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

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10 General Conclusions

1 Forming a hypothesis on responsibility and accountability

The examination of the issues that constituted the subject matter of this thesis is based on the hypothesis that Frontex can bear responsibility for human rights violations conducted during its operations and should therefore be held accountable for it. This hypothesis is based on the sensitivities that are inherent in border surveillance and return operations. When these sensitivities materialise into real violations, the need arises to protect the rights of the individual. The hypothesis is also based on the dynamic growth of the mandate of the agency almost every two years, along with the expansion of its de facto powers and its operational capacity regarding budget, personnel, and the acquisition of its own assets, which have made the EBCGA one of the most important actors in border enforcement in Europe. This study shows that the increased powers of the agency especially after 2019 (e.g. statutory staff, owned large assets) exacerbate the existing risks and magnify the current gaps in the legal protection framework, enhancing the need for structural changes in order to address them. The agency's modus operandi indicates a substantive and steadily growing influence, with its identity remaining, though, mostly ancillary to the work of the host state, and not able to replace as such the border guard functions of the member states, even after the 2019 amendment of the EBCG Regulation.

Notwithstanding its increased influence, the responsibility of Frontex has been contested, under arguments that the agency is merely the coordinator of the operational cooperation of member states, it has no independent executive powers. Accordingly, it is the national authorities that have the operational power and the general command and control of the operation on the ground. They should, therefore bear the full responsibility for possible breaches. It is time and again presented as common wisdom that the activities of the agency are technical, and, as such, do not affect the right of the individuals. At the same time, it faces a 'capacity-expectations gap', which makes the agency dependent upon the voluntary contributions of the member states to actualise its mandate. While this view of absolute irresponsibility has become more nuanced, the underlying assumption still remains that only violations attributed directly to Frontex staff members, until now primarily based in Warsaw, can engage the responsibility of the agency.

Therefore, the hypothesis needed to be explored under the main research questions of this study. In the following sections, I recapitulate upon earlier findings and draw the conclusions that directly respond to the research questions.

Firstly,
How can Frontex be understood to be able to bear legal responsibility for human rights violations that take place during its operations? How can it be held legally accountable for such violations?

2 The fundamental rights obligations of the agency

Frontex is bound by international human rights standards, as well as protection obligations towards migrants, as defined in EU primary and secondary law. The obligation to respect and protect human rights has also been acknowledged in its Regulation since 2011, while respect for non-refoulement and other legal norms on human rights and international projection, is reaffirmed in the Frontex Sea Operations Regulation, the Returns Directive, the Data Protection Directive, and the Schengen Borders Code. More importantly, Frontex, as an EU agency, is bound by the EU Charter, as well as the ECHR and fundamental rights as enshrined in the constitutional traditions of the member states, including those derived from international law (Art. 6(3) TFEU), such as the 1951 Refugee Convention and its 1967 New York Protocol and other international treaties relevant to refugee protection (Article 78(1) TFEU), to the extent that these inform the jurisprudence of the CJEU on general principles of EU law and the interpretation of the EU Charter (Article 52(3) and (4)).

The agency is also bound by positive obligations to protect fundamental rights derived from these documents, always taking into account the limitations presented by its mandate, competencies and actually available resources. These obligations include duties to monitor and supervise the state of compliance with fundamental rights during its operations and prevent violations of which it can be presumed to have knowledge. These obligations have over the years also been specified in its mandate, for instance, in the form of broad monitoring powers, including the Fundamental Rights Officer, vulnerability assessments, and a system or serious incidents reporting, and in the form of an obligation of the Executive Director to suspend or terminate an operation in case serious and consistent violations are taking place. Considering the agency's capacity to intervene and its margin of appreciation, non-compliance with these duties can lead to the engagement of the agency's responsibility.

3 Responsibility in EBCG operations: a matter of interaction between EU and international law

The responsibility of Frontex for human rights infringements is undoubtedly a matter of EU law, and, since the accession of the EU to the ECHR has yet not taken place, the competent Court to rule upon it is the CJEU.

The responsibility of Frontex, though, should be dealt with in a pluralist environment, where EU law allows itself to be inspired by international law on responsibility.

The principles on the international responsibility of states and international organisations, as developed by international courts and state practice and codified in the ILC Articles on the Responsibility of States (ARS) and of International Organisations (ARIO) and their Commentaries, constitute a framework for dealing with responsibility under international law.

Some admissions are essential at this point:

Frontex does not strictly speaking, fit the traditional definition of an international organisation. The ARIO are not a Treaty, and, as an EU agency, Frontex should be dealt with in the context of EU law. Moreover, the CJEU often interprets the Charter in isolation and adopts an overall hesitant stance towards international law.

