

Research Proposal:

# Liability for Human Rights Violations caused during Frontex- coordinated Joint Operations

Field of Law  
Public International Law  
European Union Law

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## 1 Background

### 1.1 Description of the Problem and Overall Research Objectives

Especially in recent times, the EU and its member states have been heavily criticized for their practices in the control of the EU external borders from a human rights perspective.<sup>1</sup> In a recent judgment, the Grand Chamber of the European Court of Human Rights [ECtHR] condemned the practice of interdicting vessels carrying migrants and forcibly returning them to the country of origin. These so-called 'push-backs', it ruled, violate the prohibition of *refoulement* as well as the prohibition of collective expulsion of aliens.<sup>2</sup> The case concerned the practices of Italy, handing migrants over to Libya on the basis of the bilateral 'Treaty of Friendship, Partnership and Cooperation', concluded in August 2008. In the immediate aftermath of these 'push-backs', UNHCR expressed deep concern and pointed out that even though it was considered likely that people in need of international protection were on board there was no 'proper assessment of their possible protection needs'.<sup>3</sup> Also Weinzierl and Lisson note that in these cases 'those on the vessel seeking protection are in practice refused access to asylum procedures'.<sup>4</sup> The action can furthermore 'have deadly consequences for those affected if they are forced to continue their journey in unseaworthy boats'.<sup>5</sup>

Within the period of time in which Italy conducted these 'push-backs', Frontex coordinated Joint Operation Nautilus 2009 was carried out. The EU 'Border Agency' Frontex was accused of having played a role in the circumstances that led to the 'push-backs' of the Italian authorities, which was, however, denied by Frontex.<sup>6</sup> Even though the relationship between Nautilus 2009 and the Italian 'push-backs' remains unclear,<sup>7</sup> as other Joint Operations show, interception and diverting back of vessels are practices also applied during Frontex-coordinated Operations. In Hera II for example, running from 11 August 2006 until 15 December 2006, the participating member states patrolled the coastal areas of Senegal, Mauritania, Cape Verde and the Canary Islands. The aim was to 'detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea'.<sup>8</sup> Hence, the primary goal was to prevent migrants from leaving the African coasts. If they had managed to do so, they were intercepted and handed over to

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<sup>1</sup> see for example: Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (September 2011); Parliamentary Assembly of the Council of Europe [PACE] 'The interception and rescue at sea of asylum seekers, refugees and irregular migrants' PACE Resolution 1821 (2011), para 5.4, holding that 'there are inadequate guarantees of respect for human rights and obligations [...] in the context of the joint operations it [Frontex] co-ordinates'; Human Rights Council, *Mission to Greece Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, March 4, 2011, A/HRW/16/52/Add.4; Human Rights Watch, *Pushed back, pushed around: Italy's Forced return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (September 2009).

<sup>2</sup> *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012, not yet reported).

<sup>3</sup> UNHCR, 'UNHCR deeply concerned over returns from Italy to Libya', Press Release 7 May 2009.

<sup>4</sup> Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights, December 2007) 22-23.

<sup>5</sup> *ibid* 22.

<sup>6</sup> Human Rights Watch, *Pushed back, pushed around* (n 1) 37; Violeta Moreno Lax, 'Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean' (2010) Working Paper Series RefGov-FR-28, 7; Frontex, 'Frontex not involved in diversion activities to Libya', Frontex Press Release 21 September 2009; Bernard Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 3, 34-35, who states that 'it is clear that Frontex has increased the possibilities for it [interdiction] to occur'.

<sup>7</sup> for a more detailed account of the circumstances of the case see Moreno Lax (n 6) 6-7.

<sup>8</sup> Frontex, 'Longest FRONTEX coordinated operation – HERA, the Canary Islands', Press Release 19 December 2006.

the authorities of the respective authority.<sup>9</sup> According to Frontex, more than 3.500 migrants were stopped close to African coast.<sup>10</sup> During Hera III, more than 1.000 migrants were diverted back to their points of departure at ports at the West African coast.<sup>11</sup>

Concerns regarding these and similar practices in the management of the external borders of the EU member states do not remain limited to the member states themselves but increasingly focus on the role of Frontex.<sup>12</sup> This has been especially highlighted in a recent Report of Human Rights Watch, where not only the ill treatment of migrants in Greek detention facilities was criticised but in particular the role Frontex and its RABIT operation played in this context.<sup>13</sup>

With increased frequency, ambiguities in the allocation of responsibilities for human rights violations during joint operations coordinated by the agency trigger concerns.<sup>14</sup> The recent amendments to the Frontex Regulation<sup>15</sup> did not remedy the existing challenges but arguably even intensified the gap in legal accountability by strengthening the role of the agency. In its opinion regarding the Commission's proposal for amendments to the Frontex Regulation, the European Parliament expressed its concern that '[t]he overall question of responsibilities between Member States' officers, the host Member State border officers and Frontex' personnel remains unclear and ambiguous'.<sup>16</sup>

Frontex frequently recalls its mere coordinative function and highlights the primary responsibility of the member states.<sup>17</sup> Others emphasize that the role of the agency often goes beyond and involves considerable discretion and control over the operations, which might trigger the agency's liability. It is argued that its legal basis shows that it was not intended to merely coordinate national police forces.<sup>18</sup> It is also reasoned that despite the formal restriction to a coordinating role, some activities of Frontex also go beyond and are of a more operational nature.<sup>19</sup> Especially under the amended Regulation, according to Guild a.o., Frontex is 'sufficiently capable to supervise Member State actions' and cannot

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<sup>9</sup> Sergio Carrera, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands' (2007) CEPS Working Document No. 261, 21.

<sup>10</sup> Frontex, 'Longest FRONTEX coordinated operation – HERA, the Canary Islands' (n 8).

<sup>11</sup> Frontex, 'Hera III operation', Press Release 13 April 2007.

<sup>12</sup> see references at n 1.

<sup>13</sup> Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (September 2011).

<sup>14</sup> for example: Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 229, 233-36; Moreno Lax (n 6) 4; Elspeth Guild and others, '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 requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2011, 19, 83-87; Human Rights Watch, *The EU's Dirty Hands* (n 1); PACE (n 1) para 10, expressing its concern 'about the lack of clarity regarding the respective responsibilities of European Union states and Frontex'.

<sup>15</sup> Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EU) 1168/2011 of 25 October 2011, [2011] OJ L304/1, hereinafter 'Frontex Regulation'.

<sup>16</sup> Opinion of the Committee on Foreign Affairs regarding the amendments to the Frontex Regulation, 2010/0039(COD), 18 January 2011, 3.

<sup>17</sup> see for example Ilkka Laitinen, 'Frontex – Facts and Myths', News Release of 11 June 2007; interview with Gil Arias, Deputy Executive Director of Frontex, conducted by Human Rights Watch, *The EU's Dirty Hands* (n 1) 16; with regard to detention on the territory of the Member States see Frontex, 'Frontex's Reaction to HRW report', News Release of 21 September 2011.

