48 (2) ARIO: 'Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.'

94 Commentary to Article 48 ARIO, p. 89.

an evaluation of the effectiveness of the available legal remedies. Nevertheless, even if this evaluation were positive and the victim was able to receive compensation by invoking the primary responsibility, gaps would still remain in practice.

Even though this rule is not formally found in the normative understanding of joint responsibility in EU liability law,[95] in practice, an individual whose rights have been violated in the context of a joint operation would arguably opt to bring a case against the host member state, as the legal, procedural, and factual facets of the case are more straightforward than in a case against Frontex. There are adequate judicial precedents, and the judicial avenues are already established. The host state would then have the right of recourse against Frontex, claiming the appropriate deduction from the full reparation it has provided. This is a theoretically equitable result. Realpolitik considerations, however, and the practice so far suggest that the state will not make use of the right to recourse, and a case against Frontex will most probably never be brought before courts. This leaves a gap as to the accountability of Frontex, which would not be held to account and would not be answerable for its part in the violation. This is precicely where the limitations of the model of *individualist accountability* become apparent. It could lead to remedying the situation for the particular applicant, but without addressing the accountability of the agency and building towards more structural changes that can ensure human rights standards in all joint operations.

The *systemic accountability* approach has the potential to fill this gap, as it requires that all actors responsible for a violation are held to account. In particular, while the Nexus theory suggests that reparation should come *from any* of the responsible actors, the model of *systemic accountability* suggests that it should also come *from both*. This translates in the case at hand in legal proceedings that involve all actors, including Frontex. Thus, in order for the Nexus theory to fully address the *problem of many hands*, it needs to be accompanied by the model of *systemic accountability*. The application of this principal solution will be shown in the following chapters.

## 7 Conclusion

This chapter has dealt with the responsibility of Frontex within the framework of EU law and international law on responsibility. The application of the legal framework challenges the view that the agency may only incur responsibility from wrongful acts conducted by its own staff, and only when the act falls within their de jure competencies. These claims have been

95 This rule and the distinction between primary and subsidiary responsibility are not necessarily common in EU liability law. Fink 2017, p. 214.

strongly contested in recent years by a number of writers.[96] This Chapter goes one step further, putting these criticisms in a concrete, applicable and enforceable legal context.

The above analysis, which incorporates elements of international and European law leads us to conclude that there are instances where a wrongful act may be attributed to Frontex, thus, incurring direct responsibility. It has been shown, in sum, that the violation of the human rights obligations of the agency constitutes a breach of an international obligation that can bring about the international responsibility of the agency, if the wrongful conduct can be attributed to it. This can be either due to wrongful conduct of its own statutory staff or via exercising effective control over the conduct of seconded personnel.

The agency may still also be held responsible if it has only contributed to an act that is not attributed to it. In the case of wrongful conduct of its own staff, or in case that it exercises effective control over the deployed personnel, the agency would be directly responsible in application of the principle of independent responsibility, while in the latter it would be indirectly responsible due to aiding and assisting in a violation or due to having direction and control over the wrongful act, in knowledge or presumed knowledge of the circumstances. Frontex may incur responsibility either via an act or via an omission to prevent an internationally wrongful act, given its positive human rights obligations and its widespread supervisory powers.

The responsibility of Frontex does not exclude that of other actors. In fact, there are multiple actors involved in an operation, each with their level of involvement that is nevertheless not entirely clear or independent from the involvement of others. As the study of the relevant European and international legal framework has shown, this includes undoubtedly the host state, either EU member state or third state, but also the participating states to the extent of their involvement, as well as Frontex. None of the actors may deny their responsibility on the ground of the responsibility of another actor or shift the blame to one of them. This creates a rather confusing picture regarding responsibility that has been conceptualised as the *problem of many hands*.

The embodiment of the Nexus theory in the legal framework is found in the ILC Articles as the principle of joint responsibility. It is important to realise, though that the ILC Articles are not the end, but the beginning of the discussion on responsibility. The full meaning and potential of joint responsibility has not yet been elaborated to the fullest, which leaves considerable gaps, but also room for interpretation and progressive development, including by the CJEU.

96 Chapter IV, section 4.4.

The Nexus theory sheds new light on joint responsibility, which is understood as the instance where 'more states or international organisations may be liable for conduct in breach of international law'.[97] Viewed through the nexus, joint responsibility is seen as a collective responsibility. In practice, it takes the form of *joint and several liability*, where the collective responsibility may be invoked against any of the responsible actors, and the afflicted individual is entitled to full compensation from each of them. While this approach seems appropriate to deal with *many-hands situations*, in EBCG operations, it also comes across certain limitations in the political reality of EU border management. These limitations leave certain gaps in accountability, which may be mitigated if the Nexus theory is complemented by the model of *systemic accountability*. This way, compensation can be sought not only from either of the responsible actors but from both. This translates here in legal proceedings that involve all actors, including Frontex. Such legal proceedings should aim to address the joint responsibility of all actors involved and will be studied further, along with their practical applications, in the following chapter.

97 Fink 2017, p.p.: 72, 92