However, the fluidity and flexibility of the definition of an international organisation and the particular status of Frontex, which suggests at least a limited international legal personality and a number of shared characteristics with an international organisation, suggest that the ARIO can be applied to Frontex by analogy. From a positivist point of view, the application of the Charter to EU agencies and the competence of the CJEU over their actions allow us to speak of the responsibility of Frontex before the CJEU separately from the Union.

The ARIO are only binding as far as they reflect international customary law. In their remaining part, they represent evidence of law (Article 38(1) ICJ Statute) and can be a source of inspiration and a valuable guide for scholars and courts. They invite the progressive interpretation of international law by incorporating and complementing rules from different legal orders.

Moreover, even though EU law constitutes a coherent legal order in itself and always retains its status as prevailing lex specialis, it does not exist in isolation. It is a 'new legal order' integrated into a broader system, a common environment of the coherent legal architecture of international law.[1] The interaction of the different legal frameworks within this common environment avoids fragmentation. It allows for complementarity and cross-fertilisation, that is vital for the protection of the rule of law and human rights.[2]

1 *Van Gend en Loos v Nederlandse Administratie der Belastingen*; *Costa v ENEL*.

2 Chapter VI, section 2.2.

EU law and the jurisprudence of the CJEU alone cannot provide a stable and authoritative answer with regard to questions of attribution, the liability of agencies, and the responsibility of multiple actors. Therefore, the fairly developed framework on responsibility that international law has to offer can prove valuable in cases regarding the responsibility of Frontex. Even within the hesitation of the CJEU towards international law, this pluralist approach can still have a place in the Court's case law not so much as direct application, but as harmonious interpretation, in a way that does not antagonise the internal legal order.

4 The responsibility of Frontex

Under this light of pluralism, complementarity and harmonious interpretation, the questions of attribution of the wrongful conduct, either act or omission, and that of attribution of responsibility have been studied as related to Frontex, with central amongst them, the element of effective control.[3] While arguments on the agency's indirect responsibility for aid and assistance in a violation committed by the host state, seem to land more comfortably and steadily, an argument is still to be made for the direct responsibility of Frontex for acts that can be directly attributed to the agency (Articles 3, 4 ARIO).[4] The direct responsibility of the agency becomes all the more relevant after the 2019 amendment that provides the agency with its own permanent corps of border guards, including Frontex staff members.

4.1 Direct responsibility

This concerns, first of all, the agency's statutory staff newly afforded by the 2019 legislative amendment, as part of a standing corps of 10.000 operational staff. These are de jure organs of Frontex. Following the principle of independent responsibility, any wrongful conduct of theirs is attributed to Frontex. Thus, it gives rise to the responsibility of the agency (Articles 6-9 ARIO).[5]

It also concerns the members of the border guard teams seconded by member states and their role as de facto organs of the agency.[6] The responsibility rule of Article 6 is to be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Looking at the role of deployed border guards through the lens of effective control, persons seconded to Frontex by a member state, can be considered its agents, if it is proven that Frontex exercises effective control over their conduct (Article 7).

3 Chapter VI, section 3.
4 Chapter VII, sections 2 and 3.
5 Chapter VII, section 2.1.
6 Chapter VII, section 2.2.

The waters are not clear as to whether the conduct should be attributed to the seconding state or the receiving organisation. Any conclusive statement on whether the deployed border guards are indeed de facto organs of the agency requires further substantiation from empirical evidence and should be considered on a case-by-case basis.

Even though Frontex will at no point issue instructions directly towards the deployed officers, there are several levels of orders and control that are above the day-to-day command of the operation. The decisive elements on who has effective control over the conduct of the deployed personnel, as they have been interpreted by doctrine and jurisprudence are a) retention of disciplinary powers and criminal jurisdiction by the state, b) decision-making power over the wrongful conduct, or in other words, operational command and control in accordance with formal arrangements and factual circumstances (factual control), c) power to prevent a violation of human rights (positive obligations).

The determination of either one of these elements can tip the balance towards the responsibility of either the state or the agency. What adds to the uncertainty over the debate on responsibility is that there is no hierarchical order amongst the different elements, and they can be balanced differently in court/by courts. Furthermore, different courts can take different views on the interpretation of effective control, with the ICC ruling upon 'operational command and control' emphasising factual control, the ECtHR applying the 'ultimate control test', and the CJEU having a precedent, which focuses on formal competences and de jure powers of command and control.

Still, effective control is not necessarily an exclusive quality. The effective control by a member state does not exclude effective control by Frontex. In fact, the largest portion of effective control belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control.[7] This non-singular answer as to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the degree of effective control exercised by either party that is important. In case more than one parties are shown to exercise effective control, their responsibility can be determined under dual or multiple attribution. Thus, only if it can be proven that in a particular case, Frontex has exercised adequate, effective control over wrongful conduct, can its direct responsibility be engaged, and that, alongside the responsibility of the host state.

