



Universiteit Leiden

**RESPONSIBILITY OF INTERNATIONAL
ORGANIZATIONS FOR HUMAN RIGHTS
VIOLATIONS: THE CASE OF FRONTEX**

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Introduction

The proliferation of international organizations (hereinafter: IOs) and the breadth and importance of their activities pose increasingly complex challenges; some organizations operate in delicate contexts, directly impacting security, democracy and human rights. Therefore, it cannot suffice to rely on the presumption that IOs are generally and inherently “good”¹. On the contrary, it is fundamental to ensure that States, being subject to international law and human rights law on their own, ensure the same respect for international law and human rights within the IOs that they set up. As obvious as it may seem, since IOs are a ‘product’ of international law, this is not to be taken for granted, but to be carefully assessed in each case.

In light of this, the aim of this thesis is to provide an analysis and assessment of the activities of Frontex, the European Agency for the management of the external borders of the EU, from the perspective of international law. In particular, a theoretical application of the rules on responsibility of IOs to the activities of Frontex will be carried out; the purpose of this operation is to ascertain whether and on which basis the EU could bear itself responsibility for human rights violations committed during Frontex-coordinated border control operations.

In order to reach this purpose, the thesis will proceed in the way that will be now described. The first Chapter of the thesis will outline the basis on which IOs can be held responsible under international law for their wrongful conduct, by outlining the main rules governing the regime of responsibility of IOs. Accordingly, it will start by presenting and defining IOs; then, the concept of accountability will be briefly addressed, focusing in particular on its legal aspect, that of responsibility. In this context, the concept of international legal personality (ILP) of IOs will be presented, being a preliminary condition to hold an IO responsible on the international plane. Subsequently, the fundamental components of responsibility of IOs will be introduced and briefly presented; in this regard, the work of the International Law Commission in drafting the Articles on Responsibility of International Organizations will be duly taken into account, representing an authoritative guidance as to the relevant law and its development, to say the least². In the subsequent chapters, the focus will be moved towards a specific case that will illustrate how both crucial and difficult is to reconcile theory and practice. For this purpose, the specific and peculiar example of European Agency for the Management of Operational Cooperation at the External Borders (Frontex) will be analysed. The case of Frontex can indeed give a clear example of how even a highly developed, integrated and human rights-oriented organization such as the European Union can reveal to be in fact not impeccable. From another point of view, the example will be useful to grasp

¹ J. Klabbers, *Unity, Diversity, Accountability: The Ambivalent Concept Of International Organisation*, 14 MJIL 149 at 153 (2013); M. Parish, *An essay on the accountability of international organizations*, 7 IOLR 277 (2010).

² C. Ryngaert, *The European Court of Human Rights’ approach to the Responsibility of Member States in Connection with Acts of International Organizations*, 60 ICLQ 997 at 999 (2011).

the difficulty and, at the same time, the importance of identifying the boundaries of responsibility between the organization and its member states. The second chapter will thus focus on Frontex, in order to understand its nature and role; this is indeed necessary in order to address the issue of the division of responsibility for human rights violations between Frontex and the member states participating in its operations. For this purpose, an overview of the legal basis and mandate of the Agency will be offered; its main tasks will be described, with particular reference to the coordination of joint operations (JO). This overview will permit to grasp the main issue at stake, which also constitutes the wrongful conduct in relation to which responsibility is discussed: the human rights violations that regularly occur during Frontex-coordinated operations. Once identified the problem, the legal framework governing Frontex' activities will be outlined.

Subsequently, in the third chapter, a synthesis of the elements presented in the first two chapters will be carried out. In particular, the rules on responsibility of IOs will be applied, in a theoretical way, to Frontex' activities, with the purpose of assessing specifically whether Frontex -or the EU- could bear responsibility for violations occurred during Frontex-led operations.

For this purpose, it will be first identified which entity, between Frontex and the EU, would hypothetically bear responsibility for such violations; subsequently, some hypothetical conclusion in terms of responsibility will be proposed. In this process, extensive reference will be made to the ARIO rules that appear more suitable to the case. Moreover, a brief overview will be given of possible remedies available to individuals who suffer human rights violations against the EU, in the event that these are attributable to the organization. The thesis will be then concluded with a concise reflection on the possible value of the analysis carried out.

CHAPTER 1

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Introduction

This first chapter will address the question whether, and on which basis, IOs can be held responsible for their wrongful acts under international law. Therefore, the essential features of the regime of responsibility of IOs will be outlined. Firstly, the definition of IO will be presented, as well as the concept of their accountability, with particular focus on its legal aspect - responsibility. In this perspective, the concept of ILP, a precondition to hold an organization responsible under international law, will also be addressed. Then, the essential components of international responsibility of IOs will be introduced. The rules drafted by the ILC in the ARIO will be taken as a reference in outlining these components, namely attribution of a certain conduct and breach of an international obligation. In relation to this second aspect, the crucial element to assess is on which basis IOs bear obligations under international law. In light of the specific focus of this thesis, particular attention will be devoted to the protection of fundamental rights within the European Union.

1. International Organizations: definition and role

Although IOs represent today “the most conspicuous non-state actors in international law”,³ it is only within the last decades that they have been recognized as subjects of international law.⁴ Since the end of WW2, IOs have become major players in international law.⁵ IOs can be defined as entities composed mainly or exclusively by States, and established under international law.⁶ As to the way in which they are set up, most common is the conclusion of an international treaty; however, the agreement to establish an organization can be expressed in other forms.⁷ As a result, it cannot be excluded that an entity, even an organ of an existent organization, be an autonomous organization, only for the reason that it was not established through an international treaty. On the other hand, when an organization is established by

³ C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* 1 (2007).

⁴ H.G. Schermers, *Liability of international organizations*, 1 LJIIL 3 at 7 (1988).

⁵ M. Hartwig, *International Organizations or Institutions, Responsibility and Liability*, in R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law* (online ed.).

⁶ D. Akande, *International organizations*, in M. Evans (Ed.), *International Law*, 248 at 249 (2014).

⁷ H.G. Schermers, N.M. Blokker, *International Institutional Law* 37 (2011).

treaty, its separate legal identity will be more easily recognized.⁸ A key element of any IO is its autonomy, element that can be differently described. For instance, the definition adopted by the ILC for the purposes of the ARIO expressly includes the element of ILP;⁹ some authors instead ‘replace’ this element with the existence of at least one organ with a will of its own.¹⁰ IOs are employed in many areas and in charge of important functions. Moreover, the powers they exercise in practice go often beyond the terms of their original mandate.¹¹ Therefore, it is reasonable to call for greater accountability of IOs, which possibly represents, with vigilance and transparency, the only valid solution to constrain the risks of misconduct, inherent in any IOs.¹²

2. Accountability and responsibility of IOs

Accountability can be defined essentially as “the process of being called to account to some authority for one’s actions”.¹³ The concept can easily be applied to the activity of IOs when the focus is moved to the exercise of public powers in international law;¹⁴ indeed, “power entails accountability, that is the duty to account for its exercise”.¹⁵ Therefore, the importance of establishing accountability mechanisms arises from the circumstance that IOs exercise important aspects of public authority;¹⁶ in this light, this is even more important where IOs are engaged in activities with direct impact on human rights of individuals.

Responsibility is one form of accountability; it concerns its legal dimension, being specifically linked with the violation of an international legal obligation.¹⁷ In the context of IOs, the mechanisms of political accountability existing for public authorities at the domestic level are generally absent or significantly weakened.¹⁸ In this light, legal accountability acquires crucial importance. Of course, it cannot be ignored that such accountability is in practice hurdled by at least two unavoidable factors which make IOs in practice exempt from any judicial review: the absence of an international court with jurisdiction over most IOs¹⁹ and their immunity from domestic jurisdictions. This situation leaves in practice accountability dependent on

⁸ *Id.* at 40-41.

⁹ ILC Draft articles on the responsibility of international organizations, with commentaries, 2011 YILC, Vol. II (Part Two), Art. 2.

¹⁰ See Schermers & Blokker, *supra* note 7.

¹¹ G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?*, at 13 (2011).

¹² See Parish, *supra* note 1 at 293, 297.

¹³ R. Mulgan, ‘Accountability’: An Ever-Expanding Concept? (2002), cited in N. White, *The Law of International Organizations* 189 (2005).

¹⁴ See White, *supra* note 13.

¹⁵ ILA, *Final Conference Report*, Berlin 2004, at 5.

¹⁶ J. Wouters, E. Brems, S. Smis, P. Schmitt (Eds.), *Accountability for Human Rights Violations by International Organisations*, at 3 (2010).

¹⁷ See White, *supra* note 13, at 190; ILA Report, *supra* note 15, at 5.

¹⁸ See Parish, *supra* note 1 at 341.

¹⁹ The European Union, being endowed with its judicial organ (the CJEU), represents the main exception.

IOs' goodwill.²⁰ Awareness of this problem does not detract from the fact that IOs should in principle be subject to some form of judicial scrutiny.²¹

In order to properly address the issue of responsibility of IOs, the concept of their ILP must be preliminarily understood.