<sup>18</sup> Andreas Fischer-Lescano and Timo Tohidipur, 'Europäisches Grenzkontrollregime: Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX' (2007) 67 ZaöRV 1231.

<sup>19</sup> Guild and others (n 14) 18.

‘evade scrutiny of its actions merely by invoking the liability of the Member State’.<sup>20</sup> Baldaccini notes that Frontex’ ‘responsibilities derive from its planning and coordinating role’ and that once the Union acceded to the ECHR, Frontex can be ‘directly accountable before the European Court of Human Rights for violations of fundamental rights protected under the ECHR’.<sup>21</sup> It is also stressed that decisions of the agency have a strong *de facto* binding force,<sup>22</sup> that Frontex has considerable discretion in planning its operations<sup>23</sup> and exercises a sufficient degree of control over the operations in order to make the agency itself liable for human rights violations occurring during Joint Operations<sup>24</sup>. The Commission in its impact assessment accompanying its proposal for amendments to the Frontex-Regulation explicitly raised the issue, that the enhanced role of Frontex taking effect with the entry into force of the amendments might have an impact with regard to liability for fundamental rights violations in that it would possibly increase the risk of exposing Frontex to liability due to the fact that it would be more involved in concrete operations and because of the co-lead role in operations.<sup>25</sup>

This illustrates that when it comes to bearing responsibility, the member states and Frontex continue blaming each other for the human rights violations occurring during Frontex-coordinated Joint Operations. This lack of transparency represents a serious challenge for individuals wanting to bring a claim, which can amount to a denial of access to justice. The importance of remedying breaches for a legal order based on the rule of law requires that liability for damages suffered should be clear, transparent and unambiguous. This is especially so, in the case of border control, which in general is a highly human rights sensitive activity, often touching upon most basic human rights of applicants who are from the outset often in a vulnerable position. As Baldaccini notes, ‘[e]stablishing proper public and legal accountability with respect to Frontex is of critical importance given that there is profound concern on the human rights impact of its operations’.<sup>26</sup>

As the European Union legal order is based on the rule of law,<sup>27</sup> ‘neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.<sup>28</sup> This core feature of the Union legal order is illustrated by the obligation incumbent on the Union and its member states by virtue of Article 340(2) TFEU<sup>29</sup> to make good damage caused by illegal action of its organs.<sup>30</sup> Article 41(3) of the Charter of Fundamental Rights of the European Union, which has become legally binding with the entry into force of the Lisbon Treaty, reiterates Article 340(2) TFEU. This explicit reference to the action for damages ‘cannot help but cement its linkage to the right to good administration and the

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<sup>20</sup> *ibid* 85.

<sup>21</sup> Baldaccini (n 14) 234, 238.

<sup>22</sup> Human Rights Watch, *The EU’s Dirty Hands* (n 1) 38.

<sup>23</sup> *ibid* 50.

<sup>24</sup> Amnesty International and ECRE, ‘Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)’, September 2010, 13.

<sup>25</sup> European Commission, ‘Impact Assessment’, SEC(2010) 149, Brussels 24 February 2010, 27, 29-30.

<sup>26</sup> Baldaccini (n 14) 238.

<sup>27</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, hereinafter ‘TEU’, art 2.

<sup>28</sup> Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, para 23.

<sup>29</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, hereinafter ‘TFEU’.

<sup>30</sup> Ton Heukels and Alison McDonnell, ‘The Action for Damages in a Community Law Perspective: Introduction’ in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004) 1, 8.

importance of remedying breaches committed by the Union in this context'.<sup>31</sup> Also under international law, a breach of an international obligation triggers the responsibility of the state or the international organisation the breach can be attributed to and gives rise to a requirement for reparation. Responsibility of subjects of international law for internationally wrongful acts constitutes a fundamental principle of international law.<sup>32</sup> Article 13 of the European Convention on Human Rights [ECHR], to which it is envisaged that the EU will accede, grants everyone who has suffered a human rights violation contrary to the ECHR, the right to an effective remedy.

The objective of this thesis is to allocate liability for human rights violations occurring during Frontex-coordinated joint operations. In particular the unresolved question whether Frontex itself bears responsibility in these cases will be analysed in detail. Responsibility will be examined under two legal frameworks, namely EU law and public international law. Liability under EU law would have the advantage for the individual that it could directly bring a claim without having to rely on its state of nationality. As opposed to this, under international law, the individual largely still depends on the will of its state of nationality to pursue a claim. This, however, is different under the ECHR, where individuals are granted direct access to the ECtHR. Against the background of the on-going negotiations regarding accession of the EU to the ECHR and the concomitant possibility of directly claiming responsibility of the EU, responsibility under international law also needs to be analysed. The thesis will, however, not deal with responsibility arising under the national legal systems of the member states. It would go beyond the scope of this work to analyse the responsibility of each individual member state according to their national laws. Furthermore, as regards responsibility of Frontex or the EU, this can generally only be invoked in the courts of the EU or international courts, not, however, before national courts.

## 1.2 State of the Art

There is extensive academic work on the action for damages in EU law in general, including the collected articles edited by Heukels and McDonnell,<sup>33</sup> the monograph written by Czaja<sup>34</sup> and the volume edited by Biondi and Farley.<sup>35</sup> However, the allocation of liability in cases where two or more public actors are involved has not received much scholarly attention.<sup>36</sup> Nevertheless, as Anagnostaras stated 'the often neglected causality factor gives rise to much more interesting problems in practice than what the scarcity of academic literature on the point would seem to suggest' and identified situations of closely intertwined action of the Union and member states as one of them.<sup>37</sup>

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<sup>31</sup> Kathleen Gutman, 'The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection' (2011) 48 CMLR 695, 703.

<sup>32</sup> Malcolm Shaw, *International Law* (6<sup>th</sup> edition, Cambridge University Press 2008) 778.

<sup>33</sup> Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004).

<sup>34</sup> Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe* (Nomos 1996).

<sup>35</sup> Andrea Biondi and Martin Farley, *The Right to Damages in European Law* (Kluwer 2009).

<sup>36</sup> Peter Oliver, 'Joint Liability of the Community and the Member States' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004) 285, 285.

<sup>37</sup> Georgios Anagnostaras, 'Not as unproblematic as you might think: the establishment of causation in governmental liability actions' (2002) 27 *European Law Review* 663, 675.

The most extensive research on this issue has been provided by Säuberlich who developed an elaborate conceptual framework.<sup>38</sup> The works of Renzenbrink<sup>39</sup> and Oliver<sup>40</sup> provide for valuable insights with regard to the allocation of responsibility between the Union and the member states and the procedural challenges. In international law, the question of allocation of responsibility between and international organisation and its member states has received scholarly attention especially in relation to peace-keeping operations under the auspices of the United Nations.<sup>41</sup> The discussion has received a new impetus, with two diverging judgements of the ECtHR on this issue.<sup>42</sup> As regards the evolution of EU border control and its regulatory framework, including Frontex, Rijpma has completed extensive research.<sup>43</sup> Fischer-Lescano and Tohidipur,<sup>44</sup> Carrera,<sup>45</sup> and Baldaccini<sup>46</sup> provided insights regarding the legal framework of Frontex, the implementation of joint operations and the challenges in relation to the work of the agency.