4.2 Indirect responsibility

Moreover, the agency may incur indirect responsibility for a wrongful act that is not attributed to it but solely to the state if it has contributed to it, facilitating its commission (Article 14 ARIO).[8] Thus, international

7 See Chapter IV.
8 Chapter VII, section 3.1.

responsibility may arise from an act of the agency that does not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state. Frontex may have a significant role in aiding and assisting in a violation. It finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as EUROSUR. Any of these powers and competences and certainly their combination can be regarded as significantly contributing to the commission of a wrongful act during an EBCG operation.

Such assistance can also be the result of failing to utilise its monitoring obligations in light of its positive obligations to prevent a violation. Like in the case of direct responsibility, this will need to be shown on a case-by-case basis, but in principle, it can be safely argued that the agency can be responsible for 'setting the scene that allows the result.'[9] In this case, Vital is whether Frontex knew or should have known about the violation, as this protection is provided not against all threats, but against reliable and predictable threats. Such knowledge can occur through the agency's own internal and external reporting mechanism, including vulnerability assessments, serious incidents reports, and the individual complaints mechanism, or via well-documented credible NGO and media reports of recurring or systemic violations.

Thus, if it can be reasonably presumed that Frontex has been aware of a violation, or willfully ignored it, it may incur indirect responsibility for assisting in that violation by financial, operational and practical means or by failing to exercise its positive obligations to prevent it.

5 Legal accountability difficult but not impossible

When the sensitivities that are inherent in the agency's work materialise into real violations, the need arises to bring issues of responsibility before courts and seek authoritative answers in questions that have until now only been the centre of theoretical examination. Seeking the legal accountability of the agency is essential, especially since the existing framework for the non-legal accountability of Frontex has failed to ensure a sufficient standard of accountability that would help prevent further violations. The different standards and mechanisms of administrative, political, and social accountability of the agency constitute a loose compilation of different fora that do not manage to complement each other. They rather present a fragmented picture, each fragment with its own deficiencies.

The EP does not have but weak political control over the agency, while it still lacks access to essential information concerning the fundamental rights impact of its work. Social accountability is hindered by the secretive

9 Goodwin-Gill 2011, p. 453.

stance of the agency, especially concerning the right of access to documents. A vast number of requests are partly or wholly denied on the ground of exceptions in the name of public interest, which does not facilitate proper scrutiny by civil society. Finally, promising developments at the level of administrative accountability, such as the FRO, the Frontex Consultative Forum, and the crown jewel of administrative accountability, the individual complaints mechanism, have not gone far enough and have failed to satisfy the minimum standards of accountability. The main limitations concern the lack of effective external monitoring and the lack of consequences in case of misconduct.[10]

Therefore, the need for judicial review with enforceable consequences remains potent and urgent. Still, no such action has yet been brought before courts since the establishment of the agency in 2004, and the reasons for this are threefold: legal, procedural, and practical.

Firstly, regarding the legal implications, Frontex implements through its joint operations, a new model of cooperation, where a multiplicity of actors is involved. In such an environment, it is legally challenging to address issues of responsibility.

Secondly, procedural reasons have to do with the inherent systemic difficulties in adjudicating such a case. As the CJEU has exclusive jurisdiction over issues regarding EU agencies, a claim against Frontex cannot be brought before national courts. The most promising legal route for the accountability of Frontex, a complaint before the ECtHR, depends on the accession of the EU to the ECHR, which, although it being a constitutional obligation for the EU since 2009, has yet to be realised. The remaining avenue is before the CJEU, which, however, offers limited possibilities for access to individuals. Each of the remedies available before the CJEU, present their own complications, both in regard to access to justice and in regard to the details of the case at hand (for example finding a reviewable act of an institution, which claims that its acts do not have legal effects vis-à-vis individuals).

Thirdly, practical complications include the lack of transparency over the acts of the agency and the limited knowledge of its work, including its powers and its limitations. This creates insecurity around pursuing litigation, especially in regard to gathering evidence to support the legal claims.

Thus, pursuing the accountability of Frontex adds an extra level of difficulty in factual investigation and legal argumentation. It would also need to break new ground, as the procedural routes of legal accountability are not always straightforward. Despite the limitations, the possibility still exists for holding the agency to account.

10 Chapter V, section 3.

6 Summing up the remedies before the CJEU

The most appropriate litigation route for an individual before the CJEU is the liability action or action for damages under Article 340 TFEU. It addresses the liability of Frontex directly and has the potential to make good any damages caused by the agency in the course of its activities.[11] It comes, nevertheless, with its own unique procedural difficulties. The binary distinctions concerning rules on causality and the division of jurisdiction among competent courts, along with the burden of proof that lies with the applicant present substantial obstacles in holding the agency accountable for fundamental rights violations. Interpreted narrowly, the direct causal link may prove too strict of a requirement for the liability of Frontex, since its actions occur in a multi-actor environment, where a nexus of responsibilities exists, and a severality of acts and omissions by different actors may cause the harmful result.