3. International legal personality (ILP)

In order to hold an entity responsible under international law, the entity must be able to bear rights and obligations under international law. This legal status is summarized in the notion of ILP. Although there might exist organizations whose ILP is not recognized but nevertheless can be qualified as IOs,²² only IOs that are international legal persons can be held responsible for their wrongdoings under international law. Indeed, international responsibility is a "question inseparable from that of legal personality in all its forms".²³ The recognition of this status is fundamental: if an organization has no legal personality, its actions cannot be attributed to it but are to be regarded as actions of its member states;²⁴ in such a situation, the organization merely represents an agent through which its MS acts. Without the capacity to bear rights and responsibilities, IOs would not be able to participate effectively in international legal life, thus they would eventually become meaningless.²⁵ As mentioned before, it is only in the last decades that IOs have been accepted into the realm of subjects of international law, due to the traditional prominence of State sovereignty. The ICJ *Reparation for injuries* Advisory Opinion represented an important step in this direction.²⁶ In this landmark case, the Court, assessing the question whether the UN had the capacity to bring a claim against a State, found that it had such capacity, as an inherent consequence of an organization possessing ILP.²⁷ In any case, to say that an IO has ILP only means that it is capable of possessing international rights and duties, but it does not say anything about the sources or the content of these rights and obligations.²⁸ This last element is nevertheless crucial in order to correctly address any issue of responsibility, which is in turn necessarily linked to the breach of an obligation, as the law of international responsibility dictates.

²⁰ See Wouters *et al*, *supra* note 16 at 11 and Parish, *supra* note 1 at 340.

²¹ See Parish, *supra* note 1 at 341. However on the specific issue of the appropriateness of judicial review of decisions of UN Security Council the opinions are more mixed; the reason is essentially that the function of maintenance of peace and security might be in this way significantly weakened or compromised; see for instance K. Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 Pace ILR (1995).

²² The main example is represented by the OSCE; see Schermers and Blokker, *supra* note 7 at 991.

²³ I. Brownlie, *Principles of public international law* 433 (2008).

²⁴ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* 412 (2005).

²⁵ See Schermers and Blokker, *supra* note 7 at 985.

²⁶ *Reparation for Injuries Suffered in The Service of the United Nations*, Advisory Opinion, April 11th 1949, 1949 ICJ Rep. 174.

²⁷ J. Klabbbers, *An Introduction to International Institutional Law* 43 (2009).

²⁸ See Akande, *supra* note 6 at 252 and Schermers & Blokker, *supra* note 7 at 993.

4. Elements of responsibility of international organizations

It is a settled principle of international law that every wrongful act entails responsibility and the obligation to make reparation.²⁹ This principle is the cornerstone of state responsibility; its extension to the regime of IOs is however now widely accepted. Accordingly, the ILC inserted this important principle of international law in article 3,³⁰ following the structure of the analogous provision in the Articles on state responsibility (hereinafter: ARSIWA).³¹ This way, it extended its application to IOs, reasoning that the principle in question “applies to whichever entity commits an internationally wrongful act”(IWA).³² Following the same logic, the ARIO continue by enunciating the elements of responsibility of IOs. These are contained in Article 4 ARIO, which duly follows the structure of the corresponding provision in the ARSIWA (article 2), and provides that the two indispensable elements of international responsibility of IOs are (1) the attribution of conduct to the organization and (2) that the conduct constitutes a breach of an international obligation of the organization.³³

4.1 Attribution of conduct to the organization

In light of the same nature of IOs, attributing a given conduct to an organization can be a complex issue: when persons effectively operating are under control of more than one international person it is often necessary to identify who is responsible for a certain unlawful act that has been committed.³⁴ Indeed, to assign responsibility, a necessary preliminary step is to identify that certain ‘agents’ actually took part in a certain conduct. As a general rule, IOs themselves, and not states, are responsible for the IWA committed by the former.³⁵ However, this might constitute a problem with IOs: because of the interplay of their autonomy on one hand, and the important role of member states on the other, “it is not always clear where the

²⁹ *Factory at Chorzow (Germany v. Poland)*, 1927 P.C.I.J. (ser. A), No. 9, Jurisdiction, Judgement of July 26 at 21.

³⁰ ILC ARIO, *supra* note 9, Art. 3: “Every internationally wrongful act of an international organization entails the international responsibility of that organization”.

³¹ ILC Articles on responsibility of states for internationally wrongful acts, 2001 YILC, Vol. II (Part Two), Art. 1.

³² ILC ARIO, Commentary on Art. 3, at 13.

³³ ILC ARIO, Art. 4.

³⁴ C.F. Amerasinghe, *An Assessment of the ILC's Articles on the Responsibility of International Organizations* in M. Ragazzi (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, at 72-73 (2011).

³⁵ Institut de Droit International, Resolution II, *The Legal Consequences For Member States Of The Non-Fulfilment By International Organizations Of Their Obligations Toward Third Parties*, 66 *Annuaire de l'Institut de Droit International* 444-453 (1996); UN Doc. A/CN.4/597, Sixth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur (2008); R. Wilde, *Enhancing Accountability at the International Level: the Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake*, 12 *ILSA JICL* 395 at 404 (2006).

organization begins and its member states end”.³⁶ Indeed, unclear situations may arise in a number of occasions. The first example that comes into mind is that of the responsibility for violations committed in the framework of UN peacekeeping missions; another is the one that will represent the focus of this thesis, namely that of the responsibility arising from JO conducted under the aegis of Frontex.³⁷

A series of provisions is dedicated in the ARIIO to attribution of conduct.³⁸ Firstly, Article 6 states the principle of attribution to the IO of the conduct held by its organs or agents in performance of their functions: the principle has been defined as a “customary secondary norm” and is supported by long-standing practice.³⁹ Furthermore, particular importance is vested in the provision contained in article 7, dealing with attribution to an IO of conduct held by “an organ of a State or an organ or agent of an IO that is placed at the disposal of another IO”.⁴⁰

Another set of Articles in the ILC Draft deals with the responsibility of an IO “in connection with the act of a State or another international organization”. It includes cases of aid or assistance (article 14), direction and control (article 15), coercion (article 16) by the IO in the commission of an IWA by a State -or another IO. In all these cases, the IO will incur responsibility. Responsibility of the IO is also foreseen by article 17, dealing with the event in which an organization adopts a decision binding its MS or another IO to commit an IWA or authorizes them to the same effect.

4.2 Breach of an international obligation

As to the second element of responsibility, the fundamental issue is to identify which law is applicable to the organization. In this regard, it is important to recall that the ICJ has affirmed, in the *WHO and Egypt* AO, that IOs, being subjects of international law, are bound by any obligations incumbent upon them under general rules of international law.⁴¹ Indeed, many are the sources of obligations for IOs, also depending on the applicable legal

³⁶ See Klabbers, *supra* note 27, at 274; A.S. Barros, C. Ryngaert, *The Position of Member States in (Autonomous) Institutional Decision-Making - Implications for the Establishment of Responsibility*, 11 IOLR 53 at 54 (2014).

³⁷ D. Jacobs, A. Nollkaemper, *Shared Responsibility in International Law: a Conceptual Framework*, 34 MJIL 359 at 362 (2013).

³⁸ Unsurprisingly, the ARIIO follow the same structure as the ARSIWA, and the similarities between the two are manifest as well as logic. The ILC’s work has been widely criticized for this and other reasons: see N.M. Blokker, R.A. Wessel, *Introduction: First Views at the Articles on The Responsibility of International Organizations*, 9 IOLR 1 (2012).

³⁹ D. Shraga, *ILC Articles on Responsibility of International Organizations: the Interplay between the Practice and the Rule (A View from the United Nations)*, in M. Ragazzi (Ed.) *supra* note 34 at 202.

⁴⁰ ILC ARIIO, Art. 7.

⁴¹ Interpretation of the Agreement of 25 March 1951 Between the Who and Egypt, Advisory Opinion of 20 December 1980, 1980 ICJ Rep. 73.

framework in which the IO operates and on which activities the IO is called to undertake.⁴² For instance, the EU has a complex structure relative to the protection of human rights. Respect and protection of human rights is presented as a core value of the Union.⁴³ The EU has also, since its adoption in 2000, its Charter of Fundamental Rights,⁴⁴ now legally binding and enjoying “the same legal value as the Treaties”.⁴⁵ However, the Union is not (yet) a party to the European Convention on Human Rights (ECHR); the accession is provided by article 6(2) TEU, introduced by the Lisbon Treaty; the procedure has however already proved lengthy and cumbersome, as showed by the strong rejection by the ECJ of the Commission’s draft agreement.⁴⁶ In the meantime, article 6(3) realized a sort of incorporation of the Convention into EU law⁴⁷ by providing that the fundamental rights guaranteed by the ECHR constitute general principles of law of the EU. This is indeed consonant with the approach of the CJEU,⁴⁸ which has in its case law in fact incorporated the ECHR in the EU legal system by way of general principles of law.⁴⁹

The issue can also be addressed from the perspective of the states as members of the organization; where there is an international obligation for states not only to respect but also to “ensure” or “secure” respect for human rights, this entails a conventional legal obligation for them to ensure, through adequate supervision, that IOs do not act in breach of these rights.⁵⁰ More specifically, members of IOs are under an obligation of due diligence which compels them to make sure that the functions they transfer to the organization are exercised in conformity with their international obligations.⁵¹ This has been confirmed by the European Court of Human Rights (ECtHR) in relation with obligations of MS under the ECHR; dealing in *Matthews*⁵² with the issue of transfer of competences from member states - bound by the ECHR- to the EU, the Court found that the Convention “does not exclude the transfer of competences to international organizations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer”.⁵³ A few years later, in *Bosphorus*, the Court reiterated that such transfer is permitted by the Convention, insofar as fundamental rights receive an “equivalent level of protection” within the organization; there is thus a presumption of equivalent protection, but

⁴² See White, *supra* note 13 at 40.

⁴³ See in particular Arts. 2 and 3(5) of the Consolidated version of the Treaty on the European Union (TEU), OJ C 83/13, 30 March 2010.

⁴⁴ Charter of Fundamental Rights of the EU, OJ C 83/389, 30 March 2010.

⁴⁵ TEU, art. 6(1).