In this thesis, the principles regarding attribution of responsibility in multi-actor situations will be applied to the particular situation of Frontex-coordinated joint operations. The outcome of the proposed thesis will close an important gap in scholarly research. Even though considerations from the perspective of the rule of law, legal certainty and access to justice strongly mandate clarity and transparency in the allocation of responsibility for human rights violations, the legal ambiguities persist. Furthermore, this research is of great societal value, as it will improve the uncertainty victims of human rights violations currently face as regards the respondent of their claim.

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<sup>38</sup> Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhältnisse* (Springer 2005).

<sup>39</sup> Ulf Friedrich Renzenbrink, *Gemeinschaftshaftung und mitgliedstaatliche Rechtsbehelfe: Vorrang, Subsidiarität oder Gleichstufigkeit?* (Peter Lang 2000).

<sup>40</sup> Oliver (n 36).

<sup>41</sup> see for example: Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltung* (Peter Lang 2004); Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces' (1976) 32 *Revue Egyptienne de Droit International* 57; James W Houck, 'The Command and Control of United Nations Forces in the Era of Peace Enforcement' (1993) 4 *Duke Journal of Comparative and In Law* 1; Torsten Stein, 'Attribution of Possible Internationally Wrongful Acts: responsibility of NATO or of its Member States?' in Christian Tomuschat (ed) *Kosovo and the International Community: A legal Assessment* (Kluwer Law International 2002) 181; Kirsten Schmalenbach, 'Third party Liability of International Organizations. A Study on Claim Settlement in the Course of Military Operations and International Administration', *International Peacekeeping – The Yearbook of International Peace Operations* 10/2006, 33.

<sup>42</sup> Joined Cases *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/01 and 78166/01, Grand Chamber Decision of 2 May 2007; Case of *Al-Jedda v The United Kingdom*, App No 27021/08, Grand Chamber Judgment of 2 July 2011; for many others see: Caitlin A Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010) 42 *International Law and Politics* 501; Marko Milanović and Tatjana Papić, 'As Bad as it Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267; Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*' (2009) 11 *International Community Law Review* 155; Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 *Human Rights Law Review* 151.

<sup>43</sup> Jorrit Rijpma, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (PhD thesis, European University Institute Florence 2009).

<sup>44</sup> Fischer-Lescano and Tohidipur (n 18) 1219.

<sup>45</sup> Sergio Carrera, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands' (2007) CEPS Working Document No. 261.

<sup>46</sup> Baldaccini (n 14).

## 2 Specific Aims

### 2.1 Main Research Objectives

The main research question to be analysed in this thesis is

*Can Frontex itself / the EU be liable for rights violations occurring during Frontex-coordinated joint operations?*

By reason of the specific characteristic of the work of Frontex, an individual willing to bring a claim against the agency faces a number of hurdles. There is often no direct contact between the agency and the individual, rendering it difficult to establish a causal link between the action of the agency and human rights violations suffered. As Guild a.o. call it, the 'multi-actor nature' of the agency's operational activities complicates the determination of the responsible body.<sup>47</sup> The actors involved belong to different legal systems that are closely intertwined, especially because the execution of Union legislation and policy is usually entrusted to the member states. In cases where the root causes of human rights violations suffered can be found in acts of both, the Union and its member states, the allocation of liability can prove considerably challenging.<sup>48</sup> The difficulty of identifying the responsible body in substantive terms is reinforced by the procedural complexity. In disputes relating to non-contractual liability of the Union, the European Court of Justice is exclusively competent to give final judgement.<sup>49</sup> A member state's liability on the other hand, can only be determined by its own national courts.

The determination of the liable body therefore requires the following questions to be answered:

- a) What are the principles for the allocation of responsibility in multi-actor-situations under EU law?
- b) What are the principles for the allocation of responsibility in multi-actor-situations under international law?
- c) What is the nature of the tasks of Frontex and the member states respectively? How much choice do Frontex and the member states enjoy respectively in taking their decisions?
- d) What is the outcome of the application of the principles elaborated in a) and b) to the specific situation of Frontex-coordinated joint operations as analysed in c)?

The application of the EU law principles will show whether Frontex can be held liable under EU law. The application of the international law principles will show whether the Frontex, in case it has international legal personality, or the EU, in case Frontex itself does not possess international legal personality, can be held responsible under international law.

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<sup>47</sup> in more detail see Chapter 2.2 and 2.3; Guild and others (n 14) 83; see also Opinion of the Committee on Foreign Affairs regarding the amendments to the Frontex Regulation (n 16) 83.

<sup>48</sup> see for example: Anagnostaras (n 37) 664-69; Säuberlich (n 38) 91; Czaja (n 34) 39, 43-44; Maartje de Visser, 'The Concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A one-way Ticket into Oblivion?' (2004) 22 Maastricht Journal of European and Comparative Law 47, 51; Francette Fines, 'A General Analytical Perspective on Community Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004) 11, 17.

<sup>49</sup> TFEU (n 29) arts 268 and 274.



The research will hence consist of elaborating the principles governing allocation of liability in multi-actor-situations, first, under EU law and, second, under public international law. These principles will then be applied to Frontex-coordinated joint operations, taking into account the specific characteristics of border control. For this purpose, the nature and effects of the respective tasks of the actors involved have to be determined. It will be of crucial importance to assess the degree of actual choice Frontex and the member states respectively enjoy in taking their decisions. The aims and challenges of each of the three steps will be outlined in more detail in the following three sections.

## **2.2 The Action for Damages in EU Law**

### **2.2.1 General Principles**

Claims against the agency as well as against the member states have their basis in EU law. The non-contractual liability of Frontex is governed by Article 19(3) which stipulates:

In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

Article 19(3) is a replication of Article 340(2) TFEU, governing the non-contractual liability of the European Union, which is a common approach chosen for Regulations establishing EU agencies.<sup>50</sup> Whereas the liability for Frontex is explicitly mentioned, the liability of the member states arising from EU law was developed by the ECJ starting with its well-known *Francoovich* ruling.<sup>51</sup> Nevertheless, the court has held that the elements of non-contractual liability of the Union and of the member states match each other.<sup>52</sup> No matter whether the Union or the member states are concerned, liability presupposes the existence of actual damage, unlawful conduct and the existence of a causal link between the conduct and the harm alleged.<sup>53</sup>

In general, the court seemed to have been of the opinion that it is either the Union or the member state that is liable so that they cannot be jointly liable for an injuring act. However, in *Kampffmeyer* it at least accepted the possibility of joint liability of the Union and the member states, even though staying the proceedings until the German courts decided.<sup>54</sup>

Only an injuring act that can be imputable to an actor triggers liability. Hence, imputability is the link between the damage and the illegal act on the one hand and the actor on the other hand. As the legal orders of the Union and its member states are closely intertwined, often root causes of damage suffered can be found in acts of both, the Union and its member states. In these cases the allocation of liability can prove considerably challenging. It is necessary to determine whether one act breaks the causal chain of another or whether they can both be liable.