The mere involvement of the host state could be sufficient for the CJEU to break the chain of causation and prevent the liability of the agency. Still, this needs to be determined on a case-by-case basis. In *Krohn*, the Court held that the causal link is not severed by an implementing act of the state if the latter was not acting independently, but under binding instructions of the Union.[12] Applied to Frontex, this argument can lead to the liability of the agency if it is shown that the host state had no discretion to derogate from decisions taken by the agency. This could potentially, exceptionally, be the case, for instance, with respect to the right of the EU to intervene, and in the context of de jure non-binding but factually substantially influential instructions of the agency. While the CJEU has often affirmed the competence model in its case law, allocating liability on the basis of normative control and de jure powers, it has held in *KYDEP* that such instructions which are treated as de facto binding by the member state, can leave the causal link intact.[13] The limits of the competence model have also been acknowledged by the EP, and academic commentators, if its application would result in unaccountability for acts that impact upon fundamental rights. When the competence model reaches its limits, the Court can take inspiration from the organic model, present in international law, where the investigation spreads beyond the formal arrangements also to cover factual circumstances, de facto powers, and effective control. This can extend to the non-binding instructions of the agency, in case these are no longer considered a 'genuine recommendation', but constitute the agency the 'de facto operative decision-maker', as also discussed in more detail with respect to the action for annulment.

11 Chapter VIII, section 7.
12 *Krohn Import-Export v Commission*.
13 *KYDEP v Counicl and Commission*.

Likewise, the causal link can remain intact in the case of breach by the agency of its positive obligations in the context of its the obligation of the Executive Director to suspend or terminate an operation when serious and persistent violations occur, and the other monitoring powers of the agency. The knowledge of the agency of violations can be presumed on the basis of such powers, while the causality requirements can still be met in relation to a breach of supervisory obligations and its consequent violation of fundamental rights.

While the allocation of *Liability-Responsibility*, as meant by H.L.A. Hart, as assignment of blame for a wrongful act, is best served via an action for damages, accountability is rather a broader concept. Liability embodies the idea of punishment and compensation and often comes as a result of legal responsibility. However, accountability puts the emphasis on answering for the administration of public affairs before a forum and facing the consequences for misconduct, which does not always take the form of financial compensation. Thus, the search for legal accountability can also include other legal remedies before the CJEU.

Alongside an action for damages, and a request for interim measures in cases of imminent irreparable harm stands the action for annulment of Article 263 TFEU. An act of the agency can be declared void, or the failure to act contrary to the Treaties, as a result of the legality review of the Court performed under Article 263 TFEU. In an attempt to seek legality review of acts and omissions of Frontex, the individual faces strict accessibility requirements. While the obstacles to individual access are not insurmountable, there is a role here for the EP, which can use its status as a privileged applicant to appear directly before the Court and seek the review of the conduct of the agency.

In response to the challenge that the agency does not produce acts that have legal effects vis-à-vis individuals that can be reviewed by the CJEU, I argue that the reviewability of certain acts of the agency is still exceptionally possible, under two lines of argumentation.[14]

Firstly, in 2016 the agency's individual complaints mechanism was established, in the context of which, the Executive Director decides upon the legality of an act of the agency. This does not suffice to constitute a system of legality review as such, as shown earlier, but there are reasons to suggest that it is part of a more extensive system of legality review. Like in other EU agencies, this decision can be considered the first line of legality review, as intended by the European Ombudsman, and should be reviewable under Article 263 TFEU. Only this way, the complaints mechanism can fulfil its purpose to ensure the compliance of fundamental rights.

Secondly, Frontex has developed strong non-formally-binding functions, for instance, in the context of its risk analysis, the right of the EU to intervene, and other advisory functions. As observed by Busuic, often

14 Chapter VIII, section 6.3.

the boundaries between scientific advice and decision-making become obscured in practice, as it becomes hard for the member state to circumvent it due to the research and technical expertise of the agency. Thus, the agency becomes the de facto operative decision-maker. A gap would be left in the effectiveness of judicial review if the institution that made the operative decision would remain unchecked. Therefore, judicial control needs to also focus on the reasoning of the recommendation that lies behind the final decision. The reviewability of such non-binding acts, with a marginal legality review test, is also supported by judicial precedent before the CJEU, where the Court annulled, in *Ardegodan*, the Commission's decision, based on the review of the scientific opinion an EU agency.[15]

Finally, even though not a genuine, effective remedy, the preliminary reference procedure can be used to address the CJEU indirectly through a complaint before national courts in order seek the interpretation of EU law as a first step towards more direct action. This route easily reaches its limits, not only in light of delays and costs but also importantly on the need to rely on the discretion of the national judge. Still, the Court could be asked to rule on the validity of an act of Frontex, or respond to questions related to the division of effective control between a state and the agency, thus opening the way for an action for annulment or damages.