⁴⁶ See <http://ukhumanrightsblog.com/2014/12/22/eu-judges-oppose-accession-of-eu-to-echr/#more-25017>, <http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VJU4fcACA>.

⁴⁷ D. Harris, M. O’Boyle *at al*, Law of the European Convention on Human Rights 32 (2014).

⁴⁸ The CJEU has *inter alia* the competence to check whether the actions of EU institutions and governments are compatible with the Treaties.

⁴⁹ F. Naert, *Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations*, in Wouters *et al*, *supra* note 16 at 138.

⁵⁰ See ILA Report, *supra* note 15 at 18-19.

⁵¹ P. Sands, P. Klein, *Bowett's law of international institutions* 530 (2009).

⁵² *Matthews v. The United Kingdom*, Judgment of 18 February 1999, 1999 ECHR-I.

⁵³ *Id.*, para. 32.

a rebuttable one.⁵⁴ The rule according to which states are not permitted to circumvent their obligations by transferring certain powers to an IO is reflected in article 61 ARIO, which to a certain extent could be seen as incorporating the abovementioned principles developed by the ECHR.⁵⁵ These arguments, although not entailing that IOs are directly bound by or somehow ‘succeed’ to their MS’ human rights obligations, allow reaching a similar result: preventing IOs to act in breach of such obligations.

Conclusion

This chapter has presented IOs as subjects of international law; in particular, it offered a definition of IOs and briefly addressed the reasons why it is desirable that IOs be held accountable for their exercise of public powers. In this context, the concept of their responsibility has been introduced, as well as that of the ILP of IOs, a condition necessary for them to bear responsibility under international law. Subsequently, the main features of the regime of responsibility of IOs have been outlined, through reference to the ILC ARIO. The Articles represent indeed an important tool in dealing with matters of responsibility of IOs, despite the criticism directed to the result of the efforts of the ILC; their increasing use by practitioners and judges confirm this position. This outline has showed on which basis IOs can bear obligations under international law. Particular attention has been devoted to the human rights obligations of the European Union: this element is indeed crucial for the purpose of this thesis, which is to provide an assessment of Frontex’ activities under international law in perspective of the responsibility of the EU.

⁵⁴ *Bosphorus Hava Yollari Turizm v. Ticaret Anonim Şirketi v. Ireland*, Judgment of 30 June 2005, 2005-VI ECHR, para. 156.

⁵⁵ A. von Bogdandy, M. Steinbrück Platise, *ARIO and Human Rights Protection: Leaving the Individual in the Cold*, 9 IOLR 67 at 72 (2012). The Commentary on art. 61 also cites *Bosphorus*. It is however not clear to what extent this provision reflects the current *lex lata*: see A. Gattini, *Breach of International Obligations*, in A. Nollkaemper, I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law An Appraisal of the State of the Art*, at 54 (2014).

CHAPTER 2

INTRODUCING FRONTEX: ROLE, MANDATE AND LEGAL CONSTRAINTS

Introduction

In the first chapter some general and fundamental concepts related to IOs have been outlined; the focus will be now moved towards the specific situation of the EU, or more precisely Frontex, one of its agencies. In particular, the Agency will be analysed in its legal basis and mandate, linked with the EU competence in the field of border control. The tasks of the Agency will be described, with particular attention to the carrying out of JO, the most important of Frontex' activities. This background is indeed necessary to assess and weight the role of the Agency in the context of the border control operations it coordinates. Moreover, the wrongful conduct for which responsibility is discussed will be described: the violations of human rights (in particular: the principle of *non-refoulement*) that regularly occur in the context of Frontex-coordinated operations. Lastly, the legal framework governing Frontex' activities will be exposed, from both the perspective of Frontex and the EU MS. In particular, an overview of the rules that Frontex is bound to respect by virtue of its founding Regulation and EU law will be offered; in addition, an overview of the main other rules of international law that come into relevance for -or in collision with- Frontex' activities.

1. Frontex: legal basis

Frontex, one of the many agencies created within the EU in the last decades, was established by Regulation 2007/2004 of 26 October 2004 (hereinafter: "Regulation").⁵⁶

Frontex' activity must be put in the context of the EU competence in the field of immigration and asylum, gradually developed alongside the evolution and expansion of the EU itself. In particular, with the Treaty of Amsterdam the EU has acquired competence also in the field of control of external borders; such competence has been exercised with the adoption of Council Regulation 539/2001 and the Schengen Borders Code (SBC).⁵⁷

⁵⁶ Council Regulation (EC) 2007/2004 of 26 October 2004, later amended by Regulation No. 863/2007 of the European Parliament and the Council of 11 July 2007 and Reg. No. 1168/2011 of the European Parliament and the Council.

⁵⁷ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, later amended by Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 and Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013.

Precisely, the legal basis for the establishment of Frontex must be found in article 77 TFEU,⁵⁸ which provides for the adoption of common rules and procedures for the control of external borders, as well as for “any measure necessary for the gradual establishment of an integrated management system for external borders”.⁵⁹

2. The role of Frontex

2.1 Mandate and tasks

The stated aim of the Union in the management of its external borders is to ensure a uniform level of control and surveillance: this is considered a necessary corollary to the free movement of persons within the EU itself. Leaving aside considerations relative to the so-called “securitization” of migration and asylum in the EU,⁶⁰ the establishment of Frontex is rooted in the willingness of the EU Commission to develop a common approach to border control, through the establishment of an integrated system of border management (IBM).⁶¹ The concept of IBM consists of several dimensions, including but not limited to border checks and surveillance.⁶² According to Frontex’ Regulation, the main purpose of the Agency is the improvement of the integrated management of the external borders of the MS of the EU, although the same provision states that “the responsibility for the control and surveillance of external borders lies with Member States”.⁶³ In order to achieve its mandate, the Agency has been entrusted with a series of tasks, set forth in Article 2 of Frontex Regulation; first of all, the coordination of operational cooperation between MS in the field of management of external borders comes into relevance. Frontex’ foremost task is indeed that of coordinating JO and pilot projects; each of these operations is grounded in an operational plan, drawn up by the Executive Director of the Agency and including the necessary agreements with the MS.⁶⁴ The other tasks include assisting MS in the training of national border guards, and assisting them in circumstances requiring increased technical and operational assistance at external borders.⁶⁵ The Agency is then charged with carrying out risk analyses and providing consequential information to the EU and its MS.⁶⁶ This task is particularly important as in practice the operations planned and coordinated by the Agency are based on these risk

⁵⁸ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 83/47, 30 March 2010.

⁵⁹ TFEU, Art. 77.

⁶⁰ See S. Leonard, *The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy*, 5 J CER 371-388.

⁶¹ European Commission, *Towards Integrated Management of the External Borders of the Member States of the European Union*, COM (2002) 233 final, 7 May 2002.

⁶² Council of the European Union, Justice and Home Affairs Council Meeting, Brussels, 4-5 December 2006.

⁶³ Frontex Reg., Art. 1.

⁶⁴ Frontex Reg., Art. 3(a).

⁶⁵ This is especially provided for those Member States facing specific and disproportionate pressures, according to art. 2(1)e as amended.

⁶⁶ Frontex Reg., Preamble, para. 6.

analyses.⁶⁷ On the operational level, Frontex is also tasked with providing MS with the necessary support in organizing joint return operations; it is also worth mentioning the important addition, with the 2011 amendment to the Regulation, of a provision entrusting the Agency with the composition of European Border Guard Teams (EBGT) to be deployed in JO and pilot projects.⁶⁸

2.2 Joint Operations

Planning and carrying out JO represents arguably the most important of Frontex' tasks.⁶⁹ According to article 3(1), Frontex "shall evaluate, approve and coordinate proposals for JO and pilot projects made by Member States [...]". It is important to note that originally the initiative for any JO had to be of one or more MS, as is clear from article 3(1), and the Agency could only "launch initiatives" in that regard; after the amendments, however, the new article 3(2) provides that the Agency "may itself initiate and carry out" such operations, in agreement with the host MS. The intervention of the Agency may also be requested, pursuant to article 8, by MS "facing specific and disproportionate pressures and confronted with circumstances requiring increased technical and operational assistance" concerning border control.⁷⁰ In JO are deployed both local and guest border guards, conferred with executive powers, which remain under the command and control of the host Member State authority;⁷¹ exception is made as to disciplinary measures, which remain with the sending state.⁷² Article 10 provides for this purpose:

"While performing their tasks and exercising their powers guest officers shall comply with Union and international law, in accordance with fundamental rights, and the national law of the host Member State [...]. Guest officers may only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards of the host Member State".⁷³

Therefore, once deployed, the officers have to comply with the domestic law and the

⁶⁷ A. Baldaccini, *Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea*, in B. Ryan and V. Mitsilegas (Eds.), *Extraterritorial Immigration Control*, at 234 (2010).

⁶⁸ Frontex Reg., Art. 3(1)b.

⁶⁹ This is confirmed by the external evaluation report carried out by COWI, issued on 15 January 2009, which precises that JO "cater for more than 75% of Frontex' total operational costs".

⁷⁰ Frontex Reg., Art. 8.

⁷¹ Conference "The Feasibility of a European System of Border Guards: A practitioner's perspective", Academy of European Law (ERA) & Frontex Warsaw, 28-29 October 2013, at 5.

⁷² Fundamental Rights Agency, *EU solidarity and Frontex: fundamental rights challenges*, originally published as part of Fundamental rights at Europe's southern sea borders, at 6 (2013).

⁷³ Before the amendments, art. 10 provided: "Exercise of executive powers by the Agency's staff and the Member States' experts acting on the territory of another Member State shall be subject to the national law of that Member State".

authorities of the host state.

