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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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Summary:

A run-through of the dissertation

Frontex operates in a field with high stakes for human rights. When these sensitivities materialise into actual violations, the need arises to examine its legal responsibility and accountability, especially in light of the constant development of its powers and competences.

Hence, the main questions that my research has aimed to answer are:

- Can Frontex bear responsibility for human rights violations that take place during its operations and, if so, how can it be held legally accountable?
- Does the present situation live up to the standards of accountability and responsibility, and how can it best do so?

This research introduces international law on responsibility into the EU context to fill the gaps left by EU law, which is not able on its own to provide a definite answer to the questions related to the responsibility of multiple actors. This innovation can, at first sight, be looked upon with suspicion by the Court of Justice of the European Union (CJEU) that has adopted an overall hesitant stance towards international law. However, this interaction of legal orders that I propose creates an environment, where EU law can allow itself to be inspired by international law on responsibility, in a way that does not antagonise its own internal legal order. This cross-fertilisation is vital for the protection of the rule of law and human rights.

Through this interaction between EU and international law, I show that Frontex can incur legal responsibility mainly indirectly for aiding and assisting in a violation, either by action (e.g. technical, financial and other support) or by omission (e.g. failure to suspend or terminate an operation), as the agency is under the positive obligation to prevent a violation committed by the member states, but also directly for conduct of its statutory staff, or conduct of other members of teams over which it has effective control. At the same time host member states or third states, and participating states may also be responsible for a violation either on its own right or in relation to the violation of another actor. None of the actors may deny their responsibility on the ground of the responsibility of another actor. This creates a complex picture regarding responsibility that has been conceptualised by the political philosopher, Dennis Thompson, as the ‘problem of many hands’, which describes the difficulty of pinpointing responsibility in cases such as Frontex joint operations, where multiple actors are involved. This can essentially function as a wall, behind which actors may hide their own contribution and shift the blame to others.

As a solution to the problem of many hands and building upon the conceptualisations of Mark Bovens and H.L.A. Hart, I propose the *Nexus theory*. This theory suggests that the problem can be solved if we look at responsibility not as a linear relationship between the conduct of an actor and the harmful result, but as a nexus, where all different responsibilities meet and interact to produce the harmful result. Therefore, the responsibility, like the outcome, is a collective one.

This theoretical construction of the nexus helps shape our understanding of responsibility in 'many hands' situations. In order to be transferred into the practice of courts, the theory is transposed into the normative framework as joint or shared responsibility. Since no single actor is entirely and independently responsible for the outcome, the actors should be ideally *jointly responsible*.

In terms of answering for human rights violations, I develop the theoretical model of *systemic accountability*. This comes in contrast to our traditional understanding of accountability as individualist accountability, understood as *the 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/her alone*.

Systemic accountability, instead, suggests that structural solutions need to be developed to address issues that are persistent and systemic and affect a large number of people. Such solutions should include all different forms of accountability (political, administrative, social, and judicial) and address all actors responsible for the violation. *Individualist accountability* is no longer sufficient 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*, which I define as *accountability, aiming at dealing with the systemic issues that underlie and cause or allow for consistent violations via focusing on structural solutions*.

Finally, the dissertation sketches in concrete and applicable normative and procedural terms, what these approaches can mean in terms of potential litigation strategies before the CJEU, international and national courts. It assesses limitations of each strategy and pans out procedural hurdles and possible solutions to them.