Thus, answering the first research questions, Frontex can indeed, under certain circumstances, bear responsibility for human rights violations either direct (via its own statutory staff or effective control to seconded personnel) or indirect (via aid and assistance or, from a different angle, its positive obligations). It can be held accountable for it by the CJEU. The action for damages, the action for annulment and the preliminary reference procedure can be used to that end.

7 Nexus and systemic accountability

We now need to answer the last central question to this research:
What is the appropriate conceptual framework under which the responsibility and accountability of Frontex should be examined in the context of EBCG operations? How can this translate into the applicable legal framework?

However, saying that Frontex can be responsible does not mean that the member state hosting the operation is absolved of responsibility. In practice, the wrongful act would be first and foremost attributable to the member state hosting the operation. Additionally, states participating in the operation may also incur responsibility for aiding or assisting in a violation conducted by the host state. In sum, several actors in an EBCG operation,

15 *Artegodan v Commission*.

host member states or third states, Frontex, and participating states may be responsible for a violation either on its own right or in relation to the violation of another actor. At the same time, none of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a rather confusing picture regarding responsibility that has been conceptualised as the *problem of many hands* by the political philosopher Dennis Thompson.

According to this problematique, which is at the centre of this research, different actors are involved in an operation, each with their separate level of involvement that is nevertheless not absolutely clear or independent from the involvement of others. In such cases, the multiplicity of actors can create confusion as to who bears responsibility, and this may result in gaps in accountability, as each actor tries to shift the blame to the other.

7.1 The Nexus theory

The solution to the *problem of many hands* is found in the Nexus theory. It suggests that when responsibilities become obscured due to the multiplicity of the actors involved, we should regard the responsibility of the different actors as collective.

In such circumstances, a violation is the result of collective action. Trying to allocate responsibility to one actor independently from the others creates gaps in accountability and fails to properly attribute responsibility to all the actors that have contributed to a violation. To prevent these gaps, we need to adjust our way of thinking about responsibility to the particular features of many-hands situations. In these circumstances, responsibility should not be seen in our most common understanding of it, as a linear relationship between the conduct of an actor and the harmful result, but rather as a nexus. In EBCG operations it is usually not the acts of a single actor that lead entirely and independently to human rights violations, in a straight line without interacting with or passing through an act or omission of a different actor. More often than not, it is multiple actions and omissions that result in a violation. We can observe a complicated series of connections among the different components of responsibility that can be visualised as a nexus.

It is in this nexus that the separate responsibilities meet and interact through the cooperation of the different actors. Only then does the harmful result occur, which is the collective outcome of the interlinked responsibilities. Thus, to achieve the optimal result in allocating responsibility there, responsibility, similar to the harmful result, should be viewed as collective.

The Nexus theory can play a catalytic role in achieving a holistically equitable result with regard to responsibility, rather than only dealing with the more obvious and easier to reach responsibility of the host state, in a fragmentary and coincidental manner. This disconnected and partial approach cannot but be incomplete. Through the nexus analysis, we can achieve all responsibilities simultaneously considering them as collective.

This way, the Nexus theory aims to combat gaps in accountability and, through the preventive effect that answerability and consequences have, ensure better compliance with human rights in general.[16]

7.2 Joint responsibility

This theoretical construction helps develop our understanding of responsibility in many-hands situations, but can also be translated into the practice of courts. It is translated within the normative framework as joint or shared responsibility. Since no single actor is entirely and independently responsible for the outcome, the actors should be *jointly responsible*.

Even though the EU Treaties do not contain rules governing the joint responsibility of the EU and its member states, joint responsibility is not as such foreign to EU law. It has dealt with it, for instance, in the context of mixed agreements or in Article 5(1) EBCG Regulation, which mentions the shared responsibility for border control between the agency and the member states. This article has a declaratory nature and refers primarily to Hart's *Role-Responsibility* rather than *Liability-Responsibility*. Thus, even though it is not a complete stranger to it, EU law does not provide us with stable answers as to the exact nature and application of joint responsibility. Therefore, we once again need to turn for guidance to international law.

The parallel responsibility of several actors has been dealt with in international law under Article 48(1) ARIO, according to which an internationally wrongful act can be attributed to one or more states or international organisations. This can be the result of dual or multiple attribution of the same harmful conduct to different actors (principle of independent responsibility), or the simultaneous application of the rule of attribution with a different rule of responsibility, for instance, aid and assistance. If an internationally wrongful act can be attributed to one or more states or international organisations, the actors involved are *jointly responsible*.