3. The need for a legal framework for Frontex' activities

The described JO involve a series of activities that are regulated by multiple, overlapping regimes of international law. The law of the sea, refugee law, human rights law, conventional and customary rules interact in the regulation of operations at sea, including interceptions of vessels.⁷⁴ This last aspect in particular causes serious concern: a series of measures, varying from dissuasion or deterrence techniques from indiscriminate, collective push-back and expulsion, represent the dynamic most frequently implemented by MS at their borders; such practices are in some cases carried out in the territory of third countries and on the basis of apposite agreements concluded between the relevant EU MS and one or more third countries.⁷⁵ These practices appear to be also predominant in the context of Frontex-led operations; these are consequently highly criticised in reason of the serious and widespread reports of violations of human rights and of the principle of *non-refoulement* in particular.⁷⁶ The situation is furthermore compounded by the circumstance that the prevention of arrivals of migrants in the territory of EU MS appears to be the most prominent part of Frontex' mission.⁷⁷ In this light, the establishment of clear rules for the operations coordinated by Frontex is clearly essential. Following the distinction between obligations binding Frontex and the EU on one side and those binding MS, the next paragraphs will proceed as follows: first, the legal framework of Frontex' activities will be analysed, from its perspective as EU Agency, bound as such to respect EU law. Secondly, the focus will be moved to the perspective of the MS: when engaging in certain activities, they are also bound by the EU legislation in the same way as Frontex. However, they are also bound by other obligations

⁷⁴ The term 'interception' includes, according to the UNHCR "all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination". See *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendation for a Comprehensive Approach*, Executive Committee Standing Committee (18th Meeting), UN Doc. EC/50/SC/CRP.17, 9 June 2000, para. 10.

⁷⁵ This is the practice carried out by Spain with Senegal and Mauritania. See Frontex, "Longest Frontex Coordinated Operation – Hera, The Canary Islands", 2006, at <http://frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc>.

⁷⁶ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Addendum, Mission to Greece, UN DOC. A/HRC/23/46/Add.4 (2013), at 5; Pro Asyl, *Pushed Back. Systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land*, at 4 *et seq.* (2013); UNHCR, *Syrians in Greece: Protection Considerations and UNHCR Recommendations*, 17 April 2012; Amnesty International, *Frontier Europe – Human Rights Abuses on Greece's borders with Turkey* (2011); S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, *Frontex Agency: which guarantees for human rights? A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate* (2011); Migreurop, EMHRN, FIDH, *Frontex between Greece and Turkey. At the border of denial*, (hereinafter: "Border of denial"), Report of the Frontexit campaign (2014).

⁷⁷ FRONTEX, *Annual Report 2006-2007*, at 8, 13; see B. Vandvik, *Extraterritorial Border Controls And Responsibility To Protect: A View From Ecre*, Amsterdam Law Forum, at 7 (2008).

under international law, and some of them come into relevance in relation to the activities coordinated by Frontex.

3.1 Frontex' perspective

Serious concern was raised, in the aftermath of the establishment of Frontex, by the lack of clarity over the rules governing its activities. As mentioned, although these activities potentially extend to a large set of measures related to border management, this broad mandate is not matched with a clear regulatory framework.⁷⁸

As an Agency of the EU, Frontex is bound to respect the EU primary legislation, including the Charter of Fundamental Rights.⁷⁹ Furthermore, as its establishment is linked with border checks and surveillance, Frontex must act in observance of the EU legislation on border control, namely the SBC. Regrettably, however, the Frontex Regulation originally did not contain any mention of the rules to be applied in the context of its operations. It was originally conceived as a 'technical' actor, and therefore humanitarian concerns were limited;⁸⁰ the absence of any reference to human rights in the founding Regulation confirms this consideration. This point was also raised in the European Council in the Stockholm Program; the EC indeed requested the Commission to propose:

“[...] clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law”.⁸¹

This request was at least partially addressed: the 2011 amendments to the Regulation partly remedied to the described legal uncertainty. Firstly, article 1 now explicitly states:

“The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union, international law, including the Convention Relating to the Status of Refugees of 28 July 1951 [...], obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights [...]”

Moreover, the list of the Agency's tasks is now followed by this paragraph (1a):

⁷⁸ See Baldaccini, *supra* note 67, at 233.

⁷⁹ See Chapter 1, para. 4.2.

⁸⁰ S. Trevisanut, *Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management*, in L. Azoulay, K. De Vries (Eds.), *EU migration law: legal complexities and political rationales*, at 117 (2014).

⁸¹ Council of the European Union, “The Stockholm Programme – An open and secure Europe serving and protecting the citizens”, Brussels, 2 December 2009.

“In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. [...]”.

The inclusion of this article, reiterating the obligation of state parties not to expel, return or push back in any manner whatsoever a refugee to a territory in which he or she would be at risk of persecution, as article 33 of the Refugee Convention provides, is particularly important. The provision protects indeed any refugee, including those not formally recognized as such, since a person “does not become a refugee because of recognition, but is recognized because he is a refugee”.⁸² Accordingly, it is clear the importance of recognizing this safeguard to potential asylum seekers: persons that are intercepted anywhere, including in the high sea, have to be given the opportunity to be identified and to express possible protection needs. This means that the procedures of surveillance of sea borders and the subsequent, related operations (for instance interception, diversion, disembarkation):

“[...] should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law”.⁸³

By the same token, the SBC explicitly leaves the right of international protection unaffected and recalls the duty of border guards to respect human rights.⁸⁴

Amongst the elements introduced by the new Regulation is worth mentioning, as proof of a growing awareness of what to some extent can be considered Frontex’ ‘human rights problem’, the Fundamental Rights Strategy,⁸⁵ as well as the addition of a provision foreseeing the establishment of a Code of Conduct for operations coordinated by the Agency. The Code of Conduct establishes a series of duties for all people participating in Frontex activities, including that of reporting any violations of the Code itself⁸⁶; this duty must be linked with the provision in the Fundamental Rights Strategy according to which the Agency might, as a last resort, terminate a JO “if the conditions guaranteeing the respect for fundamental rights

⁸² UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV.3, reissued 2011, para. 28.

⁸³ UNHCR, Executive Committee Conclusion on Protection Safeguards in Interception Measures, 10 October 2003, available at <http://www.unhcr.org/496323740.pdf>.

⁸⁴ J. Rijpma, *Frontex: Successful Blame Shifting of the Member States?*, 68 Analisis del Real Instituto Elcano (ARI), (2010).

⁸⁵ Frontex Reg., art 26a.

⁸⁶ Frontex, Code of Conduct for all persons participating in Frontex activities, Art. 22.

are no longer met”.⁸⁷

3.2 Member States’ obligations in relation to Frontex’ activities

3.2.1 Law of the sea

In the context of Frontex’ activities taking place at the maritime borders, the law of the sea is certainly of great relevance. It would not be possible to expose a complete overview of all the legal aspects that may furnish a legal basis for maritime operations coordinated by Frontex; the analysis will be therefore restricted to the provisions more directly related to Frontex’ operational area, namely the duty to render assistance at sea. The issue of rescue at sea is clearly of certain relevance, considering the high number of people losing their life in their journey to Europe.⁸⁸

As a premise, it is useful to recall that in the law of the sea different rules apply to activities taking place at sea, depending on which maritime area is concerned. Consequently, different laws may be applicable in the territorial sea of a third country and in that of a EU MS. It is important to notice in this regard the inclusion in the 2011 Frontex Regulation of a preambular paragraph leaving the rights or obligations of MS under, inter alia, UNCLOS,⁸⁹ SOLAS⁹⁰ and ICMSR⁹¹ Conventions unaffected.⁹² Indeed, there are a series of obligations binding EU MS that come into relevance in this context. Furthermore, UNCLOS is also binding on the EU.

Importantly, all states must comply with their duty to rescue at sea; this duty to render assistance to whoever finds him/herself in danger or distress at sea is arguably a customary law norm⁹³ and was codified in UNCLOS, article 98. This obligation is further specified and developed on a conventional level in the SOLAS and in the ICMSR Conventions; the latter in particular established an international system regulating search and rescue operations, pursuant to which every state is required to arrange search and rescue services.⁹⁴

This duty is, pursuant to article 98 UNCLOS, owed to anybody found in danger or distress at sea; furthermore, it includes the obligation to deliver the person(s) rescued to a place of

⁸⁷ Frontex Fundamental Rights Strategy, endorsed by the Frontex Management Board on 31 March 2011, at 4.

⁸⁸ It is estimated that at least 20.000 people lost their lives in this way since 1998; source: <http://fortresseurope.blogspot.it/p/la-strage.html>.

⁸⁹ 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3.

⁹⁰ 1974 International Convention for the Safety of Life at Sea, 1184 UNTS 287.

⁹¹ 1979 International Convention on Maritime Search and Rescue, 1405 UNTS 1985.

⁹² Reg. No. 1168/2011 of the European Parliament and the Council amending Frontex Regulation, Preamble, para. 30.

⁹³ G. Goodwin-Gill, *The refugee in international law* 157 (1996).