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<sup>50</sup> Paul Craig, *EU Administrative Law* (OUP 2006) 164; Ronald van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance' in Deidre Curtin and Ramses Wessel (eds), *Good Governance and the European Union* (Intersentia 2005) 125, 147.

<sup>51</sup> Joined Cases C-6/90 and 9/90 *Francoovich and Bonifaci v Italy* [1991] ECR I-5357.

<sup>52</sup> Joined Cases C-43/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para 42.

<sup>53</sup> for example: Case C-414/08 P *Sviluppo Italia Basilicata v Commission* [2010] ECR I-2559, para 138; C-419/08 P *Trubowest Handel and Viktor Makarov v Council and Commission* [2010] ECR I-2259, para 40; Case 4/69 *Lütticke v Commission* [1971] ECR 325, para 10.

<sup>54</sup> Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and others v Commission* [1967] ECR 245; Oliver (n 36) 288; Christopher Harding, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 CMLR 389, 402-405.

### 2.2.2 Multi-Actor Situations and their Consequences

Member states are usually entrusted with the execution of secondary Union legislation. In the case-law of the ECJ, where member states merely execute unlawful secondary Union legislation, the damage is imputed exclusively to the Union.<sup>55</sup> As soon as the member state authorities themselves engage in wrongful conduct, even where they are acting within the framework of Union law, liability is shifted to them.<sup>56</sup> This could for example be the exercise of a margin of discretion in the performance of their duties resulting in damage.<sup>57</sup>

Not always is the 'true author of the illegal act'<sup>58</sup> as simple to detect. Even in cases where the national authority has *prima facie* engaged in wrongful conduct, in some instances they do so on the basis of guidance by Union institutions. This 'guidance' may range from mere recommendations, legal advices and administrative influence to legally binding instructions. Even where the Union intervention does not amount to a legally binding obligation for the member states, they might reach a considerable degree of factual binding force. It is within this sphere, where it is argued that the case-law of the court has not always been consistent.<sup>59</sup>

In *Krohn*, the ECJ held that 'the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to the Bundesanstalt [member state authority in that case], which was bound to comply with the Commission's instructions, but to the Commission itself'.<sup>60</sup> Hence, the competence of the Commission to give legally binding instructions to member states in applying Union rules shifts responsibility for damage to the Union. In *Sucri-mex*, the ECJ considered a telex message of the Commission as merely 'part of the internal co-operation between the Commission and the national bodies responsible for applying Community rules [which] [...] cannot make the Community liable to individuals'.<sup>61</sup> Similarly, in *Sunzest*, a letter containing 'not a decision but merely an opinion of the Commission's staff, with no effect in law' did not incur the Union's liability.<sup>62</sup> Hence, mere recommendations, legal advices or similar kinds of interferences, as opposed to legally binding instructions, do not trigger a shift of liability to the Union. In the view of the court, in these cases member states merely choose to comply with the instructions given. These considerations even applied where the intervention of the Commission had produced considerable factual binding

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<sup>55</sup> for example: Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955, para 6; Case 59/83 *Biovilac v European Economic Community* [1984] ECR 4057, para 6; Case 81/86 *De Boer Buizen v Council and Commission* [1987] ECR 3677, para 8; Joined Cases C-104/89 and C-37/90 *Mulder and others and Otto Heinemann v Council and Commission* [1992] ECR I-3061, para 9; implicitly also Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975; Säuberlich (n 38) 111-13; de Visser (n 48) 56.

<sup>56</sup> Joined Cases 106 to 120/87 *Asteris and others v Greece and European Economic Community* [1988] ECR 5515, paras 19-20; Czaja (n 34) 39; A G Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004) 179, 193

<sup>57</sup> Säuberlich (n 38) 113-14.

<sup>58</sup> Anagnostaras (n 37) 664.

<sup>59</sup> Säuberlich (n 38) 6; Czaja (n 34) 43; Fines (n 48) 20; Biondi and Farley (n 35) 165.

<sup>60</sup> Case 175/84 *Krohn v Commission* [1986] ECR 753, para 23.

<sup>61</sup> Case 133/79 *Sucri-mex v Commission* [1980] ECR 1299, paras 22-23.

<sup>62</sup> Case C-50/90 *Sunzest v Commission* [1991] ECR I-2917, para 18; other cases concerning non-binding Union involvement see: Case 217/81 *Interagra v Commission* [1982] ECR 2233, para 8; Joined Cases 89 and 91/86 *Étoile Commerciale and CNTA v Commission* [1987] ECR 3005, paras 19-20; Case T-54/96 *Oleifici Italiani and Fratelli Rubino v Commission* [1998] ECR II-3377, para 67; Case 99/74 *Société des Grands Moulins des Antilles v Commission* [1975] ECR 1531, paras 18-24; Joined Cases 12, 18 and 21/77 *Debayser and other v Commission* [1978] ECR 553, paras 10-26.

effect on the member state authorities so that it was open to doubt how much choice the member states had actually left.

There have, however, been developments that seem to take this 'lack of actual choice' into account. In *KYDEP*, the ECJ held that 'it must be acknowledged that although the telex at issue had no binding force it was likely to prompt the competent authorities of the Member States' to comply with the Commission's opinion because they 'were at risk, had they ignored the interpretation given by the Commission in the telex at issue, of having the reimbursement of their expenditure'.<sup>63</sup> Also the General Court in *Geotronics* examined whether the behaviour of the Commission that guided the action of the member state authorities was lawful.<sup>64</sup>

Scholars hold differing views on the question of the principles governing allocation of liability in multi-actor-situations. Säuberlich is of the opinion that factual involvement of a Union body can neither establish liability of the Union nor exempt member states of their liability, even where this factual intervention develops a considerable binding force. The dividing line, between action leading to liability and action that does not, rests within the criterion of legal decision-making power.<sup>65</sup> His view is shared by Renzenbrink.<sup>66</sup> Czaja on the other hand advocates for the liability of the Union in cases where the intervention of Union bodies develops a strong factual binding force. She argues that the effects of such involvement of Union bodies should not be underestimated and emphasizes the strong factual binding force even where the formal decision-making power rests within the member states. In her view, in those cases, the Union organs have contributed to a greater degree to the damage and should therefore be liable.<sup>67</sup> Her view is shared by von Bogdandy and Jacob.<sup>68</sup> Biondi and Farley as well as Oliver also appear to be of this opinion when they describe the ECJ's ruling in *Sucrimex*<sup>69</sup> as harsh 'since it is clear that upon receiving such a telex, a Member State will almost certainly follow it, despite its non-binding nature'.<sup>70</sup>

It follows from this that an analysis of the nature of the tasks of Frontex and the member states in planning and carrying out joint operations will show whether Frontex or the member states bear liability.