Article 48(1) ARIO provides for the principle of separate invocation of responsibility but does not give us adequate clarity as to its interpretation and the more precise inner workings when it comes to its application. The Nexus theory, acknowledging the collective nature of the harmful result and the subsequent responsibility, supports the interpretation of *joint responsibility*, in terms of invocation, as joint and several responsibility. According to this construction, the collectivity is acknowledged in many-hands situations and is dealt with accordingly, as it renders each actor responsible for the acts of the collective. The victim may invoke the responsibility of and sue for damages each and any responsible actor, as long as double recovery is prevented. Each actor will then owe full reparation and can use their right of recourse to claim its share of the damages from the other responsible actors.

16 Chapter IV, section 5.

This interpretation can be introduced in the framework of EU liability law via Article 288 TEU, which states that the non-contractual liability of the EU and its agencies shall be implemented in accordance with the general principles common to the member states. Seen as a modern form of ius gentium, joint and several responsibility is indeed such a principle, as it is derived from domestic private law and its content has been determined by comparative domestic law.

7.3 Systemic accountability

This theory can provide equitable solutions in terms of responsibility, but it still has certain limitations with respect to accountability. In particular, the more likely course of action for the victim of a violation in an EBCG operation would be to bring a case against a host state and receive compensation for damages. The host state would theoretically have the right of recourse against Frontex. However, the practice, where this right of recourse has, to my knowledge, never been used by a state, and political considerations suggest that this occurrence is highly unlikely.

This leaves a gap on the accountability front, as Frontex would not be brought to account and would not be answerable for its part in the violation. This gap can be filled with a new model of accountability, which requires all actors responsible for a violation to be brought to account, namely the model of *systemic accountability*. This is defined as *accountability aiming at dealing with the systemic issues, which underlie and cause or allow for consistent violations, via focusing on structural solutions*.

Our habitual way of assessing the legal framework on accountability is based on access to justice and effective legal protection. I refer to this approach as *individualist accountability, i.e. the traditional approach of answering for human rights violations on the level of the individual applicant with measures that redress the effects of the violation on him alone*.

This approach, largely designed to address the separate responsibilities of distinct actors and offer redress, may be successful in bringing justice to the individual applicant, in the sense of effective legal protection, especially in the case of an isolated violation. However, it is no longer adequate when the problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner. That manner is *systemic accountability.*[17]

The passing from *individualist* to *systemic accountability* is justified with arguments of justice and the rule of law inspired by liberal political philosophy, as well as the practice of courts. Breaking down the model of *systemic accountability*, we can identify some specific characteristics.

17 Chapter V, section 3.7.

- It benefits a large number of people, present and future members of a loosely distinct group.
- It addresses not only a particular violation (effective legal protection) but also the underlying systemic issues.
- Its effects are long-term.
- It aims to hold accountable all actors responsible for the violation in a manner that reflects the nature of their responsibility (for example, joint responsibility).
- It adopts a proactive approach to attain accountability in its own right, rather than depending on the initiative of the victim (responsive nature).
- Its aims go beyond the redress of the violation for the given applicant, which is only part of this approach and aims to achieve justice for all, safeguard the rule of law and bring policy changes on a structural level.

Reflecting upon EBCG operations, three practical applications of this model can be identified.

Firstly, *systemic accountability* should aim to examine the responsibility of all actors involved in a violation and ensure that they are all answerable before courts. In EBCG operation, even though individuals are able to get compensation via the already established judicial avenues against the host state, the responsibility of other actors, including Frontex, should not be ignored. Thus, the gap that the Nexus theory leaves in practice is covered by the model of *systemic accountability*. While the Nexus theory suggests that reparation should come from any of the responsible actors, *systemic accountability* supports that it should come from both. In practical terms, this would translate in legal proceedings that involve Frontex alongside the host state and can address their joint responsibility.

As its second application, *systemic accountability* provides fertile ground for strategic litigation or impact litigation, implemented in practice through the procedures mentioned in Chapters IX and X. This is understood as putting forward a case that, apart from the interests of the individual applicant, also aims at creating broader changes in society.

Finally, as systemic problems require structural solutions, *systemic accou*ntability would have been incomplete without solutions outside courts. This is where the other forms of accountability identified by Bovens come in. Structural solutions can only be achieved through a holistic approach that necessarily includes non-judicial forms of accountability. Therefore, strengthening administrative, political, and social accountability, by enhancing the powers of the Frontex FRO and the CF, reinforcing parliamentary control over Frontex activities, and increasing transparency are necessary steps in the process of *systemic accountability*.