⁹⁴ Source: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx).

safety.⁹⁵

In sum, even if Frontex is not tasked with coordinating search and rescue operations, MS' assets coordinated by the Agency remain nonetheless bound by their duty to rescue those in danger at sea.⁹⁶ Accordingly, the Frontex regulation, as mentioned, contains now several references to the necessity to respect these duties.⁹⁷

3.2.2 International Human Rights - International Refugee protection

There are a series of human rights that are engaged by border control measures; the right to seek asylum and the prohibition of *refoulement*, already mentioned, are of primary importance. The right to leave a country also comes into relevance.⁹⁸ As it has been observed, immigration control measures aimed at arbitrarily and indiscriminately preventing people from leaving a country may constitute violation of such right;⁹⁹ exceptions to the right are possible, pursuant to 12(3) ICCPR, but should be interpreted restrictively.¹⁰⁰ Furthermore, it is fundamental to recall that all EU MS are also part of the ECHR. Therefore, as mentioned in Chapter 1 paragraph 4.2, in every activity in which they engage, when they exercise jurisdiction, they must honour their obligations under the Convention. On this note, the ECHR case law on the application of the Convention outside the borders of the EU, and at sea in particular, is of great relevance; in particular, the principle of the necessary respect of the right to international protection in the context of maritime operations related to immigration control was importantly clarified by the recent ECHR judgment *Hirsi and Others v. Italy*.¹⁰¹ The case was brought to the Court by some Somali and Eritrean citizens that were on board of one of the vessels intercepted and diverted back to Libya in the context of the 'push-backs policy', carried out by Italian authorities in execution of bilateral agreements concluded with Libya. The applicants alleged, *inter alia*, violations of the prohibition of inhuman and degrading treatment (article 3 ECHR) and the prohibition of collective expulsions (article 4 of Protocol 4 to the ECHR). The Court, having established

⁹⁵ ICMSR Annex, Ch. 1, para 1.3.2; a 'place of Safety' is defined by the International Maritime Organization (IMO, a specialized agency of the UN) in Res. MSC.167(78), Annex 34, Guidelines on the treatment of the persons rescued at sea, as "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination".

⁹⁶ See Rijpma, *supra* note 84.

⁹⁷ See Frontex Reg., Arts. 3a(i) and 8e(i).

⁹⁸ Expression of this right can be found, *inter alia*, in art. 13 of the 1948 Universal Declaration of Human Rights U.N. Doc A/810, and art. 12 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

⁹⁹ E. Papastavridis, 'Fortress Europe' and FRONTEX: *Within or Without International Law?*, 79 NJIL 75 at 109 (2010).

¹⁰⁰ See Human Rights Committee, General Comment No. 27, para. 1 (1999).

¹⁰¹ *Hirsi Jamaa and Others v. Italy*, Merits and Just Satisfaction, Judgment of 23 February 2012 (Grand Chamber), 55 EHRR 21 (hereinafter: *Hirsi*).

that Italy was exercising extraterritorial jurisdiction -by exercising continuous *de jure* and *de facto* control over the applicants during the operation-¹⁰² found Italy responsible for the violations alleged. The consequence of exercising jurisdiction is, pursuant to art. 1 ECHR, that the state in question must guarantee and secure the rights of the Convention; these include the right not to be returned to a territory where an individual risks being subjected to inhuman and degrading treatment, the right to an effective remedy and the right not to be collectively expelled (*i.e.* the right not to be expelled without a proper assessment of the individual situation). The lack of an explicit reference to the Agency in the judgment does not detract from its relevance for Frontex' activities -especially since some of the push-backs operations overall condemned by the Court were, according to Human Rights Watch, coordinated by Frontex.¹⁰³ In particular, as the role of Frontex is primarily that of coordinator of the action of MS in border control activities, and MS have to respect certain guarantees in that context, it necessarily follows that also Frontex needs to ensure that such guarantees are in practice respected in the course of these operations. From the opposite perspective, MS that are bound by certain rules of international law have to comply with those rules, even when acting together with other states in JO, and even when these operations are coordinated by an Agency of an IO that they are part of.

Conclusion

This second chapter has concisely presented Frontex, by describing its legal basis and mandate, as well as its tasks. The focus has been in particular put on the rules governing the deployment and coordination of JO. These JO indeed represent on one hand the most important of Frontex' activities; on the other hand, they also raise serious concern in relation to the negative impact that they have on the human rights of the individuals affected by border control measures. In this situation, it is crucial to clearly identify the legal framework governing these border control activities. In light of the complex interaction between the EU and its MS in this field, an attempt has been made to spell out such legal framework; this has been divided in two parts, following a distinction between the rules binding the EU -and therefore Frontex- on one side, and EU MS on the other, as this might acquire relevance for the purposes of responsibility. The conclusion of this analysis is that the fundamental norms at stake, especially those related to the prohibition of *refoulement* and the duty to rescue at sea, have to be respected by Frontex as well as the EU MS.

¹⁰² *Hirsi*, para. 81.

¹⁰³ *Id.*, para. 38.

CHAPTER 3

THE RESPONSIBILITY OF THE EU FOR HUMAN RIGHTS VIOLATIONS AT EUROPE'S BORDERS

Introduction

This third and final chapter will address the question whether and on which basis Frontex -or the EU- could incur responsibility under international law for violations of human rights occurring during Frontex-led operations. For this purpose, first a preliminary point will be addressed: whose responsibility is at stake: that of Frontex or the EU? Once clarified this element, the analysis will focus on the application of the ARIO provisions that appear more suitable for the case at hand, in order to check whether the organization at issue may incur responsibility under international law for the described wrongful conduct. After drawing some conclusions from this analysis, the chapter will then be concluded with an overview of the situation of possible remedies for victims of human rights violations of which the EU could be found to be responsible.

1. Frontex' responsibility?

It is important to state as a premise that the purpose of this thesis is not to question the responsibility of a given state for wrongful acts committed during border control activities, where attributable to it. Indeed, a state will incur responsibility for violations of human rights suffered by individuals subject to its jurisdiction,¹⁰⁴ including during control measures conducted at sea.¹⁰⁵ The aim is instead to assess whether, and on which basis, Frontex -or the EU- could bear responsibility for the same or an analogous conduct, in light of the role that it plays in that context. In other words, the question is whether entities other than -or in addition to- a state engaged in a joint border control venture can also incur responsibility. Two possible scenarios could arise, in alternative to a situation of exclusive responsibility of a state. The first would arise pursuant to the attribution to Frontex or the EU of the wrongful conduct committed by a state; in this case it would be the organization, and not the state, responsible for the wrongful act. A second possibility that could be envisaged is that of responsibility of both the organization and the state, for the same or for a connected conduct.

¹⁰⁴ This depends on the scope of application of the applicable treaty.

¹⁰⁵ See for instance V. Moreno-Lax, *Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean*, REFGOV WP Series FR, available at: <http://refgov.cpd.ucl.ac.be/?go=publications&cat=1&subcat=8>.

This possibility, envisaged in ARIO,¹⁰⁶ is an attractive solution to the problems arising when it is not completely clear who, between two or more entities, bears responsibility for a certain obligation.¹⁰⁷ This type of joint responsibility may arise from dual attribution of the conduct to a state and an IO.¹⁰⁸ Indeed it could be envisaged that the same conduct of human rights violations be attributed to both Frontex and the MS involved in the same operation. This would lead to dual attribution and thus joint responsibility. However, joint responsibility does not necessarily derive from dual attribution.¹⁰⁹ An example is that of the mixed agreements concluded by the EU together with its MS, when such agreements do not provide for the apportionment of the responsibility between the two.¹¹⁰ A comparable situation will arise with the EU accession to the ECHR.¹¹¹

In sum, the essential question to address is whether there is a sound legal basis on which Frontex or the EU could be held responsible for violations of human rights, in light of what is stated above.

1.2 Frontex or the EU?

So far, a fundamental point has been left aside: is Frontex an IO?¹¹² Indeed, the rules on responsibility outlined apply to IOs as defined by art. 2a ARIO;¹¹³ therefore, in order to find Frontex responsible for any breach under international law, it must first be ascertained that it fulfils this definition. Although it could be satisfied that Frontex is established under international law, being set up by a legislative act of an IO, the main issue is assessing its ILP. The relevant provision in the Frontex Regulation does not specify the extent of its legal personality¹¹⁴; while it clearly emphasizes the capacity of the Agency to act on the national plane, it does not explicitly exclude international personality. Therefore one could argue that Frontex must be able to act on the international plane, since it can conclude working

¹⁰⁶ ILC ARIO, Commentary on art. 48, para. 1.

¹⁰⁷ That is why it has been suggested as a possible solution for non-performance of the obligations contained in multilateral environmental agreements; see A. Nollkaemper, *Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements*, SHARES Research Paper 05, 2011, downloaded from <http://www.sharesproject.nl/publication/joint-responsibility-between-the-eu-and-member-states-for-non-performance-of-obligations-under-multilateral-environmental-agreements/>.

¹⁰⁸ Second Report on the Responsibility of International Organizations (2004), UN Doc. A/CN.4/541, para. 6.

¹⁰⁹ *Id.*, para. 9.

¹¹⁰ ILC ARIO, Commentary on art. 48, para. 1.

¹¹¹ F. Hoffmeister, *Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?*, 21 EJIL 723 at 724 (2010).

¹¹² As to the EU, it will be taken for granted that it is an IO.

¹¹³ ILC ARIO, Art. 2: “For the purposes of the present draft articles, [...] ‘international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities [...]”.

¹¹⁴ See Frontex Reg., Art. 15.

arrangements with Union Agencies and bodies and third countries.¹¹⁵ This conclusion could however be rejected on the basis that generally these instruments are expressly not qualified as international treaties; although the designation of an agreement made by its authors is not the only relevant element to consider,¹¹⁶ the intention not to bind the EU on the international plane must be given due account.¹¹⁷ Thus, if any ILP could be recognized in Frontex, this would be at most limited to the treaty-making capacity necessary to conclude headquarters agreements.¹¹⁸ Although its founding regulation endows Frontex with legal personality and liability for damages,¹¹⁹ this is not sufficient to consider it as an autonomous international legal subject.