### 2.2.3 Supervisory Powers and Responsibility

Even in cases where Union organs do not directly take part in the execution of secondary Union legislation, they can be involved by virtue of an obligation to make sure the member states act in accordance with the provisions of the Treaties. A breach of such an obligation can trigger liability because a Union body has disregarded a duty to prevent damage. A wide margin of discretion in exercising the supervisory functions or situations where the exercise would not have affected the

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<sup>63</sup> Case C-146/91 *KYDEP v Council and Commission* [1994] ECR I-4199, para 26.

<sup>64</sup> Case T-185/94 *Geotronics v Commission* [1995] ECR II-2795, para 39; Renzenbrink (n 39) 66; Armin von Bogdandy and Marc Jacob, 'Art. 340: Haftung der Union und ihrer Bediensteten' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (46st supplement, Beck 2011) para 65.

<sup>65</sup> Säuberlich (n 38) 87-97.

<sup>66</sup> Renzenbrink (n 39) 120.

<sup>67</sup> Czaja (n 34) 131-32.

<sup>68</sup> von Bogdandy and Jacob (n 64) para 65.

<sup>69</sup> see n 59.

<sup>70</sup> Biondi and Farley (n 59) 189; see also Oliver (n 36) 306.

conduct of the injuring national body will prevent the Union from being liable.<sup>71</sup> However, the ECJ accords certain types of supervisory functions the character of provisions for the protection of the individual.<sup>72</sup>

In *Vloeberghs AG* Roemer stated:

The fact that conduct contrary to the Treaty on the part of a Member State is at the commencement of a chain of cause and effect does not prevent the subsequent omission of the High Authority from being regarded as the direct cause of the damage. If the High Authority has failed to exercise its functions of supervision with regard to a Member State it is liable for the damage which follows from the original behavior of a Member State contrary to the Treaty.<sup>73</sup>

Hence, certain types of supervisory functions can trigger liability if they are not properly performed.<sup>74</sup> It follows from this that the supervisory tasks of Frontex will have to be analysed in detail in order to establish whether these tasks are capable of triggering liability.

## **2.3 Responsibility of International Organisations**

### **2.3.1 International Legal Personality**

Generally, the capability of possessing rights under international law and incurring international legal responsibility depends on the existence of international legal personality. Almost all EU agencies have been provided with legal personality.<sup>75</sup> This enables them to fulfil their tasks independently from the EU institutions.<sup>76</sup> In Article 15, the Frontex Regulation sets out that the agency 'shall have legal personality'. In the first place, this means that Frontex has the legal capacity to act within the national legal systems of the member states.<sup>77</sup> However, legal personality under national law has to be differentiated from legal personality under international law. The mere fact that an entity is granted legal personality on the national level does not mean that the same is true for the international plane. Some authors categorically deny the question of international legal personality of EU agencies.<sup>78</sup> Other authors detect certain indications of their international legal personality.<sup>79</sup> Based on an analysis of the wording of the Regulations establishing agencies and on the practice of working arrangements, Ott

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<sup>71</sup> Anagnostaras (n 37) 32; Marc H. van der Woude, 'Liability for Administrative Acts under Article 215(2) EC' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer 2004) 109, 118.

<sup>72</sup> Czaja (n 34) 122.

<sup>73</sup> Case 9 and 12/60 *Vloeberghs v High Authority of the European Coal and Steel Community* [1961] ECR 393, Opinion of AG Roemer, para 240; see also Toth (n 56) 193-94.

<sup>74</sup> the ECJ acknowledges such a possibility in Case 4/69 *Lütticke v Commission* [1971] ECR 325.

<sup>75</sup> Ronald van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance' in Deidre Curtin and Ramses Wessel (eds), *Good Governance and the European Union* (Intersentia 2005) 125, 132.

<sup>76</sup> Gregor Schusterschitz, 'European Agencies as Subjects of International Law' (2004) 1 *International Organizations Law Review* 163, 169.

<sup>77</sup> *ibid.*

<sup>78</sup> Waldemar Hummer, 'Von der "Agentur" zum "Interinstitutionellen Amt"', in Stefan Hammer and others (eds), *Demokratie und sozialer Rechtsstaat in Europa: Festschrift für Theo Öhlinger* (WUV 2004) 92, 107; Thomas Oppermann, *Europarecht* (3rd edn, Beck 2005) 130; however, see Thomas Oppermann, Claus Dieter Classen and Martin Nettesheim, *Europarecht* (4th edn, Beck 2009) 125, the reference to agencies not having international legal personality has been omitted.

<sup>79</sup> Schusterschitz (n 76) 172-74, 179-81; Léontin-Jean Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos 1977) 449, para 374.

argues that ‘some of these agencies could have acquired international legal personality or are on their way to achieving it’.<sup>80</sup> Most authors, however, reach the conclusion that agencies lack such capacity.<sup>81</sup>

Nevertheless, there is still the possibility that on the international plane, Frontex acts under the umbrella of the Union’s international legal personality. As an agency, Frontex was established on the basis of EU law and is hence an EU body. From the perspective of international law, the EU bears the responsibility for all its bodies and organs.

### 2.3.2 The Question of ‘Attribution’ or ‘Direct Incurrence’ of Responsibility

Every internationally wrongful act entails the international responsibility of the respective state or international organisation.<sup>82</sup> Hence, a violation of human rights in the context of Frontex-coordinated Joint Operations is in principle capable of triggering responsibility. Also under international law, the question of attribution becomes particularly challenging, where more than one actor is involved in a violation.

As Kuijper outlines,<sup>83</sup> there are two ways, an international organisation can be held responsible. The first case is where an international wrongful act can be attributed to that organisation.<sup>84</sup> An act is attributed to an international organisation where its organs or agents act.<sup>85</sup> In the case of the European Union, already this comparably simple provision poses difficulties in terms of responsibilities, as it might be unclear in a certain instance, for the purpose of responsibility, whether the relevant organ acts as an organ of the state or of the international organisation.<sup>86</sup> A further important possibility of attribution of responsibility is the exercise of ‘effective control’. The ILC Draft Articles on the Responsibility of International Organizations, which were adopted in 2011, contain a basic rule regarding state organs put at the disposal of an international organisation. The conduct of a state organ shall be considered an act of the international organisation ‘if the organization exercises effective control over that conduct’.<sup>87</sup> Therefore, the decisive criterion regarding attribution in these cases is the notion of ‘effective control’. The issue has especially arisen with regard to peace keeping operations under auspices of the United Nations. In two recent decisions, the ECtHR, invoking the ILC Draft Articles, had to address the actual meaning of this formula in such cases. Even though the cases concerned comparable circumstances, the Court came to opposite conclusions. Whereas in 2007 it

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<sup>80</sup> Andrea Ott, ‘EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law’ (2008) 13 *European Foreign Affairs Review* 515, 538.