7.4 The solution on joint liability through the principle of subsidiarity

The practical effects of both theoretical constructions of the nexus and *systemic accountability* include that all actors responsible for a violation

should be brought to account and that they should be held jointly responsible before a court, in a way that the individual can seek compensation not only from any of the actors (Nexus theory, joint and several responsibility) but also from both (*systemic accountability*). Attempting to actualise this in the liability jurisprudence of the CJEU stumbles upon certain procedural hurdles. The first concerns the binary distinctions in the Court's case law on the causal link. The causation criterion often creates a binary distinction in the attribution of responsibility, where either the member state or the agency can be found to have caused the damage. The second is another binary distinction regarding the distribution of jurisdictional competencies among courts. According to this, actions for damages attributed to the Union are dealt with by the CJEU, and those attributed to member states are dealt with by domestic courts. What is more, in the context of the rule on exhaustion of domestic remedies, a legal remedy would need to be sought first at the domestic courts, before the CJEU can examine the liability of the Union. A strict interpretation of these principles can create an environment within which a case of Union liability for the misconduct of Frontex may never see the light.

Following the duality of causality and jurisdiction, the CJEU could reject a case on the liability of Frontex as inadmissible referring to the national court to decide first on the responsibility of the host state. The national proceedings need to be completed first for the action for damages against Frontex to be admissible, and unless domestic courts have not ordered full compensation for the damage, the responsibility of the agency will not be examined, leaving a gap in accountability.

A solution closer to *systemic accountability* would be for the CJEU to pause the proceedings concerning Frontex waiting for the ruling of the national courts and take that into account when adjudicating on the liability of Frontex. This is the solution followed in *Kampffmeyer I*. There the Court rejected in practice the possibility for the EU and a member state to be jointly liable and stated that the Community would be liable to the extent the damage was not covered (fully) through the national courts.[18]

The current judicial status quo before the CJEU supports either a strict interpretation of the duality of causality and jurisdiction or a solution where the CJEU pauses the proceedings concerning Frontex waiting for the ruling of the national courts. Neither of these options would satisfy the principles of the Nexus theory and the model of *systemic accountability*.

In seeking an alternative structure that allows for all actors responsible to be held to account in a manner compatible with the above principles, I conclude that that structure is one that brings the respective actors before a single court.

18 *Kampffmeyer and Others v Commission*.

I propose a judicial construction through which, the CJEU can rule upon the joint responsibility of Frontex and the host state so that all actors responsible for a violation are held to account before the same forum. According to this solution, the CJEU could, in line with the principle of subsidiarity (Article 5(3) TEU), adjudicate on the issue of shared responsibility further than it has in *Kampffmeyer* and ensure that the responsibility of the EU is examined. The CJEU may be responsible as the ultimate arbiter, as all actors, including the host state, operate within the scope of EU law whenever they participate in a joint operation. In practice, the CJEU, without creating new competencies for itself, would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. Following that decision, the cases can be joined before the CJEU for the purpose of the exact allocation of the share of responsibility of each actor and the corresponding compensation.[19]

Admittedly, that is a complex judicial construction that is difficult to implement. Arguably, the aims of *systemic accountability*, effective judicial protection, and legal certainty would be better served with a legislative change that would explicitly provide for the liability in EU law of all actors responsible to be examined in the same court. Such legislative change giving primary jurisdiction to the CJEU to examine joint liability between the EU and member states would require Treaties amendments. As this is highly unlikely, an interpretation in accordance with the subsidiarity principle is the more plausible solution at the moment.

7.5 Living up to the standards of responsibility and accountability

Thus, in response to the last research question, the present situation does not live up to the standards of responsibility and accountability. In fact, we need to change the way we view these concepts in order to address the unique circumstances of many-hands situations.

The Nexus theory can advance our understanding of the complicated responsibility relations that constitute the *problem of many hands*. It helps us see responsibilities not as linear connections, but as a nexus, as they collectively result in the harmful outcome. Moreover, the dominant and traditional paradigm on accountability, *individualist accountability*, is inadequate for dealing with complex cooperative endeavours, such as the EBCG. It needs to be replaced by the more holistic model of *systemic accountability*.

In terms of their practical implementation, the Nexus theory supports the utilisation of the concept of joint responsibility that is widely invoked in international law and also present in EU law, to address the *problem of many hands* in EBCG operations. It further contributes to the interpretation and the progressive development of the rules of invocation of responsibility, putting forward the rule of joint and several responsibility.

19 Chapter VIII, section 8.

Our traditional understandings of responsibility and accountability have been proven inadequate to address this new animal of operational cooperation in EU border management. Even though 17 years have passed since the establishment of Frontex and the first calls for accountability in such cooperation[20] we have yet to achieve a good understanding of this animal in terms of its accountability, and we will continue to remain in the dark so long as courts are not presented with critical questions regarding the lawfulness of the conduct of the agency and its responsibility for violations. To the extent that we do not have authoritative answers to these questions, accountability and the rule of law in EU migration law remain at stake.

8 The future of joint liability and systemic accountability before the ECtHR

The path to joint liability in the existing legal framework may be obstructed but can still be created and utilised for strategic litigation purposes. Gaps in *systemic accountability* and joint responsibility still remain though, and they can be filled with the accession of the EU to the ECHR, when individuals can bring complaints concerning violations by Frontex before the ECtHR in Strasbourg.