If Frontex is not an IO having ILP, then the question becomes: is Frontex an organ or agent of the EU? This element is crucial since, according to a widely accepted rule, reflected in article 6 ARIO, acts of organs or agent of an IO entail the latter's responsibility.¹²⁰ To consider Frontex as an organ or agent of the EU does not present particular problems, being Frontex part of the EU machinery. Article 2 ARIO defines an organ of an IO as "any person or entity which has that status in accordance with the rules of the organization"¹²¹ and 'agent' as:

“[...] official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts”.¹²²

It will be sufficient that Frontex satisfies any of the two definitions, since both the conduct of organs and that of agents are attributed to the IO.¹²³ For the definition of organs, one must refer to the 'rules of the organization'. As to the EU, it must be noted that it acts through a variety of organs:¹²⁴ primarily through its institutions,¹²⁵ but also through a series of "bodies,

¹¹⁵ R. van Ooik, *The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance*, in D. Curtin and R. Wessel (Eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, at 132 (2005); Frontex Reg., Arts. 13-14.

¹¹⁶ A. Ott, *EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law*, 14 EFAR 515 at 530 (2008); M. Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'*, 28/75 Merkurios at 26 (2013).

¹¹⁷ See Fink, *supra* note 116, *infra*.

¹¹⁸ See G. Schusterschitz, *European Agencies as Subjects of International Law*, 1 IOLR 163 (2004); see Frontex Reg., Art. 15(a).

¹¹⁹ Frontex Reg., Arts. 15 and 19.

¹²⁰ ILC ARIO, Art. 6.

¹²¹ *Id.*, Art. 2(c).

¹²² *Id.*, Art. 2(d).

¹²³ *Id.*, Commentary on art. 2, para. 21.

¹²⁴ P.J. Kuijper, E. Paasivirta, *EU international responsibility and its attribution: from the inside looking out*, in M. Evans and P. Koutrakos (Eds.), *The International Responsibility of the European Union: European and International Perspectives*, at 50 (2013).

¹²⁵ Consolidated version of the Treaty on the Functioning of the European Union (TEU), OJ C 83/47, 30 March 2010, Art. 13.

offices and agencies”,¹²⁶ that can all be considered as organs of the EU for international law purposes.¹²⁷ As to agencies, they are essentially executive actors,¹²⁸ assisting the Commission and the Council in the implementation of EU policies.¹²⁹ For all these reasons, Frontex can be considered as an organ, or at least an agent through which the EU acts. Following this path, any conduct of Frontex (or of an agent charged by Frontex to carry out one of its functions)¹³⁰ that is found to be in breach of an international obligation binding Frontex and the EU would lead to responsibility of the EU. Having clarified this preliminary issue, it is now possible to address from a theoretical perspective the responsibility of the EU for violations of human rights occurring in the context of Frontex-led operations. According to the law of responsibility of IOs as reflected in the ARIIO, responsibility of an IO may arise in two possible ways: either for attribution of a wrongful conduct to the IO, or through a mechanism by which the IO incurs responsibility in connection with a wrongful act of a MS or other IO.¹³¹ The two scenarios will be explored.

2. Attribution of the conduct held the border guards deployed

The first point of this analysis is whether, subject to what conditions and to what extent the conduct of EU MS border guards¹³² could be attributed to the EU through Frontex, as explained above. The conduct referred to can be defined as the indiscriminate pushbacks of migrants.¹³³ Attribution of the conduct to an IO is regulated in ARIIO articles 6-9. Therefore it will be first assessed if applying those rules the described conduct may be attributed to the EU.

2.1 Attribution under article 6

According to the rule reflected in ARIIO article 6, the conduct of organs and agents of an IO

¹²⁶ This ‘formula’ is recurrent in the treaties as well as in the of fundamental rights, in the provision related to its field of application (Art. 51, *see note 44*); *see* Kuijper and Paasivirta, *supra* note 124, at 50.

¹²⁷ Kuijper and Paasivirta, *supra* note 124, at 69; Hoffmeister, *supra* note 111, at 740.

¹²⁸ J. Rijpma, *Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions: the case of Frontex*, in M. Busuioc *et al*, *The agency phenomenon in the European Union. Emergence, institutionalisation and everyday decision-making*, at 85 (2012).

¹²⁹ A. Ott, E. Vos, F. Coman-Kund, *European agencies on the global scene: EU and international law perspectives*, in M. Everson, C. Monda, E. Vos (Eds.), *European agencies in between institutions and Member States*, at 98 (2014).

¹³⁰ According to the definition of the term ‘agent’ given by the ICJ in the Advisory Opinion “Reparation for Injuries Suffered in The Service of the United Nations”, April 11th 1949, 1949 ICJ Rep. 174 at 177.

¹³¹ J. Kuijper, *Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?*, 7 IOLR 9 at 30 (2010).

¹³² The reference to border guards of MS is due to the fact that generally during JO they are the only officers endowed with executive powers; sometimes guards of third countries participate to the operations, as observers; *Border of denial*, *supra* note 76, at 35. However in other cases, such as in the JO HERA, also third countries authorities were involved. *See* E. Papastavridis, ‘Fortress Europe’ and FRONTEX: *Within or Without International Law?*, 79 NJIL 75 at 79 (2010).

¹³³ *See* Chapter 2, para. 3.

is attributed to the organization. The question to answer in this perspective is whether the conduct was carried out by Frontex officers, part of the Agency staff. On this point, it must be noted that in Frontex-coordinated operations many states are typically involved in the joint patrols¹³⁴. For instance, according to one report referring to Joint Operation Poseidon, carried out at the Greek sea borders:

“ [...] in addition to the coastguard and border guards of the country hosting the Frontex operation, participants include guest officers from EU Member States, Frontex officers and observer officers from non-EU member states”.¹³⁵

JO are indeed generally characterized by the presence of this variety of officers. Therefore, in consideration of the secrecy surrounding the practical conduct of the operations,¹³⁶ it is usually not possible to say with certainty whether or in which specific operations Frontex officers are effectively involved and what measures they actually take. The lack of transparency is indeed particularly worrying as it prevents the exercise of ex-post accountability on the Agency's activities.¹³⁷ If, however, there were proof that a Frontex officer had carried out the described wrongful conduct, this would be attributed to the EU, pursuant to article 6 ARIO.

2.2 Attribution under article 7

Another aspect under which to consider the responsibility of the EU is addressed in article 7 ARIO. Pursuant to this provision, the conduct of an organ of a state or an IO that is placed at the disposal of an organization is attributed to the latter, insofar it exercises effective control over that conduct. Applying this rule to the present case, it must be assessed if the described conduct of the border guards of the EU MS deployed in JO can be attributed to the EU. As to the first two elements necessary for such finding, the issue is not problematic. Indeed, it can be easily ascertained that the MS border guards are organs of the relative states: they are public officials entrusted with the authority to perform the tasks related to the management of external borders of the EU.¹³⁸ Furthermore, they are placed at the disposal of the EU, since the EU acts through Frontex in coordinating the efforts of EU MS in the management of the

¹³⁴ European Union Agency for Fundamental Rights, *EU solidarity and Frontex: fundamental rights challenges*, at 115 (2013).

¹³⁵ *Border of denial*, *supra* note 76, at 35.

¹³⁶ Although several organisations have collected and published testimonies that may prove an active role of Frontex' officers (*Border of denial*, *supra* note 76, at 43).

¹³⁷ G. S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 IJRL 443 at 450 (2011).

¹³⁸ See Final Report of the Study on Conferring executive powers on Border Officers Operating at the External borders of the EU, carried out for the Directorate General Justice, Freedom and Security of the European Commission (2006), Glossary.

external borders; EU MS put at the Agency's disposal a certain number of national border guards, as agreed between that MS and the Agency for the deployment of JO. Therefore, the crucial element to assess is whether the EU, through Frontex, has effective control over the border guards deployed in JO. In this regard, it must be firstly noted that the Frontex Regulation seems to lead to a negative finding in this sense, insofar it provides that border guards deployed in JO can only exercise powers "under instructions from and, as a general rule, in the presence of border guards of the host Member State"; this is confirmed by the circumstance that the operational plan on which the operation is based should include:

"[...] command and control provisions, including the names and ranks of the host Member State's border guards responsible for cooperating with the teams, in particular those of the border guards who are in command of the teams during the period of deployment".¹³⁹

On the other hand, the effective control has to be exercised 'over the specific conduct';¹⁴⁰ this suggests that the provisions mentioned above would not necessarily prevent the ascertainment of effective control, where the factual circumstances and particular context indicate otherwise;¹⁴¹ effective control could be found, for instance, if it was proved that the MS guards acted under the instruction of Frontex.¹⁴² The elements available in the present case, however, do not permit to make such assumption. This situation could significantly change, however, if the EBGT were exclusively deployed and tasked with border control. In that case indeed, proving the exercise of effective control by Frontex would be an easier task.

Considering the importance of the operational plans, on the basis of which JOs are launched and coordinated, one could be tempted to see in Frontex the source of that "ultimate authority and control" that could bring to attribution of the conduct, and thus responsibility. This was indeed the test employed by the ECtHR in *Behrami and Saramati* to conclude that the conduct of France and Norway was neither attributable to NATO nor to its MS, but instead to the UN which authorized their presence.¹⁴³ However, it would not be advisable to rely on this judgment, widely criticized on the basis that for the purpose of effective control,

¹³⁹ Frontex Reg., Art. 8e(f).

¹⁴⁰ ILC ARIO, Art. 7.

¹⁴¹ *Id.*, Commentary on art. 7, para. 4.