<sup>81</sup> Robert Uerpman, ‘Mittelbare Gemeinschaftsverwaltung durch gemeinschaftsgeschaffene juristische Personen des öffentlichen Rechts’ (2000) 125 *Archiv des öffentlichen Rechts* 551, 583-84; Meinhard Hilf, ‘Die abhängige Juristische Person des Europäischen Gemeinschaftsrechts’ [1976] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 551, 583; Schusterschitz (n 76) 171.

<sup>82</sup> International Law Commission, ‘Draft Articles on the Responsibility of International Organizations’, 2011 *Yearbook of the International Law Commission*, vol II, Part Two, art 3 [DARIO]; International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’, 2001 *Yearbook of the International Law Commission*, vol II, Part Two, art 1 [DASR].

<sup>83</sup> Pieter Jan Kuijper, ‘Amsterdam Center for International Law: Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010) 7 *International Organizations Law Review* 9, 30.

<sup>84</sup> Conversely, of course, where the act is attributable to a state, the state is responsible.

<sup>85</sup> DARIO (n 82) art 6.

<sup>86</sup> Kuijper (n 83) 15.

<sup>87</sup> DARIO (n 82) art 7.

attributed effective control to the United Nations in respect to the mission in Kosovo,<sup>88</sup> in 2011 it held ‘that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force’ in Iraq and thus held the UK accountable.<sup>89</sup> As this shows, the exact meaning of the notion of ‘effective control’ is far from clear. As Shaw noted ‘Much will depend upon the circumstances of the operation in question and the nature of the link between the offenders and the UN.’<sup>90</sup> Kuijper argues that where member states directly apply legislation and implement policies of an international organisation, ‘the State’s veil should be removed’ and ‘the attribution should be to the organisation’ for which they act.<sup>91</sup>

Even where an act is not attributable to an international organisation, it can under certain circumstances be held accountable. This concerns cases where an internationally wrongful act is attributable to a state, but there is a mechanism by which the international organisation directly incurs responsibility. This can come about by rendering aid and assistance or exercising control and direction over the entity to which the wrongful conduct is attributed to. Whereas it seems that direct incurrence of responsibility makes shared responsibility possible, as Kuijper notes ‘shared responsibility through shared attribution’ is not a permissible construction of attribution.<sup>92</sup>

This shows that it is again warranted to analyse the nature and tasks of Frontex and the member states during joint operations in order to establish who exercises ‘effective control’ and as a result bears responsibility. In addition, the mechanisms for shared responsibility will have to be related to the specific situation of Frontex joint operations.

## **2.4 Application to Frontex-coordinated Joint Operations**

Frontex’ legal bases are Articles 77(2)b and d and 74 TFEU. Its tasks include the coordination of the operational cooperation between member states in the field of management of external borders, risk analysis, training of border guards, monitoring and contributing to relevant research, assistance to member states in circumstances requiring increased technical and operational assistance at the external border, setting up European Border Guard Teams and coordination or organisation of joint return operations.<sup>93</sup>

In the case of Frontex-coordinated joint operations, Frontex emphasizes that ‘Member States remain primarily responsible [...] for the respect of fundamental rights’. It, however, also states that

This does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all its activities.<sup>94</sup>

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<sup>88</sup> Joined Cases *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/01 and 78166/01, Grand Chamber Decision of 2 May 2007.

<sup>89</sup> Case of *Al-Jedda v The United Kingdom*, App No 27021/08, Grand Chamber Judgment of 2 July 2011.

<sup>90</sup> Shaw (n 32) 1313.

<sup>91</sup> Kuijper (n 83) 31.

<sup>92</sup> *ibid* 30-1.

<sup>93</sup> Frontex Regulation (n 15) arts 2-14.

<sup>94</sup> Frontex, ‘Frontex Fundamental Rights Strategy’, endorsed by the Management Board on 31 March 2011, art 13.

This statement entails references to two distinct functions of Frontex. First, it remains fully accountable for its own actions and decisions that it takes as a coordinator. Indeed, whenever human rights violations suffered by an individual are attributable to Frontex' coordinating activities, Frontex will either, under European Union law, itself be liable under Article 19(3),<sup>95</sup> or, under international law, the European Union bears responsibility for its agency. Second, Frontex has an obligation to monitor the joint operations and ensure that conditions are in place for securing fundamental rights compatible activities. Where a breach of the obligations of the member states occurs that Frontex was, under European Union law, under an obligation to prevent, Frontex could be liable together with the member state. In addition, the EU could be responsible together with the respective member state under international law in case Frontex can be said to incur responsibility on the basis of rendering aid and assistance or exercising control and direction over the state to which the human rights violation is attributed to.

As outlined above, under EU law as well as under international law, there are two broad scenarios. First, the multi-actor situation in a narrower sense, ultimately resulting in the question which actor constitutes the more proximate cause for the human rights violation and who the breach will be attributed to. Second, there are the cases where the violation is attributed to one body, but the other, in addition, incurs liability for a specific reason. In EU law, this could be a breach of a duty to prevent a violation, under international law, the basis could be rendering aid and assistance or exercising control and direction.

As regards the multi-actor-situation in a narrower sense, it is crucial to analyse the degree of choice the actors involved enjoy in taking their decisions. Hence, it is necessary to clearly identify the nature of the tasks of Frontex and the member states respectively. It will furthermore be necessary, to analyse how Articles 10(b) and (c) of the Frontex Regulation dealing with civil and criminal liability relate to the questions at stake. It will have to be elaborated whether the extensive tasks of Frontex may have implications for its liability.

Frontex enjoys a broad range of powers in the planning as well as the implementing phase of joint operations. According to Article 3 Frontex Regulation, the agency shall evaluate, approve and coordinate proposals for joint operations at the external borders and may itself initiate and carry out joint operations in cooperation with the member states concerned. The Executive Director of Frontex is in charge of drawing up the operational plan, the core element in planning a joint operation containing all the aspects considered necessary for carrying out the joint operation. The operational plan is subject to final agreement by the host member states. Participating member states are consulted.<sup>96</sup> In the implementation of joint operations, Frontex takes a co-leading role.<sup>97</sup> The agency can be involved with human resources and/or technical equipment. As regards the former, under the amendments to the Frontex Regulation, the common name for teams deployed during Frontex

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<sup>95</sup> compare Jorrit Rijpma, 'EU Border Management after the Lisbon Treaty' (2009) 5 Croatian Yearbook of European Law and Policy 121, 139, in relation to liability for coordinating activities, Rijpma notes that 'A wrongful act that would be directly imputable to the co-ordinating activities of the EU could result in the non-contractual liability of the EU on the basis of Article 288(2) EC.'