The route before the ECtHR is more straightforward and is already designed around joint responsibility and an intuitive understanding of *systemic accountability*. In fact, the post-accession procedure before the ECtHR provides for the joint responsibility of EU/Frontex and the host state, which takes the form of joint and several responsibility, as the complaint can be addressed to any of the responsible actors. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility. Both the co-respondent mechanism and the practice of the Court to join relevant cases can be used to seek damages from all responsible parties, and ensure that they can be held accountable under the same judicial roof, satisfying, thus, the goals of *systemic accountability*. The general measures ordered by the ECtHR and the pilot judgments procedure are further examples of how the *systemic accountability* model can be implemented in practice. Finally, the ECtHR is more familiar with the international law on joint responsibility, while the Accession Agreement itself holds that the respondent and co-respondent are, as a rule, jointly responsible for the violation. The Strasbourg court seems to be the natural environment for joint responsibility and *systemic accountability* to flourish, which justifies yet another call for the realisation of the accession of the EU to the ECHR.

20 Peers 2003.

9 Recommendations: the way forward

Moving continuously between theory and practice, this thesis develops legal theory based on societal observations in regard to the agency and its responsibility, only to move back to practice seeking to implement the newly reached understandings. As a final note, some of the most important recommendations are highlighted here, aimed at the realisation of responsibility as nexus and the development of *systemic accountability*. These recommendations take into account both its legal and non-legal elements and are addressed to the EU legislator, the judiciary, and the agency itself.

Our main focus on the enforcement of the existing legislative framework through courts, has, in fact, revealed that much of the burden still lies on the shoulders of the legislator. Courts ought to be the ultimate resort in a democratic system, while the legislator should ensure legal certainty and prevention, especially regarding the protection of human rights.

In particular,

- Further efforts are necessary to determine clear obligations and responsibilities of each of these actors a priori, to achieve clarity in this tangled web of responsibilities in EBCG operations.
- Accountability would be better served with a legislative amendment that would empower the CJEU, giving it primary jurisdiction to examine the joint liability of the member states and the EU in general or Frontex in particular.
- The EC should propose amendments to the Regulation that will ensure the follow-up of individual complaints by the European Ombudsman and their review by the CJEU.
- The FRO's role needs to be strengthened in practice with concrete commitments as to the resources and operational capacity of her Office.
- A robust system of external monitoring is necessary next to the internal mechanisms of administrative accountability. This should involve the EP and the EU Ombudsman, who has full powers of investigation, including all internal documents of the agency, but also other actors with relevant experience in human rights monitoring, such as the CPT and National Human Rights Institutions (NHRIs) and Ombudspersons. In this light, following the improvements in its openness and transparency in 2011, Frontex has a central role to play in amending the impression that it attempts to hide its activities behind a veil of secrecy.
- Transparency is the beginning towards seeking answers to any question. The agency can improve its record in honouring the right of access to documents.
- Frontex can further open a window to its assessment of the human-rights related Serious Incidents Reports it receives and the justification of the decision of the Executive Director to continue an operation, which should have otherwise been suspended or terminated due to serious and continuous violations.

Finally, most of the burden of the judicial accountability of the agency is to be shouldered by the CJEU.

- If the CJEU aspires to become the human rights court of the EU, it does not suffice to use the EU Charter detached from the overall human rights framework and adopt a protectionist stance with respect to its own instruments ignoring the experiences of international law. The Court would then risk being swept away by the rapid political and legislative developments, including the expansive role of EU agencies, securitisation and externalisation. The Court needs not only to keep up, but be ahead of the developments, by adopting a dynamic interpretation of EU law, as it has already done in *Artegodan*, and pro-actively cover the existing gaps in order to ensure the protection of the rights enshrined in the Charter.
- In such a dynamic and pluralist interaction with the law, the CJEU may apply arguments taken from international law directly or draw inspiration from them, in cases where the matter has not been otherwise regulated within EU law. This is in line with Article 340 TFEU, which states that the Court should resort to general principles common to the member states to draw inspiration and legitimacy for the rule governing the non-contractual liability of the Union, thus creating a fundamental common law on liability.
- The unchartered territory of Frontex liability can allow the Court to introduce joint liability into its common practice, and develop relevant mechanisms within EU law, but also to study through international law the intricacies of its application and get inspiration regarding its own interpretation of joint liability. This, finally, presents an opportunity for the CJEU not to submit the supremacy and autonomy of EU law by giving priority to international law, but to progressively develop the international regime on responsibility within its own case law.

Only standing upon such strong accountability foundations can the agency safeguard itself against violations and help bring up human rights standards across its operations in EU countries and beyond.