¹⁴² The criterion of "the specific instructions or authorizations given" is borrowed from the Commentary on the ARSIWA, ILC Yearbook 2001, Vol. II (Part Two) at 48, para. 7-8.

¹⁴³ *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Admissibility Decision, 2 May 2007, 45 EHRR SE10. The cases arose from the situation of Kosovo after the NATO military action against Yugoslavia, in 1999¹⁴³. Following the end of the conflict, as established in UNSC Res. 1244, Kosovo was governed by a UN mission (UNMIK), and KFOR (the NATO-led military forces) was in charge of security. In the context of KFOR, each troop-contributing country was responsible for maintaining security in a specific area. In *Behrami and Saramati* the two applicants, directed their complaints against France and Norway; the key question was whether it was possible to hold them responsible for their conduct in the context of the KFOR and UNMIK mandate. See M. Milanovic, *As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law*, acquired from <http://ssrn.com/abstract=1216243>, at 3 (2009); Schermers & Blokker, *supra* note 7 at 1014.

operational control seems “more significant than ultimate control”.¹⁴⁴ Indeed, the ECtHR appears to have changed its approach over the issue of attribution of conduct in the subsequent *Al-Jedda* decision, which correctly resorted to the ‘effective control’ test, endorsed by the ILC.¹⁴⁵ In that case the Court also recognized the possibility to have dual attribution, to both an organization and troops-contributing MS.¹⁴⁶ In this context is also important to cite the judgment of a Dutch court in the *Srebrenica* case, involving the failure of the Dutch peacekeeping forces to protect the victims of the Srebrenica massacre in 1995. In 2012, a Dutch court found that the conduct at issue was in fact attributable to The Netherlands under international law, irrespective of whether it was also attributable to the UN.¹⁴⁷ Importantly, it reached this conclusion by applying the ‘effective control’ test. Two years later, the Hague District Court, in its 2014 judgment,¹⁴⁸ adopted the same reasoning and thus reached the same conclusion, finding the Dutch state responsible for the death of 300 of the victims of the Srebrenica massacre. Here as well, the Court expressly referred to the notion of ‘effective control’ and ARIO Article 7.¹⁴⁹

3. Responsibility of the EU in connection with the act of MS

Although at the current stage and with the available information it is problematic to attribute to the EU the wrongful conduct held by MS border guards in the control of the external borders, the responsibility of the EU may nevertheless be ascertained otherwise. Another important aspect to consider is for instance whether, or to what extent, the EU can be responsible for its own conduct, carried out through Frontex, in the context of the described violations. Hypotheses of this sort are dealt with in ARIO in the section dedicated to the responsibility of IOs “in connection with acts of states or another IO”. It is important to note that these rules concern attribution of responsibility, not attribution of conduct.¹⁵⁰

3.1 Aid and assistance

A realistic scenario in relation to the case at hand is that of responsibility of the EU for aid

¹⁴⁴ ILC ARIO, Commentary on art. 7, para. 10.

¹⁴⁵ F. Messineo, *Things could only get better: Al-Jedda beyond Behrami*, 50 *Mil. Law and the Law of War Rev.* 321 at 335 (2011).

¹⁴⁶ *Id.*

¹⁴⁷ *Mustafic et al. v. the Netherlands*, LJN: BR0132, n. 200.020.173/01, 5 July 2011. See Messineo, *supra* note 145, *infra*.

¹⁴⁸ *Mothers of Srebrenica v. The State of The Netherlands and the United Nations*, The Hague District Court, Judgment of July 16th 2014; consulted at <http://goo.gl/sDLM5b>.

¹⁴⁹ *Id.*, para. 4.33.

¹⁵⁰ P. Palchetti, *The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations*, 95 *IRRC* 727 at 739 (2013).

and assistance to a MS, through Frontex, in the commission of wrongful act. The conditions for this responsibility to arise are that the organization does that with knowledge, and that the act would be wrongful if committed by the organization. As to the nature of the contribution, the organization must have intended to facilitate the occurrence of the conduct;¹⁵¹ moreover, it is required that the wrongful conduct is actually committed and that the aid or assistance from the IO has contributed “significantly” to the commission of the act.¹⁵² As to the element of knowledge, it must be firstly recalled that JO are planned on the basis of the risk analyses conducted by Frontex; even more importantly, all persons participating in its activities have the duty to report violations of the Code of Conduct and therefore also human rights violations.¹⁵³ Furthermore, the migration control practices carried out by the MS that Frontex decides to support and coordinate with JO are well-known, as are the violations of human rights and of the principle of *non-refoulement* that regularly occur. Therefore, the element of knowledge cannot be reasonably doubted.¹⁵⁴ Frontex provides training to national border guards, collects or acquires technical equipment to be deployed in JOs, and in the fulfilment of its primary task deploys border guards sent by other MS, coordinating their efforts in JO: all actions that provide significant support to the MS conducting border control. As to the condition that the act would be wrongful if committed by the organization, as outlined in chapter 2, para. 3.1, Frontex is bound to respect human rights and the principle of *non-refoulement* in particular. Therefore, when the conduct of a MS held in the context of a Frontex-led operation is found in violation of such obligations, it could be envisaged a responsibility of the EU for aiding and assisting that MS.

3.2 Circumvention of international obligations

As mentioned in chapter 1, pursuant to article 17, an organization will incur responsibility when it adopts a decision binding its MS or another IO to commit an IWA or authorizes them to the same effect. The purpose of this provision is to address situations in which an IO is prevented from a certain act because bound by a certain obligation, and circumvents this obligation by obliging its member to perform that act.¹⁵⁵ Caution in the application of this rule is advisable, since it reflects more a progressive development of the law than its codification.¹⁵⁶ Nevertheless, it could be in theory possible to identify such scenario here:

¹⁵¹ See ARIIO Commentary on art. 14, recalling in turn the commentary on the art. 16 ARSIWA, *supra* note 142.

¹⁵² *Id.*

¹⁵³ Decision of the Frontex Executive Director No 24/2011 of 21 March 2011.

¹⁵⁴ See Goodwin-Gill, *supra* note 137, at 453.

¹⁵⁵ N. Blokker, *Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations*, 7 IOLR 35 at 39.

¹⁵⁶ See M. Möldner, noting in particular that this provision does not have a corresponding one in the ARSIWA, in *Responsibility of International Organizations - Introducing the ILC's DARIO*, in A. von Bogdandy and R. Wolfrum, (Eds.), 16 MPYUNL 281 at 314 (2012).

Frontex is bound by the principle of *non-refoulement*¹⁵⁷ and therefore it could not commit itself acts resulting in violation of the principle. As to the binding decision, this could be perhaps recognized in operational plan, on the basis of which JOs are carried out, which is drawn up by Frontex' Executive Director. MS involved in Frontex-coordinated operations have to comply with this operational plan;¹⁵⁸ it is therefore binding, as the ECJ has implicitly confirmed.¹⁵⁹ Thus, one might argue that, were proved that this plan contains instructions in contravention of the organization's obligation (for instance: instructions as to interception, diversion and disembarkation without the necessary human rights guarantees) the responsibility of the EU may arise, following the rationale of article 17. On the other hand, to safely reach this conclusion, one should first have a clear understanding of the legal nature of the operational plan. The extent to which it can be considered a binding decision of the organization is however not clear: the plan also includes the necessary agreements with the MS involved in the operations, and therefore to some extent also MS can be seen as participating to the formation of the plan. This sheds some doubt on the conclusion that the plan can be considered as the binding decision required by article 17.

4. Responsibility: conclusion

The analysis carried out above shows that the EU could in theory incur responsibility for violations of human rights committed in the context of Frontex-led JO. In particular, by looking at the rules outlined in ARIIO, responsibility for aid and assistance to MS in the commission of a violation could easily be established. On a more general note, it can be reasonably argued that Frontex has the duty to ensure respect for the obligations relative to the protection of human rights and rescue at sea in the context of the operations it coordinates;¹⁶⁰ this is clearly established in its Regulation. Moreover, the prominent role of Frontex in evaluating, approving and coordinating proposal for such operations cannot be ignored: responsibility of the EU should be recognized proportionally.¹⁶¹ This, notwithstanding that the Regulation indicates an exclusive command of the host state over the vessels deployed in JO: this element certainly represents an important indicator that MS will bear responsibility for violations occurred in the context of these operations, but it does not detract from the previous conclusion. This argument can be proposed even more

¹⁵⁷ As are the MS, although this is not required; see ARIIO, Art. 17(3).

¹⁵⁸ Frontex Reg., Art. 8g(2.c).

¹⁵⁹ Case C-355/10, European Parliament v. Council of the European Union, Judgment of the Court (Grand Chamber) of 5 September 2012, OJ 2010 L 111, p.20; it was a decision on the Application for annulment of decision 2010/252/EU, which introduced additional rules governing border surveillance to the SBC. See Y. Pascouau, P. Schumacher, *Frontex and the Respect of Fundamental Rights*, Policy Brief for the European Policy Centre (EPC), 3 June 2014.

¹⁶⁰ See Rijpma, *supra* note 84 at 97 and Goodwin-Gill, *supra* note 137 at 453.