<sup>96</sup> *ibid* art 3a.

<sup>97</sup> 'co-commanding role': Ilkka Laitinen cited in Frontex, 'Frontex's Reaction to HRW report', News Release of 21 September 2011; 'co-leading role': Council of the European Union, 'New rules on Frontex adopted: Strengthening the European external borders agency' Luxembourg, 10 October 2011, Press Release, 15208/11; Amnesty International and ECRE (n 24) 13; European Commission, 'Impact Assessment' (n 25) 29-31; Guild and others (n 14) 23.

operations is 'European Border Guard Teams'. Instructions to the European Border Guard Teams shall be issued by the host member state in accordance with the operational plan. The agency via its coordinating officer may communicate its views on those instructions to the host member state, who shall take those views into considerations. A further possibility created with the amendments to the Frontex Regulation is the secondment of national experts to Frontex.<sup>98</sup> As regards the involvement with technical equipment, with the amendments to the Frontex Regulation the agency gained the capacity to acquire or lease itself or in co-ownership with member states equipment to be deployed during joint operations. Any equipment available to the agency, either put to its disposal by a member state or owned by the agency, is registered in a centralised record called Technical Equipment Pool.<sup>99</sup> An example of tasks frequently assumed by deployed guest officers include nationality-determination screenings conducted by debriefing/screening experts deployed by Frontex.<sup>100</sup> After these interviews the experts usually make recommendations to the host member state as to the nationality of the irregular migrant. Even though these are not formally binding, it has been contended that under certain circumstances they can develop a strong *de facto* binding force.<sup>101</sup>

Hence, the factors to be taken into account in assessing the allocation of responsibility include that its risk analysis has a strong influence on the implementation of joint operations, that Frontex itself can initiate joint operations and that it has the possibility to lease or buy equipment on its own. In planning joint operations, it has an important role in drafting the operational plan and in the actual implementation Frontex enjoys a co-commanding or co-leading role.

As regards the second scenario, in particular Frontex' supervisory tasks will be analysed in detail. A newly introduced obligation incumbent on Frontex is its Executive Director's duty to 'suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that violations concerned are of a serious nature or are likely to persist'.<sup>102</sup> This obligation has received very little attention. Neither the academic debates nor NGO reports seem to attach major significance to this duty, which, however, is also due to its very recent introduction. As outlined above, certain supervisory functions that are classified as provisions for the protection of the individual are capable of triggering liability. A side effect of this newly introduced obligation of Frontex might therefore that it has implications for the agency's liability.

### 3 Methodology

The first part will consist of a legal analysis in order to develop the general principles governing responsibility in multi-actor situation and liability triggered by supervisory tasks, obligations to prevent damage and on direct incurrance of responsibility. For this purpose, the relevant legal documents and the corresponding case-law of the Court of Justice of the European Union and international courts will be analysed and interpreted. In addition, practice under international law regarding responsibility of international organisations especially for human rights violations occurring in the framework of peace-keeping operations will be considered.

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<sup>98</sup> Frontex Regulation (n 15) art 3c.

<sup>99</sup> *ibid* art 7.

<sup>100</sup> for example: Joint Operation Hermes 2011 see Frontex, 'Hermes 2011 Starts Tomorrow in Lampedusa', News Release of 19 February 2011; RABIT 2010 and Joint Operation Poseidon 2011 see Human Rights Watch, *The EU's Dirty Hands* (n 1); Joint Operation Hera I see Frontex, 'Longest FRONTEX coordinated operation – HERA, the Canary Islands' (n 8).

<sup>101</sup> Human Rights Watch, *The EU's Dirty Hands* (n 1) 38.

<sup>102</sup> Frontex Regulation (n 15) art 3(1a).



The second part will consist of a legal as well as an empirical analysis for the purpose of establishing the legal and the *de facto* decision-making power in planning and during the implementation of joint operations. As the legal determination of the allocation of responsibility depends on the power structures and decision-making authority, this part of the research is crucial for reaching the conclusion. Hence, in a first step, the legal provisions related to decision-making power during joint operations will be analysed. In a second step, the actual practice before and during joint operations will be analysed. Due to the lack of information related to the question of the *de facto* decision-making power in the planning and during the implementation of joint operations, the empirical research will serve the purpose of closing this transparency gap. The empirical analysis will consist of interviews with Frontex officials as well as member state officials having been deployed to Frontex-coordinated joint operations. This will allow establishing clarity with regard to the chain of command during joint operations, the decision-making authority, risk management and the internal mechanisms to prevent or remedy related deficiencies.

The third part will consist of a legal analysis with the ultimate objective of establishing responsibility for human rights violations occurring during Frontex-coordinated joint operations. The outcome of the analysis of the legal provisions related to decision-making power during joint together with the results of the empirical analysis will allow deducing the decision-making authority and power structures that govern the planning and implementation of joint operations. These structures, in turn, constitute the core element upon which the legal determination of the allocation of responsibility depends. Hence, relating the findings in relation to the power structures to the general principles as elaborated in part one will establish legal responsibility.

In a final step, the findings of part three need to be translated into workable principles governing concrete human rights violations. For this purpose, the results will be related to the general system of access to justice of the European Union as well as the possibilities of the individual to act under international law. With these principles, the individual will be enabled to institute proceedings against the accurate respondent before the proper court.

#### **4 Work Procedure and Time Schedule**

In order to achieve the research objective, in a first step, the principles governing allocation of liability have to be elaborated. Therefore, the first six months (July to December 2012) will be devoted to research on this question in the context of European and International law. This part of the research will mainly be conducted at the University of Vienna.

In order to later apply the general principles to Frontex-coordinated joint operations, it is important to draw a clear picture of the nature of the work of Frontex and responsibilities and tasks of the agency and the member states respectively. First, a profound understanding of the organisational structure, working methods, decision-making procedures and internal processes of Frontex is necessary. It would be ideal to carry out research on these issues in Warsaw, Poland, the headquarters of the agency. For this purpose, the PhD candidate is in contact with Frontex and already received promising feedback. In case, however, it does not turn out to be possible, the research aim can nevertheless be achieved without major sacrifices. The research will be carried out at the University of Vienna and Leiden University instead. Especially Leiden University possesses a vast amount of relevant literature and the candidate will be able to draw on the experiences of the supervisor in Leiden with regard to the agency. This part of the research will be considerably time-consuming, as one of its purposes is to

close some of the existing transparency gaps with regard to the work of Frontex. Hence, the time span devoted to this research is from January to September 2013. Subsequently, in order to embed the work of Frontex into the broader picture, research on EU Immigration Law and the nature of EU agencies in general will be carried out. Due to its substantial amount of literature on EU migration law, this part of the research will be conducted at Leiden University from October 2013 to March 2014.