¹⁶¹ Council of Europe, Parliamentary Assembly, Doc. 13161, Report of the Committee on Migration, Refugees and Displaced Persons, 08 April 2013, *Frontex: human rights responsibilities*, at 12.

powerfully with reference to JO that are carried out by Frontex on its own decision and initiative. Indeed, notwithstanding EU MS responsibility for their own acts, Frontex is not relieved “of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate”.¹⁶² For instance, Frontex should bear the responsibility for not terminating an operation when there is evidence of violations of human rights.¹⁶³ More broadly speaking, responsibility should also be reconciled with competence; on this point it must be noted that, in the process of its expansion of the EU, a not insignificant transfer of competence has been realized from MS to the EU, also in the field of border control.¹⁶⁴ Consequently, it is reasonable to argue that responsibility of the EU, alongside that of MS, should also be recognized under this perspective.¹⁶⁵

In sum, the obligations to respect fundamental rights in border control activities are clearly binding on all the entities involved in these operations; therefore, all of those entities should bear responsibility for their violations where appropriate. In particular, where the responsibility of the EU is ascertained as arising from aid and assistance to MS (or otherwise), joint responsibility of the EU and the MS involved could be established.¹⁶⁶ As indicated in paragraph 1, this is a viable option when the conduct of two entities is closely intertwined and therefore it is particularly complex to apportion responsibility between them for the violations committed.¹⁶⁷ This is exactly the situation arising from the carrying out of Frontex JO, as also underlined by the European Ombudsman¹⁶⁸.

As to MS, we should recall the *Bosphorus* judgment; in that case the ECHR found that states are not absolved from complying with the Convention by the circumstance that their action is imposed by a binding act of the EU.¹⁶⁹ In the same way, here the transfer of competence does not excuse MS from respect of the Convention rights. Especially after the *Hirsi* judgment, states cannot be exculpated from inobservances of their obligations stemming from the ECHR, whether either acting alone or in joint ventures with other states, including in the context of Frontex operations. Furthermore, the recurrent reports of violations could perhaps rebut the presumption of ‘equivalent protection’ that represents the condition for the ECtHR not to assess respect of human rights at the EU level.¹⁷⁰

¹⁶² Frontex. Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011.

¹⁶³ See Chapter 2, para 3.1.

¹⁶⁴ European Parliament, Directorate General for Internal Policies, Citizens’ Rights and Constitutional Affairs, Justice, Freedom and Security, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office*, Study 2011.

¹⁶⁵ See the ITLOS Advisory Opinion of 2 April 2015; in the AO the Tribunal asserted the responsibility of the EU for conduct of a vessel of a MS, although in an area of exclusive competence of the organization, which also concluded the international agreement at issue in that case.

¹⁶⁶ See Nollkaemper, *supra* note 107 at 19.

¹⁶⁷ *Id.*

¹⁶⁸ Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Decision of 12 November 2013.

¹⁶⁹ See Chapter 1, para. 4.2.

¹⁷⁰ L. Marin, *Protecting the EU’s Borders from ... Fundamental Rights? Squaring the Circle Between Frontex’s Border Surveillance and Human Rights*, in R.L. Holzhaecker, P. Luif (Eds.), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty*, at 98 (2014).

5. Remedies?

Starting from the premise that violations of human rights may and do occur in the context of JO carried out by Frontex, the issue arises of what possible remedies could victims resort to. On this point, it must be noted that pursuant to the amended Frontex Regulation, the Agency should put in place an effective mechanism to monitor respect for fundamental rights in all its activities.¹⁷¹ However, at the current stage the Fundamental Rights Strategy is limited to monitoring and reporting human rights violations. There is no possibility of complaint mechanism through which Frontex can be confronted with individual claims of people that believe that their rights have been infringed in the course of Frontex' activities.¹⁷² This, however, would be the best way to deal with complaints about violations of fundamental rights during Frontex-led operations, according to the Ombudsman.¹⁷³

At the current stage, it is not possible to bring a claim to the ECtHR for a breach of the Convention committed by the EU. However, in the future this possibility may become concrete. If -or when- this will happen, in the event of a claim brought to the Court by an alleged victim of violations of human rights committed in the context of Frontex-led operations, the hypothesis of establishing the responsibility of the EU for Frontex' conduct would be realistic. The Court could for this purpose refer to the ARIIO, as it did elsewhere,¹⁷⁴ as guidelines for the ascertainment of responsibility. This would probably represent the most powerful and effective remedy for victims.

As judicial remedies to hold IOs accountable for human rights violations lack on the international level, possible victims are at left with domestic remedies; indeed, domestic courts of the MS of the EU are the primary fora for the enforcement of EU law.¹⁷⁵ This includes the Charter of Fundamental Rights, which is addressed "to the institutions and bodies of the Union",¹⁷⁶ including EU Agencies. Therefore, it is by hypothesis conceivable that an individual would bring a claim before the judicial authorities of a MS responsible for human rights violations in execution of a Frontex operational plan.¹⁷⁷ In this case, where appropriate, the EU's responsibility could also be also asserted as indicated.

¹⁷¹ Frontex Reg., Art. 26(a).

¹⁷² Special Report of the European Ombudsman, *supra* note 168.

¹⁷³ *Id.*

¹⁷⁴ Behrami and Saramati *supra* note 143 para. 107.

¹⁷⁵ The issue of possible remedies under EU law will not be addressed, as it goes beyond the scope of this thesis.

¹⁷⁶ EU Charter of Fundamental Rights, Art. 51(1).

¹⁷⁷ See European Parliament, Directorate General for Internal Policies, Citizens' Rights and Constitutional Affairs, Justice, Freedom and Security, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office*, Study 2011, at 82.

Conclusion

This chapter has showed the product of the interaction between the rules of international law on responsibility of IOs and the specific rules laid down for the functioning of Frontex, the Agency for the management of operational cooperation at the external borders of the EU. This analysis started from the premise that formally the host MS holds command and control of the vessels deployed in a given operation, and therefore will normally bear responsibility for violations arising therefrom;¹⁷⁸ nevertheless, it showed that, although Frontex presents itself as a mere coordinator of the action of MS in border control, the reality is less simple than it is depicted. In particular, by application of the ARIO rules it is possible to define and highlight (at least to a certain extent and on a theoretical level, in consideration of the lack of sufficient information) the legal basis on which also the EU could be held responsible for wrongful acts committed in that context. For instance, it would be relatively easy for a court or tribunal, endowed with the necessary jurisdiction, to find the EU liable for aid or assistance to a MS in the violation of the principle of *non-refoulement* committed during a Frontex-led operation. More difficult seems at the present stage to find that the EU should bear responsibility because it exercises effective control on other MS involved. However, it is worth repeating that any conclusion reached here as to the responsibility of the EU can only be hypothetical, given the lack of information as to what happens in practice in the course of Frontex-led JO. This is particularly true in reference to the effective power and control exercised by Frontex officers. In sum, some arguments can be made in support of the conclusion that, where appropriate in light of the factual circumstances, the EU could also bear responsibility for human rights violations at its external borders. However, the lack of available effective remedies remains a matter of serious concern, leaving individuals powerless to effectively react to violations suffered.

¹⁷⁸ See in particular Chapter 2, para. 2.2 and Chapter 3, para. 4.

GENERAL CONCLUSION

The declared purpose of this thesis was to ascertain whether there is a sound legal basis on which the EU could be held responsible for human rights violations that occur in the context, or are directly caused by, EU MS border control activities coordinated by Frontex. It is however important to reiterate that the enquiry carried out did not aim to put into question the responsibility of the relevant MS under international law for wrongful conduct attributable to them. Instead, the aim was to apply some of the general rules on international responsibility, adopted by the ILC in its work on responsibility of IOs, to Frontex, a EU Agency tasked with the coordination of border control measures taken by EU MS. The operation was a complex one, mainly in reason of the peculiarities stemming from the nature of the EU as an IO; its advanced integration and broad field of competence vis-à-vis its MS are amongst the factors deeply impacting on the relation between the organization and its MS as well as the organization and the sphere of general international law. Nevertheless, in reason of the underlying “unity within diversity”¹⁷⁹ of IOs, the task proved to be not impossible; this, notwithstanding the fact that the necessarily limited scope of this thesis did not allow for an adequate disquisition on the nature of Frontex as Agency of the EU, from the perspective of the balance of power between institutions and MS of the EU. Indeed, the aim of this thesis was limited to the international law perspective.

In order to reach its purpose, this thesis has developed through three preliminary steps: first, it has outlined the basic notions related to the nature of IOs and their responsibility under international law. Secondly, it has laid down the parameters necessary to weight Frontex’ role in the context of the operations it coordinates, with particular reference to the role of MS in the context of these operations and the legal framework regulating them. Thirdly, and conclusively, the rules on responsibility of IOs that appeared more suitable to the described situation were applied to Frontex (*rectius*: the EU) in order to ascertain whether the latter could be held responsible under international law for human rights violations. The outcome of this analysis is that, notwithstanding the narrative that sees Frontex as mere coordinator of states’ actions, the Agency plays in fact a prominent role; this role, under some conditions, could well entail the responsibility of the EU under international law. However, in drawing conclusions on this point, one is inescapably hampered by the lack of transparency surrounding Frontex’ activities: this is indeed a great obstacle to any ascertainment of responsibility of the EU, and constitutes a serious concern in itself, preventing also an effective political accountability of Frontex’ activities. In light of this lack of clear information, the analysis carried out could necessarily only be theoretical. Nevertheless, it is submitted that there is still value in drawing such hypothetical conclusions, as this may ultimately affect in a positive way compliance with human rights at Europe’s borders. Indeed, a blurred demarcation of responsibility between the entities taking part in border control operations is detrimental for the situation of individuals involved in these operations. In light

¹⁷⁹ See Schermers and Blokker, *supra* note 7, Introduction.

of this, the establishment of clear rules on responsibility has the potential to bring a positive change this situation: indeed, when the rules on responsibility are clear, all the entities involved in a given joint operation are incentivised to increase their effort in ensuring compliance with their obligations.

In conclusion, as long as Frontex' mandate will remain as it currently stands, this process of clarification of rules and responsibilities is necessary to respect the rule of law, one of the fundamental values on which the European Union takes pride in being founded on.

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