The general principles will then be applied to particular situation of Frontex joint operations. The outcome will show whether the action of the member states or Frontex constitutes a more proximate cause of the human rights violations occurred. The application of the general principles to the specific situation of Frontex-coordinated joint operations will be conducted from April 2014 to November 2014 at the University of Vienna and Leiden University. As a final step, from December 2014 to February 2015, the results of the research will be applied to practice. This especially includes addressing the issue how and where individuals will have to bring a claim. This part of the research will be conducted at the University of Vienna.

The time span from March to May 2015 will serve to revise the whole thesis. The thesis will be handed in in June 2015 and defended at Leiden University. Hence, the dissertation project in total will be concluded within 36 months. As from 1 January 2013, which represents the proposed start of the funding under the Doctoral Fellowship Programme of the Austrian Academy of Sciences, the duration of the research project would be 2 years and 6 months. Hence, the application for the scholarship is for 30 months.

<b>Time Span</b>	<b>Research Objective</b>	<b>Research Institution</b>
29/05/12	Presentation of the research project and lecture on the EU Agency Frontex.	Rijksuniversiteit Groningen
11/06/12	Presentation "The new Frontex Regulation: Potential and Weaknesses of its impact on Human Rights Protection in EU External Border Management" at the annual GRAMNet Conference	University of Glasgow
07-12/12	Allocation of responsibility in multi-actor situations	University of Vienna
01-09/13	Procedures and Decision Making of Frontex	6 months: Frontex headquarters, Warsaw 3 months: Leiden University
10/13-03/14	EU Immigration Law, EU Agencies	Leiden University
04-11/14	Allocation of responsibility in Frontex-coordinated Joint Operations	Leiden University University of Vienna
12/14-02/15	Application to Practice	University of Vienna
03-05/15	Revision	University of Vienna
06/15	Handing in of Thesis	
	Defence	Leiden University

## 5 References

- Anagnostaras G, 'Not as unproblematic as you might think: the establishment of causation in governmental liability actions' (2002) 27 *European Law Review* 663
- Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 *Human Rights Law Review* 151
- Baldaccini A, Guild E and Toner H (eds), *Whose Freedom, Security and Justice?* (Hart 2007)
- Bigo D and Guild E (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005)
- Biondi A and Farley M, *The Right to Damages in European Law* (Kluwer 2009)
- Boeles P, den Heijer M, Lodder G and Wouters K, *European Migration Law* (Intersentia 2009)
- Bogdandy A von, 'Das deutsche Staatshaftungsrecht vor der Herausforderung der Internationalisierung: Zum Verhältnis von rechtlicher Gestaltungsmacht und Schadensverantwortung' (1997) 122 *Archiv des öffentlichen Rechts* 268
- Bogusz B, Cholewinski R, Cygan A and Szyszczak E (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004)
- Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces' (1976) 32 *Revue Egyptienne de Droit International* 57
- Busuioac M, Groenleer M and Trondal J (eds), *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making* (Manchester University Press, forthcoming May 2012)
- Carrera S, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands' (2007) CEPS Working Document No. 261
- Chiti E, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 *CMLR* 1395
- Craig P, *EU Administrative Law* (OUP 2006)
- Czaja A, *Die außervertragliche Haftung der EG für ihre Organe* (Nomos 1996)
- Fischer-Appelt D, *Agenturen der Europäischen Gemeinschaft* (Duncker & Humblot 1999)
- Fischer-Lescano A, Löhr T and Tohidipur T, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256
- Gammeltoft-Hansen T, *Access to Asylum* (Cambridge University Press 2011)
- Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe's Borders* (Kluwer 2003)
- Guild E, Carrera S, den Hertog L and Parkin J, '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 requested by the European Parliament's LIBE Committee, 2011
- Gutman K, 'The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection' (2011) 48 *CMLR* 695
- Hailbronner K, *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (Beck 2010)
- Harding C, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 *CMLR* 389
- Hartley TC, 'Concurrent Liability in EEC Law: A Critical Review of the Cases' (1977) 2 *EL Review* 249
- Heijer M den, *Europe and Extraterritorial Asylum* (Hart 2012)
- Heukels T and McDonnell A (eds), *The Action for Damages in Community Law* (Kluwer 1997)
- House of Lords, *Frontex: The EU External Borders Agency. Report with Evidence* (HL Paper 60 2008)

- Jeandesboz J, 'Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and EUROSUR' (2008) Challenge Research Paper No. 11, August 2008
- Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltung* (Peter Lang 2004)
- Köck HF and Hintersteiner M, 'The Concept of Member State Liability for Violation of Community Law and Its Shortcomings: An Analysis of the Case Law of the European Court of Justice on this Matter' (1998) 3 Austrian Review of International and European Law 17
- Möllers R, *Wirksamkeit und Effektivität der Europäischen Agentur FRONTEX: Eine politikwissenschaftliche Analyse der Entwicklung eines integrierten Grenzschutzsystems an den Außengrenzen der EU* (Verlag für Polizeiwissenschaft 2010)
- Moreno Lax V, 'Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean' (2010) Working Paper Series RefGov-FR-28
- Neal A, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) 47 Journal of Common Market Studies 333
- Ooik R van, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance' in Curtin D and Wessel R, *Good Governance and the European Union* (Intersentia 2005) 125
- Ott A, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) 13 European Foreign Affairs Review 515
- Papastavridis E, "'Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 Nordic Journal of International Law 75
- Peers S and Rogers N (eds), *EU Immigration and Asylum Law* (Martinus Nijhoff 2006)
- Renzenbrink UF, *Gemeinschaftshaftung und mitgliedstaatliche Rechtsbehelfe: Vorrang, Subsidiarität oder Gleichstufigkeit?* (Peter Lang 2000)
- Rijpma J, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (PhD thesis, European University Institute Florence 2009)
- Rijpma J, 'EU Border Management after the Lisbon Treaty' (2009) 5 Croatian Yearbook of European Law and Policy 121
- Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff 2010)
- Säuberlich U, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhältnisse* (Springer 2005)
- Schusterschitz G, 'European Agencies as Subjects of International Law' (2004) 1 International Organizations Law Review 163
- Strondl R, 'Die Europäische Grenzschutzagentur FRONTEX: Mehr Chancen als Risiken für die Grundrechte im europäischen Grenzmanagement?' (Master Thesis, FH Wiener Neustadt 2011)
- Visser M de, 'The Concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A One-way Ticket into Oblivion?' (2004) 11 Maastricht Journal of European and Comparative Law 47
- Vos E, 'Refoming the European Commission: What Role to Play for EU Agencies' (2000) 37 CMLR 1113
- Weinzierl R and Lisson U, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights, December 2007)
- Wils W, 'Concurrent Liability of the Community and a Member State' (1992) 17 EL Review 191
- Zapata-Barrero R (ed), *Shaping the normative contours of the European Union: A Migration-Border framework* (CIDOB and GRITIM-UPF 2010)